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ANNOUNCING
THE HAROLD S. SHERTZ
TRANSPORTATION LAW JOURNAL
ANNUAL AWARD

An Annual Award of $250.00, named in honor of Harold S. Shertz, Esq., of the Philadelphia, Pennsylvania, Bar, will be given for the student article deemed best in the development of transportation problems. The Award was established by the Film, Air and Package Carriers Conference of the American Trucking Associations with the Motor Carrier Lawyers Association to honor Mr. Shertz' long service to the transportation industry and to the legal profession. The paper receiving the Award will be published in The Transportation Law Journal.

Open to all students of accredited North American law schools, the competition will focus upon any area of transportation law with special emphasis on the role of regulatory bodies, national or international.

Submission of manuscripts must be in conformance with the competition's rules which appear in this volume. Deadline for the first annual Award is September 1, 1971.
THE IMPACT OF RAIL EX PARTE RATE INCREASES ON TARIFF COMPLEXITY

BY

HERBERT O. WHITTEN* and JOHN L. SHIRA**

Cost-Price Inflation and Railroad Rates

The United States is currently in the midst of its third major cost-price inflationary spiral since World War II. For rail freight transport, each of these three steps has resulted in numerous ex parte rate increases. The cumulative increases have had an unfortunate impact on the demand for rail traffic and seriously aggravated tariff complexity of the railroads.

The first of these three series of railroad rate increase cases resulted from World War II and lasted from 1946-1949. The second was the aftermath of the Korean War, lasting from 1955-1958, with a minor adjustment in 1960. The third and present series is directly attributable to the Indo-China Wars, with rate increases beginning in 1967 with Ex Parte 256; Ex Parte 267 is currently in litigation. No clear limit is in sight but further increases through 1972 seem probable to cover wage agreements that have been made or are contemplated. Following each of the earlier series of increase cases, a period of relative rate stability followed, with some downward adjustments due to transport and market competition and rate experimentation.

The Interstate Commerce Commission has recognized the problems created by the numerous ex parte increases, which have further aggravated rate and tariff complexity. On December 15, 1970, The Interstate Commerce Commission issued an order in Ex Parte No. 270, Investigation of Railroad Freight Rate Structure, to explore:

1. The possible self-defeating nature of general rate increases with respect to generating revenue.
2. Disparities and distortions in the basic structure.
3. Uneven effects of rate increases on individual railroads.
4. Lack of railroad incentive to improve services in line with shipper requirements.

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** Associate, Herbert O. Whitten & Associates, rate and traffic expert for forty five years.
The Commission also announced a related proceeding, Ex Parte No. 271, Net Investment — Railroad Rate Base, to investigate whether net investment as now used, or some other rate base, is the proper basis for measuring rate of return. The order of the Commission did not mention one of the most serious problems created by these numerous rate increases, the utter chaos which has occurred in railroad rate determination.

On January 6, 1971, a letter to the editor of the Journal of Commerce from Allan H. Surplus, Vice President-Transportation, Bay State Milling Company, Boston, Massachusetts, called attention to the extreme aggravation caused by out-dated tariffs, with numerous and conflicting ex parte increases. This current article may highlight his viewpoint.

Since World War II there have been a series of fourteen poorly designed, non-standard rate adjustments applied to out-dated, archaic and illogical railroad rates and tariffs. These have caused extreme complexity and utter chaos in railroad rates and tariffs, as well as serious loss of rail traffic and unnecessary expense in rating, billing and accounting.

**Effect of Ex Parte Increases on Railroad Rate Complexity**

A large number of the ex parte increases in railroad rates and charges have changed basic scales and specific rates. During the early period, adjustments were made as percentage increases, which did not change the structure of rates and charges, but which did raise the level. Many of the later increases have been made in an attempt to improve the structure, but they have only succeeded in making a very much aggravated alteration, at a higher level, to an extremely complex situation which already existed.

Table A lists the changes (many increases and one decrease) which have occurred in the railroad class rates since 1914. Most of the commodity rates were increased similar amounts in the early years, but more recently the changes in class and commodity rates and charges have not been identical, with a general tendency to raise the class rates higher and higher in an apparent effort to price them out of existence. In several instances, different percentage increases were applied in the different rate territories. Although past experience should have indicated the problems created by different territorial adjustments, this occurred again in November 1970 in Ex Parte No. 267A. Many increases to commodity rates have been specific and of varying amounts, for example see Ex Partes 175, 212, and 259 and the Southern lines proposal in Ex Parte 267.

---

Table A—See pages 56 to 57
Prior to the prescription of the Docket 28300 Class Rates in 1952, there were numerous local, territorial and inter-territorial class rate systems coexisting simultaneously in the United States. Many of these still exist in specific commodity tariffs.

The problem of finding an applicable freight rate by rail is almost unbelievably complex and time consuming. The problem is aggravated by the existence of numerous ambiguous, conflicting and overlapping definitions being in existence at the same time. (See Table B.)

Special problems and complexities arise from the Section 4, long and short-haul provision and combination rate or aggregate of intermediates provision, both of which open up an almost infinite number of additional possible rates and make rate computerization impractical from a cost standpoint. Transit rates pose an additional onerous, expensive and unnecessary complication.

But even beyond this, the problem of freight rate determination is extremely aggravated by out-of-date tariffs, some of which must have as many as fourteen ex parte rate increases applied in sequence to determine a current rate!

With combination rates (between two or more rate territories) increases must be applied for each territorial segment individually. Increases must also be applied for each rate possibility being evaluated. This is especially complex when maximum increases in cents are applied and such maximum applies to the sum or total of two or more rate factors. If two segments are involved, twenty-eight increases may have to be applied, etc.

What this means is that the determination of a rate for a new movement not previously experienced by a shipper is a major research effort. Unbelievably, it frequently costs so much to determine the rate that it is not worth the effort to use rail service.

The pages which follow summarize the ex parte increases from X-123 to X-267-A, currently under investigation. The ex parte tariffs, summarized here, have been subject to numerous supplements and are extremely complex in application. It is necessary to go back to X-123, effective March 28, 1938, because some tariffs, still in effect, pre-date that increase, some going back as far as 1925. The rather detailed summary presented herein includes less than fifty percent of the complexities in these ex parte rate cases. Most of the details of the rate adjustments have been placed in footnotes.

Table B—See page 58
Ex Parte No. 123—10% Increase — Effective March 28, 1938

In 1938, railroad freight rates received their first general increase since World War I. On November 5, 1937, substantially all the Class 1 railroad companies in the United States, their subsidiaries, and certain electric lines, had sought authority to increase all existing freight rates and charges, generally 15 percent, subject to certain exceptions. After investigation, the Commission granted 10 percent, with exceptions.

Publication of the increased rates was permitted on short notice and the carriers published a master tariff effective March 28, 1938. The Commission stipulated that the increases were to be incorporated in the existing tariffs as soon as possible. (Certain tariffs, it is said, have yet to be updated.)

1. X-123—Increases authorized.

<table>
<thead>
<tr>
<th>Amount of Increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>10%</td>
</tr>
<tr>
<td>5%</td>
</tr>
<tr>
<td>10%</td>
</tr>
<tr>
<td>No Increase</td>
</tr>
<tr>
<td>No Increase</td>
</tr>
<tr>
<td>Maximum Increase</td>
</tr>
<tr>
<td>15¢/cwt</td>
</tr>
<tr>
<td>6¢/cwt</td>
</tr>
<tr>
<td>6¢/cwt</td>
</tr>
<tr>
<td>Separate Increase Determined</td>
</tr>
<tr>
<td>Combination of Factors Subject to Maximum</td>
</tr>
</tbody>
</table>

1. All rates and charges (class, commodity and minimum increases), except those in next item

2. Class rates, commodity rates and minimum rates on commodities shown in a certain list

3. Accessorial charges increased (see exception)

4. Exception. The rates and charges on the following services
   a. For protective service against heat or cold
   b. Loading or unloading on livestock; viz: Cattle, sheep, swine and goats at public stock yards.

5. Maximum increases in cents per 100 lbs. on carloads (will apply when percentages of increases exceed maximum stated below):
   a. Fresh fruit and fresh or green vegetables, not cold pack (frozen)
   b. Lumber and articles taking lumber rates
   c. Sugar, cane or beet

6. Rates based on addition or deduction of arbitraries or differentials, the base rate and the arbitraries or differentials are separately increased

7. Combination of rates, where two (2) or more rate factors apply to form a through rate, each separate rate is increased accordingly, subject to the maximum increase in cents per cwt to the total of the factors so increased
Percentage relationships were preserved by increasing the first class rates 10% and other groups by related amounts on the basis of existing percentages.

Increase Tables were provided for Ex Parte No. 123, with two columns, before and after the rate increase. The rate, prior to increase, was determined by reference to the applicable tariffs. The increase tables were used to determine the increased rate, which was multiplied by the actual or appropriate minimum weight to compute the billed revenue.

This increase procedure, more complex than direct multiplication of the tariff rate (or resulting revenue) by the percentage of the increase (or addition of the maximum increase) was perhaps easier for clerks in the days prior to ready availability of computing equipment and centralized, or regionalized, billing. In 1938 most of the railroad billing was performed at local stations, without mechanical equipment.

The continuation of this same procedure into a period of mechanization and computerization is not only highly questionable, it is absolutely deplorable as this is one of the practices which makes computerization of tariffs and their retrieval and application by computer with "certainty" an absolute impracticality. It is obviously impossible to determine the rate with "certainty" by hand, but utter frustration and the passage of time, exceeding the 3 to 5 years statute of limitations, obviates further search.

Beginning with Ex Parte 162, which follows, many railroad tariffs must have as many as fourteen increases applied in this cumbersome manner, and with combination rates with two or more factors, it may be necessary to work through 28, 42 or more increases, before a correct rate can be determined.

Ex Parties 162-C, 166-D and 168-B (Consolidated) Effective July 16, 1951\footnote{2. X 162-C, X 166-D and X 168-B—Increases Authorized.}

This series of Ex Parte increases were consolidated into one tariff for X 162-C, 166-D and 168-B, effective July 16, 1951. The Table of Increases shows the territorial application and the increases applied.

These three ex parte tariffs, consolidated into what became known as the "3X Tariff," resulted in very substantial increases to rail rates over the period of 5 years immediately following World War II.

Because of substantial differences in territorial application, percentage
increase differences by territory, and commodity and maximum increases on specified commodities, even the consolidated “3X Tariff” is very difficult to apply and the incidence of error in application may be great.

Many tariffs never cancelled and still in use must have these ex parte increases from twenty years ago applied and then brought up to date through all the subsequent additional complexities set forth in summary form in the pages which follow.

<table>
<thead>
<tr>
<th>Column 1 (Table)</th>
<th>Column 2 (Percentage increase)</th>
<th>Column 1 (Table)</th>
<th>Column 2 (Percentage increase)</th>
<th>Basis of Cumulative Increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>1*</td>
<td>8</td>
<td>15**</td>
<td>25</td>
<td>162-C x 166-D x 168-B</td>
</tr>
<tr>
<td>2**</td>
<td>8</td>
<td>16*</td>
<td>30</td>
<td></td>
</tr>
<tr>
<td>3*</td>
<td>9</td>
<td>17*</td>
<td>56</td>
<td>120 x 120 x 108%</td>
</tr>
<tr>
<td>4**</td>
<td>9</td>
<td>18*</td>
<td>60</td>
<td>120 x 122.5 x 109%</td>
</tr>
<tr>
<td>5*</td>
<td>10</td>
<td>19*</td>
<td>64</td>
<td>120 x 125 x 109%</td>
</tr>
<tr>
<td>6**</td>
<td>10</td>
<td>20*</td>
<td>65</td>
<td>120 x 125 x 110%</td>
</tr>
<tr>
<td>7*</td>
<td>15</td>
<td>21*</td>
<td>72</td>
<td>120 x 130 x 110%</td>
</tr>
<tr>
<td>8**</td>
<td>15</td>
<td>22*</td>
<td>60</td>
<td>122.5 x 120 x 108%</td>
</tr>
<tr>
<td>9*</td>
<td>18</td>
<td>23*</td>
<td>65</td>
<td>122.5 x 122.5 x 109%</td>
</tr>
<tr>
<td>10*</td>
<td>20</td>
<td>24*</td>
<td>68</td>
<td>122.5 x 125 x 109%</td>
</tr>
<tr>
<td>11**</td>
<td>20</td>
<td>25*</td>
<td>69</td>
<td>122.5 x 125 x 110%</td>
</tr>
<tr>
<td>12*</td>
<td>22.5</td>
<td>26*</td>
<td>76</td>
<td>122.5 x 130 x 110%</td>
</tr>
<tr>
<td>13**</td>
<td>22.5</td>
<td>27*</td>
<td>67</td>
<td>125 x 122.5 x 109%</td>
</tr>
<tr>
<td>14*</td>
<td>25</td>
<td>28*</td>
<td>79</td>
<td>125 x 130 x 110%</td>
</tr>
</tbody>
</table>

*Fractions resulting from the application of the foregoing increases in connection with Tables 1, 3, 5, 7, 9, 10, 12, 14, 16 through 28 will be dropped if less than a half-cent (½) and increased to the next higher whole cent if a half-cent (½) or more.

**Fractions resulting from the application of increases in Table 2 = 8%; Table 4 = 9%; Table 6 = 10%; Table 8 = 15%; Table 11 = 20%; Table 13 = 22.5%; Table 15 = 25%; will be dropped if less than a quarter-cent (¼), will be increased to half-cent (½) if a quarter-cent (¼) or more but less than three quarters (¾) cent, and will be increased to the next higher whole cent if three-quarters (¾) cent or more.

Column Symbols:  
A = (increases in 162-C)  
B = (increases in 166-D)  
C = (increases in 168-B)  
D = (increases in 162-C-166-D-168-B)

Territory Symbols:  
O = Within Official (Eastern)  
S = Within Southern  
W = Within Western  
OS = Between Official (Eastern) and Southern  
OW = Between Official (Eastern) and Western  
SW = Between Southern and Western  
AT = All Territories
Correct application of this complex tariff is extremely important, as all of the railroad rate increases since that time must be applied consecutively. Any error in application of this tariff will be multiplied by differences in the very substantial increases since that time.

2. (cont.)
Tables 1-6 apply only to increases in Ex Parte 168-B.
Tables 7-8 apply only to increases in Ex Parte 162-C.
Tables 10-12-14-16 apply only to increases in Ex Parte 162-C or 166-D.
Tables 17-28 apply to the consolidations of Ex Parte 162-C-166-D and 168-B.

Percentage columns:

<table>
<thead>
<tr>
<th>A</th>
<th>B</th>
<th>C</th>
<th>D</th>
</tr>
</thead>
<tbody>
<tr>
<td>X162-C</td>
<td>X166-D</td>
<td>X168-B</td>
<td>X162-C +166-D +168-B</td>
</tr>
<tr>
<td>(1/1/47)</td>
<td>(8/21/48)</td>
<td>(9/1/49)</td>
<td>(7/16/51)</td>
</tr>
<tr>
<td>(1)</td>
<td>(2)</td>
<td>(3)</td>
<td>(4)</td>
</tr>
<tr>
<td>O = 25</td>
<td>O = 30</td>
<td>O = 10</td>
<td>O = 79</td>
</tr>
<tr>
<td>S = 20</td>
<td>S = 25</td>
<td>S = 10</td>
<td>S = 65</td>
</tr>
<tr>
<td>W = 20</td>
<td>W = 20</td>
<td>W = 8</td>
<td>W = 56</td>
</tr>
<tr>
<td>OS = 22.5</td>
<td>OS = 25</td>
<td>OS = 10</td>
<td>OS = 69</td>
</tr>
<tr>
<td>OW = 22.5</td>
<td>OW = 25</td>
<td>OW = 9</td>
<td>OW = 68</td>
</tr>
<tr>
<td>SW = 20</td>
<td>SW = 25</td>
<td>SW = 9</td>
<td>SW = 64</td>
</tr>
</tbody>
</table>

A. Line haul class rates, commodity carload rates, less-than-carload shipments and any quantity rates except D and E below and other than those listed in 39 pages (Items 130-1195) of specific commodity increases and maximums in the Master Tariff

B. Other line haul rates and changes other than those listed in 43 pages (Items 55-1195) of specific increases and maximums in the Master Tariff

C. Line haul rates on freight in truck bodies, trailers, semi-trailers on flat cars.

D. Milk and cream, Fresh (not frozen) and articles taking same rates when handled in passenger or freight services, carload, less-than-carload or any quantity

E. Tobacco, leaf, Unmanufactured, and Cutting, Scraps, siftings, Stems (unground) and Sweepings from unmanufactured tobacco; Carloads, less-carloads and any quantity . . . and hundreds of others!

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Ex Parte 175 — First Interim — 2-4% Increase — Effective March 14, 1951

On January 16, 1951 the railroads requested the ICC to grant, on one day’s notice, substantial increases in all existing freight rates and accessorial charges, with certain exceptions. The increase requested on freight traffic, generally, was 15 percent of the current rates. The Commission did not allow the request.

On March 14, 1951, the ICC authorized the following interim increases:

<table>
<thead>
<tr>
<th>Type of Territory</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Within Eastern Territory</td>
<td>4%</td>
</tr>
<tr>
<td>Within Southern Territory</td>
<td>2%</td>
</tr>
<tr>
<td>Within Western Territory</td>
<td>2%</td>
</tr>
<tr>
<td>Inter-Territorial</td>
<td>2%</td>
</tr>
</tbody>
</table>

The increases authorized were to be applied to the basic freight rates then in effect, including increases authorized in Ex Parte 162, 166, and 168. Master Tariff X-175 became effective April 4, 1951.

Ex Parte 175-A — Second Interim — 6-9% Increase — Effective August 8, 1951

On August 8, 1951 the ICC issued its second interim increase in rates as shown below. These increases were to be applied in lieu of those heretofore authorized in this proceeding:

<table>
<thead>
<tr>
<th>Type of Territory</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Within Eastern Territory</td>
<td>9%</td>
</tr>
<tr>
<td>Within Southern Territory</td>
<td>6%</td>
</tr>
<tr>
<td>Within Western Territory</td>
<td>6%</td>
</tr>
<tr>
<td>Inter-Territorial</td>
<td>6%</td>
</tr>
</tbody>
</table>

The increases were published by the carriers in Master Tariff X-175-A, effective August 28, 1951, and were to be applied to the freight charges in the form of surcharges.

3. X 175—First Interim—Increases Authorized.

1. Rates within Eastern Territory were to be held as minima, on inter-territorial traffic to and from Eastern Territory.

2. Rates on grain and grain products were increased 2% on all movements. Specific maximum increases were applied on coal, coke, fresh fruits, vegetables, sugar, lumber, and canned or preserved foodstuffs.

3. Accessorial and terminal charges were increased in accordance with the above table, except that no increase was to be applied to the charges for perishable protective services; demurrage; allowances to shippers for drayage service; storing or handling iron ore at Lake ports; wharfage and handling at South Atlantic, Florida, and Gulf ports.
EX PARTE RATE INCREASES

Ex Parte 175-B — Third Interim — 15% Increase — Effective May 2, 1952

On April 11, 1952 the Interstate Commerce Commission issued its third report in the Ex Parte 175 investigation. In this report it granted the railroads the full 15% increase originally sought by them in January 1951.

These increases went into effect on May 2, 1952 on 15 days’ notice, except for grain and grain products on which 30 days’ notice was required.

3. (cont.)

4. Each factor in a combination rate was to be increased separately and the total through rate made subject to the maximum increase specified, if any.


1. Maximum increases were provided on various commodities such as fresh fruits, melons, canned foods, sugar, lumber, iron ore, grain and grain products, coal and coke, lignite, and phosphate rock.

2. Accessorial and terminal charges were increased in accordance with the above table, except that no increase was to be applied to the charges for perishable protective services; demurrage; allowances to shippers for drayage service; wharfage and handling at South Atlantic Florida, and Gulf ports; and storage of iron ore at lower Lake ports.

3. When a through rate is made by combining separately stated rates the line haul transportation charges resulting from the application of each rate comprising such combination were to be increased separately. The total increase, however, must not exceed that which would result from applying any maximum or specific increase provided for the commodity.

5. X 175-B—Third Interim—Increases Authorized.

All line-haul rates and charges in all territories were subject to the 15% surcharge with the following exceptions:

1. Maximum increases were provided on various commodities such as fresh fruits, melons, canned foods, sugar, lumber, copper, lead and zinc articles, iron ore, grain and grain products, coal and coke, lignite, and phosphate rock.

2. Accessorial and terminal charges were increased 15%, except that no increase was to be applied to the charges for perishable protective services, demurrage, allowance to shippers for drayage service, wharfage and handling at South Atlantic, Florida, and Gulf ports, and storage of iron ore at lower Lake ports.

3. Where a through rate is made by combining separately stated rates, the line haul transportation charges resulting from the application of each rate comprising such combination are increased separately. The total increase, however, must not exceed that which would result from applying any maximum or specific increase provided for the commodity.

4. The authority to maintain the increases provided in these findings shall expire February 28, 1954, unless sooner modified or terminated (later extended to December 31, 1955). The record will be held open for the purpose of re-examination of the increases authorized herein prior to the expiration date.
The increases were published by the carriers in Master Tariff X-175-B. These increases were to be applied as surcharges to the basic rates in effect when the original petition was filed in January 1951, *and were in lieu of those heretofore authorized in this proceeding.*

*Ex Parte 175-C — Final — 15% Increase — Effective December 1, 1955*

On October 18, 1955, the Interstate Commerce Commission issued its final report in the Ex Parte 175 investigation. In this report, it canceled the December 31, 1955 expiration date of its authorization of the general increases, published as surcharges, in railroad freight rates granted by its order of April 11, 1952, thereby permitting the increases to become a permanent part of the railroad freight rate structure.

---

6. X 175-C—Final—Increases Authorized.

Fractions were to be disposed of as follows:

1. Rates and charges in cents or dollars and cents per 100 pounds, per car or other unit, except line-haul carload commodity rates on grain, grain products and by-products; and Flaxseed (Linseed) taking grain, grain products or by-products rates, when moving in carload commodity rates:
   a. Five cents or lower, resolve fractions to the nearest *quarter cent*;
   b. Higher than five cents, but not higher than ten cents, resolve fractions to the nearest *half cent*;
   c. Higher than 10 cents:
      Fractions less than \( \frac{1}{2} \) cent—drop;
      Fractions \( \frac{1}{2} \) cent or over—convert to next higher full cent.

2. Line-haul carload commodity rates on grain, grain products, and by-products:
   a. Fractions less than .25 cent—drop;
   b. Fractions .25 to .75 cent—convert to \( \frac{1}{2} \) cent;
   c. Fractions .75 cent and over—convert to next higher full cent.

3. *Maximum increases* in cents per 100 pounds, or net ton applied to various commodities in specific groups when the percentage increases provided higher rates. These do not apply to line-haul class rates obtained by the use of classification ratings

4. *Specific percentage increases* applied to various commodities in specific groups (see exceptions) These do not apply to line-haul class rates obtained by the use of classification ratings

*Exceptions:* There are different percentage increases on the following commodities—

a. Grain, grain products and grain by-products and articles taking same rates, and Flaxseed (Linseed) when taking grain, grain products or by-product rates, when moving on carload commodity rates versus, when not moving on carload commodity rates.
It was further ordered that the increases, presently authorized by the findings and orders in this proceeding, were to be published to apply in connection with rates per 100 lbs., per ton, per car, or per other unit of transportation, and would not thereafter be applied as surcharges to the amount of the freight bill.

6.4 (cont.)

b. On Coal, anthracite or bituminus, and coke (not ground or pulverized) including briquettes, the percentage increase is subject to maximum increase of 40 cents per net ton or 44.8 cents per gross ton, as rated, subject to further breakdowns as follows:

(1) When coal is transshipped by vessel as cargo at North Atlantic Ports, Hampton Roads—New York, inclusive the percentage increase is also subject to maximum increase of 40 cents per net ton and 44.8 cents per gross ton, as rated. However, when shipped in vessels at the tidewater ports destined to New England Ports thence moving via rail to points in the States of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island or Vermont, the rate to the tidewater port will be increased 20 cents per ton or 22.4 cents per gross ton as rated. When reshipped from the docks at the New England Ports, the rate from the docks to the points in the foregoing states will be increased 20 cents per net ton or 22.4 cents per gross ton, as rated.

(2) When coal and coke moves via rail-water and rail-water-rail when the Water Transportation is not subject to the increases, the percentage increase subject to the maximum increase of 40 cents per net ton or 44.8 cents per gross ton as rated will apply. However, when bituminous coal and coke is transported by rail-water-rail and the rate for the intermediate water transportation is not subject to the increase, the separate rail rates will be prorated in percentage and such percentages will be applied to the maximum increase provided for in cents per net or gross as rated.

(3) On Ex-Lake Coal moving by rail from United States Lake Superior Ports and from West Bank Lake Michigan Ports to destination, the rate from these ports will be increased 20 cents per net ton or 22.4 cents per gross ton, as rated.

(4) On bituminous coal shipped from mines in the States of Illinois and Western Kentucky to St. Louis and Alton, moving beyond by barge to points on the Mississippi, Minnesota or St. Croix Rivers the amount of increase will be 16 cents per net ton, exclusive of dumping and switching charges.

5. Accessorial charges were increased 15%, but no increases were applied on the following:

a. Charges for demurrage on freight cars;

b. Charges for protective services against heat or cold;

c. Amounts paid or allowance made by carriers drayage or other services performed by the consignors or consignees of freight;
All line-haul rates and charges in all territories were subject to the full 15% increase with some exceptions. With X 175-C, at least four Ex Parte increases had to be applied to many tariffs. The amounts of the increases were quite different depending upon the territorial application.

Ex Parte 196-A — 6% Increase — Effective March 7, 1956

In December 1955, railroads petitioned for a 7% increase in freight rates. The application requested authority to depart from tariff publishing rules, to publish their proposed general increase in a Master Tariff, filed on December 30, 1955, to be effective February 25, 1956. Provision was made for the application of this tariff and any increases which might subsequently be prescribed by the ICC.

6.5 (cont.)

d. Rates and charges at or between points in Canada on Canadian domestic traffic, or in Mexico;

e. Charges for storing iron ore at Lower Lake Ports;

f. Charges for wharfage or handling at ports in Virginia; South Atlantic Ports, Florida Ports, and Gulf Ports in the United States, or dumping of coal or coke at Hampton Roads, Virginia, or Charleston, South Carolina;

g. Charges for loading or unloading of livestock;

h. Charges for handling loading or unloading export, import, coastwise or intercoastal traffic at ports, when such charges are not in addition to the line-haul rate or switching rate or charge.

6. Rates made by addition or deduction of arbitraries or differentials, such base rate and the amount to be added or deducted on arbitraries or differentials are to be increased separately, but in no case shall exceed the maximum increase to the total sum, if any, provided for the commodity. This also applies to rates composed of two (2) or more separately stated rates where combinations are applied to construct through rates.

7. X 196-A—Increases Authorized.

Rate Increase Tables

In order to increase the existing rates, for certain articles and items, tables were included with the existing rate shown in column 1 and the increased rate as determined by the percentage of increase in column 2 adjusted for fractions of a cent as indicated in 1. and 2. below.
The Commission instituted an investigation into the reasonableness of the proposed increase on January 4, 1956. Special rules of practice were established for an expedited procedure to be observed by parties to the case, with oral argument before the Commission to begin on February 20. This proceeding was designated as "Ex Parte — 196, Increased Freight Rates, 1956." On February 22, 1956, the ICC requested postponement of the effective date to some future date. In compliance with this request the carriers voluntarily postponed the effective date of the tariff to March 7.

The table numbers (Col. 1) and percentage increases included were as shown below:

<table>
<thead>
<tr>
<th>Col. 1</th>
<th>Co. 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Table No.</td>
<td>Percentage Increase</td>
</tr>
<tr>
<td>1</td>
<td>6¹</td>
</tr>
<tr>
<td>2</td>
<td>5²</td>
</tr>
<tr>
<td>3</td>
<td>5²</td>
</tr>
<tr>
<td>4</td>
<td>3¹</td>
</tr>
</tbody>
</table>

¹Fractions will be dropped if less than a half-cent (.5¢) and increased to the next higher whole cent if a half cent or more.
²Fractions resulting from the application of the percentage increase will be dropped if less than a quarter (¼) cent; a quarter (¼) cent but less than three-quarter (¾) cents will be half (½) cent; three-quarters (¾) cent or more will be increased to the next whole cent.

The increases were applied in various manners:

A. Class Rates
   Not subject to maximum increases

B. Exception Ratings and Commodity Rates
   1. Line Haul Rates, except as specified below

C. Other Increases, Including Specifics
   1. a. Specific percentage increases were provided for on Coal and Coke (not ground or pulverized) including Coal or Coke Briquettes, with maximum increases in cents per 100 lbs. or net ton, when such specific percentage increases resulted in higher rates.
   b. Specific percentage increases, without maximum increases in cents per 100 lbs. or net ton, were provided for on the following commodities:
      (1) Grain, Grain Products or By-Products
          (a) When moving on carload commodity rates Tab. 3 5%
          (b) When not moving on carload commodity rates Tab. 2 5%
      (2) Flaxseed
          (a) When taking grain, grain products or by-products rates, or percentage of grain, grain products, or by-products rates same as grain (see (a)&(b) above)
          (b) When moving on other rates Tab. 1 6%
      (3) Livestock, except horses or mules Tab. 2 5%
      (4) Meats, fresh, fresh salted or fresh frozen Tab. 2 5%
On March 2, 1956, the Commission ordered the carriers to cancel “Ex Parte - 196,” effective March 7. A general increase of 6% was authorized in the freight rates and charges by the railroads, domestic water carriers, and freight forwarders, with some exceptions and “hold-downs.”

7.C-b (cont.)

(5) Meats, cooked, cured, diced, dry salted or smoked
   )
   Tab. 2 5%

(6) Packing House Products
   )
   )

(7) Shortening, NOIBN, or vegetable oil
   )

c. Maximum increases in cents per 100 lbs. or net ton, when the territories percentage increases of 6% resulted in higher rates, apply on the following commodities; viz:

<table>
<thead>
<tr>
<th>Commodity</th>
<th>Increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>Building Woodwork or Millwork</td>
<td>7¢/cwt</td>
</tr>
<tr>
<td>Cotton, in bales</td>
<td>9¢/cwt</td>
</tr>
<tr>
<td>Food Products, canned or preserved</td>
<td>6¢/cwt</td>
</tr>
<tr>
<td>Fruits, fresh, not cold pack nor frozen</td>
<td>6¢/cwt</td>
</tr>
<tr>
<td>Vegetables fresh or green, cold pack</td>
<td>6¢/cwt</td>
</tr>
<tr>
<td>Lumber and articles related thereto;</td>
<td></td>
</tr>
<tr>
<td>Applies only on Canadian or Native Wood;</td>
<td></td>
</tr>
<tr>
<td>Box-wood, Holly, Ironwood or Lancewood;</td>
<td></td>
</tr>
<tr>
<td>also applies on Mexican Pine, European;</td>
<td></td>
</tr>
<tr>
<td>Spruce or Birch</td>
<td></td>
</tr>
<tr>
<td>Manure Salts, Muriate or Potash</td>
<td>5¢/cwt</td>
</tr>
<tr>
<td>Sulphate of Potash Magnesia or Sulphate of Potash</td>
<td></td>
</tr>
<tr>
<td>Nuts, edible</td>
<td>6¢/cwt</td>
</tr>
<tr>
<td>Phosphate Rock, not further process</td>
<td></td>
</tr>
<tr>
<td>Sand</td>
<td>30¢/NT</td>
</tr>
<tr>
<td>Phosphatic Clay or Sand</td>
<td></td>
</tr>
<tr>
<td>Salt (sodium chloride) and articles</td>
<td>30¢/NT</td>
</tr>
<tr>
<td>taking salt rates</td>
<td></td>
</tr>
<tr>
<td>Salts, Manure</td>
<td>50¢/NT</td>
</tr>
<tr>
<td>Sugar, beet, cane, corn, invert, liquid,</td>
<td></td>
</tr>
<tr>
<td>sorghum or wheat</td>
<td>5¢/cwt</td>
</tr>
</tbody>
</table>

(14) Sugar, grain

2. All accessorical charges were increased by 6% except no increases were applicable on the following; viz:
   a. Charges for Demurrage;
   b. Charges for protective services against heat or cold;
   c. Amounts paid or allowances made by carriers for drayage or other services performed by shipper or receivers;
   d. Rates and charges on Canadian domestic traffic, or in Mexico;
Tariff X-196-A was filed by the railroads, on March 5, 1956, effective March 7, 1956. This tariff canceled X-196 and increased all rates and charges in all territories generally by 6%, with certain “hold downs” and exceptions. These increases were to be applied to the basic freight rates and charges, (those in effect including the increases granted in Ex Parte 162, Ex Parte 166, Ex Parte 168, and Ex Parte 175).

At this point the railroads had to increase their tariffs in use by the various percentages set forth in the different territories for as many as five Ex Partes.

7.2 (cont.)

   e. Charges for storing Iron Ore at Lower Lake Ports;
   f. Charges for wharfage or handling at ports in Virginia, South Carolina and Georgia, Florida Ports, and the Gulf ports in Alabama, Louisiana, Mississippi and Texas, or dumping of coal or coke at Hampton Roads, Virginia, or Charleston, South Carolina;
   g. Charges for loading or unloading of livestock.

3. Where a through rate is made by combining separately stated rates, each rate comprising such combination is increased separately and the applicable rate is the sum of the separate rates so increased, except that the total increase will not exceed that which would result from applying the maximum increase, if any, provided for the commodity. This application also applies to through rates made by additions or deductions of arbitreries or differentials.

4. Where a through rate on joint rail-barge, barge-rail, rail-ocean, rail-ocean-rail, rail-lake, lake-rail or rail-lake-rail is formed by deducting differential from all-rail rates, such applicable rates will be increased accordingly.

5. Charges for out-of-line, indirect or back haul services on;
   a. Grain, grain products and by-products and articles taking grain, grain products or by-product rates
   b. Flaxseed (linseed) when taking grain, grain products or by-products rates

6. Charges at ports for loading or unloading export, import, coastwise or inter-coastal traffic
   a. When charges are not in addition to line haul rate or switching rate or charge

7. Charges for handling export, import, coastwise or inter-coastal traffic at ports (except exports outlined in Accessorial Charges), will be 6% except no increases will be applied to charges which are not in addition to the line haul charges or switching rate or charge.
In Ex Parte 206, the ICC authorized interim increases on December 17, 1956 of 7% in Eastern territory and 5% in Western territory. On February 4, 1957 an interim increase in Southern territory of 5% was authorized.

8. X 206-A—Increases Authorized.

<table>
<thead>
<tr>
<th>Territory Description</th>
<th>Increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>Within Eastern Territory</td>
<td>14%</td>
</tr>
<tr>
<td>Within Western Territory or between Western Territory and</td>
<td></td>
</tr>
<tr>
<td>Western-Border Territory</td>
<td>12%</td>
</tr>
<tr>
<td>Between Eastern &amp; Western Territory</td>
<td>12%</td>
</tr>
<tr>
<td>Within Southern Territory</td>
<td>9%</td>
</tr>
<tr>
<td>Within Western-Border Territory or between Eastern and</td>
<td></td>
</tr>
<tr>
<td>Western-Border Territories</td>
<td>9%</td>
</tr>
<tr>
<td>Between Southern Territory and Eastern, Western and Western-Border Territories</td>
<td>9%</td>
</tr>
</tbody>
</table>

The following exceptions where specified:

A. All accessorial charges were increased except on the following; viz:
1. Charges for demurrage on freight cars
2. Amount paid on allowances made by carriers for drayage or other services performed by shippers or receivers
3. Rates and charges on Canadian domestic traffic or in Mexico
4. Charges for storing Iron ore at Lower Lake Ports
5. Charges for Wharfage or Handling at ports in Virginia; South Atlantic ports in North Carolina, South Carolina and Georgia, Florida ports; and Gulf ports in Alabama, Louisiana, Mississippi and Texas, or dumping of Coal or Coke at Hampton Roads ports, Va. or Charleston, S.C.
6. Charges for loading or unloading of Livestock
7. Charges for protective services against heat or cold.
8. Charges for handling export, import, coastwise or intercoastal traffic at ports, (except to ports outlined in paragraph A, No. 5.) when charges are not in addition to the line haul rate or switching rate or charge
9. Charges at ports for loading or unloading export, import, coastwise or intercoastal traffic, when charges are not in addition to line haul rate or switching rate or charge

B. A uniform increase of 12% on Docket 28300 class rates in all territories not subject to specific or maximum increases.

C. Specific percentage increases of 9%, without maximum increases in cents per 100 lbs or net ton, on the following commodities;
1. Grain, Grain Products or By-Products (a)
2. Flaxseed, when taking grain, grain products or by-products rates or percentages of grain, grain products or by-products rates (a)
   a. When moving on commodity rates the fractions resulting from the application of the percentage increase will be dropped if less than a quarter
The final report of the ICC Ex Parte 206 was issued on August 9, 1957 authorizing additional general increases in railroad freight rates. Tariff X-206A issued on August 9, 1957 became effective August 26, 1957. It included the increases granted by the Commission during the entire Ex Parte 206 proceedings.

Beginning in 1955 and 1956, rate research was started for the Eastern Railroads using modern techniques and computer analysis. This research continually stressed that it is the structure and not the level of the railroad rate complex, which is non-competitive and uneconomically designed from the standpoint of the industries financial health in a competitive economy. However, superficial contrary arguments thought that ‘specific’ rate adjustments were the answer.

Beginning in 1958, due to publicity against “across-the-board” rate

8.C (cont.)

(1/4) cent. A quarter (1/4) cent but less than three-quarter (3/4) cent will be increased to a half (1/2) cent. Three quarter (3/4) cents or more will be increased to a whole cent.

3. Shortening, NOIBN.
4. Livestock, except horses or mules.
5. Meat, fresh, fresh salted or fresh-frozen
6. Meats, cooked, cured, dried, dry salted or smoked
7. Packing House Products
8. Vegetable Oil Shortening
D. Specific increases in cents per net ton were provided for on Coal and Coke (not ground or pulverized) including Coal or Coke Briquettes.
E. Maximum increases in cents per 100 lbs or net ton, when the territorial percentage increases resulted in higher rates, apply to the following commodities; viz:
1. Building Woodwork or Millwork
2. Food Products, canned or preserved (not cold pack nor frozen)
3. Lumber and articles related thereto.
   Applies only on Canadian or Native Wood, except Butternut wood, Boxwood, Holly, Ironwood or Lannegwood; also applies on Mexican Pine, Spruce or Birch
4. Magnesia, Sulphate of Potash
5. Nuts, edible
6. Phosphate Rock not further processed than ground
7. Phosphatic Clay or Sand
8. Salt (sodium chloride) and articles taking salt rates
9. Salts, manure
10. Sugar, beet, cane, invert, liquid, sorghum or wheat
11. Sugar, grain, unmixed (glucose)
F. Through rates on combination of two (2) or more separate rates also when made by additions or deductions of arbitraries or differentials.
   Each separate rate or addition or deduction of arbitraries or differentials shall be increased accordingly except the sum of the separate factors shall not exceed that which would result from applying the maximum or specific increase, if any, for the commodities.
increases, new methods of rate increases were tried. The changes were not made in accordance with advice from those conducting research and, in fact, were made ignoring structural advice given. The increases which resulted are interesting, because each was structurally different; also from the standpoint of the even greater confusion they created; from their extreme difficulty of application; and the fact that they resulted in an even more regressive economic effect than an "across-the-board" percentage increase would have created. Rather than improving the unfortunate impact on freight demand of an increase in rates, they increased the regressive impact.

Ex Parte 212 — 2% Increase — Effective February 1, 1958

The ICC report dated February 1, 1958, in Ex Parte 212, authorized the railroads to make selective freight rate increases effective February 1, 1958.

This increase raised the level of the class rates by 2% in a manner similar to previous "across-the-board increases." However, the increases

9. X 212—Increases Authorized.
Uniform increases were allowed in all territories as follows:

Line-Haul Rates and Charges

Class rates determined by the use of ratings provided in governing classification; for all traffic

| All less-than carload or any quantity rates under exception ratings or commodity rates: | 2% |
| Specifically grouped commodities moving in carload under exception ratings or commodity rates: | As provided in Group listings from ICC-AAR 262 Commodity Groups |
| Commodities in carloads not specifically grouped and moving in carload under exception ratings or commodity rates | 2% |
| All-commodity (all freight) freight rates: | No Increase |

All accessoril rates or charges unless specifically listed below

1. Railway Equipment moving on own wheels in cents per mile
   a. All United States Atlantic Port, Florida and Gulf Ports (See Note A) 6¢ per 100 lbs. or $1.20 per ton, net or gross, as rated
   b. All Canadian Ports (See Note A)
   c. All Great Lakes Ports (see Note B)
   d. All Pacific Coast Ports (see Note A)
on the commodity rates were of varying amounts. These were called specific adjustments.

The specific commodity increases were applied to the 262 commodity groups from the old Association of American Railroads-Interstate Commerce Commission commodity code (Red Book) which contained 262 poorly defined commodity groups. Increases were made according to the judgment of the traffic officers without referring to the rate

9.2 (cont.)

This increase is in addition to all other increases provided in this tariff

Note A: This increase is applicable only on rates to or from shipside, either by reason of application, being so stated in tariffs or by reason of absorption, in whole or in part, by railroads or loading, or unloading charges or wharfage (tollage) charges or both

Note B: Will not apply on export and import traffic moving under domestic rates to or from Great Lake Ports

Note C: These increases will not apply to
(1) Grain, soybeans (soybeans) or Flaxseed (Linseed) in bulk handled through grain elevators or other facilities at port
(2) Coal and coke, in bulk
(3) Bulk Ore
(4) Phosphate Rock
(5) Barytes, in bulk
(6) Traffic interchanged in railroad cars with the Seaftrain Lines, Inc.

3. On shipments of coal where the increase is 10¢ per ton, the increase is prorated to the line-haul rates to the Atlantic Ports, Pacific Ports, Great Lake Ports or River Ports when evidence is provided that shipments were reforwarded to destinations in United States and Canada moving via rail to the ports, water to other ports and rail from the docks of vessels; also moving via truck from Norwich Conn. docks to Montville, Conn., see tariff for specifications

No increases or various increases are assessed on coal when moving via rail to points within or between various territories. This is also specified in the increase tariff

4. Combination of rates; viz:
   a. Rates made by addition or deduction of arbitraries or differentials (c)
researchers. The result was near chaos. It was extremely difficult and nearly impossible to apply these rate increases because of the poor definitions of the old AAR-ICC Red Book commodity code which did not agree with the tariffs. Unfortunately this complex increase must still be applied for most tariffs. The problem of application remains unresolved.

The unfortunate experience with this freight rate increase, including the complexities of application which resulted, was one of the major factors

9.4 (cont.)

b. Rates made by composing two or more separately rates (c)

c. Each separate rate or rates including addition or deduction of arbitraries or differentials are increased accordingly except the sum of total of each factor shall not exceed the maximum increases in cents per 100 lbs., per ton, net or gross as rated or per any other unit

5. Specifically increases on the following:

a. Charges for services (Except below)

b. Charges for split delivery or reforwarding arrangements or for loading or unloading traffic by carriers, including partial loading or unloading transfer from car to car to highway vehicle, from highway vehicle to car, and from highway vehicle to highway vehicle, except at ports for export, coastwise, intercoastal or other water borne traffic

c. Stop-off charges, where stop-off to partially unload or to complete loading carload freight is accorded any commodity

d. Charges for weighing or reweighing cars

e. Demurrage charges on export traffic at ports

f. Minimum rate under which pick-up and/or delivery services are accorded on less carload shipments, subject to any-quantity rates

g. Switching rates or charges which are absorbed, in whole or in part, by line-haul carriers, between stations in Eastern Territories

(1) Coal and coke

Where line-haul rates are not increased
Amount of Increase
5¢ per ton

Where line-haul rates are increased
5¢ per 100 lbs. or $1.00 per ton for each separate operation

6%
$1.00 per car increase to $3.00 per car per day

2%
which led to development of the Standard Transportation Commodity Code.?! With this increase, in addition to the class rates, many existing exception and commodity tariffs required as many as seven increases applied according to territorial and specific application:

9.5g-1 (cont.)

Where absorption charges are in dollars and cents per car

3%

Maximum 90¢ per car
(See note)
3%

Maximum 55¢ per car
8%

(2) Iron Ore

Maximum 4¢ per ton, net or gross as rated or $2.80 per car

(3) Limestone

1¢ per ton, net or gross or 65¢ per car

(4) Scrap, iron or steel
3%

(5) Pig iron
3%

(6) All other traffic
1 1/2%

No increases to apply on the following:

a. Transit charges on coal, coke, grain, grain products and grain by-products, and articles taking the same rates;
b. Charges for demurrage on freight cars, except as listed specifically;
c. Amounts paid or allowances made by carriers for drayage or other services performed by shippers or receivers of freight;
d. Rates and charges at or between points in Canada on Canadian domestic traffic, or in Mexico;
e. Charges for storing Iron Ore at Lower Lake Ports;
f. Charges for wharfage or handling at ports in Virginia, South Atlantic ports, Florida ports, and Gulf ports in the United States; or dumping of coke at Hampton Roads Ports, Virginia, or Charleston, South Carolina;
g. Charges for loading or unloading of Livestock;
h. Charges for protective services against heat or cold;
i. Charges for dumping, leveling, tipping, transferring or trimming coal;
j. Charges absorbed, in whole or in part, by carriers except as specifically listed;
k. Switching rates or charges absorbed, in whole or in part, by carriers, except as specifically listed.

The decision of the ICC dated October 21, 1960, in the Ex Parte 223 investigation, was amended and Ex Parte 223 A became effective September 1, 1962.

10. X 223-A—Increases Authorized.  
The very complex increases are summarized below:

**Line Haul Rates**

A. **General** (Class and Commodity rates)

1. Cents per 100 lbs.
   - Not Exceeding 65¢
   - Exceeding 65¢
2. Per net ton
   - Not Exceeding $13.00
   - Exceeding $13.00
3. Per gross ton
   - Not Exceeding $13.00
   - Exceeding $13.00
4. Per car, except rates on Coal and Coke (all kinds) and Iron Ore (not ground or hydrated) or iron sinter
   - $3.00 per car
5. Per unit other than 100 lbs., per ton or per car
   - Convert to the equivalent in cents per 100 lbs. and apply the increases under (1) above

B. **Exceptions on Specific Commodities**

1. Iron Ore to Upper Lake Ports
   - No Increase
2. Anthracite Coal to Breakers and Washeries; viz: condemned or Unprepared Anthracite
   - No Increase
3. Lumber and articles taking some rates or rates related thereto or Logs published in Units per 1000 board feet
   - 40 cents per 1000 board feet
4. Petroleum Products rate in cents per gallon
   - Not Exceeding 4.29 cents per gallon
     - .033 cents per gallon
   - Higher than 4.29 cents per gallon
     - .066 cents per gallon
5. Fresh or Green Fruits and Vegetables (not cold pack or frozen)
   - Rated per car
     - $2.00 per car
6. Freight or Passenger or Combination of Freight or Passenger Automobiles
   - Rated on a per car; viz:
     - Bi Level Cars
       - $3.00 per car
     - Tri Level Cars
       - $4.00 per car
     - Transported on flat cars, when loaded in or on trailer bodies, trailers, vehicles or containers
       - $3.00 per car
EX PARTE RATE INCREASES

This was a very poorly designed rate increase and difficult to apply. As a result of this proceeding, class rates in general, published in cents per hundredweight (cwt) were raised 0.5¢/cwt if they did not exceed 65¢ and 1.0¢/cwt if they did exceed 65¢/cwt. However, all of the specific increases and exceptions applied to class rated traffic as well as to exception ratings and commodity rates.

10.B (cont.)

   Rated per Cord or per unit
   (other than units of per 100 lbs., per ton or per car)
   1.25¢ per cord or
   per unit, as rated
   5.00¢ per car, as rated

     Rates published in units
     of 160 cubic feet
     of 168 cubic feet
     31¢ per unit
     33¢ per unit

   1One increase to be applied where rate is combined of two (2) or more factors

8. Petroleum Coke, Petroleum Coke Briquettes and Briquettes made or a mixture of Petroleum Coke and Bituminous and/or Anthracite Coal

9. Coal, Anthracite, all sizes, and Bituminous (not including ground or pulverized coal) or Briquettes, Anthracite or Bituminous Coal or made of a mixture of Anthracite and Bituminous Coal

10. Coal, Bituminous, when published for application in connection with cleaning, sizing and/or mixing in transit

11. Coal, Lignite or Briquettes, Lignite Coal

12. Railway Equipment, when moving on own wheels, handling of
   Rated per mile or cents per 100 lbs.
   Not Exceeding 65¢
   Exceeding 65¢
   Rated per car or locomotive
   0.5 as rated
   1¢ as rated
   $1.00 per car or locomotive

13. Milk or Cream, Fresh and articles taking
    Fresh Milk or Fresh Cream rates when handled in passenger or freight service, carload, less carload or any quantity
   0.5¢ per gallon
The effect of Ex Parte 223-A was to leave both the level and structure of the class rates unchanged for general increases, but to include an additive to the rate depending upon the dollar amount. If specific increases or hold-downs apply, the rate determination becomes very complex. This value remains the same for class rates for all of the ex parte increases. Changes are made in the Price Level and by addition of additives or by hold-downs.

10. (cont.)

C. Exceptions on Freight Traffic

1. a. Freight in trailer bodies, trailers, semi-trailers, vehicles or containers
   also
   Empty trailer bodies, trailers, semi-trailers, vehicles or containers, in connection with
   and taking same rates as freight in the foregoing equipment or containers

   Loaded on flat cars
   Rated per trailer
   Not Exceeding $260.00  $2.00 per trailer
   Exceeding $260.00  $4.00 per trailer
   Rated per flat car
   Not Exceeding $520.00  $4.00 per flat car
   Exceeding $520.00  $8.00 per flat car

   b. On export, import, Coastwise and inter-coastal freight
   Effective 9/1/62
   1¢ per 100 lbs. or
   20¢ per ton, net or gross, as rated
   6¢ per 100 lbs. or
   $1.20 per ton, net or gross, as rated

   Effective 3/4/67

D. Accessorial or Special Service Charges

All, same increases as provided in paragraph A, Sub. 1, 2, 3, 4 and 5 under General Line Haul Rates

E. General Exceptions

1. Split delivery service or reforwarding arrangements or loading or unloading traffic by carriers or partial loading or unloading, transfer
   from car to car, from and to car and highway vehicle and from highway vehicle to highway vehicle, except at ports for export, import, coast
   wise, intercoastal or other water borne traffic
   5¢ per 100 lbs. or
   $1.00 per net ton for each separate operation

2. Transit at ports, on import, export, coastwise and intercoastal freight
   a. Charges in cents per 100 lbs.
   b. Charges on per car basis
   5¢ per 100 lbs.
   $3.00 per car

3. Diversion or reconsignment
   $2.00 per diversion or reconsignment
EX PARTE RATE INCREASES

In addition to the class rates, with this increase many existing exceptions and commodity tariffs required as many as eight increases to be applied according to territorial and specific application:

10.E (cont.)

4. Weighing or reweighing, including switching and/or spotting for weighing on shippers scales for shippers account $1.00 per car
5. Collection on delivery services (C.O.D.) 1¢
6. Trap and ferry cars $2.00 per car
7. Crane services
   Same as provided for in paragraph A. under General Line Haul Charges except the minimum service is increased to $1.00
8. Installation of Grain Doors
   When charge is made for installation only $1.00

F. Specific Commodities
1. Handling Services
   a. Iron Ore (not ground or pulverized) or Iron Sinter
      (1) At Upper Lake Ports No Increase
      (2) At Lower Lake Ports; viz.
         (a) From Hold to Rail of Vessel No Increase
         (b) From Rail of Vessel to Car or from Dock Stockpile to Car 3¢ per gross ton
         (c) From Rail of Vessel to Dock Stockpile 4¢ per gross ton
   b. Coal and Coke (all kinds)
      From Cars to Vessels or Barges at Lake or River Ports or from Barges to Cars at River Ports 2¢ per net ton

G. Special Services
1. Livestock
   Loading and unloading to feed, water and rest when destined to other than public markets, feeding and watering at enroute points, cleaning and disinfecting cars or for bedding of cars $1.00 per car

H. Switching Rates or Charges
   General to all territories—Effective 7/25/64
1. For intra-terminal or inter-terminal movements when charges are paid by the consignor or consignee and on movements without interruption having a prior or subsequent line haul movement $7.50 per car
   (one increase to apply when switching charge charge is a combination of two (2) or more factors)
The very complex application of the 5¢/cwt and 1¢/cwt increases and specific increases and hold-downs is still creating extreme difficulty. The application is even more difficult with the additional complex increases which began in 1967.

10.H (cont.)

2. Intra-Plant when charges are paid by the consignor or consignee

$3.00 per car per ladle or per crane, as rated

3. All other switching rates or charges, except as specified in paragraph J

No Increase

4. Specified carriers when absorbed in whole or in part by line haul carriers

Coal or Petroleum Coke

0.5¢ per ton, net or gross or
30¢ per car, as rated

Coke (all kinds, except petroleum coke)

1¢ per ton, net or gross or
40¢ per car, as rated

Iron Ore

60¢ per car, as rated

Fluxing stone or raw dolomite

Iron or steel bearings, etc., pig-iron, or

0.5¢ per ton, net or gross or
25¢ per car, as rated

Iron or steel scrap

1¢ per ton, net or gross or
40¢ per car, as rated

All other traffic

1. Minimum Charge

Per shipment less carload or any quantity

$4.00

Per Car

Eastern Territory, to, from or within

$60.00 per car

All other territories

$40.00 per car

J. Assessorial Charges (except as noted). No increases on the following:

1. For demurrage on freight cars

2. Amounts paid or allowance made by carriers for drayage or other services performed by consignors or consignees

3. Rates and charges at or between points in Canada on Canadian domestic traffic or in Mexico

4. Wharfage or handling at ports in Virginia; South Atlantic Ports in North and South Carolina and Georgia; Florida Ports; Gulf Ports in Alabama, Louisiana, Mississippi and Texas; Dumping of coke at Hampton Roads Ports, Virginia, or Charleston, South Carolina
EX PARTE RATE INCREASES

From October 1960 until Ex Parte 256, effective August 19, 1967, the railroads did not have general increases in their freight rates. During this period a substantial gain in rail traffic occurred.

10.J (cont.)

5. Loading or unloading of livestock, except as provided in G-1
6. For protective service against heat or cold
7. For dumping, leveling, tippling, transferring or trimming coal or coke, except as provided in F-1-b
8. Absorbed, in whole or in part, by carriers
9. Switching rates and charges absorbed in whole or in part by carriers, except as provided in H-4
10. Dockage or handling of Iron Ore (not ground or hydrated) or Iron sinter at upper Lake ports
11. For pick-up and delivery services
12. Minimum rate under which pick-up and/or delivery services are accorded on less than carload or any quantity rates
13. Transit services on cotton; Transloading Operations; or Stopping in transit to complete loading or partly unload

K. Rates made by addition or deduction of arbitraries or differentials
   When made, add or deduct the arbitraries or differentials first then increase accordingly

L. Through rates based on separately combination rates
   Each rate in the combination is increased separately and the applicable rate is the sum of the separate rates so increased, except that the total increase will not exceed that which would result from applying the maximum or specific increase, if any, provided for the commodity
Ex Parte No. 256 — 5% Increase — Effective August 19, 1967.11

On August 1, 1967, the ICC issued its report in Ex Parte 256 authorizing additional general and specific increases in freight rates and charges, effective August 19, 1967.

11. X 256—Increases Authorized.
   Typical Ex Parte No. 256 increases applied to all territories:

Line haul class rates and commodity rates

<table>
<thead>
<tr>
<th>Amount of Increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Class Rates, determined by use of ratings in the governing classification</td>
</tr>
<tr>
<td>B. Class or Column rated traffic by use of ratings in the Exceptions to the Classification</td>
</tr>
<tr>
<td>Less-than-Carload or any quantity</td>
</tr>
<tr>
<td>Carload (except as outlined under specific commodities)</td>
</tr>
<tr>
<td>C. Specific Commodity rated traffic</td>
</tr>
<tr>
<td>Less-than-Carload or any quantity</td>
</tr>
<tr>
<td>Carload (except as outlined under specific commodities)</td>
</tr>
<tr>
<td>D. All Commodity (All Freight) Freight Rates</td>
</tr>
<tr>
<td>Rates in cents per 100 lbs.</td>
</tr>
<tr>
<td>Rates in other than in cents per 100 lbs.</td>
</tr>
</tbody>
</table>

TABLE 1

<table>
<thead>
<tr>
<th>Amount of Increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Rates published in cents per 100 pounds:</td>
</tr>
<tr>
<td>Rates not exceeding 10 cents</td>
</tr>
<tr>
<td>Rates over 10¢ but not exceeding 30¢</td>
</tr>
<tr>
<td>Rates over 30¢ but not exceeding 80¢</td>
</tr>
<tr>
<td>Rates over 80¢</td>
</tr>
<tr>
<td>2. Rates published in cents per ton</td>
</tr>
<tr>
<td>(Net or gross as rated)</td>
</tr>
<tr>
<td>Rates not exceeding 200¢</td>
</tr>
<tr>
<td>Rates over 200¢ but not exceeding 600¢</td>
</tr>
<tr>
<td>Rates over 600¢ but not exceeding 1600¢</td>
</tr>
<tr>
<td>Rates over 1600¢</td>
</tr>
<tr>
<td>3. Rates published in amounts per car or in units other than per 100 lbs. or per ton</td>
</tr>
</tbody>
</table>

E. Commodities, carload, listed in specific groups principally from, to or within SFA territory, except as outlined under specific commodities

<table>
<thead>
<tr>
<th>Amount of Increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>As Specified</td>
</tr>
</tbody>
</table>

1. Specific commodities in groups to all territories (except as noted).
As a result of this proceeding, class rates in all territories determined by use of the Uniform Classification were raised by 5 percent. Various increases in cents were applied to exception ratings and commodity rates depending upon the amount of the rate as indicated in Table 1. (See D-1-2-3,11)

11.3-1 (cont.)

(a) Anthracite or Bituminous Coal and articles taking some rates (see exceptions)

(1) Domestic rates per ton

<table>
<thead>
<tr>
<th>Description</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Net or gross as rated)</td>
<td>5¢/ton</td>
</tr>
<tr>
<td>Over 50¢ per ton but not exceeding $1.00 per ton</td>
<td>10¢/ton</td>
</tr>
<tr>
<td>Over $1.00 per ton</td>
<td>15¢/ton</td>
</tr>
</tbody>
</table>

(2) Tidewater rates to North Atlantic Ports

<table>
<thead>
<tr>
<th>Description</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Exceptions)</td>
<td></td>
</tr>
</tbody>
</table>

(3) Lake cargo traffic

(a) Rates to Ports on the Great Lakes and St. Lawrence River, then transported via water to the docks in the United States on Lake Superior or on West Bank of Lake Michigan thence reshipped to interior points in the United States, including Bituminous Coal to Sault Ste. Marie, Mich., or Ont. to interior points in Canada

<table>
<thead>
<tr>
<th>Description</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Exceptions</td>
<td></td>
</tr>
</tbody>
</table>

(b) Rates from docks via rail to interior destinations in the United States including Bituminous Coal from Sault Ste. Marie, Mich., to interior points in Canada, which had prior rail and water hauls to the ports

<table>
<thead>
<tr>
<th>Description</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Exceptions</td>
<td></td>
</tr>
</tbody>
</table>

(c) Rates on Bituminous Coal moving on a single factor joint proportioned rail-lake-rail to destinations in Minnesota and Wisconsin

<table>
<thead>
<tr>
<th>Description</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Exceptions</td>
<td></td>
</tr>
</tbody>
</table>

(d) Rates on Metallurgical Coal or Coking Coal, domestic and to tidewater ports, and to river ports for transshipment to the United States and on ex-river shipments via rail

<table>
<thead>
<tr>
<th>Description</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Exceptions</td>
<td></td>
</tr>
</tbody>
</table>
The effect of *Ex Parte* 256 increased the level of the class rates by 5 percent; the original structure was unchanged but the additives, which had been added in *Ex Parte* 223 were increased by 5 percent.

11.E-1-a(3) (cont.)

| (e) Lignite Coal or Briquettes rates per ton                                      |
|---------------------------------|---------------------------------|
| (net or gross as rated)         |                                 |
| 50¢ per ton or less             | 2½¢ per ton                     |
| Over 50¢ per ton but not over $1.00 per ton | 5¢ per ton                     |
| Over $1.00 per ton              | 7½¢ per ton                     |

| (f) Rates on Coke and articles taking same rates                                  |
|---------------------------------|--------------------------------|
| (see exception) per ton (net or gross as rated)                                  |
| 50¢ per ton or less              | 5¢ per ton                      |
| Over 50¢ per ton but not over $1.00 per ton | 10¢ per ton                     |
| Over $1.00 per ton               | 15¢ per ton                     |

| Exceptions: Coal Coke, Petroleum Coke or Briquettes for overseas export          |
|---------------------------------|--------------------------------|
| No Increase                     |                                 |

| (g) Iron ore, Hematite, Iron or Iron ore sinter, Magnetite or Taconite per ton   |
| (net or gross as rated)                                                        |
| (i) Rates via rail to Upper Lake ports moving via vessels destined to Lake Erie ports thence moving via rail to interior destinations |
| (ii) Rates via rail to interior destinations which had prior rail and water haul to Lake Erie ports |
| No Increase | 5¢ per ton |

| (h) Rates on Gravel and Sand; including aggregate or ballast; stone or rock, broken or crushed (see exceptions) per ton (net or gross as rated) |
|---------------------------------|---------------------------------|
| 100¢ per ton or less            | 3¢ per ton                      |
| Over 100¢ per ton but not over 200¢ per ton | 6¢ per ton                     |
| Over 200¢ per ton but not over 350¢ per ton | 10¢ per ton                    |
| Over 350¢ per ton but not over 500¢ per ton | 15¢ per ton                    |
| Over 500¢ per ton               | 20¢ per ton                     |

| Exceptions: Within Southern Territory | As Specified |

| (i) Pulpwood and articles taking same rates (see exceptions)                     |
|---------------------------------|---------------------------------|
| Cents per 100 lbs.              | ½¢                             |
| Per net ton                     | 10¢                            |
| Per gross ton                   | 11¢                            |
| Per units other than per 100 lbs. or per ton | 3% (see exceptions) |
The additives were further complicated for exception ratings and commodity rates. These complexities have continued and created further difficulty with increases which have followed since that time.

11.E-1-a-(3)-i (cont.)

<table>
<thead>
<tr>
<th>Exceptions: Between Eastern Territory</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Per car</td>
<td>$12.00</td>
</tr>
<tr>
<td>Cents per 100 lbs.</td>
<td>1 ½¢</td>
</tr>
<tr>
<td>Per ton (net or gross as rated)</td>
<td>30¢ per ton</td>
</tr>
<tr>
<td>Per car or per unit (other than units per 100 lbs., per ton or per car)</td>
<td>50¢</td>
</tr>
</tbody>
</table>

(j) Fuelwood, viz., Cordwood, Firewood, Kindling wood or Fuel wood, NOIBN Products of forests, viz., Chemical wood Wood excelsior, Resinous wood or Tree Stumps

<table>
<thead>
<tr>
<th>Cents per 100 lbs.</th>
<th>½¢</th>
</tr>
</thead>
<tbody>
<tr>
<td>Per net ton</td>
<td>10¢</td>
</tr>
<tr>
<td>Per gross ton</td>
<td>11¢</td>
</tr>
<tr>
<td>Per units (other than per 100 lbs. or per ton)</td>
<td>3%</td>
</tr>
</tbody>
</table>

(k) Sugar, viz., beet, cane, corn, maple, raw cane, sorghum, NOIBN or wheat 30¢ per 100 lbs. or less

<table>
<thead>
<tr>
<th>1¢/cwt</th>
</tr>
</thead>
<tbody>
<tr>
<td>Over 30¢ per 100 lbs. but not over 50¢ per 100 lbs.</td>
</tr>
<tr>
<td>2¢/cwt</td>
</tr>
<tr>
<td>Over 50¢ per 100 lbs.</td>
</tr>
<tr>
<td>3¢/cwt</td>
</tr>
</tbody>
</table>

Exception: Within Western Territory all rates in cents per 100 lbs. 3¢

(l) Iron or steel scrap, borings, turnings, etc. per ton (net or gross as rated) 10¢ per ton

(m) Cinders, Ashes, Slag and Haydite, etc. (see exceptions)

<table>
<thead>
<tr>
<th>Per ton (net or gross as rated)</th>
</tr>
</thead>
<tbody>
<tr>
<td>100¢ per ton or less</td>
</tr>
<tr>
<td>Over 100¢ per ton but not over 200¢ per ton</td>
</tr>
<tr>
<td>Over 200¢ per ton but not over 350¢ per ton</td>
</tr>
<tr>
<td>Over 350¢ per ton but not over 500¢ per ton</td>
</tr>
<tr>
<td>Over 500¢ per ton</td>
</tr>
</tbody>
</table>

Exceptions:

Within Southern Territory
On Coal ashes; Cinders and Soil, mixture of; or Coal Cinders; between points in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Washington and Wyoming

| Table I |

(n) Railway Equipment when moving on own wheels

<table>
<thead>
<tr>
<th>Rates in cents per mile</th>
<th>1¢ per mile</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rates in any other unit</td>
<td>3%</td>
</tr>
</tbody>
</table>
In addition to the class rates, with this increase, many existing exceptions, commodity and other tariffs required as many as nine

11. (cont.)

F. Charges for specified services, except as shown under General Exceptions
   1. At points in Eastern Territory and at Southern territory
   2. Helena, Ark.; Baton Rouge and New Orleans, La.; Natchez and Vicksburg, Miss.; and Memphis, Tenn.
   3. At points in Western Territory including Alaska, except points in Illinois, Iowa, Michigan (Upper Peninsula), Missouri or Wisconsin in the Eastern Territory
   4. Stopping in transit of carload traffic for partial loading or unloading (see Exception) at points in the Eastern and Western Territories
      At points in Southern Territory except Helena, Ark.; Baton Rouge and New Orleans, La.; Natchez and Vicksburg, Miss.; and Memphis, Tenn.
      Track storage in transit
      Exception: Does not apply on trailer-on flat-car
      flat-car traffic (see 5)
   5. Stopping in transit of carload traffic for partial loading or unloading on trailer-on flat-car traffic (see 1, 2 and 3, Paragraph F.)
      Track storage in transit on trailer-on flat-car traffic (see 1, 2 and 3, Paragraph F.)
   6. Switching and holding cars of grain; seeds (field or grass); screenings from grain, unground, containing not more than 5% of flaxseed (linseed); soybeans; hay, straw, corn husks or shucks; pumies, unground, or alfalfa meal, for inspection, sampling and disposition orders
      At points in Western Territory, including Alaska, (except at points in Illinois, Iowa, Michigan (Upper Peninsula), Missouri or Wisconsin in the Eastern Territory)
      5% minimum
      $2.00 per car
   7. For installation of Grain Doors
      At points in the Western Territory, including Alaska, (Paragraph 6) and at Helena, Arkansas; Baton Rouge and New Orleans, La.; Natchez and Vicksburg, Miss., and Memphis, Tenn.
      When per car charge is less than $2.25
      Increase to $2.40 per car
      When per car charge is $2.25 or over
      15¢ per car
increases to be applied according to territorial and specific application, different in every ex parte.

11.F (cont.)

8. Detention charges on heavy duty flat cars
   (see 1, 2 and 3, Paragraph F.)

9. Use charges on heavy duty flat cars
   a. From all points to Eastern and Southern Territories, and Canadian Territory, east of Armstrong and Port Arthur, Ont. 10%
   b. From Helena, Ark.; Baton Rouge and New Orleans, La.; Natchez and Vicksburg, Miss.; and Memphis, Tenn. to points in Illinois 10%
   c. From all origins to Western Territory (except from or to shown in paragraph b.) and Canadian Territory west of Armstrong and Port Author, Ont. 5%

10. Switching rates and charges, when not absorbed or in part by line-haul carriers
    As specified

11. Switching rates and charges of certain carriers (as specified) when absorbed, in whole or in part, by line-haul carriers
   a. Coal, Coke and Iron Ore 3%
   b. All other traffic 5%

12. Transit charges
   a. On grain, grain products or by-products and articles taking same rates, at points in Eastern Territory
      No Increase
   b. All other transit charges at points in the Eastern Territory 5% Note 1
   c. All transit at points in Western Territory, and at Helena, Ark.; Baton Rouge and New Orleans, La.; Natchez and Vicksburg, Miss.; and Memphis, Tenn. 5% Note 1
   d. Transit at points in Southern Territory except points in paragraph c. directly above
      (1) Minimum charge when published per car on outbound shipments
          When less than $22.00 per car Increase to $22.00 per car
          All other transit charges No Increase
   e. Transit charges, or rates or charges (including wastage rates or charges) to plants in connection with cleaning, sizing, mixing and/or briquetting coal 20% Maximum $2.00 per car
However, the complexities do not end here as further increases have been made, adding further complications.

11.F (cont.)

13. Handling charges on Iron ore (not ground or hydrated) or Iron Sinter
   At upper Lake Ports; viz.  1/2¢ per gross ton
   At lower Lake Ports; viz.  No Increase
   From Hold to Rail of Vessel
   From Rail of Vessel to Car and from
   Dock to Stockpile to Car
   From Rail of Vessel to Dock Stockpile

14. Charges for ground or dock storage of ores at Lake Erie Ports
   1/4¢ per ton, net or gross as rated, per month

15. Handling of Coal and Coke (all kinds)
   From cars to vessels or barges at Lake Ports and River Points and from barges to cars at
   River Points
   3¢ per net ton

G. General Exceptions
The increase in rates or charges will not apply to:

1. Charges for demurrage or detention of freight cars, except detention charges on heavy duty flat cars
   (See F-8)

2. Amounts paid or allowances made by carriers for drayage or other services performed by the consignors or consignees of freight

3. Rates and charges at or between points in Canada on Canadian domestic traffic, or in Mexico

4. Charges for wharfage or handling at ports in Virginia; South Atlantic ports in North or South Carolina, and
   Georgia; Florida ports; and Gulf ports in Alabama, Louisiana, Mississippi and Texas; or dumping of
   Coke at Hampton Roads Ports, Va., or Charleston, S.C.

5. Charges for loading or unloading of livestock

6. Charges for protective services against heat or cold

7. Charges for dumping, leveling, tippling, transferring or trimming coal or coke, except in handling at
   Lake Ports and River Ports (See F-15)

8. Charges absorbed in whole or in part, by carriers

9. Switching rates and charges absorbed, in whole or in part, by carriers, except as indicated under
   charges for specified services

10. Ground storage of coal and coke at Lake Erie Ports

11. Charges for storage of grain in cars at South Atlantic, Gulf and Florida Ports

Cont. on Page 35
EX PARTE RATE INCREASES

Ex Parte No. 259A — First Interim — — 3% Increase — Effective June 25, 1968

Ex Parte No. 259B — Second Interim — 10% Increase — Effective November 28, 1968

In Tariff X-259, the railroads proposed increases of 3 to 10%. These were suspended by the ICC and by order of June 19, 1968, an interim increase of 3% in rates and charges was permitted to become effective June 24, 1968, as Tariff X-259A.

11. X 256 Increases (cont.)

H. Minimum net line-haul revenue where carriers absorb charges for switching at Eastern territory, except East St. Louis, Ill., or St. Louis, Mo.
   (1.) Fraction less than ⅛¢ will be dropped and fractions ⅛¢ or greater will be increased to next whole cent

I. Minimum rates or charges to line-haul rates and charges
   1. Per shipment less carload of any quantity
   2. Line-haul carload charges per car provided for in Rule 13 of the Consolidated or Uniform Classification and corresponding rules in other tariffs
   3. All other minimum rates or charges

J. Rates made by addition or deduction of arbitraries or differentials, the addition or deduction of arbitraries or differentials shall first be made and then apply the increase

K. Through rates composed of two or more separately stated rates, each rate is increased separately except that the total increase will not exceed that which would result from applying the maximum or specific increase, if any, on the commodity

12. X 259-B—Increases Authorized.

Increases were allowed in all territories as follows:

A. Class rates, less-carload, any quantity and carload, determined by the use of ratings provided in governing classifications, except radio active or nuclear chemicals (See H), commodities, carload, in special groups (See F), and TOFC traffic (See G).

B. Rates, less carload or any quantity, governed by the exceptions to the classification and commodity
The suspension was lifted by order of November 25, 1968, allowing the full increases of 3 to 10% to go into effect. The only exceptions were on iron or steel scrap and pig iron, which remained at the 3% interim level. The full increases were allowed, pending a final order in the case because of the railroads' critical need for additional revenues to offset increased operating costs. All of the increases were subject to an automatic refund provision if the increases were later found unwarranted. The carriers issued Tariff X-259B with increases of 3 to 10% effective November 28, 1968. On January 23, the ICC issued its Final Report and order in Ex Parte 259 substantially upholding its previous order of November 25, 1968.

A novel provision in connection with increases on certain commodities was the establishment of minimum increases. For example, rates on Aluminum Basic Shapes were increased 5% with a minimum increase of 2¢ per cwt.

12. (cont.)

C. Rates, carload, commodity, exceptions to the governing classification or column, except those outlined in specific groups (see F) 6%

D. Rates published per car or per unit (other than per 100 lbs., per ton or per car) (see exceptions) 6%

Exceptions: Rates published per car on hot metal in hot metal cars
Where different increases are provided in specific groups 7%

E. All commodity (all freight) freight rates 6%

F. Commodities, carload, in specific groups As Specified

G. Piggy-back (TOFC) line haul rates on freight in trailer bodies, trailers, semi-trailers, vehicles or containers loaded on flat cars,

1. Ratings provided in governing classifications 6%

2. Ratings, provided in exceptions to the governing classifications and commodity (See 3-5) 6%

3. Within Southern Territory as specified and Between Southern Territory as specified and Eastern, Western and Canadian Territories (Note A&B) 6%

4. Within or between all other Territories (Note B&C) 6%

5. Piggy-back (TOFC) line haul, rates on freight in trailer bodies, trailers, semi-trailers, vehicles or containers, also on empty trailer bodies, semi-trailers, vehicles or containers loaded on flat cars, between both railroad terminal or origin and railroad terminal at destination
In addition, the railroads' Master Tariff "X-259" was based on the new "Standard Transportation Commodity Code." The STCC was published as a tariff, grouping commodities by industry. The Commission stated that this method of tariff publication was a worthwhile step toward tariff simplification and, with refinements, might lead to application of automatic data processing procedures in determining rates.

As a result of Tariff X-259B, commodities, accessorial and other special service rates and charges were differently increased. It is impossible to set forth in summary form the extreme complexities caused by this tariff.

The use of the STCC in applying the increases provided the carriers with a method of being more specific in their increases. The method used to determine whether a commodity received no increase, or one of the various increases, from 3 to 10% is not indicated but must be assumed to have been based on informed judgment, buttressed by some market research into competitive transport economics.

12.G-5 (cont.)

a. Within Southern Territory as specified and Between Southern Territory and Eastern, Western and Canadian Territories 3%
   \[\text{Note A & B}\]

b. Within or between all other Territories 6%
   Note A: On shipments in or on trailers or containers or on shipments of empty trailers or containers, leased and owned by shippers, on cars owned or leased by shippers 6%
   Note B: Commodities described in specific groups As Specified
   Note C: When percentage increase is not provided in specific groups 6%

H. Radio-active or nuclear chemicals 10%

I. All accessorial charges (see general exceptions and unless specifically stated) 6%

J. General Exceptions: The increases do not apply on the following services, except as shown in paragraphs 1 and 9.

1. Charges for demurrage or detention of freight cars, except use and detention charges on heavy duty flat cars (except as shown in K-6)

2. Amounts paid or allowances made by carriers for drayage or other services performed by consignors or consignees of freight

3. Rates and charges at or between points in Canada on Canadian domestic traffic, or in Mexico

4. Charges for wharfage or handling at ports in Virginia; South Atlantic ports in North and South Carolina and Georgia; Florida ports; and Gulf ports in Ala-
Severe problems arise from the extreme difficulty of application of these very complex increases. It appears doubtful whether structural changes in the rates can be satisfactorily and efficiently made by "patching-up" existing rates during Ex Parte increase cases by combining minimum increases, hold downs (maximum increases), percentage increases, numerous different ways of handling or changing the application any of the other numerous complexities.

In considering these complexities it must be remembered that at the time of Ex Parte X-259B, there might be ten or more of these different types of increases to be applied to determine any effective rate for rail service.

12.J-4 (cont.)

bama, Louisiana, Mississippi and Texas; or dumping of coke at Hampton Roads ports, Virginia, or Charleston, South Carolina
5. Charges for loading and unloading of livestock
6. Charges for protective services against heat or cold
7. Charges for dumping, leveling, tipping, transferring or trimming coal and coke at Atlantic and Gulf ports
8. Charges absorbed, in whole or in part, by carriers
9. Switching rates and charges absorbed, in whole or in part, by carriers, except as shown in L
10. Ground storage of coal and coke at Lake Erie Ports
11. Charges for storage of grain in cars at South Atlantic, Gulf and Florida Ports
12. For handling iron ore (not ground or hydrated) or iron sinter at Lower Lake Ports from Hold to Rail of Vessel

K. Stopping in transit for partial loading or unloading
1. At points in the Southern Territory (see exception A) and at points in the Western Territory (see exception B) $3.00 per stop 6%
   2. All other points
   3. In or on trailer bodies, trailers, semi-trailers, vehicles or containers loaded on flat cars at points in Southern Territory (see exception A)
   4. Transloading at points in the Southern Territory (see exception A)
   5. Detention of trailer bodies, trailers, semi-trailers, vehicles or containers at points in Southern Territory (see exception A)
   6. Use and detention charges on heavy-duty flat cars

7. Split delivery at points in the Southern Territory (see exception A) and Western Territory, including Alaska (see exception B) (5¢ per 100 lbs.
   or $1.00 per ton  for each separate operation)
8. Loading or unloading, other than Motor Vehicles by carriers at points in Eastern, Southern and Western Territories including Alaska (5¢ per 100 lbs.
   or $1.00 per ton  for each separate operation)
EX PARTE RATE INCREASES

In addition to the class rates, with this increase many existing exception, commodity and other tariffs required as many as ten increases to be applied according to territorial and specific application, different in every Ex Parte.

12.K (cont.)

9. Transit Service, and minimum transit charge per car
   at points in Western Territory, including Alaska
   (see exception B) and Southern Territory (see
   exception A)
   6% minimum $3.00 per car
10. Exceptions A and B see N-1-2.

L. Switching rates and charges of certain carriers, when
   absorbed by line haul carriers
   1. Coal, coke and iron ore
   3%
   2. All other traffic
   6%

M. Minimum per shipment
   1. Less carload or any quantity
   2. Minimum rates per carload shipments, except
      in paragraph 3
   3. Minimum rates per car, on line-haul carload rates
      provided in Rule 31 of governing classification
      a. From, to or within points in the Eastern Terri-
         tory and from, to or within points in Canada
         east of Armstrong and Port Arthur, Ontario
      b. From, to or within points in Southern Terri-
         tory (see exception A), Western Territory
         (see exception B), and from or to points in
         Canada west of Armstrong and Port Arthur,
         Ontario
   5%
   c. Exceptions A and B see N-1-2.

N. Minimum Net Line Haul Revenue where tariffs provide
   for absorption of charges for switching at points in
   Southern Territory, including Helena, Arkansas,
   Baton Rouge and New Orleans, Louisiana; Natchez
   and Vicksburg, Mississippi; and Memphis, Tenness-
   see, except East St. Louis, Illinois; St. Louis, Mis-
   souri, and points shown in exception B
   Note: Fractions less than one-half cent will be
   dropped and fractions of one-half cent or
   greater will be increased to the next whole
   cent
   33 1/3% (note)

1. Exception A: Not applicable to points on the C&O
   Railway in Virginia, exclusive of Newport
   News, Norfolk, Richmond, Lynchburg,
   Glasgow, Charlottesville, Waynesboro, Or-
   ange and Staunton, Virginia; Points in the
   State of Kentucky, exclusive of Louisville,
   Covington, Lexington, Maysville, Newport,

Cont. on Page 40
Since the effective date of Ex Parte 259B, a total of 28 supplements have been issued, further complicating the problem of accurate rate determination.

*Ex Parte No. 262 — 6% Increase — Effective November 18, 1969.*  

On October 15, 1969, the Interstate Commerce Commission denied a request by the railroads to increase rates by 6%, on 24 hours' notice. The railroads had proposed a six percent emergency freight rate increase to become effective October 18. The Commission said the new rates could be

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12.N-1 (cont.)

...and Winchester; Points in the State of Ohio, taking Kenova, West Virginia, rate bases in NRB No. 1-A on the BaO RR Co. and Penn Central Co.

2. Exception B: Not applicable to points in Illinois, Iowa, Michigan (Upper Peninsula only), Missouri and Wisconsin in the Eastern Territory.

3. All other points, including East St. Louis, Ill., and St. Louis, Mo.

O. Rates made by addition or deductions of arbitraries or differentials, such arbitraries or differentials shall first be made before applying increases.

P. Rates made of two or more separately stated rates, apply the increase for each rate separately, except that the total increase will not exceed that which would result from applying the maximum of specific increase, if any, provided for the commodity.

13. X 262—Increases Authorized.

The increases included those below:

A. All rates and charges, class, exception ratings, commodity rates and other charges, except as stated below.

B. Assessorial rates or charges were not increased on the following services, except as shown in paragraphs 1 and 9.

1. Charges for demurrage or detention on freight cars, except detention charges on heavy-duty flat cars.

2. Amounts paid or allowances made by carrier for drayage or other services performed by shippers or receivers of freight.

3. Rates and charges at or between points in Canada on Canadian domestic traffic, or in Mexico.

4. Charges for wharfage or handling at ports in Virginia, South Atlantic ports; Florida Ports; and Gulf.
EX PARTE RATE INCREASES

filed "upon statutory notice," but with an effective date no earlier than November 18. The Commission set November 12 as the date of oral argument concerning the lawfulness of the proposed Tariffs. On November 12, the Commission heard more than six hours of oral argument into the merits of the rate proposal.

13. B-4 (cont.)

ports in the United States; or dumping of coke at Hampton Roads ports, Virginia, or Charleston, South Carolina

5. Charges for loading or unloading of livestock
6. Charges for protective services against heat or cold
7. Charges for dumping, leveling, tipping, transferring or trimming coal and coke at Atlantic and Gulf ports
8. Charges, absorbed, in whole or in part, by carriers
9. Switching rates and charges absorbed, in whole or in part, by carriers, except as provided in item C
10. Ground storage of coal and coke at Lake Erie Ports
11. Charge for storage of grain in cars at South Atlantic Gulf and Florida ports
12. For handling Iron Ore (not ground or hydrated) or Iron Sinter at Lower Lake ports from hold to rail of vessel
13. Rates applicable between points on the Long Island Railroad on interstate or foreign commerce, nor charges published for application upon services performed by the Long Island Railroad at stations on that railroad

C. Effective January 3, 1970, the Switching Rates and Charges of certain carriers as specified, when absorbed, in whole or in part, by line-haul carriers are increased as follows:

1. Coal, Coke and Iron Ore (not ground or hydrated) or Iron Sinter
2. All other traffic

D. Combination of rates, including addition or deduction of arbitraries or differentials, will be treated by increasing such separate rates or arbitraries, or differentials, accordingly, but the sum or total of each factor shall not exceed the percentage to the sum or total rates or charges.

E. Grain, grain produces and grain by-products and articles listed in tariffs making reference to this Ex-Parte, as, and when taking grain, grain products or grain by-products rates the increases are as follows:

1. Effective September 18, 1970
   a. Between stations listed in Western Territory as described in Exception "A" (Table 6) or
   b. Between stations in other territories (Table 1) or

   5% (g) see 2-b

   6%
The railroads had requested that the increases be allowed to go into effect on Saturday, October 18. In seeking the new rates, the railroads cited increased costs and revenue needs. The proposed increases would produce approximately $600 million of additional gross freight revenue annually, according to the railroads' petition.

At this point certain Commissioners began to question the increases.

Chairman Virginia Mae Brown and Commissioner Willard Deason voted to reject the order and to substitute an order providing suspension and full investigation. Chairman Brown filed a separate dissenting expression. Commissioner Dale Hardin voted not to adopt the order as circulated since it does not provide for hold-downs on such commodities as coal and grain.

However, as a result of Tariff Ex Parte 262, the class rates, as well as exception ratings and commodity rates, were raised an additional 6 percent.

13.E (cont.)

2. Effective September 22, 1970
   a. Between stations listed in Western Territory as described in Exception "A" on one hand and stations listed in Western-Southern Border Territory as described in Exception B on the other hand (Table 6) or
   b. (g) Any fractions resulting in the application of 5% increase will be dropped if less than a quarter (¼) cent, a half (½) cent if a quarter (¼) cent or more but less than three quarter (¾) cent and the next higher whole cent if three quarter (¾) cent or more

3. Exception:
   a. "A" Western Territory, Viz:
      All points in the states located west of the Mississippi River, including Alaska, Canada (Armstrong and Port Arthur, Ont., and all points west there-of), (1) Illinois, Indiana (points located in the Chicago switching District), (1) Iowa, Michigan (upper peninsula only) Minnesota, (1) Missouri, and (1) Wisconsin.
      (1) Will not apply between points in the IFA territory.
   b. Western-Southern Border Territory, Viz:
      Baton Rouge, La., Helena, Ark., Memphis, Tenn., New Orleans, La., Natchez, Miss., Reserve, La. and Vicksburg, Mississippi.

F. On September 18, 1970 there also has been added an increase of 5% in Table 5 for rates and charges, but no provisions are made which apply to this table.
This “across-the-board” increase is considerably easier to apply than earlier ones BUT did not simplify the situation, as the many earlier increases remained in effect and still must be used in rate determination. An additional step was added to the confusing picture, now making eleven or more increases to apply before a railroad rate can be ascertained on most traffic!

Ex Parte No. 265-A — Interim 5 Per Cent Increase — Effective June 9, 1970\textsuperscript{14}

Ex Parte No. 265-B — Final 6 Per Cent Increase — Effective November 20, 1970\textsuperscript{15}

In early 1970 the inflationary spiral caused numerous and significant rate actions and further recognition of the severe problems in rate complexity. The Eastern and Western rail carriers filed on March 3, 1970, for a six percent general freight rate increase to become effective on 24-hours notice, which was rejected. Permission was granted to file for the increase upon not less than 75 days notice with proposed effective date no earlier than June 2.

\textsuperscript{14} X 265-A—Increases Authorized.

A. All rates and charges per 100 pounds or other units higher than shown in applicable tables are increased as follows:

<table>
<thead>
<tr>
<th>Column 1 (applicable table)</th>
<th>Column 2 (Percentage increase)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>5%</td>
</tr>
<tr>
<td>2</td>
<td>5%</td>
</tr>
<tr>
<td>3</td>
<td>4%</td>
</tr>
<tr>
<td>4</td>
<td>3%</td>
</tr>
</tbody>
</table>

Fractions resulting from the application of the foregoing percentage increases in connection with Tadles 1-3 and 4 under Column 1 will be dropped if less than a half (½) cent and increased to the next higher whole cent if a half (½) cent or more.

Under the 5% increase in Table 2 Column 1 the fractions will be dropped if less than a quarter (¼) cent, a half (½) cent increase if a quarter (¼) cent or more but less than three-quarter (¾) cent and a whole cent increase if fraction is three-quarter (¾) cent or more.

B. All rates and charges, except as otherwise provided specifically herein, shown in Tables are increased per Table 1 or

\textsuperscript{5%}
The Southern carriers were reluctant, but eventually joined the increase request.

14. (cont.)

C. On Carload Traffic Moving on line-Haul Commodity Rates and Classification Exception Ratings are increased accordingly on commodities listed below:

1. Bituminous Coal, including Briquettes, Culm, Dust, Run of mine, Screenings, slack, Waste, steam coal, Metallurgical and Coking Coal and Smelting Coal

   5%
   Maximum 18¢
   per net ton

2. Anthracite Coal, viz: including Briquettes, Calcined, boulets, dust, screenings, condemned, Un-Prepared and Anthracite and Bituminous Coal Briquettes

   5%
   Maximum 18¢
   per net ton

3. Coke, viz: Coke braize, breeze, briquettes, dust, Coke noibn, Coke screenings, Creosote, gashouse, petroleum, phthalic acid or pitch coke, semi-coke (semi-distilled coal) or tar coke

   5%
   Maximum 18¢
   per net ton

4. Lignite Coal or Coal Briquettes

   5%
   Maximum 9¢
   per net ton

5. Tidewater, Lake Cargo and Island Waterway rates on Coal and Coke as described in paragraphs 1-3. The rail rates are increased to North Atlantic Ports, Hampton Roads to New York, inclusive.

   (Note A
   a. Upon evidence the products shipped have been placed in vessels destined to New England ports, and thence moved beyond the New England ports to points in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island or Vermont. The increase to New England ports is
   b. The rates from New England ports, by rail, which had prior rail and water haul are increased
   c. On Lake Cargo rates to ports on the Great Lakes and St. Lawrence River for transhipment by water to ports in the United States or Canada and thence transported beyond the said ports to interior destinations in the United States or Canada are increased
EX PARTE RATE INCREASES

On May 27, 1970, the Commission suspended and placed under investigation the railroads' request for a 6 percent general freight rate increase, but authorized an interim increase not exceeding 5 percent, pending investigation, but subject to refund provisions and imposition of restrictions on certain selected commodities. (See footnote 14)

14.C-5 (cont.)

d. On Inland Waterway rates to ports (other than Great Lake ports) for transhipment beyond by water as cargo to a second port, and thence transported beyond the second port the increases will be

Maximum 9¢ per net ton to the first port and 9¢ per net ton from the second port to the final rail delivery

5% (see Exc.)

e. On rates which have had a prior rail and water haul, moving by rail beyond the ports in the United States to interior destinations in the United States or Canada the increase is

5% Maximum 9¢ per net ton

Maximum 15¢ per ton net or gross, as rated

3%

6. Flaxing Stone or Furnace limestone

7. Fly Ash

8. Grain, Grain Products and Grain By-Products and articles listed in tariffs making reference to this Ex Parte, as, and when taking grain, grain products, or grain by-products rates

a. Between stations described in Exception "A"

also between stations described in Exception "A" on one-hand and stations described in Exception "B" on the other hand (Table 2)

5%(g)

(g) see table 2 Column 1 disposition of fractions in Paragraph A

b. All other territories (Table 1)

5%

Exceptions

"A" Western Territory, Viz:
All stations in the United States west of the Mississippi River, including Alaska, Canada (Armstrong and Port Arthur, Ont., and all points west), (1) Illinois, (1) Indiana (points located in the Chicago switching District), (1) Iowa Minnesota, (1) Missouri and (1) Wisconsin

(1) Not applicable between points in Illinois Freight Association territory

"B" Western-Southern Border territory, Viz:
Route, La., Helena, Ark., Memphis, Tenn., New Orleans and Reserve, La., and Vicksburg, Miss.
The Commission order announced intention to investigate the lawfulness of all rates, charges, and regulations which were previously filed, as well as the current increases and that all schedules were to be subject to a refund provision.

14.C-5 (cont.)

9. Iron Ore, noiln, including Hematite, Iron ore, hydrated (bog, red or yellow ore), Iron ore sinter, Magnetite ore or Taconite.

10. Scrap Iron and Scrap Steel, including scrap terne plate or tin plate.

11. Iron and steel Borings, Turnings, including clippings, Drippings, Filings, Grindings, Punchings, and spallings

12. Pig Iron

13. Sugar, including beet, cane, corn, maple, raw cane, sorghum, liquid, invert or sugar wheat

D. General Exceptions
No increase in rates and charges are applicable to the following:

a. Charges for demurrage or detention on freight cars, except detention charges on heavy-duty flat cars
b. Amounts paid or allowances made by carriers for drayage or other services performed by shippers or receivers of freight.

c. Rates and charges at or between points in Canada on Canadian, domestic traffic or in Mexico

d. Charges for wharfage or handling at ports in Virginia; South Atlantic ports in North and South Carolina and Georgia; Florida ports; Gulf ports in Alabama, Louisiana, Mississippi and Texas; or dumping of Coke at Charleston, S.C.

e. Charges for loading or unloading of Livestock
f. Charges for protective services against heat or cold

g. Charges for dumping, leveling, tippling, transferring or trimming Coal and Coke at Gulf ports

h. Charges absorbed, in whole or in part, by carriers.
EX PARTE RATE INCREASES

On June 1, the Commission directed the railroads to submit “specific evidence to demonstrate the efficiency and economy of their existing operations and service to the shipping public.” The Commission said any party opposing the increase may submit evidence of specific deficiencies in the service of the railroads, accompanied by recommendations as to how

14. D (cont.)
   
i. Switching rates and charges absorbed in whole or in part by carriers
   j. Charges for storage of grain in cars at South Atlantic, Gulf and Florida ports
   k. Rates applicable between points on the Long Island Railroad on interstate or foreign commerce, nor charges published for application upon services performed by the Long Island Railroad at stations on that railroad.

E. Where a through rate for line haul transportation is determined by the amount of another rate or charge or by addition of an amount to or deduction of an amount from a base (not base point) rate, first ascertain the applicable rate, then increase such rate as provided.

F. When through rates are made by combining separately established rates, each rate comprising such combination is increased separately and the applicable rate is the sum of the separate rates so increased, except that the total increase will not exceed that which would result from applying the maximum or specific increase, if any.

In this tariff there is a Table 3 of 4% increases in rates or charges but no provisions are stipulated to use this table.

15. X 265-B—6% Increase—Effective November 20, 1970; which canceled X 265-A—5% Increase—Effective June 9, 1970

A. All rates and charges per 100 pounds or other units higher than shown in applicable tables are increased as follows:

<table>
<thead>
<tr>
<th>Column 1 (applicable table)</th>
<th>Column 2 (Percentage Increase)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>6%</td>
</tr>
<tr>
<td>2</td>
<td>6%</td>
</tr>
<tr>
<td>3 (Suppl 11-20-70)</td>
<td>4%</td>
</tr>
<tr>
<td>4 (Suppl 11-20-70)</td>
<td>3%</td>
</tr>
</tbody>
</table>

Fractions resulting from the application of the foregoing percentage increases in connection with Tables 1-3 and 4 under Column 1 will be dropped if less than a half (½) cent and increased to the next higher whole cent if a half (½) cent or more.
such deficiencies may be overcome. June 24 was set as the date for filing opposition statements.

On November 5, 1970, the Commission lifted the one percent suspension it had imposed earlier on the six percent increase and permitted it to become effective November 20, 1970 as X-265B. This increase was applied to all commodities except grain (5%) and maximum increase limits established in X-265A were removed.

Ex Parte No. 267A — 8 Per Cent East and West — 6 Per Cent South Increases — Effective November 21, 1971

On September 4, 1970, the ICC announced it was going to investigate the adequacy of freight rates and charges of all U.S. railroads. That order

15.A (cont.)
Under the 6% increase in Table 2 Column 1 the fractions will be dropped if less than a quarter (.¼) cent, a half (.½) cent increase if a quarter (.¼) cent or more but less than three-quarter (.¾) cent and a whole cent increase if fraction is three-quarter (.¾) cent or more.

B. All rates and charges, except as otherwise provided specifically herein, shown in Tables are increased per Table 1 or

C. The rates and charges on Grain, Grain Products and Grain By-Products and articles listed in tariffs making reference to this Ex Parte, as, and when taking grain, grain products, or grain by-products rates are increased as follows:

a. Between stations described in Exception "A" also tween stations described in Exception "A'" on one hand and stations described in Exception "B'" on the other hand (Table 2)
   (g) see table 2 disposition of fractions in Paragraph A

b. All other territories (Table 1)

Exceptions

"A" Western Territory, Viz: All stations in the United States west of the Mississippi River, including Alaska, Canada (Armstrong and Port Arthur, Ont., and all points west), (1) Illinois, (1) Indiana (points located in the Chicago switching district), (1) Iowa, Minnesota, (1) Missouri and (1) Wisconsin
(1) Not applicable between points in Illinois Freight Association territory

"B" Western-Southern Border territory, Viz: Baton Rouge, La., Helena, Ark., Memphis, Tenn., New Orleans and Reserve, La., and Vicksburg, Miss.
was in response to a request by substantially all of the Eastern and Western railroads to increase on one day’s notice their freight rates by eight percent on September 15 and an additional seven percent on November 1.

The Commission denied the request, but authorized the carriers to file new tariff schedules upon not less than 60 days’ notice, with an effective date no earlier than November 18, subject to suspension.

On November 5, 1970, the Commission suspended and placed under investigation a request by the railroads for a 15 percent general freight rate increase in the East and West and six percent in the South.

15. X 265-B (cont.)

D. Supplement 1 of Ex Parte 265-B effective November 10, 1970, added the following:

<table>
<thead>
<tr>
<th>Column 1 (applicable table)</th>
<th>Column 2 (Percentage increase)</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>4%</td>
</tr>
<tr>
<td>4</td>
<td>3%</td>
</tr>
</tbody>
</table>

There are no provisions in the tariff where these tables or increases apply.

E. General Exceptions are the same as provided for in X 265-A

16. X 267-A—8% and 6% Increases—Effective November 21, 1970

This Tariff of increased rates and charges is applicable only to the territorial application shown below:

**Territory Application**

A. At, between and within stations in Eastern Territory described in Note (a) and Western Territory described in Note (b)

B. Between stations in Western-Southern Border Territory described in Note (c) and between Western-Southern Border Territory as described in Note (c) on one hand and Western Territory described in Note (b) on the other hand

C. Rates and charges on Coal, carload, from stations in Southern Territory described in Note (d) to stations in Eastern Territory described in Note (a) and Western Territory described in Note (b)

D. The increases also apply to rates and charges to expire on February 28, 1971, unless sooner cancelled, changed or extended, between stations in Southern Territory described in Note (d), between stations in Southern Territory described in Note (d) on one hand and Eastern Territory described in Note (a), Western Territory described in Note (b) and Western-Southern Border Territory described in Note (c) on the other hand.
The Commission authorized an interim increase not exceeding eight percent in the East and West and six percent in the South to be put into effect upon not less than 15-days' notice, subject to refund provisions.

16. D (cont.)

Notes a, b, c, and d

(a) Eastern Territory, Viz: All stations within the states of Connecticut, Delaware, District of Columbia, Illinois, Indiana, (1) Iowa, (2) Kentucky, Maine, Maryland, Massachusetts, Michigan (Lower Peninsula), Missouri, New Hampshire, New Jersey, New York, (4) North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee (Bristol only), Vermont (2) Virginia, (2) Wisconsin and points in Canada east of Thunder Bay and Armstrong, Ont., also (3) Michigan (Upper Peninsula)
1. West bank of the Mississippi River points extending from Keokuk, Iowa on the south to Dubuque, Iowa on the north, also Columbus Jct., Mediapolis, Morning Sun and Wapello, Iowa.
2. As specified in Note 24 of Tariff
3. Cherry Valley via Mackinaw City, Mich, and Manistee, Menominee and St. Ignaces, Michigan via A.A.R.R.
4. Colvards, Company Farm, Lansing, Nella, Tuckerdale, Warrensville, and West Jefferson
(b) All points in the United States west of the Eastern Territory described in Note (a) and Southern Territory described in Note (d) and Alaska, Canada (Armstrong and Thunder Bay, Ont. and all points west), and Mexico
(c) Western-Southern Border Territory, viz: Baton Rouge, La., Helena, Ark., Memphis, Tenn., Natchez, Miss., New Orleans and Reserve, La., and Vicksburg, Miss.
(d) Southern Territory as described in notes 15, 16, and 17 of Tariff

Increases

E. The Rates and Charges higher than shown in applicable tables are increased as follows:

<table>
<thead>
<tr>
<th>Column 1 (applicable table)</th>
<th>Column 2 (Percentage increase)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>8% (a)</td>
</tr>
<tr>
<td>2</td>
<td>8% (b)</td>
</tr>
<tr>
<td>3</td>
<td>6% (a)</td>
</tr>
<tr>
<td>4</td>
<td>6% (b)</td>
</tr>
</tbody>
</table>

(a) Fractions resulting from increases in Tables 1 and 3 will be dropped if less than a half cent and increased to the next whole cent if a half cent or more.

(b) Fractions resulting from increases in Tables 2 and 4 will be dropped if less than a quarter and will be converted to a half cent if a quarter cent or more but less than three quarter cent and will be to the next higher whole cent if three quarter cent or more.

F. All rates and charges, except as specifically stated, within territories outlined in notes (a), (b) and (c) (Table 1) 8%
EX PARTE RATE INCREASES

The Commission authorized no more than six percent on all traffic moving between the East and West to the South or from the South to the East and West. All carriers were required to maintain existing port relationships not to exceed six percent on all traffic moving to or from eastern and southern ports, including Gulf ports, for import and export.

The Commission announced continuation of its investigation into the adequacy of freight rates and charges of all U.S. railroads, which it instituted on September 2.

On December 31, 1970, the Commission denied the request by the South to increase freight rates up to 15 percent. The request had been filed December 21 as a supplement to an application in September for a 6 percent increase. At that time, the South had joined their request to that of East and West carriers who had sought a 15 percent increase.

16. (cont.)

G. All rates and charges between territories described in Paragraph D (Table 3) 6%

H. Coal rates and charges, carload as specified in Paragraph C (Table 1) 8%

I. Grain, grain products and grain by-products, and articles listed in tariffs making reference to this tariff, as and when taking grain, grain products or grain by-products rates, within territories outlined in Notes (a), (b), and (c) (Table 2) (Exception). (g) See Para. E-b 8%(g)

Exception

Effective January 22, 1971

(1) On Export and Import Traffic between North Atlantic Ports and stations in the United States located west of the states of New York, Pennsylvania, Maryland and West Virginia, north of the Ohio River and north of the state of Arkansas, Oklahoma and Texas and east of the states of Colorado, Wyoming and Montana on the other hand (Table 3) 6%

(2) On Export and Import Traffic between South Atlantic and Gulf Ports on one hand, and Western Territory, limited to states north and east of New Mexico, and east of and including Utah and Idaho but not including Montana and stations in Note (c) (Table 4). (g) See Para. E-b 6%(g)

J. Lumber, lumber products, and other articles as taking some rates or rates related thereto; includes Plywood, Veneer and wood built up or combined (Expires with February 28, 1971, unless sooner cancelled, changed or extended)
With the X-267 increase, there may be as many as fourteen ex parte increases to be applied to determine a specific rate. In each of these, differences exist in territorial and specific application which must be carefully researched.

16.J (cont.)

1. Within Eastern Territory described in Note (a) except between stations in Illinois Freight Territory described in Note 21 of tariff (Table 1) 8%
2. All other territories (Table 3) 6%

K. Effective January 15, 1971
All rates and charges published specifically (Except Coal, Coke, Iron Ore and Grain or Grain Products) on Export and Import traffic between North Atlantic, Eastern Canada, Gulf Ports, New Orleans, La., and West, on one hand, and Central Territory and Western Territory, on the other hand (Table 3) 6%

L. Sugar, viz: Beet, Cane, Corn, Maple, Raw Cane, Sorghum, Wheat, Liquid Invert or Sugar.
   From Baton Rouge, New Orleans, Reserve, La., and stations taking same rates to stations in Western Territory described in Note 25 of tariff (Table 3) 6%

The increases in rates and charges provided in this tariff will not apply to the following:

a. Charges for demurrage or detention on freight cars, except detention charges on heavy duty flat cars
b. Amounts paid or allowances made by carriers for drayage or other services performed by shippers or receivers of freight
c. Rates and charges at or between points in Canada on Canadian domestic traffic, or in Mexico
d. Charges for wharfage or handling at ports in Virginia, South Atlantic ports in North and South Carolina and Georgia; Florida ports; and Gulf ports in Alabama, Louisiana, Mississippi and Texas, or dumping of coke in Charleston, S.C.
e. Charges for loading or unloading of livestock
f. Charges for protective services against heat or cold
g. Charges for dumping, leveling, tippling, transferring or trimming coal and coke at Gulf ports.
h. Charges absorbed, in whole or in part, by carriers
i. Switching rates and charges absorbed in whole or in part, by carriers
j. Charges for storage of grain in cars at South Atlantic, Gulf and Florida ports
k. Charges for handling iron ore (not ground or hydrated) or iron sinter at lower lake ports from Hold to Rail of Vessel
l. Rates applicable between points on the Long Island Railroad on interstate or foreign commerce, nor charges published for application upon services performed by the Long Island Railroad at stations on that railroad.
Ex Parte No. 270 — Investigation of Railroad Freight Rate Structure; and Ex Parte No. 271 — Net Investment — Railroad Rate Base

On December 15, 1970, the ICC announced a formal investigation of the railroad freight rate structure and instituted another proceeding concerning the rate base to be used in determining rate of return as a factor in ruling on general freight rate increase requests by the nation's railroads.

In Ex Parte No. 270, Investigation of Railroad Freight Rate Structure, the Commission announced a thorough investigation of the railroad freight rate structure to, from and within all territories, and

In Ex Parte No. 271, Net Investment — Railroad Rate Base, the Commission said it will investigate whether net investment as now used, or some other rate base, is the proper basis for measuring rate of return.

An Opportunity to Remove Chaos from Railroad Rate Complexity

The chaotic situation described in this report is inexcusable and must not be tolerated. No further increases should be granted in rail rates until corrective policies are evolved and a timetable placed in effect to correct the serious problems of railroad rate and tariff complexity.

There is no question about a serious financial need of the railroads for additional revenues and more satisfactory profits and quite rapidly. Caught between the rapidly rising labor and material inflationary spiral on the one hand and the rapidly diminishing but deficit creating passenger business on the other, the plight of some of the major railroads in the East is serious.

However, the above points fail to answer the true test of the public need and interest and without question fails to meet the best interest of the railroads themselves.

1. The present rate complexity of the railroad industry in the United States is an intolerable situation in a country which prides itself on technical competence.

The railroad rate complex of the United States is the most confusing and uncertain of accurate determination of any of the railroads in the world today—without exception. It has truthfully been said that six or more rate experts may come up with as many answers as there are experts because of the confusing and hidden rates in the conflicting but applicable tariffs.
It is a fact that no rate expert in the United States can possibly understand all of the intricacies of the present railroad rate complex and the additional complications created by the numerous and inconsistent ex parte increases.

2. The present rate complexity and ambiguity leads to continuing litigation between carriers and shippers.

The fourteen rate increases listed above, some of them 20 years old, must still be applied to many tariffs in order to determine an applicable rate. The ambiguities and inconsistencies continue for many years to cause litigation requiring the ICC to issue rulings to clarify the issues. Following these rulings, corrective supplements are issued, some of which apply to ex parte tariffs issued many years earlier.

3. The present railroad rate complex aggravated by increases and changes, is unfair to the small shippers to the extent of unreasonable and unjust discrimination against them.

The large shipper, who ships numerous carloads of the same commodities between the same points, maintains a rate “PONY” or extract of rates which he can rather readily bring up-to-date with changes due to ex parte increases.

The small shipper cannot afford the expense of a large traffic department, with experts to evaluate the complexities and determine the lowest rate applicable by rail. As a result, he is frequently required to pay the highest rail class rate, non-competitive with motor carriers, either common carriage or private. As a result, he is discriminated against and will desert the rails for common or private motor carriage.

4. From the standpoint of the railroads themselves, the complexities in the present rail rate complex, greatly aggravated by the inconsistencies in the ex parte increases, has been a major contributing factor to the loss of rail traffic to the other modes of transport and added unnecessary expense to rating billing and accounting.

5. Also, from the standpoint of both the railroads and their customers, the expense of application of the increases in rates and charges is exhorbitant.

With numerous out-of-date and extremely complex tariffs, the determination of the applicable rate for a given movement is presently indeterminate and uncertain and at the same time extremely expensive. The testing of several or many combinations may be required to ascertain the lowest applicable rate.
6. Because of the numerous complex and frequently almost obsolete tariffs still in effect, the railroads hesitate to place the complex ex parte increase tariffs on computer tape for easy access for fear of extensive reparations cases, which might result in substantial payments to shippers.

7. It is evident that the railroad rate structure must be overhauled and placed into a framework which is capable of determination in an economical and efficient manner, equitable to carrier and shipper alike.

The present railroad rate complex is almost completely devoid of anything which might be called structure. It is properly named a complex. In addition, it must be recognized that there is a complete lack of consistent rate policy for the railroads, as every increase has been made on the basis of current need and expediency and as a result of give-and-take among the specific rail carriers, subject to the degree of pressure from groups of shippers. Again, the large shippers are able to exert more pressure in their own behalf than the small shippers.

8. Prior to being granted another rate increase, the railroad industry should be required to state in what manner they may be expected to overhaul and simplify their entire rate structure in order that the complexities may be removed and the problem of determining the currently applicable rate may be simplified.

Ex Parte Nos. 270 and 271 should prove to be the most important proceedings in the history of the Interstate Commerce Commission, of the railroad industry and of their customers. These proceedings provide an opportunity to solve and correct the problem of railroad rate complexity and furnish leadership to the other transport modes.

All who are interested in the future trend, simplification and rationalization of transportation rates and charges in the United States should participate in these proceedings to state and protect their interests and to see that the progress possible is achieved.

The impact on transport policy from this proceeding should transcend the railroad industry and affect all forms of transport, both surface and air.
### TABLE A

**RAILROAD CLASS RATE INCREASES & DECREASES (1914-1970)**

(Does not include interim increases, except X-265A & X-267)

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TABLE B

What’s wrong with today’s tariffs?

1. Old monopoly concepts of discriminatory classification of freight for rate determination have resulted in an allocation of traffic to higher cost modes of transportation. A transport price structure based upon economic concepts of marginal cost pricing systems designed to reflect alternative costs and service characteristics of competitive transport might well have changed this.  
2. Excessive complexity and non-standardization have resulted in chaos and illogic in published tariffs of transportation agencies and almost limitless litigation before regulatory authority.  
   a. Classification of articles by commodity descriptions, rather than transport service characteristics, has resulted in fractionalization into numerous non-standard definitions within and between tariffs. Standards which have been developed have not been placed into effect. Obsolete descriptions have not been removed from tariffs.  
   b. Origin and destination groupings of areas served differ from tariff to tariff for the same basic transportation service. The groupings reflect old railroad tariff groupings made many years ago. Railroad rate territories and groupings have been adopted in toto by the motor carrier industry without consideration of the characteristics of the highway network development.  
   c. Tariffs frequently contain more than one rate for the same article moving between the same two points by the same carriers.  
   d. There is a lack of precision in commodity definitions, and use of analogy to establish similarity of descriptions and conclusions that ratings and rates for such articles must be equal.  
   e. Numerous exceptions are made with confusing definitions, stated negatively rather than positively, with the result that double negatives may completely confuse the meaning.  
   f. Non-standard rules for shipment, packaging, handling, etc., are used. These may alter the meaning from tariff to tariff and, within an individual tariff, from item to item and even for some sub parts of individual items.  
3. Failure to revise ceiling rate structures (class rates) to reflect modern economic concepts of marginal cost pricing, taking into account competitive transport alternatives and service characteristics.  
4. The long and short haul and combination rate provisions, originally designed for protection of the public interest, have been carried forward and preserved in a period of intense competition.  
5. Tariff makers and rate men have been reluctant to use mathematical marginal cost rate structures, which would reflect economic considerations and greatly simplify the existing complex and bring logic out of the present chaos. Such mathematical formulae might reflect cubic space as well as weight of the shipment; number of pieces shipped; size of shipment; unitization of containerization; terminal factors by city size and congestion; distance of haul and road haul factors by route; annual volume; seasonality; regularity of shipment; etc.  
6. Accounting, costing and work and service measurement techniques have not been modernized to provide a basis for evaluation of effectiveness of pricing policies.

TRANSPORTATION REGULATION AND INNOVATION: THE DIAL-A-BUS*

BY

J. MICHAEL HINES** AND DAVID W. SLOAN***

INTRODUCTION

This paper examines state and federal motor carrier regulation as it may impinge on a new concept of transportation, the Dial-A-Bus. DAB is a response to the gap in public transportation service between fixed-route, fixed-schedule mass transit systems and taxi service. The absence or inconvenience of transit and the high cost of taxis have always affected large portions of the metropolitan public. However, this deficiency is becoming increasingly serious as the dispersal of economic and social activity within urban areas continues, generating many-to-many trip demand patterns as opposed to radial travel patterns to and from the urban core.

The DAB system would use a vehicle like a mini-bus to provide door-to-door service on telephone request. Service requests will be received by a central computer which will dynamically direct the buses along optimal routes.

Chapter I of the paper investigates existing systems of regulatory classification and exemption. In discussing the federal system, the classification of regulated carriers and the exemptions available to carriers of passengers are analyzed. Special emphasis is given to services which might be provided by DAB.

A second section surveys the approaches toward classification and exemption adopted by state regulatory legislation. The relationship of DAB to these statutes is considered.

A final section describes the need for consumer-oriented innovation in public transportation and the inadequacy of present institutional and regulatory structures. An “experimental exemption” from regulation is proposed to encourage the testing and implementation of new technological and service concepts.

Chapter II assumes that DAB would not qualify for any exemption from regulation, thus focusing on the problem of acquiring permission to operate. This chapter is essentially advocacy, anticipating some of the

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* This article is the product of research done by the authors for the CARS (Computer Assisted Routing System) project at the Massachusetts Institute of Technology during 1969 and 1970. A version of the article appeared earlier in Volume 55, Minnesota Law Review.
** Associate, Dow, Lohmes & Albertson, Washington, D.C.
*** Associate, Brobeck, Phleger & Harrison, San Francisco, California.
obstacles a DAB application would meet at state law and marshaling arguments and authorities to overcome them. A second section considers the developing federal law as it would affect a DAB. While it would be very unlikely that a DAB would propose to operate solely in interstate commerce, federal law can provide persuasive analogies since it is more fully developed through litigation, much state law is patterned after it, and most importantly, operations similar to DAB have recently been considered by the Interstate Commerce Commission and the federal courts.

CHAPTER I

SYSTEMS OF CLASSIFICATION AND EXEMPTION

A. The Federal System

The federal regulatory system is directly applicable to a Dial-a-Bus (DAB) or other innovative service implemented in an interstate metropolitan area. It is also important in that it serves as a model for much state transportation law. The Motor Carrier Act of 1935 (MCA), as amended,1 governs the operation of motor carriers of both passengers and property and lodges the responsibility for their regulation with the Interstate Commerce Commission.2

1. Definition of “Interstate”

To determine the position of a given service via-a-vis federal law, it must first be established that it is “interstate” within the meaning of the MCA. According to 49 U.S.C. §303(a)(10),

The term “interstate commerce” means commerce between any place in a State and any other place in another State or between places in the same State through another State, whether such commerce moves wholly or partly by motor vehicle . . . .

A general federal pattern is to develop rules and standards for regulating passenger carriage by analogy from those governing the transportation of goods. However, the two types of carriers are treated somewhat differently in defining interstate commerce.

The interstate status of a carrier of property derives from the “essential

1. 49 U.S.C. §300 et seq.
character of the movement" in which it is participating. The primary determinant of this character is the "fixed and persisting transportation intent of the shipper at time of shipment," (emphasis supplied), which will control unless there is a significant interruption in the continuity of movement of the goods. The participation of several different carriers and modes in a given shipment of goods is not sufficient to disturb the continuity of movement requisite for ICC jurisdiction.

It is usually immaterial that a carrier's vehicles actually cross state lines. However, certain cases of local delivery service, where there was no common control of the goods throughout the entire interstate trip, have been held to be beyond the reach of the ICC. An illogical or bad faith routing between points in one state, but through a second state, will not succeed as a subterfuge to avoid state regulation.

Passenger carriers are subject to a narrower definition of interstate than that described above for carriers of property. The intention of a carrier's passengers to "ship" themselves out-of-state usually does not characterize it as "interstate." In Greyhound Lines v. A.B. Allen, ad hoc and charter groups were carried, along routes completely within California, to towns straddling the Nevada border. The only attraction (and the admitted destinations of virtually all passengers) were Nevada gambling casinos in the towns, to which passengers generally walked. The ICC found the carrier to be beyond its jurisdiction, stating,

... The Commission has consistently held that regardless of the

4. See John Guadzolo, Transportation Law 651 (1965) [Hereinafter cited as Guadzolo]. See also, Leamington Transport, 81 M.C.C. 695, 699 (1959) (The service is not to be tested mechanically, but the totality of the circumstances surrounding the transportation must be weighed); North Carolina Utilities Commission v. U.S., 253 F. Supp. 930, 933-934 (1966); Atlantic Coast Line R. Co. v. Standard Oil, 275 U.S. 257, 268-269 (1927).
5. Dallum v. Farmer's Cooperative Trucking Association, 46 F. Supp. 785, 788 (D. Minn. 1942); See also, Great Northern Ry. Co. v. Thompson, 222 F. Supp. 573 (D. N.D. 1963) (transfer of goods from a railroad's cars to its trucks does not disrupt continuity of movement); State Corp. Comm. of Kansas v. Bartlett and Company, 338 F.2d 495 (10th Cir. 1964), cert. denied, 380 U.S. 964 (1964) (the temporary storage of grain prior to out-of-state shipment does not break the continuity of movement from the original shipping point).
9. 99 M.C.C. 1 (1965); See also, Moore Service, 89 M.C.C. 180 (1962); Midwest Transportation, 98 M.C.C. 362 (1965).
intention of any passenger to continue or complete an interstate journey, a carrier of passengers operating wholly within a single State, selling no through tickets, and having no common arrangements with connecting, out-of-state carriers, is not engaged in interstate or foreign commerce.\textsuperscript{10}

The Supreme Court has not gone quite as far as the Commission. \textit{United States v. Yellow Cab Co.}\textsuperscript{11} involved the taxi-cab carriage of passengers from their homes to interstate rail terminals. The Court stated that the limits of a particular kind of commerce must be set by practical considerations, and that the movements involved here were not "an integral part of interstate transportation."\textsuperscript{12} Using this test, the Court has found that an intra-District of Columbia carrier, whose clientele was comprised largely of Virginia commuters, was within the ICC's jurisdiction.\textsuperscript{13}

There do not appear to be any cases in which the Supreme Court has considered the Commission's view as expressed in \textit{Greyhound v. Allen}. The Supreme Court cases are older, and the \textit{Allen} analysis has controlled many situations and can probable be relied upon by a DAB operator.

\textbf{2. State-Federal Jurisdictional Problems}

Congress has not exhausted its Constitutional power to regulate motor carriers in interstate commerce. The MCA states that:

\begin{quote}
Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business \ldots .\textsuperscript{14}
\end{quote}

A state may tax carriers as compensation for the use of its highways, and may enforce vehicle safety regulations, registration provisions, and may require licensing of drivers.\textsuperscript{15} However, the federal courts have construed the MCA broadly to reach all those who are "in substance" engaged in interstate transportation for hire.\textsuperscript{16}

\begin{thebibliography}{16}
\bibitem{10} 99 M.C.C. 1, 4 (1965).
\bibitem{11} 332 U.S. 218 (1947).
\bibitem{12} 332 U.S. 218, 230-234 (1947).
\bibitem{13} U.S. v. Capital Transit, 338 U.S. 286 (1949).
\bibitem{14} 49 U.S.C. §302(b).
\end{thebibliography}
State officers may not interpret the conditions of an ICC operating authority, or attempt to modify their regulatory terms. Nor may a state refuse a federally certificated carrier permission to conduct its operations on the state's roads. Finally, if a carrier has both intra- and interstate activities, it will be fully subject to state regulation to the extent of its intrastate operations.

3. Classification of Regulated Carriers

a. Compensation:

The MCA subjects all carriers to the regulation of hours and safety. In addition, it creates two categories of carrier, "common" and "contract," which must submit to economic regulation as well. Thus, once a carrier has been characterized as "interstate," it must determine the classification into which it falls. These classifications are defined as follows:

The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate commerce of passengers or property . . . for compensation, whether over regular or irregular routes, . . . .

The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate . . . commerce, for compensation . . . under continuing contracts with one person or a limited number of persons . . . .

A threshold question in finding one's place in this scheme is whether "compensation" is present. This does not require an element of profit,

18. See e.g., Ex Parte Truelock, 139 Texas Cr. R. 365, 140 S.W. 2d 167 (Ct. of Crim. App. 1940).
21. 49 U.S.C. §§303(a)(14), (15). Section 15 goes on to state that the required contracts shall be "either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual shipper."
22. 49 U.S.C. §303(c).
but only the reimbursement of expenses. Services which have been found to be "for compensation" include a non-profit shippers' association, and an auto driveaway service in which a broker brought together drivers and car owners for a fee. Compensation also may include benefits such as the saving of a license fee or the ability to utilize idle equipment. Thus it appears that any exchange of value, although indirect, will bring a carrier within one of these two classes.

b. Common Carriers:

A common carrier is characterized by a "holding out" of its services indiscriminately to the general public, or a class thereof. Common carriers must receive a certificate of public convenience and necessity from the ICC before they may commence operations. They are subject to detailed economic regulation, may not discontinue service without Commission approval, and have a duty to serve all who come forward with a reasonable demand for service. In return for these burdens, however, common carriers are protected from competition by the certification process.

The class of common carriers, in addition to regularly scheduled bus lines and taxicabs, includes charter party service and tour buses, a driveaway service bringing together car owners and people willing to drive them to a specified destination; an agency which arranged groups for car pools and then leased vehicles to them; limousine service; chauffeur service; and door-to-door transportation of passengers and their baggage.

29. See, e.g., Kauffman, 30 M.C.C. 517 (1941); Bodner, 48 M.C.C. 653 (1948).
in sedan-type vehicles, between a city and a resort, on a non-scheduled basis over irregular routes. Flexible, irregular route common carriers are defined by the ICC to be "special operations."  

c. **Contract Carriers:**

A contract carrier is one who operates under a limited number of contracts which delineate specialized services designed to meet the needs of each contractor. Such a carrier must obtain a permit from the ICC, which involves economic and service regulation, but does not require that the carrier serve all comers. To qualify for a contract carrier permit, an applicant must show that his service does not involve a public dedication of facilities, but, rather, specialization to meet the distinct needs of a limited number of individuals or groups.

The ICC has found that non-profit shippers' associations serving only their members, fall within this category. However, it has only rarely granted contract carrier permits to carriers of passengers, finding, as a rule, that they are common carriers. The carriage of Mexican farm workers, and, in some cases, the transportation of groups of employees to their work places, have been classified as contract carrier services.

4. **Exemptions**

a. **Private Carrier:**

Section 303(a)(17) of Title 49 U.S.C. establishes the class of private carriers of property 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 transports in interstate commerce property of which such person is the owner, when such transportation is in furtherance of any commercial enterprise.

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35. Nudelman, 22 M.C.C. 275 (1940); reconsidered, 28 M.C.C. 91 (1941).
37. E.g., Pregler, 23 M.C.C. 691, 695 (1940); Costello v. Smith, 179 F.2d 715, 718 (2nd Cir. 1950).
40. Shipper Cooperative Inc., v. ICC, 308 F.2d 888 (9th Cir. 1962).
42. Alexandria, et al., 78 M.C.C. 655 (1959); Columbia Park Maintenance Club, Inc., 49 M.C.C. 870 (1949).
Such carriers, transporting their own goods incidental to a primary non-transportation business, are subject only to the safety and hours regulation of section 304. This type of carriage comprises the fastest-growing segment of the transportation industry.

Apparently the only case in which the Commission has found a carrier of passengers to be "private" and outside the regulatory scope of the Act is *Kratzenberg*, in which the carrier rented his car and his personal services as a chauffeur on a month-to-month basis. Given this single case, and the ICC’s practice of requiring certificates of passenger carriers, it appears that any carriage extending beyond the private needs of a family will be within the regulatory boundaries of the act. A carrier such as DAB can be freed of economic regulation only to the extent it can comply with one of the specific exemptions described below.

b. *Section 303(b) Exemptions:*

Section 303(b) defines several specific exemptions from all the regulatory provisions of the act except section 304. These cover the transportation of school children and teachers; "... taxicabs, or other motor vehicles performing a bona fide taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini"; hotel vehicles; the transportation of agricultural commodities and supplies by farmers; motor vehicles operated by a cooperative association as defined in the Agricultural Marketing Act; the transportation of livestock, fish and commodities for compensation; the distribution of newspapers; transportation of persons or property incidental to transportation by aircraft. In addition, section 303(b)(8-10) provides three further exemptions, unless the Commission finds that the national transportation policy requires that they be reduced or eliminated. These are transportation within a municipality and the "commercial zone" adjacent to it, casual or occasional transportation for compensation, and the emergency towing of disabled vehicles.

c. *Taxicabs:*

This exemption encompasses any "bona fide taxi service" which is not conducted over regular routes or between fixed termini. The ICC has

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43. 27 M.C.C. 141 (1940).
44. The full text of this qualification is "... nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in this Act, shall the provisions of this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operations or standards of equipment be applied to:"

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stated that "... taxicab service as that term is generally understood is essentially a local service ... Congress ... intended to partially exempt only those operations which are conducted within a municipality and its immediate environs: ..." Thus transportation within 25 or 30 miles of a given municipality has been held to be within the exemption, while trips of 75 miles and over have been found to be charter service.

The words “bona fide” are used to distinguish taxi operations from charter and special operations conducted in small vehicles. Thus the carriage of athletic teams in taxi vehicles, and limousine services are outside the exemption.

d. Incidental to Aircraft:

An exemption is granted to carriers of property or passengers incidental to aircraft transportation in §303(b)(7a). The regulations governing this exemption are in Motor Transportation of Passengers Incidental to Transportation by Aircraft. These require (1) that the passenger have an immediate prior or subsequent movement by air, and (2) that the transportation be within the union of an area of 25-mile radius around the airport and all the commercial zones which intersect this 25-mile radius. The ICC has the power to expand this exempt area if factual circumstances warrant. This exemption would apply to a many-to-one DAB serving an airport.

e. Commercial Zones:

The MCA exemptions transportation within contiguous municipalities and their adjacent "commercial zones." These zones are defined explicitly

46. Lynn C. Bisbee, 18 M.C.C. 175 (1939) (Applicant, operating a taxi service between Fremont, Ind. and numerous points in Michigan and Ohio, within 30 miles of Fremont, held to be exempt); Leonard, 48 M.C.C. 852 (1948) (the same for operations within 25 mile radius of base); Whitman's, note 45, supra (Interstate taxi operations originating in Birmingham, Ala., over routes longer than 75 miles, held non-exempt); DaM Taxi Co. Inc., 96 M.C.C. 439, 446 (1964). (Although distances involved were only 28 miles, ICC found that the development of intervening communities placed Ft. Dix and McGuire AFB outside the "immediate environs" of Philadelphia).
47. Whitman's, note 45, supra, at p. 740.
49. Bevacqua, 73 M.C.C. 751 (1957).
50. 95 M.C.C. 526 (1964).
52. 49 U.S.C. 303(b)(8) (... the transportation of passengers or property in interstate
for most large metropolitan areas in Part 1048 of the Code of Federal Regulations. For smaller cities and towns the commercial zone comprises the base municipality, all towns contiguous to the base, and all unincorporated areas and parts of towns within a radius of from two to five miles of the boundary of the base, depending on its population. However, when commercial, industrial, or demographic conditions warrant, the ICC may redefine a commercial zone accordingly.\textsuperscript{53}

The exemption extends only to the boundaries of a zone so defined, and routes within overlapping commercial zones may not be tacked.\textsuperscript{54} Unless it is specifically limited, an ICC authority to serve a municipality is valid within the adjacent commercial zone.\textsuperscript{55} This exemption is intended to cover all local transportation in interstate commerce, not just those carriers whose routes physically cross state lines.\textsuperscript{56} However, it may be voided if the transportation is under the common control or management of another carrier which may perform continuous carriage to a point outside the zone.\textsuperscript{57}

Also, the carrier must conduct a corresponding intrastate business, in full compliance with the relevant state laws, over the routes which it uses in its interstate activity.\textsuperscript{58} For example, if a person transports passengers, within a commercial zone, from point x in state 1 to point y in state 2, he must obtain intrastate operating authority from state 1 for his routes from x to the state line, and likewise from state 2 for routes between the border and y. In addition, he must actually conduct intrastate operations along his routes between x and y and the state line.

Section 302(c) provides a similar exemption for transportation within the “terminal area” of another carrier, provided it is under an agreement

\textsuperscript{53} C.F.R. Part 1048.10.

\textsuperscript{54} Commercial Zones and Terminal Areas, ex parte No. MC 37, 46 M.C.C. 665 (1946).
\textsuperscript{55} Ibid., 54 M.C.C. 21 (1952).
\textsuperscript{56} Ibid., 46 M.C.C. 665 (1946).
\textsuperscript{57} E.g., Greyhound, 84 M.C.C. 169 (1960); But see, The Potomac Edison Company, 48 M.C.C. 266, 270 (1948) (In spite of common control, the ICC upheld an exemption where applicant proposed a purely local service with no through tickets, joint rates, or interchange of passengers with the commonly controlled carrier).
with that carrier. For the carriage of goods, the terminal area is coextensive with the commercial zone of the municipality, but for passenger services, is confined to the actual limits of the town. 59

f. Section 304(a)(4a), Certificate of Exemption:

Section 304(a)(4a) makes it the duty of the Commission to determine if the services of a petitioning carrier, "... lawfully engaged in operation solely within a single state..." do not "substantially affect" uniform regulation and implementation of the national transportation policy. Upon such a finding, the ICC may grant the carrier a "certificate of exemption." 60 The purpose of this exemption is to afford an alternative method of carrying on interstate commerce, under regulation, without the burden of federal compliance, where the carrier's interstate operations are not substantial. 61

The exemption is based, first, on the premise that the carrier's operation is essentially local, and thus it is necessary that its activities be completely within one state. A second assumption is that the carrier will be regulated by state authorities. Exemptions have been denied where state authority had not been obtained, 62 or was not required. 63 The Commission may deny a certificate of exemption if it would give the applicant a competitive advantage.

A similar, but more limited exemption may be granted under Sections 306(a)(6) and (7). This exemption applies only to common carriers, and is available only if the carrier is lawfully engaged in operation solely within a

60. 49 U.S.C. 304(a)(4a). (The ICC is to "determine, upon its own motion, or upon application by . . . any other party in interest, whether the transportation in interstate . . . commerce performed by any motor carrier lawfully engaged in operation solely within a single State is in fact of such nature . . . as not substantially to affect . . . uniform regulation by the Commission . . . in effectuating the national transportation policy . . . . Upon so finding the Commission shall issue a certificate of exemption which . . . shall exempt such carrier from compliance with the provisions of this chapter, and shall attach to such certificate such reasonable terms and conditions as the public interest may require. At any time after the issuance of any such certificate of exemption, the Commission may by order revoke all or any part thereof . . . where a motor carrier has become exempt . . . as provided in this subparagraph, it shall not be considered to be a burden on interstate . . . commerce for a State to regulate such carrier with respect to the operations covered by such exemption . . . .")
61. L.M. Slocum, 30 M.C.C. 169, 172 (1941); International Railway Company, 44 M.C.C. 789, 792 (1945).
62. Miller, 41 M.C.C. 783 (1943).
given state, without any interest in out-of-state carriers. Further, it must have obtained a certificate of public convenience and necessity for intrastate operations from a state board under standards similar to those governing the ICC.

g. Free or Reduced-Rate Transportation:

Section 317(b) (Tariffs of Common Carriers), provides that sections 1(7) and 22 of Title 49 shall apply to common carriers by motor vehicle. These sections permit common carriers of passengers to offer free or reduced-rate transportation to various categories of people, including inmates of hospitals and charitable institutions, "... indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals or societies," and to municipal governments for the transportation of indigent persons.

The case law deals primarily with the terms under which passes can be granted and the duties owed by carriers to passengers riding under these provisions. In McGowan,\(^6^4\) however, the ICC held that a carrier serving only clients of charitable institutions was not within the purview of the act. Thus a DAB system serving one or several hospitals might be exempted.

h. Temporary Authority:

The Commission has the discretion to grant, without hearing, temporary operating authority to common or contract carriers "To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need."\(^6^5\) The carrier must make a strong showing of both urgent need and unavailability of adequate alternative service.\(^6^6\) This type of authority may continue up to one hundred and eighty days, but does not create a presumption in favor of the issuance of a permanent authority. The carrier's operations under a temporary authority are subject to all the provisions of the act.\(^6^7\)

\(^{64}\) 33 M.C.C. 888 (1942).
\(^{65}\) 49 U.S.C. 310a(a).
\(^{67}\) 49 U.S.C. 310a(c).
5. Status of DAB

Most manifestations of DAB would be classified by the ICC as "special operations." In *Asbury Park v. Bingler*, the Commission said that this category was,

... a catch-all classification which may include almost anything which is neither charter service ... nor one of the 'usual' operations of ordinary regular route common carriers of passengers.67.1

Such operations are common carriage, requiring a certificate of public convenience and necessity.67.2 Section 3(b) above contains a variety of examples of carriers with irregular routes and schedules, and unconventional service ideas, all of which were classified as common carriers or special operations.

It is conceivable that some DAB applications would be contract carriage. Others that were highly localized might qualify for a commercial zone exemption or a certificate of exemption, and be remanded to state regulation. Finally, free, charity based services would be beyond ICC jurisdiction.

B. Systems Of Classification And Exemption

1. Scope of State Regulation

Based on a selective study of state regulatory systems, this section will examine the scope of state regulation and applicable exemptions. An attempt will be made to relate the general schema to DAB operations and transit innovations in general.

No state appears to exempt any carrier from maintaining safety and equipment standards, proper licensing, and financial responsibility. The exemptions to be studied are from economic regulation, including the control of rates, levels of service, schedules and routes.

The general state pattern follows a two-step process. First, the outer boundaries and overall scope of the state commission's jurisdiction are established. Second, specific exemptions within these bounds are promulgated. Thus a carrier may be exempted either by being left outside the commission's ambit, or by falling in a specific hole cut out of its umbrella.

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a. The Federal Model:

The most limited grant of power encountered provides the commission solely with jurisdiction over "common carriers" or carriers which are "public utilities." Such a carrier is generally defined to be one,

. . . Which, as a regular business, undertakes for hire to carry all persons, within certain limitations, who may apply for passage, and holds itself out as engaged in such business.68

Delaware, for example, provides for regulation of public utilities, defined as,

. . . every individual, partnership, association, corporation, joint stock company, . . . or . . . association of individuals . . . (commonly called a "cooperative") . . . that . . . operates . . . any railroad, street railway, traction railway, motorbus, electric trackless trolley coach, taxicab . . . for public use.69

Carriers falling within this definition must obtain a certificate of public convenience and necessity from the Public Service Commission, but no others need an official operating authority.70

The next stage of boundary-expansion brings contract carriers within the commission's mandate. This copies the federal model, and is followed in many states.71 However, "contract carrier" is defined in various ways, and at least two patterns can be identified. The first follows the Motor Carrier Act by defining this class as those carriers offering specialized services to a limited number of persons under specific arrangements.72 A more prevalent scheme classifies as "contract" all carriers for compensation which are not "common."73

The states following this general scheme require common carriers to obtain a certificate of public convenience and necessity before commencing operation. Some states, including Georgia, also require contract carriers to get certificates, while others, such as Michigan and Pennsylvania, follow the federal model, requiring permits for contract


69. 26 Delaware Code §101.

70. 26 Delaware Code §162.

71. E.g., Pennsylvania (Statutes Title 26); Georgia (Code §§68-503, 68-603); South Dakota (Code §44); Michigan (Comp. Laws §475).

72. E.g., South Dakota Code §44.0402.

73. E.g., 66 Pennsylvania Statutes §1102(7); Michigan Comp. Laws §475.1(j).
carriage. The standards which must be met to obtain these operational authorities are discussed in detail in Chapter II, but, in general, a stronger showing of public need is required to obtain a certificate. Both types of authority involve direct economic regulation by the commission.

b. Non-Federal Classification Systems:

Other states define the jurisdictional scope of their regulatory commissions by combining a group of classifications. Such systems are often highly articulated and complex. New York, in addition to a series of categories of carriers of property, has established the class of "common carrier" for non-motor vehicle common carriers,74 and "omnibus corporation" for motor vehicle common carriers.75 Although the latter class is defined in terms of fixed routes, the Public Service Commission has the "... power to establish ... such just and reasonable classifications of carriers ... included in the term 'omnibus line' as the special nature of the services performed by such carriers ... shall require ..."76

New York's system also includes the category of "contract carrier of passengers by motor vehicle," which includes all motor vehicle services for compensation other than "omnibus lines."77 Common carriers and omnibus corporations must obtain certificates, while contract carriers need "permits."78

New Jersey has the following six categories for transportation services: "autobus," "charter bus operation," "special bus operation," "taxicab," "jitney," and "autocab."79 The first three of these may not operate without certificates from the Board of Public Utilities Commissioners while the latter three cover primarily local services, regulated at the municipal level. Other states with complex systems of this nature are California, Massachusetts, and Illinois.

Some states (New York and New Jersey included) also require common carriers to obtain a municipal consent or franchise from each town in which the service will be offered. The consents, permits, and certificates are all detailed regulatory documents.

74. New York Public Service Law §2(9).
75. Ibid. §2(9).
76. Ibid. §61(12-a).
77. Ibid. §2(32).
78. Ibid. §63-d, 63-k, 63-n(1).
79. 48 N.J.S. §4, 16.
2. Classification
   
   a. Compensation:

   Many states have effectively extended the boundaries of their regulatory systems to include all passenger transportation services for compensation. In such states the presence of compensation becomes a threshold question. In Chauncey v. Kinnaird\textsuperscript{80} the Kentucky Court of Appeals held that a share-the-expense car pool, in a private automobile, was not the type of "commerce" demanding regulation under the Kentucky public carrier statute. The court reasoned that the passage of value to pay the costs of a trip of mutual convenience, where the transportation was incidental to a primary purpose, was trivial and represented no evasion.

   The Pennsylvania Superior Court, by way of dictum, has adopted this reasoning. In Philadelphia Association of Wholesale Opticians v. Pa. P.U.C., while upholding the statutory exemption of a cooperative delivery service, the court stated:

   "If three neighbors . . . hire a chauffeur . . . to drive their children to and from school and divide the expenses incident thereto among themselves . . . without any profit or compensation to any of them, it is nobody else's business."

   Any service which goes beyond these very private, incidental operations, however, probably will be classified as involving compensation. For example, a sixteen-member group which operated a small bus for its own members' commutation on a share-the-expense basis was held by the Supreme Court of Washington to be "... in the business of transporting persons, for compensation . . ."\textsuperscript{82}

   In general, value need not pass from the passengers to the carrier in order to constitute "for hire" carriage. Payment to the carrier by an employer for the transportation of his employees to and from work,\textsuperscript{83} or by a landlord for his tenants,\textsuperscript{84} will suffice. Also, the benefit to the carrier can be indirect, as in the case where the owner of an apartment building or a housing development provides a service to his tenants or residents, and receives his reward through enhanced rents or property values.\textsuperscript{85}

\textsuperscript{80} 279 S.W. 2d 27 (Ct. of App. Ky. 1954).
\textsuperscript{81} 152 Pa. Super. 89, 30 A.2d 712, 718 (1943).
\textsuperscript{83} E.g., Short Line Inc., v. Quinn, 298 Mass. 360, 10 N.E.2d 112 (1937).
\textsuperscript{85} See, e.g., Re Lockbourne Manor, Inc., Dkt. no. 634-209, 50 P.U.R. 3d 271
b. Statutory Categories:

Once a new carrier establishes that it is within the bounds of a commission’s jurisdiction, it is faced with two questions of classification. The first is to determine its statutory categorization, and the second to analyze its eligibility for an exemption.

Given the variety of statutory definitions, it is difficult to develop any generalizations which will provide a reliable guide for a specific carrier. If a state follows the federal model, Part A above may provide helpful analogies. Otherwise, some tentative statements are possible, and illustrative examples may be useful.

Traditional fixed-route and-schedule bus operators are always in the common carrier classification, or its equivalent (e.g., “omnibus” in New York or “autobus” in New Jersey). Taxicabs and jitneys are also common carriers, but are generally regulated locally. Charter bus services appear to be classified as either common or contract carriers, unless the state has a specific category. Limousine services are treated similarly. Tour bus trips, arranged by the carrier, are common carriage, but may fall into a “special operations” classification.

State classification systems are based primarily on vehicle size, route patterns, and service areas. There do not appear to be any statutes written so as to accommodate technological change. There are, however, examples of the classification of carriers with innovative service or organizational concepts which may illuminate the problems of DAB.

c. Services Operated by Employers or Employees:

In *Horluck*, supra, a group of employees of a single employer operated a small bus for their own commutation. The Supreme Court of Washington held that the group was not a common carrier, but an “auto transportation company” which, under Washington law, also needed a certificate. However, the court declined to issue an injunction while the group petitioned for a certificate, and further suggested that the Commission might find that this type of carrier could qualify for a certificate under more lenient standards than those for a common carrier.

In a memorandum dealing with car pools for compensation, the Connecticut PUC stated that such arrangements are contract carrier
services subject to limited business regulation, including the setting of minimum rates so as to protect common carriers. 87

Various courts have held that persons who, under contract with an employer, pick up workers at specified points and carry them to and from work are contract carriers. 88 Massachusetts and New Jersey have categorized such services as common carriage. 89 The Appellate Court of Illinois reached the latter result and enjoined an uncertificated carrier who indiscriminately gave contracts to any rider who claimed he was an employee at one of four plants. The carrier then modified his operation by entering formal contracts with the employees who wanted his service and then carrying only those who could so identify themselves. The Commission held that this did not violate the injunction, and was, in fact, a private contract service outside the Commission’s jurisdiction. 90

d. Transportation Clubs:

Another common type of specialized service involves commutation for a club, the members brought together only by common areas of residence and work. In Hill’s Jitney Service, Inc. v. Stiltz, Inc., 91 the members of such a club paid dues and a monthly or daily fare to the club, which in turn paid a flat monthly fee in advance to the carrier. The Commission found that this was not a “public utility,” since membership was limited in size, and thus was not subject to regulation at all under Delaware law. 92 The Commission indicated, however, that the club might become a public utility if it failed to keep its membership sufficiently limited.

In a similar case in New York, where each member paid a flat monthly assessment whether he rode or not, the state Supreme Court found that the group had sufficient “common purpose” to form a bona fide “charter party.” 93 Although the bus ran daily on a fixed route and schedule, and club membership was largely unrestricted, the court felt that the Commission was within its discretion to find this to be a charter operation, lawfully run under a contract carriage permit.

92. See note 69, 70 supra.
However, on similar facts, the Appellate Division of the Superior Court of New Jersey upheld a Commission classification of "autobus," refusing to call a daily operation, over fixed routes, for an indefinite future, a "charter operation." The court found a legislative intent to establish a comprehensive scheme of control over autobus service, allowing exemptions only where specifically granted.\textsuperscript{94}

In \textit{Chicago, North Shore and Milwaukee Railway v. North Shore Transit Club},\textsuperscript{95} the respondent was organized to meet the transportation needs of domestic workers living on the South Side of Chicago and working in north shore suburbs. The club was very loose in structure, and was organized by an entrepreneur who did not personally use the service. Members had only to identify themselves to a "liaison"; there were no dues or other indicia of a membership organization, and no formal contracts with the riders.

The Commission found that a "public use" was established when "...service is available on equal terms to everyone in that community or in that class or part of the community."\textsuperscript{96} It then distinguished this service from those in the \textit{Hantel} and \textit{Jacksonville} cases,\textsuperscript{97} supra, as well as the specifications of "private contract carriage" set forth in a previous commission order.\textsuperscript{98} It found the "club" to be a public utility requiring a certificate of public convenience and necessity.

e. Services Restricted by Residence:

A third type of restricted service is one offered to the residents of a building or development, usually by the proprietor. The Pennsylvania courts have held that such services are not public utilities and are beyond the jurisdiction of the Commission, provided the recipients are a well-defined group, limited in both character and size.\textsuperscript{99} However, in New York and New Jersey, services of this type, even when limited, have been found to be common carriage.\textsuperscript{100}


\textsuperscript{95} Illinois Commerce Commission Dkt. no. 48797, 48815, 46 P.U.R. 3d 381 (1962).

\textsuperscript{96} Ibid., at p. 389.

\textsuperscript{97} Note 88, 90, supra.

\textsuperscript{98} Illinois Commerce Commission Dkt. no. 39553, 96 P.U.R. (N.S.) 621 (1952).


\textsuperscript{100} Surface Transportation, note 84, supra; Lockbourne Manor, and Columbia Transit, note 85, supra.
f. Organizations serving their Clients:

A similar situation arises when organizations operate services for their clients. A common example is school bus operations (usually subject only to local regulation). Courts have held that these are common carriers if they accept all students of given schools.101

In Utah ex. rel. PUC v. Nelson,102 the Supreme Court of Utah held that an operator who carried guests under contract with a camp was a contract carrier outside the Commission’s jurisdiction. Although the route paralleled that of a certificated common carrier, the court based its finding on the fact that there was no willingness to serve all who applied for carriage. The Utah Code has since been amended to regulate contract carriers of passengers.103

g. Small-scale Services:

Many small-scale, specialized transportation services have been before the Commissions and the courts. A limousine service operating between La Guardia Airport and Manhattan, under contract with certain airlines and the city, was held to be an omnibus line in P.S.C. v. Grand Central Cadillac Renting Corp.104 In New Jersey, a carrier who, using seven-passenger vehicles, picked up patrons at their homes in response to telephone calls and took them to Times Square, was an “autobus.”105 Similar services, however, have been found to be contract carriers in other states.106 On-call livery or limousine services have also been found to be both taxicabs107 and private services exempt from local taxi regulation.108

Auto rental services, in which the lessee drives the car and controls its

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102. 650 Utah 457, 238 P. 237 (1925).
103. Utah Code §§ 54-6-1, 54-6-8.
105. Nutley-Times Square v. B.P.U.C., 109 N.J.L. 289, 162 A. 124 (1932) (The Board had to classify this interstate carrier in order to apply the proper safety regulations, and the court upheld its classification).
108. See, e.g., People v. Sullivan, 199 Misc. 524 (Ct. of Special Sessions, N.Y.C. 1951); People v. P. Lingst, 1 Misc. 2d 890 (N.Y.C. Magistrate’s Court 1956); People v. Cassese, 43 Misc. 2d 869, 251 N.Y.S. 2d 540 (Westchester County Court 1964).
routes, while the lessor retains responsibility for maintenance, have generally been held to be contract carriers.\textsuperscript{109}

Recreation Lines, Inc., operated a small-group limousine service between Manhattan and local racetracks. Passengers were publicly solicited but they had to make appointments, and could be picked up only at a terminal or another prearranged point. Only people who had made the outbound trip, or had made reservations, were brought back. Routes were determined by passenger needs.

The PSC granted the carrier a contract permit, and the Appellate Division affirmed. The court felt that the finding of "transportation of a group for a common purpose, under a special agreement," as required by the contract carrier statute, was supported by substantial evidence.\textsuperscript{110}

However, in In Re Galil\textsuperscript{111} the California Commission found the carrier to be a common carrier. Galil operated a sedan type vehicle between San Francisco and Los Angeles, soliciting passengers on the street and in hotels. The Commission stated that fixed routes and schedules were not necessary to constitute common carriage, but that frequent operation between fixed points was sufficient. Ignoring "contracts" which the carrier executed with a straw man after it had organized a group, the Commission found a public holding out rather than a charter service.

3. Exemptions

a. General:

All the state statutes surveyed include some partial or total exemptions from economic regulation. There are generally two types of exemptions, those which delegate the responsibility for regulation to the municipal or metropolitan level, and those which are complete. These may arise from either the definitions section of the statute or specific statutory provisions. Most are based on the character of the service offered, and a few arise from the structural organization of the carrier. In addition, most statutes provide for temporary operating authorities.

State exemptions include the private carriage of one's own goods


\textsuperscript{111} In Re Joe Galil, d/b/a Acme Travel Assoc., California Railroad Comm., Case no. 3371, Dec. no. 29936, 20 P.U.R. (N.S.) 303 (1937).
without compensation; the carriage of a variety of agricultural and other commodities in their raw state; the exemption of properly organized agricultural cooperatives; commercial zone and terminal area exemptions for operations in municipalities and contiguous areas; services operated by municipalities; casual operations; the carriage of school children; church buses; hotel and airport buses; taxicabs; and jitneys.

b. Intergovernmental:

Most states offer partial exemptions, empowering their municipalities to play a coordinate regulatory role. In Pennsylvania, for example,

each city may regulate the transportation . . . of passengers . . . for pay, within the limits of the city, . . . the city may impose reasonable licensing fees, make regulations for the operation of vehicles, the rates to be charged . . . and may designate certain streets upon which such vehicles . . . must be operated.\textsuperscript{112}

In New Jersey, the “local” types of carriers (taxicabs, jitneys, and autocabs) are regulated primarily by the towns, with the PUC playing a supervisory role. Autobuses, on the other hand, must obtain a municipal consent before they can apply to the commission for a certificate. Given this interlocking of regulatory authority, it is vital that a new carrier consult both the municipal corporation statutes and the transportation or public utility statutes of its state.

Another type of exemption from state regulation is achieved by delegation to metropolitan authorities. In Pennsylvania, for example, these have a broad authority to design and operate mass transportation facilities, exempt from the Public Service Commission’s jurisdiction within the “Metro”, but subject to it outside that area.\textsuperscript{113}

Such authorities have control over “transportation systems” which include “. . . all property . . . useful for the transportation of passengers for hire, . . . as well as the franchises, rights, and licenses therefor, including rights to provide group and party services: Provided, that such term shall not include taxicabs.”\textsuperscript{114} Further, “The authority shall determine by itself exclusively, after appropriate public hearing, the facilities to be operated by it, the services to be available to the public, and

\textsuperscript{112} 53 P.S. §4511.
\textsuperscript{113} 66 P.C. §2004.
\textsuperscript{114} 66 P.S. 2003(a)(7). Pennsylvania is different from most states in that the Commission retains primary jurisdiction over taxicabs. Hoffman v. P.S.C., 99 Pa. Super 417 (1930). In most states this is a closely guarded local prerogative.
the rates to be charged therefor." Other states do not grant such broad certification and regulatory powers to their metropolitan authorities, but these represent another level of government whose requirements a new carrier must meet.

This type of authority also may provide an opportunity for a carrier to be shielded from both state and local regulation, and, in effect, to go unregulated, at the sufferance of the authority. The DAB, Cambridge experiment is an example of such an "exemption at will." There have also been exemptions at the local government level, in which livery or limousine services were allowed to operate free of the economic and service regulations imposed on taxicabs.117

**c. Specialized Services:**

Illinois provides an example of an exemption based on the nature of a carrier's service, since the statute has no provision for the regulation of contract carriers of passengers. The *Hantel*118 and *Jacksonville*119 cases, supra, classify carriers of employees of specific plants, who have prior contracts with their passengers, as "private contract carriers" beyond the jurisdiction of the Commission.120

On the other hand, Pennsylvania appears to grant an exemption based on the cooperative organization of a carrier. The Pennsylvania statute states, "The term 'Public Utility' shall not include . . . (b) any bona fide cooperative association which furnishes service only to its stockholders or members on a nonprofit basis: . . . ."111 Sections 1121 and 1122 of Title 66 speak of the need of a *public utility* for a certificate of public convenience and necessity before it may commence operation. Thus the statute, by its terms, excludes co-ops from common carrier status.

That they may also be exempt from regulation as contract carriers is supported by the Superior Court's reasoning in *Philadelphia Association*

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115. 66 P.S. 2004 (d)(9).
116. The authors have encountered personally at least one other such exemption involving the carriage of hospital workers, but have been asked to treat the details confidentially.
117. *See, e.g.*, People v. Cassese, note 108, supra; People v. Sullivan, note 108, supra; but *see*, Chasteen v. Decatur, note 107, supra (a livery service was found to be within the statutory definition, "A taxicab . . . is a vehicle for hire by passengers not having any fixed route or schedule," and therefore subject to local taxi regulation).
118. Note 68, supra.
119. Note 90, supra.
120. *See, also*, Hill's Jitney Service, note 91, *supra* (A limited employee service was held by the Delaware P.S.C. to be other than a common carrier, and thus outside the Commission's jurisdiction).
121. 66 P.S. §1102(7).
of Wholesale Opticians v. Pa. P.S.C. 122 There the court found a cooperative delivery service without both the common carrier and the contract carrier provisions of the statute.

The court reasoned that Section 1310 of Title 66 empowers the Commission to set minimum rates for contract carriers if it finds this to be necessary to promote the policy of protection of common carriers enunciated in § 1310. Given this limited regulatory mandate, the court said,

the compensation, rates, etc., thus to be prescribed [under § 1310] are not applicable to a situation such as this, where the members of a cooperative association simply divide among themselves the cost or expenses of the operations, without profit to them or any of them. 123

Further, the court argued,

And if nine or ten persons . . . requiring special and individual delivery service, use a non-profit business corporation, of which they are all members, . . . to act as their agent in furnishing transportation to them and to nobody else, . . . without profit or compensation to any of them, that . . . is . . . not subject to the regulation of the Public Utility Commission. . . ." 124

This reasoning has not been tested for a cooperative passenger service, or for an organization with a larger number of members, 125 but it might provide a basis for the exemption of certain types of DAB service.

d. Temporary Authority:

Most state commissions have the authority to grant temporary operating authorities. Generally, these are of limited duration and may be granted only to meet a seasonal or emergency need. Such an authority usually does not exempt a carrier from regulation, nor does it create a presumption in favor of the grant of permanent authority. Emergency is generally narrowly defined, and does not include the need for experimentation and innovation.

122. 152 Pa. 89, 30 A.2d 712 (1943).
123. 30 A.2d 712, 718 (1943).
124. Id.
125. In Aronimink, note 99, supra, a limited service to two apartment buildings having 800 tenants, was held to be exempt.
4. Status of Dial-a-Bus

A transit innovator, unless he is sponsored by a government body, such as a state department of transportation or a transit authority, will have to comply with a state regulatory system. This will probably be similar to those described above.

Certain statements can be made regarding the relationship of DAB to this general framework. A many-to-many service, open to the general public, or even a limited class thereof, would fall within the state's "common carrier" category. A feeder service, or an operation serving all employees of a given plant, would also probably be common carriage.

By limiting its clientele (for example, by entering into contracts with specific employees or the members of some other group with a common interest) DAB might achieve an exemption in some states, including Illinois and Delaware. In others, it would be allowed to operate under the less onerous regulation of a contract carrier permit. In still others, such as New Jersey, even this limited service would be common carriage.

Smaller-scale operations such as this would not fully utilize the DAB technology. If they could qualify for exemptions or more lenient regulation, however, they would provide considerable leeway for innovation and experimentation with new service and management concepts.

It is possible that, in a given state, it would be advantageous, for political or other reasons, to avoid state regulation in favor of metropolitan or local control. This might be achieved by qualifying for a municipal or commercial zone exemption, by coming within a "taxicab" definition, or by operating under the aegis of a public authority.

No state regulatory system explicitly recognizes the need, or provides encouragement, for technological and service innovation. In practice, classification schemes tend to obstruct change, and the available exemptions either delegate regulatory authority, or are of limited scope. The next section proposes a new regulatory concept, the experimental exemption, to meet this problem.

C. The Experimental Exemption

This section first describes the need in the passenger transportation industry for innovation and demand-oriented market mechanisms. It then outlines an "experimental exemption" which would foster technological and management innovation, and result in a more balanced system with greater consumer options.
1. The Need for Innovation and Market Response

   a. Poverty:

   A major need arises from both the present and potential roles of transportation in the problems of the poor. A variety of studies have shown that inadequate public transportation is an important obstruction to finding satisfactory employment, and to achieving residential, social, and economic mobility. The failure of reverse commute bus schemes to attract and hold ridership, coupled with their moderate success in placing poor people in better jobs, indicates the limitations of present technology and service concepts, as well as the possible catalytic effect of transportation.

   In addition to attacking poverty directly, new consumer-oriented transit services could contribute to community participation and minority economic development. Employment would be provided, as would opportunities for local management and entrepreneurship.

   b. Unmet Demands:

   In the Department of Housing and Urban Development report, Tomorrow's Transportation, the following criticism appears:

   Major failings of the entire urban transportation system today are lack of both change and capacity for change, resulting in a restricted choice of ways for people to get around the city and the metropolitan area. The common characterization of urban transportation modes as a blunt dichotomy between public rail transit and the private automobile is far too simple. Cities are the most pluralistic places in modern society; their citizens need a wide range of travel service, a mix of transportation services carefully designed to meet their varying travel needs.


One set of such needs are those of the "transport poor," a class of people present within, but not confined to, the poverty-stricken. This group includes the old and the young, the handicapped, those without drivers' licenses, other nondrivers, drivers without access to a car, and people not provided with a minimum of public transit.\footnote{128}

Another set of unmet travel needs results from demographic changes in metropolitan areas. Low density suburban development produces demands for inter-radial trips and door-to-door service. The dispersal of employment and shopping centers accentuates the need for flexible routing. The high level of transport service provided by the automobile cannot be matched by present transit modes. Also, the extension of line-haul facilities into suburban areas requires the development of new feeder services.

According to Schneider, \footnote{129}

The very words "mass transportation" have created much of the problems facing the transit industry, for "mass" implies a homogeneous demand which can be accommodated by a standardized product. Yet we know that in every other aspect of urban life, heterogeneity is the rule . . .

Yet, what of the transit industry? It, for the most part, continues to offer relatively standardized boxes on . . . wheels for all . . . rich and poor, worker, shopper, young and old.\footnote{129}

There are undoubtedly other needs hidden within the "latent demand" for transportation, that is, the trips never made. Certain experiments suggest that the best way to reach this demand is to dramatically improve the level of service.\footnote{130}

Achieving better, more comfortable service, however, is largely dependent on an environment conducive to management innovation and market responsiveness.

c. **Technological Innovation:**

The hardware of surface passenger transportation has remained essentially the same for fifty years, comprising the automobile, the bus (in

\footnote{128} Gurin, *op. cit.*, note 126, p. 16.


different sizes), and the railway car. The present period appears to be a significant turning point, however, in that a variety of new ideas are being suggested and studied, including the hovercraft, different types of dual-mode vehicles, personal-transit schemes, automated highways, moving sidewalks, and sophisticated communication and vehicle-control systems.

Some of these schemes require large-scale research and development efforts. Some do not, however, and a more competitive and innovative climate would foster the generation of new concepts and applications.

d. Reduction of Automobile Use:

A final impetus for transportation innovation is the critical need to reduce automobile usage. The problems of pollution and congestion make this imperative, and yet ridership on traditional transit modes continues to decline. To offer public alternatives which can match the convenience, flexibility, and status of the private car will require significant improvement of both vehicles and management, and a revolution in service concepts.

e. Present Institutional Framework:

The need for institutional responses to foster transit innovation has been recognized by government. The HUD report, Tomorrow's Transportation, states:

An improved institutional framework—legal, financial, governmental, and intergovernmental—is needed to eliminate rigidities and anachronisms which prevent the adoption of new technologies and methods.\(^{131}\)

On the state level, Pennsylvania, for example, has also recognized,

that there exists in the urban and suburban communities in metropolitan areas, traffic congestion and serious mass transportation problems because of underdeveloped, uncoordinated, obsolete mass transportation facilities . . . .\(^{132}\)

To meet this problem, Pennsylvania and many other states have created metropolitan transportation authorities with comprehensive powers. Another response several state legislatures have adopted is to establish a department of transportation. This approach has both potentialities and dangers.

\(^{132}\) 66 P.S. §2002.
Such agencies are suitable for assuming control of a failing system of commuter railroads or line-haul buses. They also may be the best vehicle for large scale hardware research and development. However, many of the problems outlined above are diverse, small-scale transit needs. Their solution requires specialized service concepts rather than large infusions of capital. An example is a medicaid service operated by a hospital in Nassau County, New York. Using two nine-seat minibuses, the service carries three-hundred patients per week, or 40 percent of the hospital’s total outpatients at a cost of $16,800 per year.

It is unlikely that an authority or state DOT will be able to respond on this scale, with this type of sensitivity to local needs, throughout a pluralistic state or metropolitan area. In fact, as the operator of the large scale, line haul carriers, these agencies may become actively hostile to innovative, specialized operations.

Present regulatory systems, with their tendency towards requiring certificates of all passenger carriers, and their limited exemptions, obstruct change. In order to develop imaginative management and services, market mechanisms must be allowed to operate.

The danger is described by Schneider:

In the name of coordinated metropolitan transportation, a sort of perverse conglomerate will emerge. Independent suburban bus companies and the remaining central city private transit operations will be purchased with public funds . . . . The most uneconomic labor practices and compensation schemes will remain as the efficient smaller companies are swallowed up . . . .

The Pennsylvania legislature seems to be pointing in this direction when it finds,

that the foregoing conditions cannot be effectively dealt with by private enterprise under existing law . . . and are beyond remedy or control by governmental regulatory policies: . . .

That it is desirable that the public transportation systems in the metropolitan areas be combined, improved, extended and supplemented by the creation of authorities . . .

That it is intended that such authorities operate with and/or acquire existing transportation facilities that private enterprise and government may mutually provide adequate transit facilities . . . .

133. Schneider, op. cit., note 129, p. 4.
134. 66 P.S. §2002(c), (f), (h).
This point of view overlooks the promotional power of an exemption from regulation. An example exists in the District of Columbia, where taxi service is largely unregulated, and a large, cheap fleet of taxis exists, as compared to the critically deficient service of medallion-system cities like Boston.\textsuperscript{135} The inhibiting nature of the present regulation is also illustrated by the efforts of members of Boston’s Roxbury community to establish flexible, neighborhood mini-bus services.\textsuperscript{136}

2. \textit{The Experimental Exemption}

This scheme would compel a commission to exempt from economic regulation a transportation service based on a new concept in technology, management, or service. While the exemption was in force, the carrier would be able to experiment, modifying rates, termini, service levels, and so on, in order to determine the optimum methods for implementing the innovations. If the service provided viable, the commission would have to grant permanent operating authority.

This section will consider four aspects of such an exemption: first, criteria for eligibility; second, actual operation during the experimental period; third, measurement of success or failure; and fourth, transition to regulated status.

An applicant would first have to show that his proposed service involved a new concept in either hardware, management, or service for his geographical area of operation. Standards for measuring “newness” should be developed so as to provide maximum latitude for experimentation without allowing the unregulated duplication of existing services.

While management and service innovations will be difficult to evaluate, they are critical to achieving a flexible, demand-responsive transportation system. Thus the requirements in these areas should be lenient. For example, the fact that a carrier and its management will be resident in the neighborhood to be served might be an important factor in considering an application for exemption.

In addition to new ideas, an applicant should be required to demonstrate his financial responsibility, and his compliance with state and local safety, registration, and licensing laws.

Two questions of public protection should be considered before an exemption is allowed. First, if an experiment fails, passengers who have

\textsuperscript{135} Kain and Meyer, \textit{op. cit.}, note 126, p. 86.

\textsuperscript{136} Interview with Charles Grigsby, President, Transcom Lines, Inc., and Member of the Governor’s Task Force on Transportation, Boston, Mass., 1970.
relied on the service will be hurt. Thus it is important that the
experimental nature of the service be publicly known. However, people
may be unwilling to sacrifice their existing arrangements for a temporary,
albeit superior service. A carrier's experiment might fail, although there is
a viable demand, simply because it is experimental.

One solution might be to require that the applicant establish a
membership corporation. All passengers would then understand both the
nature of the service and that its success was dependent on their
patronage. Finally, their willingness to join, perhaps at some cost, would
indicate the demand for the service, the existence of which might be a
criterion for the granting of an exemption.

A second question arises from the experimenter's effect on existing
carriers. A carrier might lose ridership and incur costs during an
exemption period, and then be forced to accommodate the same riders if
the experiment failed. As a solution, an applicant might be required to
provide a bond.

Once it is granted, an exemption should be conditioned so as to make
experimentation as fruitful as possible. Ideally, it would endure as long as
there was any hope of finding a viable service combination. The period
should be long enough to allow the carrier to overcome the normal losses
of a new business. The fact that the operations will incorporate new
concepts and technology argues for a longer period of time to allow the
experimenter to determine the best way to package, market, and manage
his service. A period of two years seems reasonable.

Another question arises from multiple applications for exemptions in
the same service area. Assuming all applicants are qualified, and offer
different services, their exemptions should be granted. This is consistent
with the goal of exposing all carriers to the discipline of market
mechanisms.

During the period of the exemption, the commission should not
interfere with the carrier's operations. He must be allowed to identify
needs and discover the cost-service mix which will meet consumer demand
and make his service a success. Certain financial reports and evaluative
data are all that should be required.

The measurement of success or failure involves difficult factual
determinations. It should be tied to the experimental goals of the carrier.
Thus an entrepreneur might be judged on the profitability of his
operations. However, a service designed to achieve non-commercial
objectives should be evaluated by other standards. Generation of new
demand might be an important factor. Finally, two showings which would
probably be required in any context are the existence of a permanent
demand for the service and the carrier's capacity to continue operations.
Since this paper assumes that total de-regulation is not an available alternative, procedures for a successful carrier's transition to a regulated status must be considered. To prevent operators from making a quick profit from their exemption and then abandoning service, the commission should probably be able to compel carriers to continue.

Regulation following an exemption should be as flexible as possible to avoid converting a successful experiment into an unsuccessful service. Rates might be tied to the cost per unit of transportation, measured in ways which are sensitive to the specialized services involved. The commission should not intervene with regard to the carrier's management and staffing policies, nor should it regulate service levels. The system should encourage further experimentation by a successful innovator, perhaps by creating a presumption in favor of granting him an exemption for a subsequent untried concept. Concomitantly, a commission might have to relax its standards for service discontinuance by inefficient competitors.

This paper does not analyze the impact of this regulatory concept on existing carriers, which must be done before the proposal can be translated into legislation. The experimental exemption would achieve the primary goal of applying market forces to the transportation industry. Existing carriers would be compelled to provide efficiency, better service, and new ideas, while the entry of innovative new carriers would no longer be restricted.

CHAPTER II

Acquiring Operational Authority

The preceding sections of this paper have examined the scope and rationale of present exemptions from state and federal economic regulations of motor carriers, noting and analyzing arguments in favor of exemption for the several possible manifestations of DAB. In addition, a new exemption in favor of experimental operations was proposed.

For the remainder of the paper, the focus shifts to the problem of acquiring the right to operate—that is, assuming that no exemption from the regulatory jurisdiction is available, how does one proposing a new and/or experimental service convince the regulatory body that he should be allowed to operate?
A. State Authorities

1. Public Convenience and Necessity

State statutes restricting entry into the motor carrier industry, as well as entry into the transportation or public utility fields generally, typically require that a certificate authorizing the operation shall not issue unless the regulatory commission finds that the operation is required by the "public convenience and necessity." There are of course many variations on this basic theme. In New Jersey the certificate will issue if the proposed operation is "necessary and proper for the public convenience and properly conserves the public interests," while in New York it must be shown that the operations "are or will be required by the present or future public convenience and necessity." At the federal level, the Motor Carrier Act of 1935 established a "public convenience and necessity" standard.

A few states have the statutory standard that the certificate will issue if the operations are "in the public interest," but the interpretation has been that "the phrase is either synonymous with public convenience and necessity or includes the latter phrase." Re Maine Central Transportation Co., 10 PUR 3rd 489 (Maine 1955). Oregon also has such a standard, and there the court interprets it as having been designed to be less restrictive than "public convenience and necessity," in order to provide less protection for existing carriers than the conventional standard.

The public "convenience" cannot be circumscribed to the severe extent of holding the term "necessity" to mean an essential requisite. In an early but leading case in Rhode Island, the court stated that convenience meant not indispensable, but "reasonably requisite." The phrase has an

137. E.g., General Laws of Rhode Island (1956), Title 39, ch. 13, sec. 2.
139. Public Service Law § 630-n. (Consolidated Laws Service).
140. Act Aug. 9, 1935, c.498, 49 Stat. 543, 49 U.S.C.A. §307(a). "... a certificate shall be issued to any qualified applicant ... if it is found ... that the proposed service is or will be required by the present or future public convenience and necessity."

Other state definitional approaches to public convenience and necessity follow a similar pattern:

"The word 'necessity' means a public need, without which the public is inconvenienced to
interpretive gloss (where separate statutory provisions do not expressly so provide) that consideration must be given to the possible impact of decreased patronage on existing carriers. Perhaps the best statement of the various considerations involved in a determination of public convenience and necessity (and one often quoted by state courts and commissions)\(^{144}\) was that given by the Interstate Commerce Commission in the first bus case decided under the new federal Motor Carrier Act of 1935:

The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interests. *Pan American Bus Lines Operation*, 1 M.C.C. 190 at 203 (1936).\(^{145}\)

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the extent of being handicapped in the pursuit of business or wholesome pleasure, or both—without which the people generally of the community are denied, to their detriment, that which is enjoyed by other people generally, similarly situated. Oklahoma Transportation Co. v. State, 198 Okla. 246, 177 P.2d 93, 67 PUR (NS) 522 (1947).

"The word 'necessity' as used in the phrase . . . does not require an extraordinary demand by the public in order to arise but just means that which is needful, requisite, or conducive to public convenience." Atlantic Greyhound Corp. v. Virginia, 196 Va. 183, 83 S.E. 2d 379, 7 PUR 3d 400 (1954).

The statute does not require that the service be indispensable; it is "sufficient if the service is necessary and useful to the public." *Eagle Bus Lines v. Ill. Commerce Commission*, 3 Ill. 2d 66, 119 N.E. 2d 915, 5 PUR 3d 475 (1954).

Compare, *San Diego & Colorado Ferry Co. v. Railroad Commission of California*, 210 Calif. 504, 292 P.2d 640, 643 (1950). "If it is of sufficient importance to warrant the expense of making it, it is a public necessity . . . a thing which is expedient is a necessity . . . Inconvenience may be so great as to amount to a necessity . . . a strong or urgent reason why a thing should be done creates a necessity for doing it."

That all such "definitions" are of little use is also well recognized. The phrase "must be construed and considered according to the whole concept and purpose of the act. As to what constitutes "public convenience and necessity" must fundamentally have reference to the facts and circumstances of each given case as it arises, as the term is not, and was not intended to be, susceptible of precise definition." *Utah Pacific R. Co. v. Public Service Commission*, 103 Utah 459, 135 P.2d 915 (1943).

\(^{144}\) *E.g.*, *Re Simmerman*, 179 Neb. 400, 138 N.W. 2d 481, 62 PUR 3d 57 (1965).

\(^{145}\) The rationale of the "public convenience and necessity" requirement in Federal legislation has been stated to be "to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest." *Texas & N.O.R. Co. v. Northside Belt Ry. Co.*, 276 U.S. 475, 479 (1928).
a. "Adequacy"—The Conventional View:

A finding that the existing service is "adequate" is a complete negation of "necessity" for the proposed service. Schmunk v. West Nebraska Express, 159 Neb. 134, 54 NW 2d 386, 6 PUR 3d 452 (1954). This terminology unfortunately results in considerable conceptual confusion, for the two crucial conflicting factors, potential benefit from the new service and potential economic harm to existing service, tend to be subsumed under the conclusory finding of "adequacy of existing service."

The obfuscation of these central considerations typically redounds to the benefit of existing carriers. What is unusual is that this result is often enforced by the courts against an unwilling commission. In Lake Shore Motor Coach Lines, Inc. v. Bennet, 8 Utah 2d 293, 333 P. 2d 1061 (1958), the commission had certified an additional carrier providing pick-up and delivery service for newspapers and motion picture films. Although there was ample testimony by potential customers of their desire for the more frequent service which would result from the additional certification, and the commission made no finding that existing carriers would be adversely affected, the court reversed the grant of authority, ruling that "public convenience and necessity" required a specific, affirmative showing, and finding by the commission, that the existing service was in some way "inadequate."

Such a restrictive attitude by court or commission is common, but not

146. The court was not impressed by such evidence, reasoning that: "Proving that public convenience and necessity would be served by granting additional carrier authority means something more than showing the mere generality that some members of the public would like and on occasion use such type of transportation service. In any populous area it is easy enough to procure witnesses who will say that they would like to see more frequent and cheaper service." 333 P.2d at 1063.

Similarly, the Supreme Court of Mississippi has held that the testimony of four businessmen that they were dissatisfied with the speed of existing service was not "substantial evidence" of inadequate service so as to justify the authorization of a competitor. Campbell Sixty-Six Express v. Delta Motor Line, 67 So. 2d 252 (1953).

147. Such a result would be required in some states where a finding of inadequacy of existing service is explicitly commanded by statute rather than by interpretation of "public convenience and necessity," e.g., in Seaboard Airline R. Co. v. Commonwealth, 193 Va. 779, 71 S.E. 2d 146 (1952), the court distinguished ICC cases on the ground that federal laws contained no provision like Va. Code of 1950, § 56-278, which specifically prohibited granting a certificate unless it was proved that the existing carrier was providing inadequate service.

However, such statutory provisions tend to be interpreted to facilitate new certifications, e.g., Atlantic Greyhound Corp. v. Commonwealth, 196 Va. 183, 83 SE 2d 379 (1954); State ex rel N.C. Utilities Commission v. Carolina Coach Co. 261 N.C. 384, 134 S.E.2d 689 (1964).
universal: "Protecting existing investments, however, from even wasteful competition must be treated as secondary to the first and most fundamental obligation of securing adequate service for the public." 148 New Jersey courts have also refused to follow the strict interpretation of "adequacy," ruling that disadvantages to existing carriers are simply entitled to be weighed in the balance against ultimate public advantages. 149

As pointed out earlier, the enactment of a "public interest" standard for granting authority has been interpreted as a deliberate rejection of the protective "adequacy" rules associated with the "public convenience and necessity" standard. 150 In addition, the Maryland Public Service Commission in consideration, inter alia, of the past and prospective economic growth of the state, recently changed its policy in interpreting the statutory standard "public welfare and convenience" from one of "regulated monopoly" to "regulated competition." The court approved both the change in stated policy and the result that adequacy of existing service was no longer a conclusive factor. 151

b. "Adequacy" and Pricing:

The prices of the existing and proposed services are typically ruled irrelevant to the question of "adequacy of existing service," and hence irrelevant in a certification proceeding, 152 on the ground that the commission has separate, independent authority to assure that rates are just and reasonable. 153 In jurisdictions where prices are relevant the proposed lower rates must be proven compensatory and have a reasonable prospect of long-run stability. 154 In any event, a showing of lower prices alone is rarely sufficient to sustain a grant of authority. 155

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150. See p. 45, supra.


152. But see Maryland Transportation Co. v. Public Service Commission ibid., where a Maryland statute expressly provided that in the issuance of certificates of "public welfare and convenience" the commission should consider the rate to be charged. Art. 78, § 33(a), Annotated Code of Maryland (1957 ed.).

153. E.g., Re Fox Application Nos. 3156-3159, Decision No. 9707 (Colorado 1937).


155. West Suburban Transportation Co. v. Chicago and WIR Co., 309 Ill. 87, 140 N.E. 56 (1923); Fornarotto v. Public Utilities Commissioners, 143 Atl. 450 (1928).
However, it has been held that although ordinarily rates should not be given consideration as an element of convenience and necessity, the commission must consider them where the proposed rates were as much as 46% under those of existing carriers. 156 Re Airway Motor Coach Lines 35 PUR (N.S.) 411 (Utah 1940).

c. First Chance:

Having made a determination that the existing service is in some manner inadequate, should the commission give the existing carrier an opportunity to cure the inadequacy before certifying the application of a potential competitor? Some states provide by statute that the existing carrier must be given a specified period to provide any needed service, e.g., State ex. rel. Utilities Commission v. Carolina Coach Co. 224 N.C. 390, 30 S.E. 2d 328 (1944), construing N.C. G.S. § 62-105 (30 days). The purpose of such statutes is said to be to protect existing carriers from "undue and ruinous competition" from competitors who "sought to serve the same territory and thus deprive them of that which was theirs, rightfully acquired under a previously granted certificate." 157 There is considerable division among the states as to the wisdom of first-chance rules, whether established by statute or by interpretation of "public convenience and necessity." 158 Since the result of these rules is that the existing carrier gets first chance without any consideration of the potential economic impact of certifying the applicant, their only justification is some policy of "fairness" to existing carriers. The better solution is to leave to the commission the discretion to decide, on a case-by-case basis, whether the existing carrier should get a "first chance." 159 The possibility

156. In the case of traditional public utilities such as gas and electric companies the applicant who offers lower rates is sometimes used to force lower rates from existing operators, e.g., Re Quinn 8 PUR (NS) 134 (Colo. 1935) where authority was granted to the present operator subject to the condition that unless he should make effective the rates proposed by another applicant, the latter's petition for operating authority would be reopened.


158. Such rules exist in Fla., Neb., Ariz., Vir., Miss., La., Colo., Tex., Ill., W. Vir., N.C., Montana, S.Dak.; contra Penn., Wis., R.I., Utah, and federal laws. (See citations at 694-5 Economics of Transportation, by D. Philip Locklin (1966)).

159. "Should such new service be rendered by existing carriers or by the new applicant . . . Which in the opinion of the commission will best subserve the public convenience and necessity and welfare?" In determining this issue the commission was directed to consider the effect on existing facilities, their investments and taxes, the effect on the economic, industrial, social and intellectual life of the territory to be served, the development of resources, etc. Mulcahy v. PSC 101 Utah 245, 117 P.2d 298, 305 (1941).
that a new carrier may be certified provides an incentive to existing carriers to maintain and develop their service, as well as providing some encouragement to outsiders for the development of new ideas and service techniques.\textsuperscript{160}

2. \textit{Response to Innovation}

The response of state commissions and courts to proposals for new or different transportation service has varied widely. In a recent Nebraska case a bus company proposed to provide an \textit{express} service for passengers and some freight items between points presently served by a single carrier operating only a \textit{local} service. The commission granted the application, finding that public convenience and necessity required the service and that the new operation was not likely to be detrimental to the existing service.\textsuperscript{161} The declared statutory policy was to promote "efficient service," without "undue preferences or advantages, and unfair or destructive competitive practices."\textsuperscript{162} The court described the proposal and proceeded as follows:

The only reasonable effect of this would be to permit passengers and shippers of \textit{express} . . . a choice between transportation schedules. Since [protestant] operated over this distance only local schedules . . . which were slower than those of [applicant], this would give rise to a conclusion that patrons and shippers would ordinarily and reasonably resort to the facilities of the [applicant]

\textsuperscript{160} Harper, Donald V., \textit{Economic Regulation of the Motor Trucking Industry} (1959) p. 109,

\textsuperscript{161} Application of Greyhound Corp., 178 Neb. 9, 131 N.W.2d 664 (1964).

\textsuperscript{162} \textsc{§}75-222, \textit{R.R.S. 1943}.

These incidents could not well be considered as anything less than unfair and destructive competition within the meaning of the legal principles set forth herein. This is true since the evidence discloses preponderantly that the facilities of [protestant] were good, the operating conditions satisfactory, and that the capacity was more than sufficient.

It may well be said that the traffic situation . . . presented elements of inconvenience, but not, in the light of the evidence of conditions and circumstances, of true necessity as that term must be applied to common carriers or public highways. 131 NW 2d at 669.

The court accordingly vacated the grant of the certificate as arbitrary
and capricious; not only was the existing carrier entitled to a first chance to provide adequate service, but the "reasonable and necessary" interchanges and transfers of the local service could not support a claim of inadequacy. Moreover, the "duplication" of lines of transportation would be authorized "only for compelling reasons." 131 NW 2d at 670.

This incredibly restrictive interpretation that existing "adequacy" must bar a new and different service should be contrasted with the view taken by the Utah Supreme Court in Mulcahy v. Public Service Commission 101 Utah 245, 117 P.2d 298 (1941). There an applicant who proposed only additional (not different) common carrier trucking service was opposed by existing truckers and railroads. Taking the view that the statute should be applied so as to encourage improvements in service,163 the court, sustaining the grant of a certificate, dealt with the "adequacy" issue in this fashion:

To be adequate [the existing services] must safeguard the people generally from appreciable inconvenience . . . And if a new or enlarged service will enhance the public welfare, increase its opportunities, or stimulate its economic, social, intellectual or spiritual life to the extent that the patronage received will justify the expense of rendering it, the old service is not adequate. (emphasis supplied).164

Greyhound and Mulcahy represent the extremes of state policy on innovation. In the vast majority of states the policies are more ambiguous and the exposition of them less clearly articulated. Moreover, much of the judicial language can be seen as surplusage in sustaining the commission's exercise of discretion. The occasional inconsistency of commission policy statements may be explained in part on the theory that state commissions, like the ICC,165 are result-oriented, the statement of policy being an afterthought to the substantive decision on certification.

a. Inter-Modal Competition and Adequacy:

The states have naturally been most receptive to new applicants where the differences in service were extreme—that is, in terms of traditional

163. 117 P.2d at 300.
164. 117 P.2d at 300. This language was quoted with approval in Clintonville Transfer Line v. PSC, 248 Wis. 59, 21 NW 2d 5 (1945). The court in Mulcahy was clearly going full steam, even to the extent of citing Marbury v. Madison for the independent power of the executive branch (the commission here).
165. See the discussion of the Metter case, pp. 61-69, infra.
modal classifications of rail, water, land, and air carriers. Modal
differences, based on an emphasis on the medium of travel, are thus
different in kind from service differences as between taxis and street buses.
Nevertheless, modal differences and "mere" service differences are both
generalizations subject to continuing technological change, and the futility
of viewing them as ultimate analytical tools for regulation seems
adequately demonstrated by hovercraft\textsuperscript{166} and DAB, respectively.

Therefore, it is instructive to look at these modal competition cases
because DAB seems to be the "most different" new service idea to come
along in public passenger transportation since buses began to compete
seriously with street railways in the 1920's. Moreover, the difficulties of
urban public transportation systems today are analogous to the woes of
the dying street railways at that time. (This central analogy is discussed
further at p. 70, infra).

In these terms the best state court decision construing "public
convenience and necessity" in the context of a new mode of transportation
is a 1929 Virginia case\textsuperscript{167} where an electric railway contested the award of
a certificate to a motor bus company:

The ability to carry in some manner all who apply for passage is
not necessarily the touchstone . . . is is sufficient if there is a public
demand for bus service in preference to other means of
transportation . . . . When people generally wish to travel in this
way, they should be permitted to do so, and it is no sufficient answer
to say that other carriers, in other ways, stand ready to give the
necessary service. 146 S.E. at 295.

The court recognized that the railway was in serious financial difficulty,
with receipts having steadily decreased since the end of World War I.
However, the court reasoned that these difficulties were due in part to the
increasing competition of private cars, and "the promise of relief depends
upon the growth of Hopewell, to which easy flow of traffic must always

\textsuperscript{166}. Sarisky, Joseph L., "The Law and an Unprecedented Mode of Transportation: The

\textsuperscript{167}. Petersburg, Hopewell and City Point Railway Co. v. Commonwealth ex vel. State
Corporation Commission, 152 Va. 193, 146 S.E. 292, 67 ALR 931 (1929). This case is
distinguishable from ordinary applications of the "public convenience and necessity
standard" because it involved a Virginia statute providing that the existence of a carrier in a
territory would not alone be sufficient cause to deny a certificate but could be considered in
limiting the number of vehicles the applicant could offer. 146 S.E. 294.
... contribute." The Virginia policy had not been to curtail competition and the railroad investors "took their chances".

We have to concede that, in industrial development, the law of survival of the fittest is not to be gainsaid. Stage coaches and canals were in many instances a total loss, made so by railroads, which in their turn clashed with interurban electric lines, and now both are facing the automobile in its varied forms. Should the time come when airplanes are preferred by a substantial part of the public, this preference, in its turn, will have to be heeded. They, too, will have then become a necessary public convenience, not to be put aside because buses can carry all who wish to go. 146 S.E. at 296.

Substantially the same line of reasoning was followed by a New Jersey court in 1935. The opinion pointed out that the proposed bus service was of a different character than that afforded by the railroad, concluding that... if railroads are entitled as public utilities to protection against destructive competition, it should be a competition with a service which they have been giving. (quotation marks omitted). 177 A. 94

Similarly, in *Union Pacific Railroad Co. v. Public Service Commission* the Utah Supreme Court sustained the grant of authority to a motor common carrier of goods against the railroad's argument that its own service was "adequate." Emphasizing the door-to-door, flexible service offered by the trucker, the opinion relied on the same sort of historical, developmental principle as did the Virginia court in *Petersburg*:

... Convenience and necessity are found, and consist largely, in the changing conditions and demands of the times. There was a time when the covered wagon, river scow, and pony express fairly well served the public needs, but as they became inadequate there arose a need for railroad facilities. So too a railroad may function well as railroad transportation and yet in the very nature of things not adequately served the need of the community. 135 P.2d at 918.

168. 146 S.E at 294.

169. Motor vehicle operators had to acquire certificates, but under Va. laws (unlike federal law after 1920) railroads were free to parallel each other as they wished. 146 S.E. 294.


171. 103 Utah 459, 135 P.2d 915 (1943).

172. For examples of willingness to assess modal advantages and disadvantages in contexts other than certification see, Chicago R. Co. v. Commerce Commission ex rel. C.M.C. Co., 336 Ill. 51, 167 N.E. 840 (1929); City of Bayonne v. DPUC, 126 N.J.L. 396, 19 A 2d 809 (1940).
3. Encouraging Innovation, Less Than Modal Differences, and Arguments for DAB

The leading state case on the need to encourage innovation is Motor Transport Co. v. PSC, 263 Wis. 31 56 NW 2d 548 (1953). The case itself was addressed, strangely enough, only to the need for competitive, identical common motor carrier service in order to encourage improvements, so that everything it says about innovation applies a fortiori where the applicant is presently offering a different service. In reply to the protestant's argument that any inadequacy could be cured by order, the commission said:

Service orders cannot take the place of management initiative or require the exercise of such initiative in experimentation and service improvements designed to follow closely the changing current of traffic needs. Management alone can pioneer this field and create a service which is above minimum standards and better even than "reasonably adequate." 56 NW 2d at 550.

While the commission had earlier adopted a conventional "adequacy" interpretation of the statute, and it was conceded by all that the existing carriers were giving "reasonably adequate" service so that a service complaint could not be prosecuted against it, the court nevertheless sustained the administrative ruling that the existing service "has failed to meet the test of the public interest and public convenience and necessity in this broader sense." 173 The court took the view that the statute did not create any presumption for or against monopoly or competition, 174 so that the commission was free to choose which would best serve the public interest. 175

Some state courts, at certain times, have made encouragingly strong statements in favor of different service, even though of the same mode as the existing service; e.g.:

The statute should be so construed and applied as to encourage

173. 56 NW 2d at 551. The Supreme Court had in an earlier opinion cited the extremely liberal standard in Union Pacific Railroad, p. 55, supra.

174. Some state courts had apparently taken the view that statutes requiring certificates for operation were based on a theory of "regulated monopoly." Contra. Union Pacific Railroad, note 172, supra; "regulated competition is as much within the provisions of the act as is regulated monopoly." 135 P.2d at 918.

175. However, one of the statutory duties of the commission was to "prevent unnecessary duplication of service." 56 N.W.2d at 551; Stat. 1951 §194.18.
rather than retard mechanical and other improvements in appliances and in the quality of the service rendered the public.\textsuperscript{176}

Going beyond the statements of policy, there seems to be rather general agreement that whatever the “adequacy of existing service” may mean, it means less where the proposed service has distinctive characteristics. Commissions and courts in certification proceedings commonly discount existing adequacy when they distinguish between local and through service,\textsuperscript{177} common carrier and express service,\textsuperscript{178} livery service and route buses,\textsuperscript{179} etc. Moreover, it has been suggested (with direct application to \textit{DAB}) as a general principle that the doctrine of adequacy must apply less strictly to any \textit{irregular route} transportation service (even though the proposed and existing services are identical.)\textsuperscript{180} The corollary to “adequacy” that prices are irrelevant in a certification proceeding is clearly inapplicable where the service is different, and a rate differential itself, if sufficiently large, may result in a “different service.”\textsuperscript{181}

It should be noted that this approach to adequacy may apply even though the existing transit system is operated by a public authority. In a recent California case\textsuperscript{182} the court held that the Los Angeles Metropolitan Transit Authority statute did not preclude the Public Utilities Commission from certifying a special bus service\textsuperscript{183} from a limited number

\begin{flushleft}
\textsuperscript{176} Mulealy v. PSC, 101 Utah 245, 117 P.2d 298 (1941). The statement was made in the context of a proposal for merely “additional” service being offered. See also, the quotation in \textit{Petersonburg (supra, note 168)} from a New York source: “When more convenient and adequate service is offered to the public it would seem that necessity requires such public convenience should be served.” 146 S.E. at 295; “... it is sufficient to show that existing service is not of such a type or character which satisfies public need or convenience ...” Kansas Transport Co. v. State Corp. Commission, 202 Kan. 103, 446 P.2d 766 (1968).


\textsuperscript{178} In Re United Parcel Service, Inc., 256 A.2d 443 (Maine 1969).

\textsuperscript{179} Dion v. PUC, 24 Conn. Sup. 403, 192 A.2d 46 (Superior Court, 1963).

\textsuperscript{180} “While the ... [adequacy doctrine] would apply rather strictly to cases involving applications for authority to operate buses within a city or in regular route service between cities and generally to regular route freight lines, it would, however, have very limited application to applications seeking authority to operate irregular route authority.” Application of Young, 171 Neb. 784, 107 NW 2d 752, (1961). See also Northern Pacific Transport Co. v. Washington Public Utilities and Transportation Commission 418 P.2d 735 (Wash. 1966).

\textsuperscript{181} Re Airway Motor Coach Lines 35 PUR (NS) 411 (Utah 1940). See, Re Louisiana-Nevada Transit Co. 30 PUR (NS) 40 (Federal Power Commission, 1939).

\textsuperscript{182} Los Angeles Metropolitan Transit Authority v. PUC, 343 P.2d 913 (1959).

\textsuperscript{183} The result of course depends on the statute involved. The California statute did not speak in explicit terms of exclusive authority for the public body. Compare the Mass. Bay Transit Authority statute, Mass. Acts 1964, chapter 161A: §3. “Additional Powers”: (i) to

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of pickup points to the Dodger baseball park if "public convenience and necessity" required. The certification was sustained on the grounds that the area and its transportation system were still growing and developing, that the authority wasn't yet ready to supply all the service that might be required, especially of a specialized variety, and that the private carrier, unlike the authority, would not be hampered by statutory geographical restrictions. 184

Finally, a "first chance" interpretive rule should not apply when the proposed service is significantly different since the existing carrier is likely to lack the equipment, knowledge, and desire to provide the different service. (For this same reason, the question has been litigated only rarely). 185 Similarly, first chance statutes have been held not applicable where the proposed service is different. 186

The proposition that a commission must weigh the public benefits likely to follow from a proposed new service against the probability and seriousness of the impact on existing services in assessing "public convenience and necessity" seems on its face entirely correct and entirely obvious. Nevertheless, that some state supreme courts still reject this view is illustrated by the 1964 Nebraska case (p. 51, supra). The conservatism of the transit industry generally and the fact that the motor carrier passenger industry has been almost entirely free of major innovations, indicates that state regulatory commissions are apt to be even less receptive. The problem is complicated by the fact that the statutory basis of regulation in many states has not been revised in many decades. 187

So the primary task of a DAB applicant is to convince the

provide mass transportation service, whether directly, jointly, or under contract, on an exclusive basis . . . (emphasis supplied).

184. However, to the extent that DAB served a pick-up and distribution function supplemental to a scheduled route service, efficiency considerations alone suggest that the route carrier should get first chance to provide the coordinated service.

The ICC, for example, has always been receptive to the claims of railroads to provide their own pick-up and delivery motor service. E.G., in Missouri Pacific R.R. Co. (Guy A. Thompson, Trustee) Extension of Operations, 41 M.C.C. 241, 243 the commission granted such a railroad application; "... we believe it to be neither the policy of congress nor the proper function of the commission to retard any form of progress in transportation which will serve the public interest. Public convenience and necessity require the increased economy, frequency and flexibility resulting from the coordinated service in such a case."

187. E.G., the DPU hearing examiner in Rhode Island was of the opinion that no irregular route passenger carrier (other than taxis) could be certified under the R.I. statute. The DPU rules and regulations for motor carriers are presently being revised for the first time since 1923. Interview with Mr. Riley, DPU hearing examiner, Aug. 29, 1969.
administrative body of the worth of the developmental approach illustrated in the preceding section. If the theory can be established, it can then be shown that DAB could fill the gap in public transportation between high cost individualized service by taxis and inflexible route service by existing transit systems. The applicant would argue that this gap has become increasingly important with the increasing dispersal of urban areas under the influence of the automobile, the continuing trend toward suburban industrial locations with resulting suburb-suburb trip demand patterns and the growing pressure to restrict the use of private autos in urban areas.

B. Perspectives From The Federal Experience

1. Service Improvements and Competition as a Means of Inducing Them

The applicant in Pan American Bus Lines Operation, 1 M.C.C. 190 (1936), the first bus case under the federal Motor Carrier Act of 1935, proposed an expansion of his New York-Miami service. The company provided free pillows to passengers, ice-water and porters on each bus who doubled as tour guides. In addition, no change of buses was required and baggage was checked only once. The service also featured stops at several tourist attractions en route. Pan American contended on this evidence that it had tapped a new market and that 70% of its passengers traveled formerly by means other than common carrier motor vehicle. 1 M.C.C. at 193.

The commission agreed in its conclusions that Pan American’s traffic was largely “newly created traffic, rather than business taken from other carriers” and that the application involved “a new and distinctive form of service, better adapted to long-distance through service than that which protestants had theretofore maintained.” 1 M.C.C. at 208. A DAB-type operation could of course make closely analogous arguments with respect to its impact on route-buses and rail transit on the one hand, and taxis on the other. In answer to the objection that the Commission should require existing carriers to provide any additional “necessary” service prior to granting certificates to new carriers, the commission replied:

... Public regulation can enforce what may be called reasonable

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188. "The necessity to be provided for is not only the existing urgent need, but the need to be expected in the future, so far as may be anticipated from the development of the community, the growth of industry, the increase in wealth and population, and all the elements to be expected in the progress of a community." Campbell v. Illinois Commerce Commission, 334 Ill. 293, 165 N.E. 790 (1929).
189. See note 140, supra.
standards of safe, continuous, and adequate service, but *it can hardly be expected to take the initiative in experimentation and the development of new types of service.* (emphasis added) 21 M.C.C. at 208.

The Commission stated that the grant of certification had been influenced by its view that the motor bus service was a "new and developing industry" and that the operation would "in any event serve a useful experimental purpose." 21 M.C.C. at 210.

The ICC's concern with fostering new and improved passenger service, and its working principle that effective competition was a necessary precondition of that goal, was reiterated in *Santa Fe Trails Stages, Inc.*, 21 M.C.C. 725 (1940). In that case the commission again granted certification to a competing bus line, reasoning that,

Regulated monopoly is not a complete substitute for competition. The latter fosters research and experimentation and induces refinements in service which are not likely otherwise to be accomplished. 21 M.C.C. at 748

The commission came very close to establishing a presumption that non-competitive service could not be "adequate":

. . . We might very reasonably say that where there is ample traffic a dominant existing service without any effective competition is not all that experience has taught that the traffic needs for its best interests and consequently is not an adequate service. 21 M.C.C. at 748.

However, the results of both these cases, and the strong commission language used in them, must be seen in the light of the dominant factor of the inter-city motor-bus industry—the Greyhound Corporation. The commission, in response not only to Greyhound's overwhelming size relative to its competitors, but also to its extremely aggressive competitive tactics, has always been receptive to competitive applications.


"There was also a second-class cut-rate service run with obsolete equipment by Dollar Lines, a Greyhound subsidiary, from San Francisco to Portland, and by Independent Stages, a North Coast subsidiary, from Portland to Seattle, and return. Both were maintained by their parent corporations 'solely as fighting ships wherewith to meet and discourage competition.'"

"The methods adopted in pursuit of these objectives included insufficient schedules and intentional crowding; people were told that they could not buy tickets, ticket holders were
Nevertheless, the commission has decided in favor of a proposed competing service when Greyhound was not involved, even when the protesting carrier was operating at a deficit.\textsuperscript{191}

The commission policy of encouraging competition to induce service improvements, while said to be most pronounced in bus cases,\textsuperscript{192} is certainly not limited to that field—"It has been our view that in order to develop a healthy transportation system in a territory, a certain degree of competition should be encouraged." \textit{Associated Transports, Inc., Extension—Kansas}, 54 M.C.C. 528, 529 (1952).\textsuperscript{193}

As might be predicted from this kind of language, the ICC, unlike some state commissions, has never felt bound by a "first chance" rule that existing carriers should be accorded an opportunity to themselves provide any additional service found to be required by public convenience and necessity.\textsuperscript{194}

The federal courts have consistently sustained the commission's view that certification of additional carriers was a permissible alternative to enforcing the duty of existing carriers to provide adequate service. In \textit{Davidson Transfer and Storage Co. v. United States}, 42 F. Supp. 215 (E.D. Pa. 1942), \textit{aff'd per curiam}, 317 U.S. 587 (1942), \textit{rehearing denied}, 317 U.S. 707 (1942), the commission found that refrigerated truck service between New York and Washington was repeatedly delayed or improperly refrigerated, particularly with regard to small shipments. The court affirmed the commission's certification of an additional carrier:

\begin{quote}
We think that one of the weapons in the Commission's arsenal is the right to authorize competition where it is necessary in order to refused passage and advised to wait or go over to Greyhound, reservations were not honored, employees were discourteous, baggage was misplaced." \textit{Citing}, West Coast Bus Lines, Ltd., common carrier application, 41 M.C.C. 269 (1942), \textit{rev'd} 32 M.C.C. 619, complaint dismissed sub. nom., North Coast Transportation Co. v. United States, 54 F. Supp. 448 (N.D. Cal. 1944), \textit{aff'd per curiam}, 323 U.S. 668 (1944).
\end{quote}

\textsuperscript{191} Norfolk Southern Bus Co. v. United States et al., 96 F. Supp. 756 (E.D. Va. 1950), \textit{aff'd per curiam}, 340 U.S. 802 (1950). However, as pointed out in the Fulda treatise, note 19. supra, this case is distinguishable because it involved not an ordinary route-extension application but the lifting of a "closed door" restriction on existing operations which "could be justified only in unusual circumstances." Moreover, it wasn't shown that the protestant's deficit was associated with this particular route.

\textsuperscript{192} Fulda, \textit{op. cit.}

\textsuperscript{193} \textit{Accord}, Balch and Martin Motor Express Common Carrier Application, 47 M.C.C. 75, 78 (1947).

compel adequate service . . . The conception that the public must wait while the commission exercises its statutory powers, fortified by orders of the court, to compel existing carriers to do what they should do, is one which does not commend itself to common sense and the public interest. 42 F. Supp. at 219, 220.

While it might be said that the commission seems to have adopted a more protective attitude, especially toward railroads and other common carriers of goods, in more recent years, the courts have generally been hostile to any tendencies away from competitive goals. In Nashua Motor Express, Inc. v. United States, 230 F. Supp. 646, 653 (D.C. New Hampshire, 1964), the court reversed the commission’s denial of a certificate to a potentially competitive common carrier trucker, reasoning that the commission was incorrect in relying on adequacy of existing service and failing to consider other essential elements of “public convenience and necessity” such as the desirability of competition, of improved service, and of different kinds of service. The court took the position that the commission had established a rule of law that inadequacy of existing service was a necessary element to any grant of certification. “While there is some authority for this view . . . we feel that the better rule is embodied in the more numerous cases to the contrary . . . ” 195


Federal administrative decisions emphasizing the importance of developing new kinds of service to meet future needs are not limited to the Interstate Commerce Commission. American Airlines, Inc. v. Civil Aeronautics Board, 192 F.2d 417 (D.C. Cir. 1951) was a controversy over the CAB’s certification of four air carriers of property only. At the time there were no cargo-only air carriers and the project involved new aircraft design, new promotion methods, new arrangements of schedules, etc. 192 F.2d at 420. Although the intervening combination carriers argued that the factual evidence of record would not justify the certification of any all-cargo carriers, the CAB, relying largely on its own expertise, concluded that there was “an existing potential domestic traffic for air freight of not less than one billion ton-miles annually.” 192 F.2d 422. The court rejected the combination carriers’ argument that the Board could look only to the evidence of record to justify the certificate, quoting with approval from the Board’s opinion:

. . . we cannot agree with the contention that the issue of public convenience and necessity in the present case is to be resolved solely on the basis of past and current facts . . . Our decision must take into account . . . broad considerations of future welfare related to the development of a new type of air commerce which until a comparatively recent time has received little attention . . . 192 F.2d at 421.

Similarly, in Re Tennessee Gas Pipeline Company, 73 PUR 3d (Federal Power Commission, 1968) the FPC granted a certificate of public convenience and necessity to construct high-capacity pipeline facilities for the transportation of off-shore gas even though they assumed that such gas, not yet attached, could be made available only at prices higher
2. New or Different Service, Intermodal Competition and the "Adequacy" Doctrine.

The reasoning of the cases in the preceding section that certifications should be granted in order to establish competition, which will then induce service improvements, of course suggests that a fortiori where a new service such as DAB is already in existence and being presently offered by an applicant, the existing service can not be "adequate."

The Supreme Court early endorsed this kind of reasoning by the commission in *U.S. v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 (1946), sustaining the commission’s finding of "inadequacy" of present service where the present service involved interchanges and applicant proposed to operate a single line, through service.

Moreover, whatever importance might be assigned to the adequacy of existing service, it was clear that that factor carried least weight where the potential competitor was another mode. In *Alabama Great Southern Ry. Co. v. U.S.* 85 F. Supp. 225 (S.D. Calif. 1952), a water carrier (Sea Train, Inc.) applied for authority to carry loaded railroad box cars between Savannah, Ga. and other ports. The protesting railroads asserted the adequacy of rail service to Savannah. The court sustained the grant of certification, ruling that water carriers could not be foreclosed just because there were present motor, rail, or air carriers "physically capable" of providing service. The existence of other service was only one element to be considered:

Perhaps there may be circumstances in which the presence of transportation other than water carriage can be found to satisfy every need. But certainly it cannot be so held until the National purpose to foster a merchant marine, the Nation's policy to develop and preserve "a national transportation system by water, highway, and rail," and the area's reliance upon the water to provide it employment and industry as well as transportation, especially carriage of the kind afforded peculiarly by ships, have been weighed and discarded as unattainable or impracticable. Service, not simply transportation, is the stipulation of the statute.197

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196. Although this case involved an application and certification of *temporary* authority, the court asserted that "Existence of other service is but one element to be considered. In this regard reason allows no distinction between temporary and permanent certificates". 85 F. Supp. at 226.

The confusion and difficulty experienced by the commission in attempting to adapt the adequacy of existing service test in a multi-modal context, as well as the resulting vacillation, can be seen in a case arising soon after the Alabama case. The Stauffer Chemical Co. had built a plant at Lowland, Tennessee, 50 miles from Knoxville, for the production of sulfur-based chemical products. The crude sulfur used by the plant orginated in Louisiana and was moved to Knoxville by barge, thence to the plant at Lowland by railroad cars. The applicant, A.J. Metler, proposed to build his own dock facility at Knoxville and transport the sulfur by dump-truck-type vehicles from there to the plant. Stauffer and Metler introduced evidence of the following advantages of the motor carrier operation: 198

(a) The trucks could dump the sulfur directly into process, thus eliminating the need for the large storage facilities and several extra handlings necessitated by the rail service.

(b) The motor carrier vehicles could arrive continually, while the rail shipments tended to arrive in large blocks of cars at a time. The plant’s rail spur and storage facilities were not adequate to accommodate the number of cars and the volume of sulfur thus involved.

(c) The trucks could arrive more predictably. The transit time of individual rail cars for the 50-mile Knoxville-Lowland trip had varied from one to ten days, thus necessitating keeping rented unloading cranes and other equipment on hand for indefinite periods.

Division 5 of the commission found that there was “no convincing evidence on this record that the [rail carriers] would not meet the shippers’ reasonable transportation requirements.” 199 Upon reconsideration, the full commission affirmed the Division 5 conclusion, stating that Stauffer’s preference for the motor service was “predicated upon its ‘desire’ to obtain reduced transportation costs and to promote certain operating efficiencies in its plant rather than upon a showing of any real deficiency in the transportation service offered by existing [rail] carriers.” 200

The two major deficiencies of the “adequacy of existing service test” in a multi-mode context were thus glaringly revealed. First, there is no

199. Id. at 149 (dissenting opinion). The Division 5 Decision, without opinion, is reported at 53 M.C.C. 823 (1952).
200. 61 M.C.C. 335, 340 (First Report on Reconsideration, 1952).
common denominator on which to assess the "adequacy" of existing service against a proposed different service. It is not surprising, therefore, that "adequacy" becomes only a conclusory label, reflecting the decision that the certificate will not be granted. In this respect "adequacy" is about as useful an analytical concept as "spot zoning."

Secondly, the commission in administering the "adequacy" test in numerous cases involving only one mode had applied the conventional doctrine that prices of the proposed and existing services were irrelevant in a certification proceeding.\textsuperscript{201} This doctrine made perfectly good sense in that context since the commission had separate power to assure that rates were just and reasonable.\textsuperscript{202} Moreover, it seems entirely reasonable for the commission to adopt such a doctrine on the grounds that it would be very unlikely that an applicant desiring to provide the same service as existing carriers with the same types of equipment would be willing or able in the long run to live up to his claims in a certification proceeding that he would offer significantly lower rates. These justifications of the doctrine are wholly inapplicable in a multi-mode situation.

From the report on reconsideration referred to above Metler filed an appeal in the federal district court. After the Justice Department indicated some uncertainty that the decision could be successfully defended, the commission issued a second report on reconsideration. Upon the same record the commission granted the certificate (3 members dissenting), citing its duty under the National Transportation policy to preserve the inherent advantages of each mode\textsuperscript{300} and finding upon reexamination that it was in fact impractical for Stauffer to use the railroad and that "in the circumstances here present the rail service is insufficient and inadequate reasonably to meet the shippers' need." 62 M.C.C. at 148.

Nevertheless the commission strove mightily to hang on to the traditional adequacy concept, stating that:

> Given a limited amount of traffic and an existing carrier of whatever mode which needs it more or less urgently, the question whether a competing service shall be authorized turns upon the question as to the relative or comparative adequacy of the existing service. 62 M.C.C. at 148.

\textsuperscript{201} E.g. comparative level of rate structures cannot be considered as a basis for denial of authority sought any more than itou be so conded in support of a grant of authority. Freight Transit Co. Extension, 78 M.C.C. 427, 432.

\textsuperscript{202} "If the sole dissatisfaction stems from belief that rates of existing carriers are unjust or unreasonable, appropriate relief is available under other provisions of the Act," Carl Subler Trucking Co., Inc.—Extension, 77 M.C.C. 707, 713 (1958).

Thus the commission attempted to subsume the factor of economic impact on the existing carrier, a most important but separate consideration, under the overburdened rubric of adequacy. Similarly, the commission gave lip service to the associated doctrine of price irrelevancy, saying only that,

*although costs definitely are not the controlling consideration influencing the shipper*, the overall cost of the proposed barge-motor movement would be somewhat lower than either barge-rail or all-barge . . . (emphasis added, 62 M.C.C. at 147)

The commission had thus succeeded in delaying a full-scale judicial test of the "adequacy" doctrine for a few more years—until 1957.


Despite the relatively unrestrictive attitude of the commission toward the certification of competitive passenger service illustrated by such cases as *Pan American Lines* and *Santa Fe Trails Stages*, the commission maintained a very protective stance with regard to common carriers of property, as illustrated by the *Metler* case. This difference in policy seems to result from a set of factors. Most important, a central purpose of economic regulation of the motor carrier industry has been to protect the railroads,\(^\text{204}\) not only by restrictions on entry but also by minimum rate regulation. The railroads have of course not desired to be protected from the loss of their passenger traffic—quite the contrary. A second major reason for promoting passenger-carriage competition is the over-riding domination of the industry structure by Greyhound. Moreover, the intercity motor carrier passenger industry has been expanding so rapidly (due in part to the railroad default and the resulting captive market) that entry restrictions have not been necessary to preserve the stability of existing firms. Finally, the commission may have been more responsive to competitive and innovative pressures in the passenger carriage industry simply because the political impact, in terms of persons directly affected, is much greater.

The cases discussed in this present section trace the federal courts' attack on these protective attitudes toward transportation of goods. This development is very important for two reasons. First, the federal regulatory analogy to the situation of a DAB applicant before a state

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regulatory commission is not the bus line application for competitive intercity authority, but the common property carrier application which threatens the railroad service. In each case there is an existing carrier providing an essential service to a more or less captive traffic; the existing urban transit lines, just like the railroads, and unlike inter-city buses, are experiencing traffic declines and usually operating at a deficit, often with public subsidy. The DAB applicant offers not a similar, directly competitive service, but a faster, more flexible, door-to-door service at significantly different prices, precisely the virtues offered by motor vehicle common carriers of goods as compared to railroads. Therefore one can expect the concerns and reactions of regulatory bodies to a DAB application to be very similar to those of the ICC to a motor common carrier of property application opposed by the railroads.

Secondly, and perhaps more importantly, these cases provide the only instances in which the federal courts, especially the Supreme Court, have considered in any depth the adequacy and price-is-irrelevant rules as analytical and regulatory concepts.

The Metler case, as pointed out above, had revealed the major difficulties of these doctrines. Their use in that kind of intermodal property carriage context finally came up for consideration in Schaffer Transportation Company v. U.S., 35 U.S. 83 (1957). Schaffer applied for a certificate to transport granite by truck from points in South Dakota and Vermont. Only rail service was presently available between all the points sought to be served by Schaffer. Division 5 of the commission granted the certificate, relying on testimony by shippers that the truck service would produce fewer delays, allow them to expand their markets and sales, ship faster, and maintain lower inventories. It was common practice for the shippers to hold back and consolidate less-than-carload shipments so that they could take advantage of the lower carload rates. The shippers were also eager to equalize the competitive disadvantage they suffered compared to other granite producers who did have truck service. 355 U.S. at 86, 87.

The full commission, however, reconsidered and with four members dissenting, denied the application, finding that the only real deficiency of rail service warranted by the record was that it was too slow. And this delay was the fault of the shipper's own action in delaying small shipments in order to get the lower rates. The commission's decision was a conventional statement of the "adequacy" concept:

We have carefully considered applicant's arguments to the contrary, but are forced to conclude that the service presently available is reasonably adequate. The evidence indicates that the
witnesses' main purpose in supporting the application is to obtain lower rates rather than improved service. It is well established that this is not a proper basis for a grant of authority..." 355 U.S. 88, 89.

The Supreme Court felt that the commission had fallen from grace since the final Metler report and quoted language from that decision to the effect that "relative or comparative adequacy" of the existing service was the significant consideration when competitive goals were being accommodated with stability goals. 355 U.S. at 90. The court, in a terse opinion by Chief Justice Warren, then exploded both major tenets of the adequacy doctrine ruling (a) that the commission had failed to give weight to the "inherent advantages" of the truck service, contravening the direction in the national transportation policy to administer the act so as to "recognize and preserve the inherent advantages" of each mode,206 and (b) that rates could never be irrelevant in an intermodel competition situation since "the ability of one mode of transportation to operate with a rate lower than competing types of transportation is precisely the sort of 'inherent advantage' that the congressional policy requires the commission to recognize." 355 U.S. at 91.207

The Schaffer rationale to justify certification of a new or different service would be of limited usefulness to a DAB type operation seeking certification from a state commission for two primary reasons. First, the Supreme Court could rely on the statutory direction to "recognize and preserve the inherent advantages" of each mode. While some states (e.g., New York, Indiana) have a very similar policy declaration,207 most do not. That language was only added to the federal statute in 1940,208 so there hasn't been a great deal of time for the operation of the usual duplication process at the state level. Nevertheless, although a number of states have no statute-announced transportation policy at all (e.g., New Jersey, Alabama), most have language calling for a "balanced", "most efficient," or "coordinated" transportation system,209 on the basis of

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206. Mr. Justice FRANKFURTER dissented on the ground that the declaration of policy conveyed "a most generalized point of view" so that the decision did not violate those standards given the "massive experience" to be attributed to the commission in this case. 355 U.S. at 94, 95.
207. N.Y. Public Service Laws § 63-i(1); Ind. Ann. Stat. §47-1214.
209. E.g., Maine, 35 M.R.S.A. §§1551, 1555; Louisiana, R.S. 45:161; Michigan, Comp. Laws §475.2 as amended; Mississippi, Code §7633.
which an applicant could make arguments analogous to those in Schaffer.

The second major reason for Schaffer's limited usefulness is that it was a case of clear modal competition. While there seems to have been very little administrative or judicial thought given to the definition of mode, it seems generally assumed that there are only four—rail, motor, water, and air. Thus while a DAB applicant would have such significant differences from conventional motor passenger carriers that the policy of deemphasizing the adequacy of existing service would seem fully applicable, such an approach would have little support in a policy declaration in terms of "modes." However, Arkansas has language even more favorable to a DAB applicant than the federal policy since its statute speaks of preserving inherent advantages "among carriers," with no limitation to modes.

However, these difficulties with using the Schaffer rationale have been alleviated by several cases subsequently decided. In ICC v. J-T Transport Co., Inc., 368 U.S. 81 (1961), the commission denied a motor contract permit on the ground that the applicant had failed to prove the inadequacy of the existing common carrier motor services. The opinion of the court (Douglas, J.), focusing on the statutory definition of a contract carrier as one who inter alia meets the "distinct need of each individual customer," reversed on the ground that the commission was thus unwarranted in placing on the applicant the burden of proof as to inadequacy of the existing services. Moreover, the commission was similarly unwarranted in indulging the presumption that the services of the existing carriers would be adversely affected by the loss of "potential" traffic, where they had not handled that traffic before. The relation of a DAB operation to existing passenger carriers is closely analogous to the contract-common motor carrier situation in this case. Although a DAB applicant would in most manifestations be classified a common carrier because it would be willing to provide its services to anyone who requested them, and although J-T Transport is distinguishable because of the particular federal statutes involved, he could argue still that (a) the new,

213. 368 U.S. at 90.
214. 368 U.S. at 89. Mr. Justice Frankfurter, joined by Justices Harlan and Stewart dissented from the J-T Transport case, at 368 U.S. 93, 82 S. Ct. 216, considering that the commission's discretion in carrying out the policy of protecting common carriers made the presumption permissible.
distinctive nature of the service and the fact that many of its customer-trips would be newly-generated rather than siphoned from the traffic of existing carriers should relieve him of the burden of proving the inadequacy of existing service, and (b) in any event "adequacy of existing service" should be less important where the proposed service is significantly different.

With regard to the price-is-irrelevant doctrine the court went further. In the companion case, ICC v. Reddish, the commission had denied a contract carrier permit on the conventional ground that the shippers' primary desire was for lower rates. The court\(^\text{215}\) ruled that the rates were a factor entitled to weight in determining the need for the new service, quoting from Schaffer. Therefore,

By analogy, contract carriage may be more "economical" than common carriage by motor or rail within the framework of the national transportation policy . . . 368 U.S. at 91 (See footnote 206, supra.)

The court continued the analogy by citing the commission's own decision to the effect that a shipper's need for more economic carriage would be considered if the existing carriers' rates were so high as to be prohibitive.\(^\text{216}\) So a DAB applicant could certainly cite this case as authority for the proposition that if the service is different, the rates are relevant factors in determining adequacy of existing service and need for the new service. Moreover, this case, unlike Schaffer, rests on the national transportation policy to "promote . . . economical . . . service," a provision similar to that found in many state declarations of policy.\(^\text{217}\)

Therefore the two major obstructions to using the Schaffer argument on behalf of DAB—that DAB isn't a separate "mode" and that Schaffer rested on the "preserving inherent advantages" language—have been substantially removed.

The judicial attack on the "adequacy" and "price-is-irrelevant" doctrines begun in Schaffer was pushed to the next logical development by the Fourth Circuit in 1963, in a passenger carriage case, Alexandria, Barcroft and Washington Transit Co. v. Washington Metropolitan Area Transit Commission, 323 F.2d 777 (1963). The Washington MATC, which began operations in 1961, was created by the terms of a transit regulation compact entered into by Maryland, Virginia, and the District

\(^{215}\) The three justices who dissented in J-T Transport concurred in this case. The opinion is at 368 U.S. 130, 82 S. Ct. 212.

\(^{216}\) Herman R. Ewell Extension—Philadelphia, 72 M.C.C. 645 (1957).

\(^{217}\) See note 212, supra.
of Columbia. The commission granted a certificate of convenience and necessity to Franklin to provide charter service to charitable and publicly-supported groups on the ground that the rates of existing charter carriers were so high as to be generally out of reach of groups like the YMCA and Little League. Franklin planned to keep his rates lower by using inexpensive school-bus type vehicles. The court’s opinion, sustaining the grant of the certificate to Franklin, is remarkable in several respects.

First, the court demonstrated its sensitivity to the unique transportation problems of urban areas, as compared to the essentially inter-city transportation dealt with by the ICC:

The creation of the Transit Commission was one of the steps taken by Congress in the realization that regulation of mass transit in a large metropolitan area requires solutions specifically tailored to the area’s special needs. It is, therefore, to be reasonably expected that the transit commission, in the exercise of its administrative functions, may establish regulations and a body of law by case decisions that will differ from those of public bodies regulating transportation. 323 F.2d at 779, 80.

Secondly, even though both applicant and existing carriers were charter services so that both Schaffer and J-T Transport were distinguishable, the court ruled that the rate differential itself was so great "as to make the service proposed by the applicant a completely different one," (emphasis added) citing by analogy the J-T case. 323 F.2d at 781. This argument would be very important to a DAB applicant attempting to overcome objections that the only useful feature he could offer as against existing taxis would be a lower price. Again analogous to a DAB situation, the court pointed out that the competitive effect of the new certificate would be minor since most of the applicant’s traffic would be newly-generated.

Finally, it is significant that the court reached this result notwithstanding that the terms of the MATC compact were comparable to the most protective of state statutes, providing that,

no certificate shall be issued to operate over the routes of any holder of a certificate until it shall be proved . . . that the service rendered by such certificate holder, over such route, is inadequate to the requirements of the public convenience and necessity. quoted at 323 F.2d 781.
4. Recent Developments in ICC Attitudes Toward Distinctive Passenger Service and DAB-Like Operations

In D.C. Transit System, Inc. Extension—Limousine service between Washington, D.C. and New York, N.Y. (1959)\textsuperscript{218} the applicant proposed to offer non-stop service for persons and their baggage between National Airport in Washington and International Airport in New York. The seven passenger limousines would offer air conditioning, reclining seats, desktop trays, as well as telephones and dictating machines. Division I found that "although the features which applicant would offer might be attractive to a limited portion of the traveling public, we are not persuaded that they are so distinctive as to transform what is essentially a regular route point-to-point operation into a new and distinctive type of service." \textsuperscript{81} MCC at 744. Having assimilated the proposed operation to an ordinary bus service, the commission found that existing non-stop reserved-seat service between New York and Washington (not the airports) was adequate and that certification would jeopardize this existing service.\textsuperscript{219}

It is useful to contrast the D.C. Transit case with a later application to provide a special service, arising in 1964.\textsuperscript{220} The proposed operation involved non-scheduled, door-to-door, eight-passenger limousine service between Worcester County, Massachusetts and, \textit{inter alia}, race tracks and bingo or beano games in New Hampshire and Rhode Island. The opposing bus companies did not propose to offer door-to-door service and their charter operations were performed only with large buses, making a trip carrying only eight persons uneconomical. The commission was sustained by the district court in its grant of certification. The commission's grounds were that the new service was significantly different, "necessarily involving a different rate structure," and that the ability of the existing carriers to maintain their regular routes would not be impaired.\textsuperscript{221}

The commission's characterizations notwithstanding, the new operation in this case is no more "distinctive" than the new operation in \textit{D.C. Transit}. Both cases turn on the commission's judgment as to the seriousness of the impact on existing carriers. It is certainly proper for this judgment to be the decisive factor in either of these cases, but the commission seems loath to rely on it too heavily.

\textsuperscript{218} 13 F.C.C. 34, 81 M.C.C. 737 (Div. 1, 1959).
\textsuperscript{219} Strangely, the only authority cited by the commission was the \textit{Pan American} case, \textit{supra} p. 60, where the application to provide special service \textit{was granted}.
\textsuperscript{221} 235 F. Supp. at 513.
In a 1966 case involving a proposed operation more like DAB than any other application we are aware of, the commission went too far in bolstering its decisions by characterizing different service as not really different. The Arrow Line, Inc. proposed to offer a door-to-door, non-stop passenger service from any point in Hartford County, Connecticut, to any point in the five boroughs of New York City. Anyone who requested the service, presumably by telephone, would be picked up by a seven-passenger limousine, with routing and pickups scheduled to meet the patron's desires as closely as possible.

In proceedings in which Greyhound and other regular-route, scheduled bus operators appeared in opposition the commission denied the application, quoting the language from the D.C. Tranist case that although the features offered might be desirable to a portion of the public, "we are not persuaded that they are so distinctive as to transform what is essentially a regular route, point-to-point service into a new and specialized type of motor carrier operation for which there is a public demand."

On appeal the district court reversed the denial of the certificate, ruling that the commission's opinion was so ambiguous that the applicant wasn't informed of the reasons for the denial. Further, the court indicated its own uncertainty that the commission had fulfilled its function of balancing the benefits of the new service against the competitive impact on existing service. In this connection the court, citing commission decisions, stated its view of the balancing process:

... In resolving such conflicting considerations, there is, indeed, leeway given the commission. However, it has been the practice to emphasize the economic impact when the proposed features are closely approximated by existing services, and, on the contrary, when the application does truly suggest a new and desired concept to run the risk of some loss of business to established operations. 256 F. Supp. at 611.

We have argued in the preceding section that this principle can be drawn directly from the Supreme Court decisions in Schaffer and J-T Transport. The court distinguished D.C. Tranist not only on service characteristics, but also on the ground that while the fare differential in that case had been "modest," in the present case the $13.16 fare proposed by the applicant (as compared to $3.95 for an ordinary Hartford-New York bus trip) was "ostensibly not competitive with existing bus lines, even combined with taxi

223. Id. at 610.
fares.” 256 F. Supp. at 611. The court concluded that despite the commission's finding that the proposed operation was “essentially...an over-the-road service between major population centers,” it had not justified its apparent disregard of the distinctive service features of the proposal. 256 F. Supp. at 612.

On remand the certificate was granted, the commission concluding that the service was distinctive, a public need for it had been shown, and that existing service would not be significantly affected.224 Importantly, however, the commission reaffirmed D.C. Transit making the distinction that while the unscheduled, door-to-door, territorial service in this case was truly “different” from ordinary bus service, the luxury limousine service there involved, even though it apparently eliminated a trip between the city and the airport on each end of the trip, was not.

The standards set out by the court and the commission's opinion on remand in Arrow were reaffirmed in a case illustrating closely another possible application of the DAB concept—the carpool-lease arrangement with customers doing the driving.225 The proposed operation involved soliciting residents of northern New Jersey desiring to commute to Manhattan, forming them into groups, and then “leasing” a 9-passenger limousine to the group at a per person, per week rate. The applicant leasing company furnished gasoline credit cards and commuter toll books, filled vacancies in the group, picked up the vehicle periodically for maintenance and insured the vehicle. The commission ruled that while the operation was not exempt from regulation as a mere vehicle leasing operation,226 the service was nevertheless so distinctive and useful that a certificate should be granted—the commission, in a virtual litany of the claimed advantages of DAB, recognized the following beneficial and distinctive attributes of the service:

—reduction in commuter time of approximately one hour each way;
door-to-door service;
weekly or monthly fare payment;
elimination of transfers;
o no crowding;
assured seat;
fitness for handicapped persons unable to use conventional mass transportation;

224. 103 M.C.C. 195 (1966).
226. For discussion of this case in regard to issues of classification and exemption, see pp. 5 (note 27) and 6 (note 32).
—flexibility in choosing least congested routes on a day-to-day basis.

The commission stated the applicable rule as follows:

Where, as here, the proposed service differs materially from that provided by the mass transportation media in the area, the authority sought has been granted. 107 M.C.C. at 284.

Significantly, the commission concluded that "... the public convenience and necessity require a grant of authority . . ." without any mention of the comparative fare levels or of the economic impact on existing carriers. Thus the commission, by focusing on a standard of material difference to the exclusion of competitive effects, reached the opposite extreme from its analytical approach in D.C. Transit. On principle, this is surely an oversimplification, for clearly a "materially different" service could not be freely certificated if the foreseeable result were that essential fixed route mass transit service would be discontinued, or could operate only with an unacceptably high public subsidy. Such a result would be at odds with the commission’s own avowed rule since Pan American Bus Lines in 1936 to consider "... whether . . . [the public purpose] . . . can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest." 228

5. Conclusion—Arguments for DAB from the Federal Regulatory Experience.

In summation then, a DAB applicant could urge the following propositions to a state DPU or court on the basis of federal authority in analogous situations:

(a) That the ICC has recognized the beneficial and distinctive features of DAB-type door-to-door service and in recent decisions has considered it to be entitled to a certificate, in one instance without any consideration of the economic impact on existing

227. Such an approach is reminiscent of that stated in West Shore Railroad Co. v. DPUC 177 A.93, 13 N.J. Misc. 180, Aff'd 116 N.J.L. 191, 183 A.180 (1935); "If railroads are entitled as public utilities to protection against destructive competition, it should be a competition with a service which they have been giving." 177 A. at 94.
229. See p. 46, supra.
carriers (*New England Trailways, Arrow Lines, Monarch Associates*).

(b) In any event, the effect on existing carriers is de-emphasized where the new service is "materially different" (*Schaffer, J-T Transport, Alexandria, Arrow Lines*).

(c) Whatever may be the standards of "differentness" required to bring the results of (a) and (b), a door-to-door service such as DAB has consistently qualified under the ICC "material difference" standard (*New England Trailways, Arrow Lines, Monarch Associates*).

(d) Price differentials are relevant to the issues of public need and present "adequacy" when the proposed service is different (*Schaffer, J-T Transport, Arrow Lines*). Moreover, the fact of a price differential may be sufficient alone to make a service "different" (*Alexandria*).

(e) The federal courts have recognized that the distinct transit needs of urban areas justify rules and analytical approaches different from those developed by the ICC and state regulatory bodies in typical inter-city and over-the-road transportation cases (*Alexandria*).

Abbreviations Used in Footnotes


P.U.R. (N.S.) - *Public Utilities Reports (New Series).*

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AGE:
A VALID BASIS FOR DETERMINATION OF AIRLINE FARES

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Introduction

There is now pending before the Civil Aeronautics Board a case in which youth standby and young adult fares for air travel are challenged because they are unreasonable and unjustly discriminatory. The Court of Appeals found sufficient basis to remand the case to the Civil Aeronautics Board for an investigation of the legality of these fares. Examination of the background and pertinent law clearly shows that age is a valid basis for determination of these fares. The principle involved is new in this specific application, though it is an established principle in rate regulation.

In considering age in the determination of the legality of the youth standby and young adult discount airline fares, the court in Transcontinental Bus System, Inc. v. Civil Aeronautics Board 1 said:

"[A]ge alone is, as a general rule, not a relevant consideration. In so concluding, we are not intimating that the time honored exception for children under 12 is unjustly discriminatory." 2

The youth standby and young adult fares pertain to persons in the 12 to 22 age group, while children's fares refer to the under-12 age group, usually ages 2 to 12. Thus, the court is suggesting that age is not a valid consideration in one age range, while it is a valid consideration in another age range because the children's range is based on a "time-honored exception" to the general rule.

Reduced fares for children are traditional not only in air transportation but in all forms of transportation. In fact, reduced fares for children are common in all aspects of life. One need only look at the closest movie theatre, amusement park, sporting event, concert or other event to which tickets are sold. On the basis of cost, the baby under 2 (who usually travels free) may be held if there is no vacant seat, and his free transportation can be justified. In the case of the children's menu in a restaurant, the cost of a smaller portion will be less. However, in most areas of reduced rates, such as admissions, there is no cost basis to justify a reduced price for children. Nevertheless, reduced rates for children are accepted without question.

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1. 383 F.2d 466 (5th Cir., 1967); cert. den. 390 U.S. 920 (1968).

2. Id. at 489.
The court in *Transcontinental Bus* suggested there is no valid basis for reduced children's rates and simply excused them as a "time-honored exception." Time alone cannot be the real basis for children's reduced fares. It may be that by now it is sufficient to justify children's fares as "time honored," because they have been accepted as valid for many years. Some indication of the length of time is the fact that when economic regulation was first introduced to the airlines, 32 years ago, children's fares were already a "time-honored exception." But these fares were not always a "time-honored exception." At some place and time, they had to be validated. At some time and place, the validation was not merely time but some other factor. It is the thesis of this paper that the basic factor is age; that a rate based on any specific age group may be valid, whether it is children in the traditional 2-to-12 age group, or some new age group never before listed, such as ages 38 to 45.

*Youth Standby and Young Adult Fares: Transcontinental Bus System, Inc. v. Civil Aeronautics Board*

The question of the validity of rates based on age has been contested in the *Transcontinental Bus System* case and, in fact, is still being contested. It should be noted, however, that these are not the first youth fares offered, although the previous youth fares were not contested. Special airline fares for the 12 to 22 age group were first offered in 1961 in the form of fares equal to 50% of the regular adult fare on reservations made within three hours of flight time. If no reservations were available, the youth had the privilege of "standing-by" and taking any unused seat at the same fare. While some of the local airlines continued these special fares until the contested youth fares were introduced, the trunk lines dropped them within a short time.

The youth standby and young adult fares presently in question were instituted in December, 1965, when American Airlines filed its youth standby fares, a new discount fare for youths providing a no-reservation fare equal to 50% of the regular adult coach fare for youths at least 12 years of age and under 22. At the same time, Allegheny Airlines filed its

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3. Children's fares were accepted in railroad transportation by 1900 and earlier.
5. All trunk lines dropped this fare in December, 1961. This fare was retained by the following local service carriers: Bonanza Airlines, Inc., Central Airlines, Inc., Frontier Airlines, Inc., Ozark Air Lines, Inc., Pacific Airlines, Inc., Southern Airlines, Inc., Trans-Texas Airways, Inc., and West Coast Airlines, Inc.
6. American Airlines youth standby fares, filed December 20, 1965. The tariff is subject
young adult tariff, providing reservations for the same age group at a discounted fare of 66 2/3% of the regular jet coach fare.\(^7\)

The American and Allegheny fares have been under constant attack since they were instituted. Complaints were filed with the Civil Aeronautics Board (hereinafter referred to as CAB or Board) against both fares by Transcontinental Bus System, Inc.,\(^8\) National Trailways Bus System,\(^9\) and the American Society of Travel Agents. Complaints against the American fares were also filed by Delta, Northeast, United, Western and Trans World Airlines. The basis of these complaints was that the rates were, inter alia, unjustly discriminatory; in that, based on the age group, an artificially selected class of traffic was created. There was no real difference between this fare and the regular adult fare, and there was, therefore, no valid reason for a difference in the rates between the youth and young adult fares and regular adult fares.

The CAB found the fares not unjustly discriminatory and dismissed the complaints without an investigation, allowing the fares to go into effect on an experimental basis.\(^10\)

The Court of Appeals\(^11\) reversed the Board. It held that unjust discrimination was ultimately a fact question for decision by the Board, but it was an abuse of Board discretion to make such a determination without an evidentiary hearing. It also laid down guidelines for the Board to follow in making its determination, including its statement that age, in itself, is not a proper consideration in cases other than children’s fares.\(^12\)

On remand the proponent airlines argued that reduced fares to young

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7. Allegheny Airlines, young adult fares, filed December 20, 1965. Allegheny provides for no "black out periods," so that a youth may ride under this plan on any flight on any day a reservation is available. Allegheny requires an identification card which is issued on proof of age at the cost of $10.00 per year.

8. An organization comprised of 46 independent motor carriers, licensed by the Interstate Commerce Commission.


11. Appeal from the Board Order was taken by Transcontinental Bus System, Inc. and National Trailways Bus System.

12. See quotation, supra page 1, covered by Footnote 2.
persons were traditional, not only in all fields of transportation, but also in other fields as well:

"Reduced rates for young people have been traditionally permitted by regulatory agencies and have not been considered in conflict with the anti-discrimination provisions of the law. Because price discrimination based on age is widespread all over the country and is traditional in transportation, the Court is at odds with the real world when it said that children's fares are a 'time honored exception.' "  

It was argued that the court passed over the traditional aspect too lightly. Fares for children under 12 on the railroads and those previously in effect on the airlines have never been seriously questioned . . . simply on the basis of age. Therefore, why is not another special age group also justified? American Airlines argued that both airlines and surface carriers long offered special rates to the age of 12 and that for many years special rates had been offered to those under the age of 22 through the family fares. In addition, both the railroads and the bus companies have offered discounts to young people aged 12-21 without objection from the Interstate Commerce Commission (hereinafter referred to as the ICC or the Commission).  

The Trial Examiner found age not to be a proper foundation for the discrimination of the youth fares, based mainly on the court rejection of the proposition that age alone is a relevant factor. Nevertheless, the Board held, upon all of the evidence presented to the Examiner, that the fares were not unjustly discriminatory in that although such fares might be discriminatory:

"(T)he circumstances and conditions inhering in the youth fares are substantially dissimilar from those inhering in traffic generally."  

The Board, however, again remanded the case to the Trial Examiner to gather additional evidence on the question of rate reasonableness, and

16. Id. The youth fares offered by the bus lines were voluntarily withdrawn prior to commencement of their action attacking airline youth fares.  
reserved the right to re-examine the question of unjust discriminations based upon any new evidence produced.\textsuperscript{19}

This case has now been pending four and one half years, and it has not yet been finally determined whether youth fares are unjustly discriminatory. Undoubtedly, the final decision is still some time away. After additional hearings and opinion of the Trial Examiner, the Board will again review the decision, and then additional court action may follow.

\textit{Other Tariffs Based On Age}

In addition to the youth fares, there have been three different tariffs instituted by the airlines and structured on age, either wholly or in part. These are the children's fares, senior citizen or golden age fares and family fares. To better understand these tariffs, each will be examined individually.

\textit{A. Children's Fares}

The history of children's fares in aviation is as old as the Civil Aeronautics Act (hereinafter referred to as the Act),\textsuperscript{20} itself. Most carriers offered half fare rates for children under the original tariff required to be filed in conformance with the Act. The original rates provided for children aged 8-12, whether or not accompanied by an adult, and for ages 2-7, only if accompanied by an adult. Children under 2 were free. Two airlines did start with full fare for children over the age of 2, but both changed their policy so that by mid-1941 all airlines provided half fares for children from 2-12.

In July, 1942, all carriers suspended reduced fares for the duration of World War II, and all children's fares were included in this suspension. The children's half-fare rates were restored in December, 1945, without distinction as to whether accompanied or unaccompanied, although some airlines would not accept children under 12 without an accompanying adult. Starting in 1947, airlines refused to accept children under 8 without an adult. This rule was later modified to provide that the airline would accept an unaccompanied child if the child were emplaned by an adult and if there was assurance that the child would be met at the plane's destination.

In 1949, two airlines instituted the full adult fare for unaccompanied

\begin{footnotesize}
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\begin{itemize}
\item[19.] \textit{Id.}
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\end{footnotesize}
children aged 5 through 11, and one instituted the same fare for children 5 through 7. During the early 1950’s, more and more of the airlines adopted the policy of charging full adult fare for an unaccompanied child. By July, 1955, 13 domestic carriers and 1 foreign carrier charged full adult fares for unaccompanied children 2-11. It was at that time that an investigation was ordered by the Board of this fare and which lead to the Investigation of Full Adult Fares for Unaccompanied Children\textsuperscript{21} which determined in 1956 that it was not unjustly discriminatory to charge full adult fares for unaccompanied children while charging half fares for accompanied children.

This case is the only airline case going directly to the question of reduced fares for children. This case makes no attempt to justify the reduced fare. It assumes the reduced fare to be legal and found a justification, in the higher costs to the airline, for the higher fare for a child who is unaccompanied. The actual point in contention here was not the reduced rate fare but rather the full fare for children traveling without adults. The court held that it was not unlawful to charge full fare for a child without an adult because the cost to the airline was higher than the cost of transporting a child with an adult. It further held that a difference between domestic and international rates was unjust discrimination because two children on the same plane could be charged different rates, one in domestic flight and the other in international flight. The reason for the difference was that it was customary in international flight to charge half fare, whether or not the child was accompanied by an adult. On this point, the Board held that the airline could either raise both rates to full fare or reduce both rates to half fare. Either fare would be legal. The only illegality would be in making a distinction between domestic and international flights.

The court recognized that legality of both half fare and full fare rates was in issue. It made every effort to insure that its opinion was understood as such when it said:

\[\ldots\text{ we think it is clear that the lawfulness of both the half fare and the full fare were in issue insofar as discrimination and prejudice are concerned, and the Board has full authority to direct that any unlawfulness in this regard be removed.}\]\textsuperscript{22}

While it is clear that rates for children, whether equal to half or full

\textsuperscript{21} Investigation of Full Adult Fares for Unaccompanied Children, 24 C.A.B. 408 (1956).
\textsuperscript{22} Id. at 411.
adult fare, are legal, the basis of their legality is not clear. Some light is shed by the opinion of Vice-Chairman Adams, in which he agrees with the result of the Board but disagrees with its approach. The majority found it lawful to charge full fare because of the extra service required in case of travel by a child unaccompanied by an adult. The dissent held that the cost of the unaccompanied child should be compared to the accompanied child, not to an adult. The children's half fare is legal, and as such should be the starting point for considering extra fare for extra service.

But if the children's fare is legal, i.e., not unjustly discriminatory, even though it is less than full adult fares, on what basis is it legal? There is no allegation that special circumstances remove it from the category of full fares, and the Board does not justify it as such. Nor is there any claim that ages 2-12 is a special age group entitled to special consideration.

What is the situation in other areas of the transportation industry? Again, children's fares are accepted but usually without reason. There are, however, two important cases decided by the ICC, which shed considerable light on this subject.

In the first of these cases, *In the Matter of Regulations Governing Sale of Commutation Tickets to School Children*, a rate was set that was only open to students of a certain class, specifically providing for the exclusion of pupils attending various other kinds of schools. The Commission held this fare unjustly discriminatory under Section 2 of the ICA. The Commission added, "... (B)ut ... carriers may lawfully offer and use a commutation ticket limited in sale and use to children or young persons between certain stated ages (as, for instance, from 12 to 21 years of age)." 24

It was suggested by the court in *Transcontinental Bus* 25 that this language should be discounted because it is dicta. If the Commission's only duty were to rule on the legality or illegality of the proposed tariff, the court would be correct. However, the Commission had the same duty the Board has under the FAA. Specifically, under Section 1002(d), it is provided that if the Board finds a rate illegal, the Board shall determine the lawful rate. 26 In view of this Board duty, it can hardly be said that the

24. *Id.* at 144.
26. *The Hepburn Act of 1906, 34 Stat. 584*, was an amendment to the Interstate Commerce Act. This amendment became effective August 29, 1906, and provided, *inter alia,*
exercise of a duty under its regulatory powers is dicta. It is, in fact, to the point of the matter that the Commission has found a rate illegal and announced what it would accept as being legal. It is directly in point here as it specifically used as an example the age group with which the current youth fares are concerned.

The court in Transcontinental Bus also said that the actual decision of the Commutation ticket Case was based on In Re Party Rate Tickets, in which the Commission had held that party rate tickets could not be limited to a particular class but must be open to the whole public alike, and such rate could not be limited based on vocation.\(^{27}\) The Commission said in regard to the application of the Party Rate Doctrine:

\begin{quote}
"The rule that if carriers desire to establish rates, such must be open to the general public and cannot be limited to a particular class is equally persuasive as to the unlawfulness of tickets limited to the use of school children."
\end{quote}

\begin{quote}
"In this connection it should be remembered that the Commission's ruling does not prohibit the publication of commutation rates for children of specified ages, but merely holds that such rates must be open to all children within the ages stated in the tariff."\(^{28}\)
\end{quote}

The Board in Commutation Tickets recognized fully the impact of Party Rates, but simply did not consider that an age group was a closed class. Instead, age was considered a valid distinction. It has been further argued that this case could not be considered because Section 22 of the ICA excises commutation tickets from the unjust discrimination provisions of Section 2.\(^{29}\) This is incorrect. The Supreme Court has held that nothing in Section 22 in any way restricts the Commission from declaring a rate unjustly discriminatory, unduly preferential or unreasonable.\(^{30}\)

The second case is similar to the Commutation Ticket Case, and the Commission again states that a special fare cannot be provided for

\(^{27}\) In the Matter of Party Rate Tickets, 12 I.C.C. 96 (1907).

\(^{28}\) In the Matter of Commutation Tickets to School Children, supra note 23, at 292.

\(^{29}\) Transcontinental Bus System, supra note 1, at 488.

Determination of Airline Fares

students, but that special rates can be provided for young persons based on age:

"No sufficient reason is shown, however, why special commutation rates for young persons between certain ages should not be established provided the rates are not limited to pupils of schools of any particular kind or class and do not exclude other persons between the same ages who travel under substantially similar transportation circumstances and conditions."\(^{31}\)

Neither of these cases, decided over 60 years ago, has been overruled by the Commission, the Board or a Court. Both cases are clear in holding that age is a valid basis for reduced fares. The ICC, like the CAB, made no attempt to determine why children are in a privileged class. As a matter of fact, the Commission does not say that children are special. Rather it is simply that a specific age group is special vis-a-vis another age group. The Commission in the Commutation Ticket Case specifically suggested that another proper age group might be 12-21,\(^{32}\) the specific age range in question in Transcontinental Bus. It may be the Commission felt it was so obvious that a fare could be set by age group that it felt no explanation was necessary. Regardless of the reason, the ICC in these cases is clear that age is a valid basis for setting of rates.

B. Senior Citizen Fares

In the search for additional traffic during the decade just past, a new promotional fare has been tested, again based on age, but rather than on children or youths, as in the past, these fares are for senior citizens, basically those in the "over 65" class. In 1966, the Board allowed a standby fare for senior citizens to go into effect without an investigation, based on its similarity to the youth standby fares.\(^{33}\)

In the first senior citizen case presented, The Board allowed a Mohawk Airlines’ fare to go into effect in a case in which the fare provided a special round trip ticket for women over 62 and men over 65, because of the need of the carrier to improve its revenue and because of the Board’s policy of encouraging experimentation with promotional fares.\(^{34}\) In 1965, when Ozark Airlines filed a similar tariff, it was suspended, pending

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32. 17 I.C.C. at 144 (1909).
investigation, because the Mohawk fare had been in effect over three years, and the Board was not convinced that it was economically successful. The Board also said that the tariff might be discriminatory because it was based on age alone. Both tariffs were withdrawn before hearing. No evidence was presented, and the Board made no findings in either case. The Board gave as its reason for suspending and investigating the fare only that it “may be” discriminatory, but no finding that the rate was discriminatory was made. No argument was made to the Board in either case that it was not discriminatory simply because it referred to traffic based on age.

Finally, in *Group Senior Citizen Excursion Fares Proposed by Trans-Caribbean Airways, Inc.* the Board allowed the fare to go into effect pending an investigation. In this order, the Board did not indicate any concern with age as a group. The investigation was ordered on the basis of the disparity of age (62 for women and 65 for men) and because a very low fare was being offered in a city pair (New York-San Juan) that already had one of the lowest fare levels in the market. The real basis for the investigation was the great probability that such fare was non-compensatory and unreasonable, rather than unjustly discriminatory.

**C. Family Fares**

Family fares provide reduced fares for all members of the family traveling with the head of the household, who pays full fare. The spouse, youths 12-22 and children 2-12 all travel at reduced fares, the exact percentage of reduction varying according to the airline and number of persons traveling.

This fare was first introduced in 1948, over 20 years ago. Not until 1957 were these fares first questioned when Capital Airlines filed a tariff providing for family fares that would be available on Saturdays for the first time. The Board sustained this new tariff on the basis that family

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37. The most common plan in present use provides that one parent pays full fare; the other parent pays 75% of full adult fare; all youths, aged 12 to 22 pays 66 2/3% of full adult fare; and children, aged 2 to 12 pay 50% of full adult fare. If only one parent is traveling, the first youth in the 12 to 22 age group pays 75% of full adult fare, and additional youths in this age bracket pay 66 2/3% of full adult fare.

Since these fares have been in force, the percentages have varied slightly from time to time. The youth rates have been as low as 50% of full adult fare, and the children’s rates have been as low as 33 1/3% of the full adult fare.

38. Previously, family fares had been limited to the slack days of the week: Monday through Thursday.
fares had been successful in generating new traffic, and it was desirable to leave solution of financial and competitive problems to managerial discretion.\textsuperscript{39}

During 1957, the Board instituted a general investigation into family fares.\textsuperscript{40} In 1962, this investigation was dismissed upon a finding that family fares served a useful purpose.\textsuperscript{41}

Another investigation was initiated in 1963,\textsuperscript{42} and this investigation was dismissed in 1964.\textsuperscript{43} The last attack on the family fares was commenced in 1967 by the Transcontinental Bus System, Inc.,\textsuperscript{44} the same complainant as in the youth and young adult fares case.

Proponents of the tariff attempted to take advantage of the "time honored exception" rule espoused by the court to justify children's fares in the youth fares case. This would apparently be a strong argument as family fares were in force 20 years. While this would not be a long time in relation to the time during which children's fares have been recognized, nevertheless, in relation to the time during which airline fares have been regulated, 40 years, the time factor is substantial. The court rejected the argument. It held that tradition appeared doubtful because several attacks had been made on these fares during this period. These challenges to the fares recognized the questionable character of the tariff.\textsuperscript{45} This court already seems to be chipping away at the "time honored exception" argument. It not only rejected 50% of the time of regulation but did not offer any specific criteria on how to qualify for the "time honored exception." A portion of this discount fare is based on age, but the age argument has not been based on a separate age group. Rather, the argument has been whether there is sufficient justification for what is assumed to be an otherwise unjustly discriminatory rate. This case is also still pending, and because of the similarity of issues, it has been consolidated with the youth and young adult fares case for final decision.\textsuperscript{46}

\textsuperscript{39} Capital Family Plan, 26 C.A.B. 8 (1957).
\textsuperscript{40} C.A.B. Order No. E-11867, October, 1957.
\textsuperscript{41} C.A.B. Order No. E-19121, December 20, 1962.
\textsuperscript{43} C.A.B. Order No. E-21617, December 28, 1964.
\textsuperscript{44} Family Fare Tariffs—Complaint of Transcontinental Bus System, Inc., C.A.B. Order No. E-26431, February 29, 1968, 2 Av. L. Rep. sec. 21,782, at 14,555.
\textsuperscript{46} C.A.B. Order No. 69-8-140, August 25, 1969. This action in itself may raise some question. The youth fares case is based strictly on age. The family fare is based only partly on age. Even if the age group were held valid, family fares would still raise a question of
The Solution

In the early ICC cases, there were clear decisions based on specific age groups.\footnote{In the Matter of the Regulation Governing Sale of Commutation Tickets to School Children, supra note 23; J.H. Bitzer v. Wash. Va. Ry. Co., supra note 31.} These cases were unequivocal; a fare based simply on age is valid. Not only did the Commutation Ticket Case enunciate the principle that a rate would be valid based on age, it even used as an example the age group 12 to 21, the exact range in question in the youth fares case.\footnote{In the Matter of the Regulation Governing Sale of Commutation Tickets to School Children, supra note 23, at 144.} Full Fare for Unaccompanied Children,\footnote{24 C.A.B. 408 (1956).} the only case dealt with by the CAB, is equally clear that validity of the fare was based on age.

None of the recent CAB cases has been decided on the basis of age as a valid group in itself. The basic argument presented by the proponents of the fares, as well as the basis for the decisions, has been that while such fares may discriminate against other groups, the fare is nevertheless valid because there are sufficient circumstances and conditions in the specific case to prevent the discrimination from being unjust. Therefore, the fare is legal. It is not all discrimination which is proscribed by the Act; it is only unjust discrimination with which the Act is concerned.\footnote{Texas & Pacific R.R. Co. v. I.C.C., 162 U.S. 197 (1896).}

If age is a valid basis for rate determination, should it be necessary to distinguish the rate in a particular age group, from any other age group or from regular adult fares? The only basis for such is the language of the Federal Aviation Act, which prohibits setting a rate which is unjustly discriminatory.\footnote{49 U.S.C. §1374(b) (1958).} The Act does not define an unjust discrimination, and the Board has, therefore, taken the definition of the Interstate Commerce Act,\footnote{49 U.S.C. §102 (1964).} which provides that a rate is unjustly discriminatory if it grants different treatment to like traffic, for like and contemporaneous service, offered under substantially similar circumstances and conditions.\footnote{Wight v. U.S., 167 U.S. 512 (1897); Transcontinental Bus System, Inc., supra note 1; Summer Excursion Fares Cases, 11 C.A.B. 218 (1950).} Even assuming different treatment of like traffic for like and contemporaneous service is discriminatory, if the circumstances and conditions are sufficiently dissimilar, then the discrimination will not be unjust. Attention is usually directed to the question whether the circumstances discrimination within the age, i.e., youth traveling alone vis-a-vis youth traveling with his family. There are also other considerations as the reduced fare for the second spouse is not based on age and would raise a question of discrimination vis-a-vis unmarried travelers.
and conditions are such that they prevent any discrimination from being unjust. However, the basic question which should be investigated is one that has been completely overlooked. It is a question the answer to which has simply been assumed, but with no justification for such assumption. The first requirement for unjust discrimination is that there be different treatment of like traffic. Unjust discrimination of a like kind of traffic is prohibited, but there can be no discrimination where the traffic is of different kinds or classes not competitive with each other.44 The Interstate Commerce Commission ruled that no discrimination is involved when different rates were applied to different traffic, each kind of traffic being open on equal terms to all.45 But what makes differences in traffic? While there are many different tariffs covering many different situations, both under the Interstate Commerce Commission and the Civil Aeronautics Board, there never has been a studied analysis of what constitutes different types of traffic, and how far such difference may extend.

Like traffic would have to be, at the very least, traffic that is sufficiently similar so that ratewise it would have to be treated in the same manner.

Both the ICC and the CAB have ruled, and been sustained by the courts, that children is an age group that does not have to be treated the same as other age groups. The validity has not been based on justification for the unjust discrimination. The only justification has been that it is a specific age group. The logical, and only, conclusion is that the difference is in the basic definition of unjust discrimination. A specific age group is unlike traffic vis-a-vis regular adult traffic or any other specific age group. Therefore, there is no need to justify the rates for one age group vis-a-vis another age group. As a separate class of traffic, a rate may be set in regard to itself only. It is not necessary to justify rates different from rates set for another group. Rates for unlike traffic are not in competition with each other, and the question of discrimination does not arise. Thus, a tariff based on any specific age group should be valid because it is traffic unlike any other group, and, therefore, it is not subject to comparison with the fares for any other traffic.

The immediate reaction to such proposal is that this would allow the airlines complete freedom in setting of rates because they would have to be justified in no way, and, in fact, the CAB would lose control over airline rates. Nothing could be further from the truth. There will not only still be the same CAB control over airline rates, but an airlines will still be prohibited from setting rates indiscriminately.

In addition to the statutory proscription against unjust discrimination, the statute also prescribes rates that are unjust and unreasonable. By the terms unjust and unreasonable reference is made to the proposition that a rate must be economically sound. It is a basic rule, not only of ratemaking but of all business, that a rate must cover the cost of doing business, as well as providing a reasonable profit to the investors. In transportation ratemaking it is required that the rate level must have a reasonable relationship to attainable cost level. While a rate need not meet all costs of operation at all times, it must nevertheless be reasonably related to the cost of doing business, and it must at all time be reasonably related to an expected future level of costs.

It is undoubtedly true as the Board stated in the Family Fare Tariffs case,

"In the absence of some indication to the contrary it is reasonable to assume that the carriers would not urge the continuance of . . . tariffs unless, as corporations operated with a profit motive, it was to their advantage to do so."

The profit motive is undoubtedly strong in the airlines, as in all business. Nevertheless, restraint in setting rates is not limited by such profit motive. An airline could set a rate based on any age group, but any age group set would have to be proven economically sound. If a rate is not economically justifiable, then it will fail, and this will be so without regard to the question of discrimination. It should be noted that the present status of the youth fares case is that it has been remanded by the Board to the Trial Examiner to take additional evidence for the purpose of determining rate reasonableness. The real protection to the public in the case of youth fares, senior citizen fares, children's fares and any other tariff based upon an age group will be the necessity of showing that a tariff based upon the age group in question is economically sound.

**Conclusion**

It is evident that age is a viable consideration in the determination of air fares. The thesis here presented is radical, at least in the sense that it is

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57. Pittsburgh-Philadelphia No Reservation Fare Investigation, 34 C.A.B. 508 (1961); Air Freight Rate Investigation, 9 C.A.B. 340 (1948).
58. Air Freight Rate Investigation, supra note 57, at 345.
59. Air Freight Rate Investigation, supra note 57.
60. Family Fare Tariffs, supra note 44, at 14,558.
new. Age, by itself, has never been presented as a valid basis on which to set fares, nor has any record been found where it has been argued before any regulatory agency or court that a tariff based on an age group alone is unlike traffic vis-a-vis regular adult traffic. This is not surprising, however, in view of the relative newness of the importance of airline economics. It is only in the past 20 years that any consideration has been given to the problems of promotional fares. It is only today when the size and cost of airplanes are rapidly increasing while passengers and revenue are decreasing that such matters are of critical importance.\textsuperscript{62} Nevertheless, novelty should not detract from the force of the argument where it has been, as here, based upon the law, practice and decided cases in the transportation industry. The conclusion can only be that age is a valid basis upon which to base airline fares.

\textsuperscript{62} The passenger load factor, the percentage of seats filled, has been steadily declining to 49.9\% on the trunk lines and 42.9\% on the local service airlines. 1970 Air Transport Facts and Figures, at 26. The load factor has continued to decline since these figures were published.
A SURVEY OF FOR-HIRE TRUCK TRANSPORTATION ACROSS THE CANADA-UNITED STATES BORDER

DAVID F. SOMMERVILLE*

For-hire truck transportation is the subject of extensive regulation in both Canada and the United States. The object of this study is to examine the operation of motor common carriers across the Canadian-United States boundary and to evaluate the effect of the various regulatory, administrative, and procedural requirements as they pertain to such traffic. Basically, three movements are discussed—goods originating in Canada and destined for points within the United States; goods originating within the United States and destined for points within Canada; and goods moving in transit through either the United States or Canada.

The paper is divided into two broad sections; Part I is concerned with the various controls, economic and safety, placed on such traffic. Part II on the other hand, attempts to evaluate government policy and practice as they affect the flow of goods by motor vehicle between the two Nations.

I

In the United States, federal regulation of for-hire truck transportation was inaugurated with the passage of The Motor Carrier Act of 1935. Under the terms of that Act, power to regulate common and contract carriers was vested in the Interstate Commerce Commission. By section 206 of the Interstate Commerce Act, operations in foreign commerce are prohibited unless there is in force a certificate of public convenience and necessity issued by the Commission.¹ The term foreign commerce is defined in the Act as:

"commerce, whether such commerce moves wholly by motor vehicle and partly by rail, express or water, (A) between any place in the United States and any place in a foreign country, or between places in the United States through a foreign country; or (B) between any place in the United States and any place in a Territory or possession of the United States insofar as such transportation takes place within the United States."²

For the purposes of insurance, the designation of an agent of service of

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process, and requirements governing qualifications, maximum hours of work of employees, safety of operations and equipment, the term has been further extended to include transportation between places within a foreign country or between a place in a foreign country and another foreign country insofar as such transportation takes place within the United States. 3

Standing alone, sections 206 and 203(a)(11) clearly indicate that for-hire operations that originate or are destined for points in a foreign country are subject to the full regulatory powers of the I.C.C. and that a certificate of public convenience and necessity must be obtained from the Commission if they are to operate legally.

The American Act, however, contains an exemption for traffic originating in and destined for points located in a "commercial zone". The commercial zone section provides:

"nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in this Act, shall the provisions of this part, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operations or standards of equipment apply to: (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone . . . ." 4

In considering the extent of the exemption referred to above, the Commission at first took the position that the section did not have any extraterritorial application. In Ex Parte No. M.C. 37, Commercial Zones and Terminal Areas, the I.C.C. was of the opinion that:

"As a practical, rather than a regulatory, matter it may be conceded that the commercial zones of such municipalities lie, in part, in the adjacent foreign country, that between such municipalities and some immediate adjacent points in the United States, on the one hand, and adjacent or contiguous points in such foreign countries, on the

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other, there is performed partially within the United States purely local transportation of a type comparable generally with that within the exemption provided by section 203(b)(8). However, our jurisdiction over foreign commerce extends only to the portion thereof performed within the United States, and it does not appear that the exemption provided to section 203(b)(8) can properly be claimed for any operation conducted in part in a foreign country, or stated another way, that the commercial zones contemplated by section 203(b)(8) include any territory beyond our own borders.”

In effect, this determination required carriers operating between border twin-cities to obtain certificates of public convenience and necessity from the I.C.C. even though they met the criteria established by that body to determine commercial zones. The mere fact that part of the operation was conducted in a foreign jurisdiction was deemed sufficient to take them out of the commercial zone exemption.

Enforcement of this ruling, however, appears to have been sporadic, and the issue was considered again in Peter Verbeem v. United States of America. In reversing the prior finding in Ex Parte No. M.C. 37, supra, Levin, D.J., concluded that the exemption in question is clearly directed “to relieving the Commission of the burdensome and highly expensive task of regulating purely local cartage operations. It is common knowledge that the United States borders at Mexico and Canada are dotted with ‘twin-cities’, one of which is on each side of the border. No reason appears why the regulation of purely local cartage between such cities would be any less burdensome to the Commission, or more important to the economy of this country, than the regulation of cartage between Kansas City, Kansas and Kansas City, Missouri, or between New York City and Newark, New Jersey.”

Since Verbeem a carrier operating between “contiguous” municipalities has been exempt from the necessity of proving public convenience and necessity for purely local movements regardless of whether the municipalities are located in separate jurisdictions. This was not true, however, for “commercial zones”. The regulations pursuant to which such zones were determined continued to speak of municipalities “within the United States”. Thus, while local operations between Detroit-Windsor were exempt, the two cities being “contiguous” 9 doubt

5. 46 M.C.C. 665 at 686-687.
7. Ibid., at 434.
9. On this point see Ed Goyeau Contract Carrier Application, 8 M.C.C. 359 at 360. For a
existed as to the status of such cities as Fort Erie, Ontario-Buffalo, New York and Sarnia, Ontario-Port Huron, Michigan.

It was not until the Commission’s decision in *Rio Grande Border Municipalities—Commercial Zones and Terminal Areas; Ex Parte No. MC-37* that this matter was clarified. There the Commission noted that

“... by its own clear terms, the statutory partial exemption bespeaks of operations in both interstate and foreign commerce. It is inconceivable that the framers of the statute could have envisaged anything other than applicability of this provision equally to wholly local operations across national borders, for wholly local foreign commerce could not be performed in any other manner.

It is clear, therefore, that ‘the transportation of passengers or property in interstate and foreign commerce ... within a zone adjacent to and commercially a part of ... [a] municipality’ must comprehend wholly local operations across national borders, in essentially the same manner as such international operations are comprehended within the phrase ‘the transportation of passengers or property in interstate or foreign commerce ... between contiguous municipalities.’”

Subsequent to this decision the references to municipalities “within the United States” were deleted from the Federal Regulations.\(^1\)

Difficulties associated with 303(b)(8), however, continued to plague the I.C.C. While it was conceded that operations in foreign commerce were subject to the Commission’s control, and while *Verbeem* and *Rio Grande* established the applicability of 303(b)(8) to municipalities located at the border, the question still remained as to the I.C.C.’s authority over that portion of operations that extended into a foreign country.

One of the grounds for the Commission’s decision in *Ex Parte MC-37* had been the I.C.C.’s belief that its jurisdiction extended only to that portion of foreign commerce that was performed within the United States.\(^2\) Similarly, Levin, D.J., had recognized in *Verbeem* “that the Commission is not concerned with purely Canadian operations.”\(^3\)

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\(^2\) 1969 Federal Carriers Cases ¶ 36,321 at 36,321.01 May 7, 1969.

\(^3\) See 34 F.R. 9870, June 26, 1969.

\(^{10}\) *Op. Cit.* at 686.

\(^{13}\) *Op. Cit.* at 435.
Past decisions of the I.C.C. appeared to confirm this viewpoint. In *Bridgeways, Inc., Extension of Operations—Alternate Canadian Routes* an American carrier sought authority to transport general commodities from the cities of Port Huron and Detroit over highways in Ontario to Buffalo and Niagara Falls, New York. The applicant, it should be noted, already possessed regular route authority to serve these points wholly within the United States. If successful, however, some 105 miles would be cut off each trip. While recognizing that such commerce was clearly transportation in foreign commerce as defined in the Act, the application was denied on the basis that the Commission's jurisdiction went only to that portion of the undertaking performed within the United States and that "we are without jurisdiction to authorize applicants to operate over highways not within the United States."  

Similarly, in *Nadeau Transport Limited, Extension—Ground Pulpwood* the Commission refused to limit the proposed service from specific points in Canada on the ground that "although the traffic originates at only two Canadian origin points, our jurisdiction extends only to the international boundary, and we see no need on this record to restrict the grant herein to traffic originating at specific points beyond the confines of the United States."  

What the Commission seemed to be saying was that it would not look beyond operations within the United States when considering the grant or denial of authority. On the basis of this reasoning and making use of the commercial zone exemption, certain carriers attempted to argue that no authority need be obtained for the movement of goods in foreign commerce where such movement originated or was destined for a point entirely within a zone located at the international boundary. Their reasoning ran as follows: "... no authority is necessary to perform a motor-carrier service between Buffalo and Fort Erie, Ontario, Canada, or points on the United States-Canadian boundary, since this involves transportation in foreign commerce between contiguous municipalities and is partially exempt under section 203(b)(8) of the Act ... that operations beyond Fort Erie take place entirely in Canada, and that this

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14. 47 M.C.C. 359 at 361.
15. 72 M.C.C. 385 at 388. Similar pronouncements as to the scope of I.C.C. authority can be found in *Independent Motor Carriers, Inc., Common Carrier Application*, 26 M.C.C. 519 at 523; *MacKenzie Coach Lines, Inc. Common Carrier Application*, 27 M.C.C. 224 at 225; and *Smith Transport, Limited, Common Carrier Application*, 27 M.C.C. 533 at 534.
phase of the operation cannot be considered by this Commission in determining whether through transportation service is involved . . .”

The particular operation involved in the above proceeding concerned the movement of goods between the international boundary line on the Peace Bridge and “a point on the public highway at the Peace Bridge Plaza at Buffalo” where the freight or vehicles were interchanged with United States carriers.

Defendant’s contention was decisively rejected. The Commission noted that it had “frequently considered the transportation situation in a foreign country, in determining whether authority should be granted, or is necessary, to conduct that portion of a through operation in foreign commerce taking place within the United States. Moreover, the I.C.C. in Reid Transports, Ltd., Common Carrier Application had determined that the 203(b)(8) exemption did not apply “to transportation which is part of a continuous movement to or from a point outside the zone, even though the movement beyond the zone limits be within a foreign country.” The operation under review was transportation “‘under a common control, management, or arrangement for a continuous carriage or shipment’, from and to points in Canada beyond the Buffalo commercial zone . . . and therefore falls within the exception to the 203(b)(8) exemption . . .”, and requires an appropriate certificate of public convenience and necessity.

Fess indicated that the Commission was prepared to consider operations within a foreign country when determining whether the full regulatory controls of the I.C.C. applied. Proof of public convenience and necessity would have to be established for undertakings in foreign commerce that extended beyond the confines of a recognized commercial zone even though such operations penetrated the United States for only a short distance to a point where interline could be achieved.

In many respects, the jurisdictional setting in Canada parallels that which exists in the United States. From a constitutional point of view, control over motor vehicle operators engaged in international transportation falls clearly within the purview of the federal government. Such works are encompassed by the exceptions enumerated in section

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17. 63 M.C.C. 342 at 346.
92(10) of The British North America Act. The relevant portions of that Act read as follows:

"92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated, that is to say, —

10. Local Works and Undertakings other than such as are of the following Classes: —

(a) Lines of Steam or other Ships, Railways Canals, Telegraphs, and other Works and Undertakings connecting the Provinces with any other or others of the Provinces, or extending beyond the Limits of the Province."

Any doubt that existed as to the scope of this provision has been dispelled by the decision of the Judicial Committee of the Privy Council in Attorney-General for Ontario and Others v. Israel Winner and Others. 19

The federal government, however, deemed it advisable to adopt the individual provincial transport boards constituted in each province in exercising this authority. This was affected through the passage of The Motor Vehicle Transport Act. 20 That Act stipulates that:

"3. (1) Where in any province a licence is by the law of the province required for the operation of a local undertaking, no person shall operate an extra-provincial undertaking in that province unless he holds a licence issued under authority of this Act.  

(2) The provincial transport board in each province may in its discretion issue a licence to a person to operate an extra-provincial undertaking into or through the province upon the like terms and conditions and in the like manner as if the extra-provincial undertaking operated in the province were a local undertaking."

It should be noted that in considering applications under authority of this Act, the various Boards sit as federal bodies. For the purposes of the Act, an extra-provincial undertaking is defined as a "work or undertaking for the transport of passengers or goods by motor vehicle, connecting a province with any other or others of the provinces, or extending beyond the limits of a province." 21 The Act is deemed in force in a province upon proclamation by the Governor in Council 22 and the Governor in Council maintains the power to "exempt any person or the whole or any part of an

21. Ibid., s.2(b).
22. Ibid., s.7.
extra-provincial undertaking or any extra-provincial transport from all or any of the provisions of this Act." At the present time, the Act is in force in all ten provinces and the two territories of Canada.

The M.V.T.A. has created considerable confusion. Rather than one federally appointed board or commission overseeing for-hire operators in extra-provincial undertakings, there exists an independent board in each province. Furthermore, while in general these boards require a finding of public convenience and necessity, there is no uniform standard by which this is measured. The degree of proof necessary in order to obtain a licence may vary depending on where the application is brought. Moreover, a carrier who wishes to engage in transportation in more than one province is required to make application before each provincial board within whose jurisdiction he wishes to operate. A favourable finding in one province is no guarantee that a similar conclusion will be arrived at in another or by the I.C.C. This imposes additional burdens on any company contemplating entering the field of international traffic.

In addition, there exists a divergence of judicial opinion on the question whether an extra-provincial licence is required where a carrier merely wishes to partake in an international movement that originates entirely within a province but is destined to a point outside that province. Section 3(2) of the M.V.T.A. speaks of licences to operate an extra-provincial undertaking "into or through the province", but fails to mention operations "out of" the province. The Manitoba Court of Appeal in Re Kleysen’s Cartage Co. Ltd. and Motor Carrier Board of Manitoba has held that "having regard to the history of the legislation, an extra-provincial undertaking must obtain a licence from the Motor Carrier Board of the Province into or through which it goes and it does not require a licence for its extra-provincial operations from the Province in which such traffic originates." 24

In contrast, the Ontario High Court in Regina v. Canadian American Transfer Ltd. arrived at the opposite conclusion. 25 Wells, C.J.H.C., was "unable to share the view of the majority in the Manitoba Court of Appeal... an extra-provincial undertaking is not limited to connections between the Provinces but is also applied to situations where the undertaking involves going into some other jurisdiction and is contained in the words 'extending beyond the limits of a province'. Section 3 of the statute is quite clear that where a licence is required by the law of the

23. Ibid., s.5.
province for the operation of a local undertaking that no one shall operate an extra-provincial undertaking in that Province unless he holds a licence issued under the authority of this Act. With respect, it would seem to me that the word 'through' also covers a transport into a foreign country from some point in Ontario. It is necessary for the exporter to drive through the Province of Ontario to the international border and I can see no reason why it should not apply to that as well as to the entry to a Province on the other side. . . . "28

Subsequent to this judgment, leave to appeal to the Court of Appeal of Ontario was denied.27 Thus, as far as Ontario is concerned it would appear that extra-provincial operations out of the province require a licence under the M.V.T.A. At the same time it would appear that Kleysen is still governing in the province of Manitoba. This anomalous situation could be corrected by a final determination of the issue by the Supreme Court of Canada. The same objective might be achieved through implementation of Part III of the National Transportation Act.28 However, while Part III was declared in force as of May 15, 1970, the provisions of that Part only apply to persons or extra-provincial undertakings exempted under section 5 of the M.V.T.A.29 To this date the power under section 5 has not been widely implemented. Furthermore, as a practical matter, it is doubtful that a great deal of international transport escapes economic regulation by this means. The fact remains that a carrier must obtain authority at one end of his line-haul or the other. For the most part, extra-provincial operations are subject to economic and safety regulation whether they move "into or through" or "out of" a province.

For a more detailed examination of the exercise of control over for-hire operations in Canada we turn now to an examination of current practices in the Province of Ontario. Under the terms of the Public Commercial Vehicles Act and Regulation 503,28 the Ontario Highway Transport Board has been empowered to oversee commercial motor vehicle operating authorities. The Board, it should be noted, does not issue licences but furnishes a certificate of public necessity and convenience to


29. See above p. 11.

the Minister of Transport who may then issue a licence in accordance with the terms of the Board’s certificate. The discretion referred to in section 3(2) of the *M.V.T.A.* would appear, thus, to reside with the Minister in Ontario. As Laidlaw, J.A., remarked in *Re Reimer Express Lines Ltd.* ""‘Provincial transport board’ as defined by s.2(h) of the Act means ‘a board, commission or other body or persons having under the law of a province authority to control or regulate the operation of a local undertaking’. It follows at once from my conclusion that the Minister of Highways has authority under the law of the Province of Ontario to control or regulate the operation of a local undertaking, that he is empowered by the *Motor Vehicle Transport Act* to issue a licence to a person to operate an extra-provincial undertaking into or through the province."

From a practical point of view applications made pursuant to the *M.V.T.A.* are subject to the same general requirements as intra-provincial operations. In considering the application for leave to appeal in the *Reimer* case above, Laidlaw, J.A. was of the opinion that "it could not have been the intention of Parliament in passing the *Motor Vehicle Transport Act* in 1954, that there should be a distinction made in respect to a local carrier and an application in respect of a carrier seeking a licence to carry on an extra-provincial undertaking." An applicant seeking to obtain a grant of authority to conduct motor carriage to or from points in Ontario and points in a state or states of the United States must be prepared to prove public necessity and convenience at a public hearing where other carriers whose interests may be affected can be present to object.

For the purposes of regulation, the Ontario Board’s concept of foreign commerce appears broader than that expressed by the Interstate Commerce Commission. The difficulty experienced with commercial zone exemptions has not found its counterpart in the province. There are no provisions respecting such zones in the *M.V.T.A. The Public Commercial Vehicles Act*, on the other hand, exempts from regulation commercial vehicles confined in their operation to one urban zone, but defines an urban zone as "an area consisting of one urban municipality and lands adjacent thereto and within a distance of three miles therefrom but does not include any part of any other urban municipality."

32. 9 D.L.R. (2d) 42 at 46 (1957).
34. *Op. cit.*, sections 1(i) and 1(m). The three mile provision does not apply to Metropolitan Toronto.
and other border twin-cities are considered separate urban municipalities and carriers wishing to operate between them must possess appropriate authority from the Ontario Board.

Grants of authority from both the I.C.C. and the O.H.T.B. are normally confined to points within their respective jurisdictions. A typical certificate from the Ontario Board would authorize the carriage of goods to the international boundary at specific border crossing points for furtherance to points in the United States of America as authorized, and return. Similarly, the I.C.C. generally takes the view that its jurisdiction "extends only to the international boundary" and does not restrict its grants to named points in Canada.\textsuperscript{35} It must be understood, however, that the principles of "res judicata" or "stare decisis" do not apply to the decisions of either agency and both have deviated from this practice on occasion.\textsuperscript{36}

In Ontario, a licence may be restricted to named points within the United States as the result of some agreement reached between the parties to the hearing. The I.C.C. in \textit{N.J. Matlock Common Carrier Application}, while acknowledging that the "fact that the grant of authority made herein does not specifically refer to service to and from points on the international boundary should not be construed as an attempt on our part to regulate that portion of the proposed operation which will be conducted over Canadian highways" , nevertheless issued a certificate permitting service between Seattle, on the one hand, and Fairbanks, Alaska, on the other.\textsuperscript{37} A much broader principle was announced in \textit{John Kostek Common Carrier Application}. In its determination, the Commission concluded that "so long as applicant here utilizes the highways of the United States to engage in an operation in foreign commerce, he is subject to our jurisdiction and, of necessity, may be limited by the terms of any authority granted even as to the points which may be served beyond the border."\textsuperscript{38}

From a practical point of view, however, the exercise of extra-provincial jurisdiction by both the I.C.C. and O.H.T.B. is more the result of agreements and arrangements made between the parties to a hearing than a conscious attempt to interfere in each others affairs. More important from the standpoint of the flow of international traffic is the fact that a

\textsuperscript{35} See \textit{Nadeau Transport, op. cit.}

\textsuperscript{36} Ontario denials are always given without prejudicing the right to reapply. On the American viewpoint see \textit{Baltimore & Annapolis Railroad Co. v. Red Star Motor Coaches, Inc.}, 44 M.C.C. 243.

\textsuperscript{37} 81 M.C.C. 497 at 501.

\textsuperscript{38} 64 M.C.C. 813; 11 Federal Carriers Cases, ¶ 33,330.
certificate from the I.C.C. authorizing service to a point located on the international boundary encompasses the port of entry at such point and a carrier so certified may serve the international boundary.\textsuperscript{39} Thus, a carrier authorized to serve Buffalo as part of an authorized route between Buffalo and New York City could also serve the international boundary at Buffalo. It would appear, however, that such service must be a "specific incident" to the carrier's line-haul service and that the carriage of traffic originated or interlined at Buffalo for furtherance to points in Ontario is precluded.\textsuperscript{40}

In contrast, a certificate issued by the Ontario Board authorizing service, for example, from Toronto to Windsor does not include the right to serve the international boundary at Windsor and carriers wishing to perform such service must obtain the necessary authority from the Board.

One other factor affecting the movement of goods across the border and the need for operating authority will be briefly mentioned here. This concerns the statutory exemptions for certain types of commerce by motor carrier. The Public Commercial Vehicles Act of Ontario defines a public commercial vehicle in such a manner so as to exempt from the requirement of obtaining a certificate of public convenience and necessity "a commercial motor vehicle or trailer used only for the transportation from a farm or forest of goods other than live stock and milk that are products of such farm or forest".\textsuperscript{41} Provisions in the Interstate Commerce Act are much broader. Section 203(b) exempts from certification the operation of school busses, taxicabs, farm vehicles used to transport produce to and from the owner's farm, vehicles operated by agricultural cooperative societies, transportation incidental to air, and more important vehicles carrying ordinary livestock, fish, agricultural and horticultural commodities.

A detailed discussion of what constitutes an exempt operation is beyond the scope of this paper. The important point, for our purposes, is the fact that the broad provisions in section 203(b) enable an Ontario carrier carrying such goods to operate within the United States without obtaining I.C.C. authority. In the opposite direction, an American trucker who is

\textsuperscript{39} Kingsway Transports Limited—Purchase—Charles A. Kuhns Delivery, Inc., 85 M.C.C. 287 at 300.

\textsuperscript{40} Red Star Express Lines of Auburn, Inc. et al. v. Maislin Brothers Transport Ltd., 1969 Federal Carriers Cases, ¶ 36,320. See also Eugene Menard and Theresa Menard Common Carrier Application, 67 M.C.C. 365 at 366-367; Consolidated Freightways Inc., Extension—Seattle, Wash., 74 M.C.C. 593 at 596-597. Compare the Kingsway case cited above that distinguished both Menard and Consolidated, 85 M.C.C. 287 at 299-300.

\textsuperscript{41} Op. cit., section 1(i).
not required to obtain a certificate from the I.C.C. for the carriage of the same goods within the United States is faced with the necessity of proving public convenience and necessity if he wishes to operate within the province.

In conclusion, it may be said that unless a carrier meets the requirements of one of the exemptions mentioned above, a grant of authority from both the I.C.C. and applicable provincial board in Canada is required for for-hire operations between the two nations. Furthermore, there is no assurance that a favourable finding by one agency will be followed by the other. In each case it is necessary to prove public convenience and necessity according to the standards and criterion demanded by the particular body you are applying to.

So far we have been concerned with entry control as administered by the I.C.C. and Canadian authorities. In both jurisdictions, however, there exist other considerations that bear heavily on the movement of goods between the two countries. Under the Interstate Commerce Act, carriers involved in foreign commerce must meet the prescribed requirements in respect of insurance, the designation of an agent of service of process, provisions covering maximum hours of work of employees, and safety of operations and equipment. Tariffs must be filed, published and posted in a manner determined by the Commission, and the Commission has the power “to reject any tariff filed with it which is not in consonance with this section and with such regulations.” The Commission may require annual, periodic or special reports from all motor carriers and “shall at all times have access to and authority, under its order, to inspect and examine any and all lands, buildings, or equipment of motor carriers . . . and shall have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents of any person controlling, controlled by, or under common control with any such carrier, as the Commission deems relevant to such person’s relation to or transactions with such carrier.”

In addition, Canadian carriers operating in the U.S. are subject to the federal highway use tax. Furthermore, a Canadian company engaged in

42. Matters in relation to qualifications and maximum service of employees and safety and operation of equipment have been transferred to the Department of Transport. See Public Law 89-670, October 15, 1966.
43. Ibid., § 317.
44. Ibid., § 320.
45. See John Munro, Trade Liberalization and Transportation in International Trade, Vol. 8, Canada in the Atlantic Community, University of Toronto Press, 1968, p. 155. Note, this tax is applicable on the purchase of a state plate. Quebec has reciprocity with New York State and a carrier from that province operating in the state is not subject to this levy.
trans-border operations, and using Canadian employees in the United States may find itself liable for unemployment and social security taxes under the Federal Insurance Contributions Act. While enforcement of these provisions has been sporadic, and union practices have done much to eliminate the use of Canadian drivers in the United States, it is still possible for a firm to face the imposition of this tax on all wages that can be attributed to employment in the United States. A recent decision of the Court of Claims has declared that an employer is subject to F.I.C.A. taxes "irrespective of what percentage of employee's total service" takes place within that country. 44 In essence, this amounts to a form of double taxation in that Canadian carriers make full contributions to the Canada Pension Plan and Unemployment Insurance scheme.

American domiciled carriers encounter similar difficulties when operating into Canada. As with the case of entry control, the practices in effect in Ontario will be used to illustrate some of these matters. As previously mentioned, the provisions of the Public Commercial Vehicles Act and Regulation 503 are applied, in general, to applications for extra-provincial authority. Thus, while non-resident carriers are permitted to obtain insurance from an authorized insurer located in the state of their residence, the same limits apply as those required of intra-provincial operators. 45 However, all persons to whom an extra-provincial operating licence for the transportation of goods is issued shall be exempt from compliance with Section 13, 14, 15 and 16 of Regulation 503 made under The Public Commercial Vehicles Act if bills of lading in the form required in the province from which the shipment originates are used and a copy of such bill of lading for each shipment is carried on the vehicle." 46 These sections relieve the carrier from requirements covering conditions that must be included in every bill of lading and conditions "deemed to be a part of every contract for the transportation of goods for compensation". Section 24 in respect to Tariffs of Tolls is similarly deemed not to apply to extra-provincial operations and rates and charges for the transportation of goods must be filed in the manner prescribed in section 25 to 29 regardless of the number of vehicles possessed by the licensee.

Two other provisions of Regulation 503 have an impact on United States carriers operating here. Section 20 empowers the Board to examine "all books, records and documents used in connection with the business of the holder of an operating licence". Under Section 21, applicants seeking

47. Regulation 503, section 17(1) and 17(3).
48. These conditions appear on the back of every "x" license.
operating authority are required to file with the Department "a certificate of the Workmen’s Compensation Board certifying that he has provisionally complied with The Workmen’s Compensation Act." While section 20 is seldom enforced, even in respect to domestic carriers, section 21 has the effect of requiring a carrier resident in the U.S. to maintain two systems of compensation for employees.49

Moreover, the Ontario Corporations Act requires a foreign corporation doing business in Ontario to register and obtain an extra-provincial licence.50 Furthermore, under the provisions of the Motor Vehicle Fuel Tax Act, 1965, a carrier entering Ontario from another jurisdiction is subject to a tax on any diesel fuel carried in his vehicle in excess of 40 gallons.51

In addition to the above, there are customs procedures and restrictions to comply with. On the whole, it may be said that Canadian practices are more suited to the free flow of such commerce than those in existence in the United States. Goods inbound to Canada may be cleared at the border or at one of the approved inland Highway Sufferance Warehouses. The Sufferance Warehouses are a beneficial aid to the smooth flow of traffic in that they relieve congestion at the border and can offer the services of specialized customs personnel. American equipment may enter under either of two systems—the permit system or the post audit system. If proceeding under the permit system, the carriage of domestic freight is prohibited. Under the post audit system, the carriage of domestic freight that is "directly incidental to the international movement of the vehicle" is permitted but such freight can only be loaded once inbound and once outbound.52 The term "directly incidental" would appear to encompass the movement of international freight from Buffalo to Toronto and the carriage of domestic freight from Toronto to Hamilton if the carrier is picking up a load for transport to the United States in Hamilton. It should be noted, however, that this provision does not apply where a carrier is hauling a U.S. trailer into Ontario under a "transferable plate". Transferable plate certificates issued by the Ontario Highway Transport Board restrict such movements to international freight only.53

Under both Canadian and United States regulations, vehicles carrying international freight may enter duty free. Furthermore, in the United

49. This does not apply in transit operators.
51. Statutes of Ontario, 1965, c. 76, s. 11.
52. See Customs Memorandum D-3, June 28, 1967.
53. For a discussion of transferable plates see below p.34.
States such vehicles may carry on their return journey domestic U.S. freight that is reasonably incidental to the vehicle’s prompt return to Canada. The major difficulty associated with U.S. border practices arises from the fact that most goods must be cleared at the border. American regulations do provide for the clearance of goods at point of destination. To do so, however, places the carrier at the mercy of local customs inspectors. Delays of two days or more are not uncommon under this scheme. The result is that trailers must be loaded in such a manner as to allow for easy inspection at the port of entry.

Further burdens facing international trucking operations between Canada and the United States arise from the various state and provincial government regulations in respect to highway use taxes, and sizes and weight limitations. These provisions are complicated and involved. By way of example a carrier who in Ontario is permitted a maximum length of 65 feet and a gross weight for a five-axle combine of 74,000 lbs. cannot operate this type of equipment in New York State where he is restricted to a length of 55 feet and a gross weight of 71,000 lbs. Again, doubles may be used in Illinois, New Jersey, Delaware, Maryland, New Hampshire and on designated highways in Michigan, but not in New York, Pennsylvania, Rhode Island, Vermont, Connecticut, Maine or the District of Columbia. The maximum allowable gross combination weight in Ontario is presently 126,000 lbs.; in Michigan, on designated highways, 136,000 lbs.; and in New York 73,280 lbs. At the same time, Ontario imposes no third structure taxes while New York levies a state highway use tax and Ohio a truck axle-mile tax. While these restrictions vary as much between the individual states as they do between the various states and Canadian provinces, they nevertheless present serious obstacles for trans-border operations.

The above illustrations are by no means exhaustive of the regulations, procedures and requirements that carriers in both the U.S. and Canada face when entering a foreign jurisdiction. They do, however, indicate the

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55. *Ibid.*, thruway exception in Massachusetts and New York.

56. The New York Highway Use Tax is imposed on trucks, tractors, trailers and semitrailers with a gross weight in excess of 18,000 lbs. In Ohio, commercial motor vehicles with three or more axles are subject to the truck axle-mile tax. See Commerce Clearing House, *State Motor Carrier Guide*, Volume 1, Taxes and Fees, ¶ 8305 and ¶ 8341.
complexities that face those who venture forth, even after operating rights have been obtained. The problems involved in meeting these various standards not only involve the outlay of significant sums of money, but are difficult for the individual carriers to administer. Taken together they do much to off-set any benefits that might be expected to flow from the ability to operate a single line-haul between the two countries.

Regulatory policy and these numerous other requirements have acted as a definite break on de-nationalizing cross-border trucking activities. Very few Americans can now provide a through service into Ontario, and while a considerable number of firms possess I.C.C. authority, the certificates that the latter hold restrict their movements to immediate border points or areas within a limited radius of such points. Typically, goods destined for points in the United States beyond the border zone are taken to the boundary by Canadian carriers where they are interlined or interchanged at the customs compound or at one of the participating carriers’ terminals. The reverse is true where the movement occurs in the opposite direction. The most common characteristic of this traffic is the two or three line haul.

To this point we have been concerned with the carriage of goods from points in the U.S. to points in Canada or from points in Canada to points in the U.S. There exists, however, a third movement of traffic that is significant for both countries. This involves traffic in transit and has been the subject of international agreement between the two nations. The General Agreement on Tariffs and Trade stipulates that:

"There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or any circumstances relating to the ownership of goods, of vessels or of other means of transport."

If entered at the proper customs house, "such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered." 37

37. See Article V, Freedom of Transit, para. (2)(3).
American practice, in general, complies with this agreement. Such traffic is not subject to full regulation by the I.C.C. While carriers must file evidence of insurance, designate an agent for service of process in each state through which they pass, and meet safety standards, no certificate of public convenience and necessity is demanded.58

In contrast, Ontario government officials originally adopted a very restrictive attitude in respect to such movements. Fearful that the province would become a U.S. truck corridor for the carriage of goods between Michigan and New York, the right to conduct in-transit operations was given very reluctantly. Indeed, it was not until 1952 that operations in transit through the province were placed on a regular, firm basis. The debate on second reading of Bill 129 was indicative of the seriousness with which the government viewed this matter. The purpose of the measure, Premier Frost noted, was “to give limited powers to the government to issue very temporary permits for travel across the province. Our purpose, of course, of this, is to limit it pretty generally to defense requirements . . . There are ways and means of meeting a situation, where we can restrict traffic, where we can get paid for it, and where we can set the days and times.”59 The acting Minister of Transport took a similar view. He assured the House “that the regulations will be very strict . . . that they will require to have a licence to operate in Ontario, and they will also have to pay the gasoline tax on the amount of gas it is estimated would be used on that journey.” He reminded the Legislature that the amendment was temporary and could be brought “to a very sudden end at any time, if they do not live up to the regulations.”60

The class “L” licence that emerged was a very confined one. It authorized the carriage of goods in transit through Ontario between the states of Michigan and New York but only over the route or routes specifically spelled out in the licence. The maximum number of trips permitted on any one day was limited, and operations “on a holiday, after 12 noon and on Monday, Tuesday, Wednesday, Thursday or Friday preceding a holiday; or on a Saturday after 12 noon, during the period from and including the 1st day of April to and including the 31st day of October” were prohibited.61

Over the years there has been a steady erosion of these restrictions. It

60. Ibid., F2-3.
would now appear that the test of public convenience and necessity for a
class "L" licence will be met by proof that the applicant has been
authorized by the federal government to carry goods in bond, and that the
Interstate Commerce Commission "has approved of the said applicant
operating public commercial vehicles between areas in appropriate
relationship to the proposed route through Ontario." The appropriate
bond and cargo and liability insurance must be carried, and the routes
that may be used are still prescribed. A fixed charge is levied per trip and
"L" licences must be renewed on an annual basis. However, operations
are now prohibited only on holidays.44

Indicative of this new flexibility is the increase both in licensees and
number of trips made since these operations were authorized. In 1953, 21
licensees made a total of 12,050 trips. By 1970 the corresponding figures
were 74 licensees and 63,400 trips.45 Moreover, the vast majority of
applications for "L" privileges are not the subject of public hearings. Of
15 such applications made in the years 1967 and 1968, 14 were considered
in chambers.46 Furthermore, all 15 applications were granted. The fears
and apprehensions present in 1952 would appear to have been largely
allayed.

II

The above discussion completes our analysis of the parameters in which
for-hire trucking across the Canada-United States boundary operates. As
we have seen, there are very few matters on which legislation and control
in one jurisdiction compliments that in effect in the other. This applies at
all levels—from the obtaining of the licence, to size and weight limitations
on vehicles, and the incidence of fees, permits and highway taxes. We turn
now to a more detailed appraisal of government policy in respect to these
movements.

Generalizations concerning the approach and policies followed by the
regulatory agencies when considering applications for trans-border rights
are extremely difficult to make. Cases may be found and statements cited
that clearly contradict one another. It must be remembered, however, that
these agencies are expected to operate with great flexibility when bringing
their expertise to bear on the issues before them. In the words of Mr.

62. Ibid., s.3. See also certificate issued to Ringle Express, Inc. dated June 8, 1970.
63. O. Reg. 70/65. For the purposes of regulation, the term "holiday" includes Sundays.
Justice Fortas, they "do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adopt their rules and practices to the Nation's need in a volatile changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday". 66

Nevertheless, a review of I.C.C. findings indicates a willingness on the part of the Commission to look at the proposed operation in its entirety when reaching a decision on an application involving international transport. On more than one occasion it has gone beyond the principle expressed in the Nadeau case and considered factors in addition to those which affect the United States side of operations only. 67 This was true in the Kostek case cited above. 68 Moreover, contrary to what John Munro indicates in his book, Trade Liberalization and Transportation in International Trade, the rationale expressed in Clarke Robertson's Transportation Limited, Extension—Petroleum Products, was followed on re-examination in Joseph Balazs Sr., Common Carrier Application. 69 As Commissioner Murphy stated, "while we are well aware that our regulatory jurisdiction does not extend beyond the borders of the United States, we, of necessity must look to the overall substance of the proposal, that is, both the interstate and foreign aspects, in order to determine whether authority within the United States is required and, if so, to what extent. For to deny an application without giving any consideration to the totality of the proposal could leave foreign consignees helpless if the traffic is destined to points beyond our border and where, as here, none but the applicant can meet shippers reasonable transportation requirements." 70

To the same effect was the decision of Division I in Imperial Truck Lines, Inc., Common Carrier Application. There the Commission rejected the contention of respondents that it could not consider any portion of the operation taking place beyond the boundaries of the United States and concluded that "we have frequently considered the transportation situation in a foreign country in determining whether authority should be granted, or is necessary, to conduct that portion of a through operation in foreign commerce taking place within the United States." 71

67. See above p. 7.
68. Ibid., p. 16 and Consolidated Truck Lines, op. cit. at 676.
69. Munro, op. cit. p. 144-5 and 98 M.C.C. 522.
70. 98 M.C.C. 522 at 527.
71. 1968 Federal Carriers Cases, ¶ 36,188 at 36,188.01.
The facts of each individual case and the class of service proposed would seem to play a more significant part in the determination of the Ontario Highway Transport Board. On occasion the Board had recognized the advantages of a single line haul. In Maislin Transport Incorporated the Board found that public necessity and convenience required such service despite evidence that the applicant was in serious financial difficulty. 72 More recently; in the application of A.J. (Archie) Goodale, the Board was “inclined to agree with Mr. Sommerville’s* argument that a through service is of considerable benefit to the public.”73

It should be remembered, however, that at the time of the Maislin application there was only one other carrier authorized to provide a similar service, and that the Goodale proceeding involved the very specialized “K” type carriage “for the transportation of heavy-duty machinery, boilers, transformers and similar equipment that require special loading devices and cannot be carried on a standard truck, trailer or semi-trailer.”74

The Board’s recent decision in the application of Roberval Express Ltee. is, perhaps, more indicative of its approach to this question.75 There the Board concluded that to grant the application to establish a through service between points in the province of Ontario and points in the province of Quebec would be tantamount to its going on record “that interchange of trailers and transfer of goods no longer has a place in the transportation complex of this country”.76 Indeed, before both the I.C.C. and Ontario Board, it would seem that an applicant has a duty to show that interline or interchange facilities are unsatisfactory before “through” rights will be conferred.

In recent years, two decisions of the Ontario Highway Transport Board have dealt with applications to provide extensive through service between the United States and the province. Transamerican Freight Lines Incorporated concerned the grant of authority to carry general commodities from points in the United States to all major points in southwestern Ontario.77 Hearings on the issue were conducted over an extensive period of time, and the application was opposed by most of the

74. Regulation 503, op. cit., s. 2(1)(9).
76. Ibid., p. 2.
major carriers of international traffic. In its decision the Board made the following remarks. It recognized that "primarily when one talks about international freight moving by truck we are faced with a transfer problem at the border" and that "the time in transit on freight moving between southern Ontario and major eastern United States points has been highly excessive." These delays, declared the Board, could not be attributed solely to the time consuming function of clearing customs. The flexibility available to domestic industry on intra-provincial services, it concluded, was "not being provided by the transportation industry on the movement of international freight between the United States and Canada", and it was "difficult to escape the fact that southern Ontario and especially the eastern portion of the United States are closely integrated in an economic sense and a significant public benefit could be achieved by providing for a more efficient movement of goods between these two major economic areas."

For these reasons, the Board granted the application in substantially the terms applied for. The decision, however, was appealed by the respondents to the Ontario Cabinet. The Cabinet, to this day, has yet to render a final determination in the matter and no vehicles have run under this authority.

Of equal interest is the fate of the Application of Automobile Transport, Inc., et al. This application was brought shortly after the conclusion of the Canada-United States Auto Pact and concerned the carriage of wheeled vehicles for and on behalf of the Ford Motor Company from points of entry on the international boundary to points in the Province of Ontario. In this proceeding the Board once again recognized that "a single line service is preferrable to one in which interlining with a connecting carrier is required," but noted that "other factors, however, have to be considered which may or may not out-weigh, the benefits which the public, including the transportation industry, will derive from a through single line service." One of these factors was whether Canadian carriers would be able to obtain "Interstate Commerce Commission authority to operate in the United States, and if so, would the various State requirements make it impossible for them to operate within the United States without a large financial outlay?"

Moreover, the Board found that "whereas damages and delays inevitably occur in

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78. Ibid., p. 4-5.
79. Ibid., p. 7.
81. Ibid., p. 3-4.
any motor vehicle transportation system, the damage and delays are not of such proportion as to warrant the change of the present policy of having American carriers operate in the United States of America, and Canadian carriers operate in the Province of Ontario. This policy would appear to be in line with that of the Interstate Commerce Commission policy, whereby very few Canadian carriers can penetrate beyond the municipalities of the international boundary. 82

The fate of these two applications would tend to indicate an overly restrictive policy on the part of Ontario officials. The temptation to draw such a conclusion, however, should be tempered by some practical considerations. The references to I.C.C. practices quoted above were only part of the considerations entertained by the Board in arriving at its conclusion to deny the application of Automobile Transport. At the time of the hearing, the impact that the Auto Pact would have on the economy of the province and the effect on presently licenced carriers was far from clear. In addition, Ford's two main competitors, General Motors and Chrysler, had not voiced any criticism of the present scheme. Moreover, the Board was of the opinion that with better use of "transferable plates" and more cooperation between shippers and carriers the deficiencies encountered by the company could be overcome. 83 In view of the Board's policy to consider each case on the particular facts before it and in the absence of further evidence, it would be unjustified to raise the fate of these two cases to the position of principles of general application.

From a more positive point of view, the provision by the Ontario government for the issuance of transferable plates has contributed greatly to the smooth flow of goods from the United States into the province. A carrier wishing to obtain these plates must make application to the Board. As a general rule, only one such plate will be granted for every five power units registered by the applicant. 84 Possession of the plates allows the holder to hook on to an American trailer and haul that trailer into Ontario without the trailer being subject to further licence or carrier fees. Problems associated with the physical transfer of freight at the border are, thus, eliminated. No similar scheme exists in respect to Canadian trailers entering the U.S. In the calendar year 1969 some 44,713 U.S.-owned trailers moved to and from the border by this means. 85 The major drawback to this scheme is that such movements are restricted to the

82. Ibid., p. 5.
83. Ibid., p. 4-5.
84. See Vice-Chairman Kingsmill's remarks in the Application of Andres Bell Construction Ltd. Decision dated November 15, 1967.
carriage of international freight only, and the pick-up and delivery of domestic goods is prohibited.

Even if the ability to provide a single line service were achieved, the international trucker would still face the prospect of dual registration fees. This results from the fact that only very limited reciprocity agreements are in effect between Ontario and the various states in the United States. Under Section 10 (e) of Ontario Regulation 227 tractors or semi-trailers registered in a reciprocating state and owned by a resident of such state are exempt from registering in the province when operating within 20 miles of the point of entry between Michigan and Ontario or between points of entry located in the Niagara Frontier. For all other border points the exemption is 10 miles. Michigan, on her part, permits Ontario trailers to operate within an area extending 8 miles beyond the city limits of Detroit, Port Huron and Saulte Ste. Marie. The corresponding exemption in New York is 10 miles. These agreements, however, do not apply to power units. In addition to the above, all three jurisdictions exempt from registration commercial vehicles, trailers or combinations thereof transporting objects and materials used in cultural or artistic exhibitions provided the sole object of such presentations is not financial gain. With these exceptions, any substantial through operation requires full licensing of equipment in both the home jurisdiction and point of destination.

This situation, however, will be radically changed when Ontario's new vehicle registration scheme comes into operation April 1, 1971. The new plan will do away with registration fees for trailers. Regulation 227 has been amended by Ontario regulation 19/71 and now provides

"10(a). Where a trailer is being operated into or out of Ontario and displays a valid registration plate issued by another province or state or where the owner is in compliance with the provisions of the law of the province or state in which he resides in respect to registration of trailers, the trailer is exempt from registration."

Transferable plates will no longer be required and U.S. trailers will be permitted free entry into the province.

The most recent detailed discussion of international for-hire transportation between the two countries can be found in Ex Parte MC-

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88. Ibid., and Regulation 227, S10 (f)(iii).
89. In this regard, it should be remembered that widespread agreements exist between the various states that provide for some form of reciprocity in respect to registration fees.
73. This was a proceeding instituted by the I.C.C. to consider whether "public convenience and necessity considered on a national basis, require that all common carriers of property by motor vehicle, regardless of their country of origin, be authorized by appropriate procedures to conduct for-hire operations between ports of entry on the United States-Canadian and the United States-Mexican international boundary lines, on the one hand, and, on the other, the nearest practical point in the United States at which such carriers' equipment or traffic may be interlined or interchanged with carriers subject to this Commission's jurisdiction." It should be noted that it was not the intention of the I.C.C. to de-regulate international carriage but merely to overcome the inhibiting affect of the Fess decision referred to above. The Commission's concern centered on the border area and its immediate environs only. Authority for extensive penetration of the United States would still have to be established in the usual manner.

Some 42 parties from both Canada and the United States made submissions in this matter. Of these, thirty-seven registered their opposition to the proposed rule. The most common arguments employed were that the Commission lacked authority to institute such a proceeding; that the delays that did occur at the border were due entirely to customs procedures; that adoption of the proposal would tend to increase the number of carriers in international service, add to the present congestion and further hinder the flow of freight; and that the rule should not be adopted without assurance that Canadian authorities would reciprocate. In short, it was alleged that there had been no complaints from shippers or receivers in respect to international traffic and that existing interline facilities and arrangements were quite adequate to handle present demands for service. Customs regulations, labour union restrictions, equipment restrictions and licensing requirements were all looked on as more important impediments than the need for certification.

90. Transfer of Equipment or Traffic at or Near Ports of Entry on the United States-Canadian and the United States-Mexican International Boundary Lines, 110 M.C.C. 730 at 731.

91. Ibid., p. 732-733.

92. See initial statements of Maislin Bros. Transport Limited and joint statement of Bulk Carriers Limited, Control Transport Inc., Inter-City Trucking Service, Inc., Liquid Cargo Lines, Ltd., Ogden & Moffet Co., and Overland Express Ltd.

93. Ibid., see also the joint statement of Consolidated Truck Lines Limited, Direct Winters Transport Limited, Inter-City Truck Lines Limited, and Canal Cartage (1968) Limited.

94. Ibid., and statement of The Niagara Frontier Tariff Bureau, Ex Parte MC-73, p. 752-753.
In determining that the adoption of the proposed rule was unwarranted, the Commission made the following remarks. It did not feel that the difficulties “allegedly met by carriers in foreign commerce” could be remedied by the agency, and noted that the “many delays in crossing the border admittedly are caused, not by the transfer of lading from one trailer to another, but from the time consuming processes of thorough customs inspection.” Those that might have been expected to benefit most by the new rule had been singularly lacking in participating in the proceeding. Only a single shipper and “one Canadian carrier had filed a statement in support of the proposal.” The only conclusion possible was that no “substantial adverse effect is being or will be suffered by the motor carrier industry or by any other interested party under the present scheme of regulation.”

The Commission was mindful of the fact that “traffic cannot today cross our international borders as easily as it can cross state lines” and that “it is in the public interest to foster international trade between this country and our neighbours.” Nevertheless, carriers wishing to operate in foreign commerce would still be required to comply with the “applicable rules of practice and procedure, including the filing of certificates of shipper support, and a showing of fitness and public convenience and necessity.”

The submission and findings arrived at in Ex Parte MC-73 serve to underline the conclusion that there does not appear to be any intense demand by the carriers themselves—both Canadian and American—for extensive through rights. This view is supported by the fact that very few broad applications involving such grants have been made to either agency. Moreover, despite the numerous controls and regulations facing trans-border trucking operations, it would seem that more and more freight is moving across the boundary by this means. In terms of dollar value, the percentage of domestic exports moving from Canada to the United States by motor vehicle has shown steady growth in recent years. In 1964 this mode accounted for 22.6% of all such exports. By 1968 this percentage had grown to 37.1%.

In addition, some of the larger carriers of international freight have found it convenient to purchase subsidiary operations within a foreign jurisdiction. While both the I.C.C. and Ontario Board have power to control such transactions, there are no prescriptions forbidding acquisitions of motor carriers by non-residents in the statutes and

regulations governing either agency. Under the Interstate Commerce Act, Canadian purchases of American firms are subject to the same standards as domestic transactions.\textsuperscript{97} Similarly, the Ontario Board has never exercised its powers under sections 4 and 5 of the Public Commercial Vehicle Act to prevent an American concern from establishing a base in the province on the grounds of nationality.\textsuperscript{98} Direct Winters Transport Limited, Canadian Freightways Eastern Limited, and Wallace Transport Co. Limited are examples of trucking operations in Ontario that are the products of purchase by large United States concerns. The Overland Express Limited, on the other hand, has wholly-owned subsidiaries in the states of Michigan and New York.

It seems clear that an efficient through service cannot be achieved through the efforts of any one agency or the change in any single piece of legislation. While on occasion it has been recognized in both the United States and Canada that single line service is preferable to two or three line haul, and that goods moving internationally face impediments not associated with interprovincial or interstate traffic, neither the I.C.C. nor the Ontario Highway Transport Board has been able to effect any significant improvement in present practices. Their remedial power goes only part way to solving this problem. With the host of other laws and regulations impinging on trans-border trucking, and with present carriers content to leave things as they are, it is doubtful that any significant changes will be effected in the near future. Full implementation of Part III of Canada's National Transportation Act would simplify the present regulatory structure in Canada, but at the present time the government's intentions in this regard cannot be evaluated. In the final analysis, it may be that the costs and restrictions imposed by state and provincial rules and regulations are more important barriers to international for-hire transportation than the policies and procedures followed by the various regulatory bodies. Until such time as sufficient information is available to weigh all of these factors, the effect of wholesale deregulation cannot be conclusively determined.

\textsuperscript{97} On this point see Ryder Truck Lines, Inc.—Control and Merger—Harris Express, Inc., 104 M.C.C. 328 at 332-333.
\textsuperscript{98} Public Commercial Vehicles Act, op. cit.
COMMENT

IN-FLIGHT LIQUOR SERVICE: A DILEMMA OF SOVEREIGNTY

BY JEANNE POLLETT*

Service of intoxicating liquor aboard commercial passenger aircraft in interstate (or international) flight gives rise to questions that test the delicate line of sovereignty between state and nation. Yet courts and administrative bodies have scarcely touched on the problem of whether a state’s liquor laws may validly be extended ad coelum.

A third of the states (Arizona, Florida, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan, Montana, Nebraska, New Mexico, New York, South Carolina, Texas, Utah, Virginia, Washington) have by statute made some effort at controlling in-flight liquor service, by license or otherwise. Of these, South Carolina by statute1 and New Mexico under an opinion of the state attorney general2 refrain from attempting to extend their restrictions to aircraft in interstate flight.

Even those states imposing licensing requirements seemingly make no effort to enforce their liquor statutes in toto by requiring airline personnel and passengers to comply with diverse regulations—hours of sale, size of containers, service by licensed bartenders—while an aircraft crosses state lines and time zones, and even hopscotches between wet and dry counties. Any attempt at literal compliance with the myriad of state laws and even county ordinances conjures a vision of monumental madness comparable only with a Marx Brothers movie. Yet the practical difficulty of enforcement does not answer the question of the right of enforcement.

If the matter be one of federal jurisdiction, applicable regulations are a far cry from the detailed liquor laws of most states. Regulations of the Federal Aviation Administration provide simply:

(a) No person may drink any alcoholic beverage aboard an aircraft unless the certificate holder operating the aircraft has served that beverage to him.

(b) No certificate holder may serve any alcoholic beverage to any person aboard any of its aircraft if that person appears to be intoxicated.

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1. CODE OF LAWS OF SOUTH CAROLINA § 4-83.
2. ATT’Y GEN. OPS. 435 (1956).
(c) No certificate holder may allow any person to board any of its aircraft if that person appears to be intoxicated.

(d) Each certificate holder shall, within five days after the incident, report to the Administrator the refusal of any person to comply with paragraph (a) of this section, or of any disturbance caused by a person who appears to be intoxicated aboard any of its aircraft.3

The juridical vacuum has its origin in the unique wording of the Twenty-first Amendment, which, following language repealing the Eighteenth, provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Is consumption of liquor in the airspace over a state “use therein” within the meaning of the amendment?

Aircraft have been found to be “within” the state whose airspace they occupy, however fleetingly, for purposes of service of process,4 forfeiture proceedings,5 and, to at least a limited extent, control of traffic.6

The question of jurisdiction over the airspace was left unanswered when Congress by statute declared the United States possesses and exercises “complete and exclusive national sovereignty in the airspace of the United States” to the exclusion of other nations.7

The House Committee on Interstate and Foreign Commerce, in a report on 1961 legislation broadening the Federal Aviation Act to cover hijacking and certain other acts committed aboard aircraft,8 treated airspace as being within the concurrent jurisdiction of the underlying state and the federal government for purposes of the criminal law. The committee viewed the problem as being primarily a practical one of enforcement. Its report states in part:

[C]rimes committed in the airspace over a State pose peculiar and extremely troublesome problems of enforcement which are not present when such crimes take place on the ground. When a criminal moves the scene of his activity to an aircraft in flight he is able to take advantage of practical and physical difficulties that may

3. 14 C.F.R. § 121.575.
6. Erickson v. King, 15 N.W. 2d 201 (Minn. 1944).
seriously impair effective apprehension and prosecution, particularly if the offense is one against the law of a State rather than against Federal law. Furthermore, in the case of offenses against State law, State officials are often faced with an insuperable task in trying to establish that a particular act occurred in the airspace over that State—and in some cases, under State law, it would be necessary to prove that the offense was committed over a particular county in the State. It is obvious that such proof may be very difficult and often impossible if the offense is committed on a jet aircraft traveling at 600 miles per hour at an altitude of 30,000 feet. . . .

We wish to emphasize that it is not our intent to divest the States of any jurisdiction they now have. This legislation merely seeks to give the Federal Government concurrent jurisdiction with the States in certain areas where it is felt that concurrent jurisdiction will contribute to the administration of justice and protect air commerce.9

An analogy to the problem of in-flight liquor service may be sought in Foppiano v. Speed,10 which upholds the power of the state to exact a license fee as a condition of the right to sell intoxicating liquor over the bar of a steamboat navigating interstate waters.

Yet is air traffic truly analogous? May a plane flying miles above the earth, perhaps never touching down within the state, be likened to a river craft? Judge J. Smith Henley, in Grace v. MacArthur, supra, suggests otherwise:

It may be conceded, perhaps, that a time may come, and may not be far distant, when commercial aircraft will fly at altitudes so high that it would be unrealistic to consider them as being within the territorial limits of the United States or of any particular State while flying at such altitudes. . . ."11

Prof. Joseph H. Beale12 suggests the upper air may be likened to the sea, and jurisdiction accordingly divided:

The analogy of the superjacent air to the border seas is a close one; and the same boundary of jurisdiction should be fixed. In all that concerns the peace and safety of the subjacent land and in the regulation of all aerial acts that do not have to do with navigation of

10. 82 S.W. 222 (Tenn. 1904), aff'd 199 U.S. 501 (1905).
11. Supra note 4, at 447.
the air and the communication of intelligence, the jurisdiction of the state within whose vertically prolonged boundaries the air lies is complete. The state, however, has no jurisdiction to interfere with the peaceful commerce of the air, or with the purely internal affairs of passing aircraft.

The question of sovereignty has been perhaps most squarely put—and most frankly avoided—in a motion before the Civil Aeronautics Board in the case of Capital Airlines, Inc. v. Northwest Airlines, Inc. Capital complained that its competitor unfairly advertised in-flight liquor service, and served liquor, over states where such practice was forbidden by statute.

The Chief of the Office of Enforcement had decided action on the complaint would not be in the public interest. He noted the case involved resolution of a multiplicity of state and local laws, as well as the question of jurisdiction, and “policing of such aircraft for possible violations would, as a practical matter, be well nigh impossible.”

The C.A.B. agreed, holding the matter to be peculiarly within the province of the state courts. The crucial question of sovereignty was relegated to a footnote: “Of course, there is also involved the question of whether State prohibition laws may be made applicable to operations of aircraft in the navigable air space over such States.”

The Attorney General of Texas, in a 1968 opinion directed to the Texas Liquor Control Board, relied in part on the 1961 report of the House Committee on Interstate and Foreign Commerce (supra) to conclude that the state possessed jurisdiction over its airspace, that it might exercise police powers therein where the powers had not been granted to nor assumed by the federal government, and that in-flight liquor sales therefore were unlawful under state statutes then in effect, without regard to whether a particular flight originated or terminated within or beyond the state’s boundaries. (Texas has since adopted a licensing statute."

The dilemma may perhaps be resolved by application of the rule in United States v. Causby, a landmark decision turning upon the extent of the property owner’s right in airspace. The court in the Causby case divided the airspace into a lower zone in which private property is permitted and in which one may assume state law applies, and an upper zone where the rights of the federal government are paramount."

15. TEXAS PENAL CODE Article 666-15.
17. For a comprehensive discussion of the historical antecedents and the impact of
Such a division for purposes of liquor control is suggested by DeForest Billyou:

The liquor laws of the several states are most diverse, and highly individualistic, and, it is fair to say, the service of liquor on board aircraft in such airspace does not, and probably can not, comply with the diverse regulatory pattern of state liquor laws. . . .

Isn’t the appropriate and complete answer, and one which should add to the cheer of the weary traveler, that aircraft in the airspace over the United States are in an area where the federal government possesses and exercises “complete and exclusive national sovereignty,” an area that is not part of any state; that there exists, by force of federal statute, “a public right of freedom of transit through the navigable airspace of the United States” in behalf of any citizen of the United States; and that the delivery or use of intoxicating liquors in such area cannot be subjected to regulation by the laws of any state of the United States?

Such an answer admittedly would do violence to the concept of dual jurisdiction implicit in the report of the House Committee on Interstate and Foreign Commerce, supra. Yet until this solution or another be reached, the question of jurisdiction over in-flight liquor service will continue to present in microcosm the whole problem of federal-state sovereignty in the skies.


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Questions concerning the Competition may be addressed to the Editor-in-Chief, The Transportation Law Journal, Osgoode Hall Law School, York University, Toronto, Canada.

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SIZE AND WEIGHT COMMODITIES—JANUARY 1971

BY THOMAS E. JAMES

With the exception of applications for new operating authority and rate proceedings, one of the principal areas of controversy which has repeatedly been before the Interstate Commerce Commission and the courts in recent years has been the question of what services may be provided and what products may be transported by a so-called "heavy hauler" or "size-and-weight" commodity carrier. What traffic may or may not be transported by heavy haulers and the facts and circumstances which must exist in order for such carriers properly to transport any given item are far from resolved. The purpose of this presentation is to explore the background surrounding heavy hauling authorities and to examine the constructions which have heretofore been made.

With the advent of regulation, the Commission was authorized under Section 204(c) of Part II of the Interstate Commerce Act to establish just and reasonable classifications of motor carriers as the special nature of the services performed by such carriers required. In Ex Parte No. MC-10,¹ the Commission defined carriers of heavy machinery to include both common and contract carrier motor carriers engaged in the hauling of heavy machinery and equipment, including road machinery, structural steel, oil field rigs and oil field equipment and noted that these commodities were grouped together because of the equipment required and the nature of the services performed. The Commission observed that certain auxiliary or accessorial services were performed in the transportation of the involved commodities and that shipments of heavy machinery and similar equipment moved to, from and between unlimited origins and destinations within the territory served by such carriers, over irregular routes, in either direction, outbound or inbound, or in cross-haul movements. Various phraseology has been used in the issuance of heavy hauler operating rights. In recognition of the inconsistencies in the wording of its prior grants of heavy hauling authority, the Commission, in Ex Parte MC-45, again considered the services provided by heavy haulers and its recent decisions relative to the wording of grants of authority designed to authorize the performance of a complete heavy hauling and rigging service and found that the commodity description,

"Commodities, the transportation of which because of size or weight requires the use of special equipment, and of related

¹. Ex Parte No. MC-10, Classification of Motor Carriers of Property, 2 M.C.C. 703 (1937).
machinery parts and related contractor's materials and supplies when their transportation is incidental to the transportation . . . of commodities which by reason of size or weight require special equipment”

would, for the future, be a just and reasonable classification of the commodities which fall within the scope of service of the heavy haulers. A review of the wording of heavy hauling authorities as to the services authorized thereunder will indicate that there are four critical words in the size and weight authorization. These are “commodities”, “transportation”, “requires”, and “special equipment”. Where appropriate, each of these will be mentioned hereinafter.

I. Interpretations Prior To The Moss Decision

A. “Transportation” and the Twilight Zone

Consideration of heavy hauling authority also necessitates consideration of the operating authority of general commodity carriers. Generally, the operating authority of general commodity carriers authorizes the transportation of general commodities, except those requiring the use of special equipment. In 1948 in the Gallagher case, the Commission pointed out the difficulty in wording a commodity description sufficient to confine the operations involved to those normally conducted by heavy haulers and riggers as distinguished from those conducted by common carriers of general commodities. Gallagher held that the term “transportation” as used in a certificate authorizing the transportation of “commodities the transportation of which, because of size or weight, requires the use of special equipment . . .” included the services of loading and unloading and that a carrier holding size and weight authority could transport a shipment which required special equipment for loading or unloading even though the shipment was transported on a flatbed trailer. Subsequently, in Berk Contract Carrier Application, decided in 1949, it was held that a heavy hauler could transport a shipment which was transported on an ordinary flatbed trailer, if it was loaded or unloaded with special equipment, even though such loading and unloading was performed either by the consignee or

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consignor. Prior to the *Gallagher* case, the general commodity carriers had considered that the restrictions in their certificates against the use of special equipment ran solely to over-the-road equipment and not to the methods of loading and unloading of freight. The propriety of general commodity carriers transporting shipments which require special equipment for their loading and unloading was drawn in issue in 1951 in the *St. Johnsbury Trucking Co.* case which recognized that there was an overlap or "twilight zone" which existed between the authorities of heavy haulers and general commodity carriers whose certificates contained the usual restrictions against the use of special equipment. In the *St. Johnsbury* case the Commission held that it did not intend to preclude the use of modern devices for the economical and expedient loading, unloading and handling of freight. The wording of the respective authorities of the general commodity carriers and heavy haulers was there explained as being intended to restrict each class of carrier from invading the field of service of the other, but not being intended to preclude either type of carrier from the transportation of specific commodities which might rightfully fit either type of service. In that respect, the *St. Johnsbury* case recognized that there is an overlap of commodities which may move either in heavy hauler service or general commodity service. In *National Automobile Transporters Assn. v. Rowe Transfer,* decided in 1955, the Commission clarified the so-called "twilight zone" by holding that:

"Where the commodity in question 'requires' special equipment or special services for loading or unloading, or both, and only ordinary vehicular equipment for the over-the-road portion of the transportation, such commodity (1) is within the authority of a heavy hauler irrespective of whether or not the heavy hauler is required to provide such loading and unloading equipment or service, and (2) is within the authority of a general-commodity carrier whose authority excepts 'commodities requiring special equipment' provided the loading or unloading or both which necessitates the special equipment is performed by the consignor or consignee, or both."

Subsequently, the question arose as to whether the "twilight zone" theory that applies between heavy hauler certificates, on the one hand, and, on the other, general commodity carrier certificates which are

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restricted against the handling of commodities which require special equipment, also applies between heavy hauler certificates, on the one hand, and, on the other, certificates which authorize the transportation of specific commodities and which contain a restriction against the handling of size and weight commodities. For example, carriers holding specific authority to transport commodities such as agricultural machinery with a restriction against the transportation of commodities requiring special equipment have asserted that under the "twilight zone" theory they may transport such agricultural machinery which can be transported by ordinary vehicular equipment but which requires special equipment to load or unload, or both, if such loading or unloading services, or both, as the case may be, are provided by the shipper or consignee. In Daily Express, Inc., Extension—Concrete Forms and Rings from Boston, Mass., Operating Rights Review Board No. 1 refused to extend the "twilight zone" concept to include specific commodity carrier certificates which are restricted against the transportation of commodities requiring special equipment. The basis of such holding was that heavy hauling restrictions in general commodity certificates relate to the equipment that the carrier may use because no one particular class of commodities is specified in such authorities to which the limiting "special equipment" phrase can be related, but that in the case of a carrier holding specific commodity authority there is a particular class of commodities to which the limiting "special equipment" phrase can be related. Operating Rights Review Board No. 1 then held that the effect of a restriction against the transportation of commodities requiring special equipment in a grant of operating authority served to preclude the holder thereof from handling any article which because of its size or weight requires the use of special equipment, regardless of whether the special equipment was provided by the carrier or by someone else. Subsequent to the Daily Express case, Review Board No. 2, in Jenkins Truck Line, Inc., Extension—Monmouth, Illinois, disapproved the holding in the Daily Express case as it related to extending the "twilight zone" concept to apply in connection with specific commodity authorities which are restricted against the handling of special commodities and held that the rationale of National Automobile Transporters Assn. v. Rowe Transfer, supra, applied equally to the division of authority between haulers of specified commodities and


heavy haulers. Petitions for leave to intervene and petitions for reconsideration were filed in the Jenkins case, supra, on behalf of numerous heavy haulers who asserted that the position of the Daily Express case relative to the extension of the "twilight zone" concept should be preserved, and the Jenkins case was then consolidated with the proceeding in Herr's Motor Express, Inc., Extension—Wheeling Steel, for disposition by Division 1, which held in its decision that a "twilight zone" does exist between heavy hauler certificates and specific commodity certificates which are restricted against the transportation of commodities requiring special equipment. Petitions for a declaration of general transportation importance in the Herr's Motor Express case were denied. The effect of the decision in the Jenkins case is that a carrier which holds authority to transport specific commodities subject to a restriction against the transportation of size and weight commodities may transport an article requiring special equipment that falls within its specific commodity authority so long as the carrier involved is not required to supply special equipment to load or unload the shipment and does not use special equipment for its transportation.

B. Special Equipment

St. Johnsbury Trucking Co., Inc., Extension—Heavy Hauling, supra, summarizes prior decisions as to what constitutes "special equipment" as follows:

"We come now to the term 'special equipment.' At the outset, let us say that there can be no question about the meaning of these words as used in the Gallagher case. There they mean special equipment necessary for the loading and unloading of the vehicle of the heavy hauler and are used as a means of identifying the commodities which the heavy hauler may transport . . . .

"The term, 'special equipment,' has been interpreted to be 'vehicles designed to transport articles which, because of their unusual weight, size or bulk, were not susceptible to loading or unloading in ordinary van-type vehicles' but 'not of a particularly unusual design . . . provided with winches to assist in the loading and unloading operations or assembly,' and with 'sides for the accommodation of articles of extraordinary dimensions, such equipment . . . not ordinarily provided on the commonly known van-type unit,' Davidson Transfer & Storage Co. Com. Car. Application, 32

M.C.C. 777; 'vehicles . . . equipped with various types of loading devices for use in the handling of unusual articles,' Belyea Extension of Operations—Heavy Machinery, 24 M.C.C. 745; and in Gallagher Common Carrier Application, 48 M.C.C. 413, ordinary flat-bed vehicles were held to be not special equipment. In Petroleum Carrier Corp. v. Black, 51 M.C.C. 717, the term 'special equipment' was said to be 'unequivocal,' and in that case stress was placed upon 'type of service'—an important if not the principal determining factor in establishing the commodity scope of the operating authority . . . .

"In Gallagher Common Carrier Application, supra, hereinafter called the Gallagher case, what appears to be a fourth element or factor was discussed, and that is the requirement of special equipment for loading and unloading . . . ."

". . . .

". . . At any event, the use of equipment such as winches and cranes for loading and unloading is unquestionably one of the services which comprise the complete holding out of the so-called 'heavy hauler' carrier. However, in the prior report in the instant proceeding we carried this element or factor one step further and, as heretofore noted, concluded that the special equipment exception prohibits the transportation of commodities which, by reason of size or weight, requires the use of cranes or other mechanical devices for loading or unloading. The effect of this conclusion was to make cranes or other loading devices 'special equipment' and it brings into issue the question of whether the use of such devices is a function exclusive to the 'heavy hauler' and not a part of any other type of service.

"It was not, however, until our determination of Steel Transp. Co., Inc., Extension—Wisconsin, 44 M.C.C. 835, decided February 3, 1945, that there was any intimation that the use of cranes, derricks, or other hoisting machinery for loading, unloading, or both, might constitute the use of special equipment. In appendix A to that report there is contained a list of iron and steel articles which generally require specialized handling . . . and in that report we pointed out that we had not previously defined the term 'special equipment,' insofar as the transportation of iron and steel is concerned, but that it comprises such equipment not generally used by general commodity carriers which 'do not utilize as ordinary equipment such devices as pole-trailers, special bulkheads, racks, dollies,
cradles, and other devices designed to enable long, rigid or semi-rigid articles to be transported around curves.

"... Special equipment as it relates to vehicles includes winch-trucks and trailers, low-bed carry-alls, crane trucks and trailers, and any other vehicle including flat-bed vehicles, especially designed for the transportation of articles of exceptional size, shape, or weight, or which have attached as a part of the vehicle any type of mechanical loading device except the ordinary tai-gate lift, and the restriction in the authorities of general-commodity carriers against the use of special equipment relates to and includes such vehicles..."

In its decision in Ex Parte MC-45, Descriptions in Motor Carrier Certificates, supra, the Commission considered the term “special equipment” and generally approved the holdings and discussions relative thereto in the St. Johnsbury Trucking Co. case, supra. In addition to its holding in the Gallagher case, supra, the Commission also held that flatbed trailers were not special equipment in Dallas & Mavis Forwarding Co., Extension—Galion, Ohio.11 Neither permanent nor portable loading ramps are special equipment.12 The observations of the Court in Moss Trucking Company v. United States,13 illustrate some of the uncertainty concerning special equipment. In that proceeding the Court stated that the term “‘special equipment’ is apparently an elastic phrase which changes solely with the progress made in the transportation industry.” The Court further stated that it was “unable to determine with any degree of certainty whether forklift trucks are ‘special equipment’” and observed that “perhaps size and capacity control the characterization...”.14 The Commission has made clear its intention not to deny the use of modern devices for the economical and expedient loading, unloading and handling of freight to any class of carrier.15 In its decision in the Ace Doran case16 the Commission observed that in contrast to the limited interpretation

placed upon "special equipment" as it relates to over-the-road equipment, the term "special equipment" had been found to cover virtually every mechanized device employed in the loading and unloading process. This expression of the Court in the Moss case illustrates one of the problems inherent in the size and weight commodity description and that is that as technology changes and improves transportation equipment, the commonly understood meaning of special equipment tends to change with the availability and usage of new or more efficient freight handling or hauling equipment. The Commission, in deciding Moss\textsuperscript{17} on rehearing, acknowledges that:

"The obvious difficulty in this area of our regulation is how to provide for equipment which may have been considered 'special' at some point in the past, but is not generally considered so today, and similarly, how to regulate impartially the movement of commodities which formerly were thought to 'require' special equipment for their handling but today may be handled in ordinary common carrier service."

This facet of heavy hauling commodity authority has not worked to the advantage of the size and weight commodity carrier.

C. "Commodity" and "Required"

The terms "commodity" and "required", as used in heavy hauler certificates, are so closely related that they will be considered together. Initially, it must be said that special equipment must be required to transport a shipment before such shipment can be construed to be included in the operating authority of a heavy hauler. The Commission has held that the individual components of a shipment rather than the shipment as a whole must be considered in determining whether the commodity involved requires special equipment; that a carrier authorized to transport commodities requiring special equipment may not bring a load of non-size and weight commodities within its scope of operations by loading such commodities on a unit of special equipment; and that, insofar as size and weight authority is concerned, the term "required" cannot be ignored. Jones Trucking Co., Extension—The Dakotas.\textsuperscript{18} "The fact that mechanical hoisting devices are convenient in putting the individual units high enough to obtain a maximum load is immaterial", since the Commission is "concerned only with the individual units in

\textsuperscript{17} Moss Trucking Co., Inc., Investigation of Operations, 103 M.C.C. 91, 105. 
\textsuperscript{18} Jones Trucking Co., Extension—The Dakotas, 62 M.C.C. 539 (1954).
making a determination as to whether special equipment is required," Hove Truck Line v. Eldon Miller. In its 1959 decision in Dallas & Mavis Forwarding Co., Extension—Galion, Ohio, supra, the Commission enunciated the proposition that a "last resort test" rule should be established whereby single-unit items weighing 15,000 pounds or more would be considered to be within the authority of heavy haulers regardless of whether such units or items could be loaded or unloaded under their own power and regardless of the type of vehicle used for the transportation service in those instances in which after applying all the usual tests, the authority of a heavy hauler to transport such a single-unit item remained in doubt. This so-called "last resort test" was thereafter affirmed by the Commission in Dillner Transfer Co.—Investigation of Operations and similarly was affirmed by the Courts. Thereafter, the Commission held, in United Transports v. Gulf Southwestern Transp. Co., that any item weighing over 15,000 pounds was presumed prima facie, not as a last resort, to be within the operating authority of a heavy hauler. In reversing the Commission's decision in the United Transports v. Gulf Southwestern Transp. Co. case, supra, the Court held that the test adopted by the Commission established a different test from that formerly applied by the Commission and resulted in an enlargement of the Gulf Southwestern authority in a manner not prescribed by law. The Court further stated that "if the words 'special equipment' as used in the certificate in question mean anything, and it observed that obviously they do, it is that Gulf Southwestern as a so-called heavy hauler is only authorized to transport commodities which require the use of special equipment . . . ." (Emphasis added.) In light of the holding in United Transports v. Gulf Southwestern, the Commission abandoned the 15,000-pound test, and the majority of heavy haulers applied for and received authority to transport self-propelled articles weighing 15,000 pounds or more when transported on trailers.

Insofar as the "commodity" to which reference must be made to determine whether the transportation service is within the scope of a heavy hauler is concerned, Division 5 stated, in its decision in Johnson Common

Carrier Application.\textsuperscript{26} that the test is "whether the commodity or commodities severally are such as to require the use of special equipment for loading and unloading or over-the-road transportation, or both." The decision in Johnson further holds that the permits and certificates issued by the Commission grant authority to transport commodities as distinguished from shipments and concludes that the individual commodity or commodities to be transported, as contrasted to a shipment in the aggregate, must be within the scope of a heavy hauler. An exception to the rule in the Johnson case was established in the instance of bundles or aggregated products in Black—Investigation of Operations.\textsuperscript{27} Among the commodities involved in the investigation of the respondent's operations in the Black case were shipments of 100 sheets of sheet steel weighing 3,000 pounds and aggregated on a skid or pallet, described as Shipment No. 47; a shipment consisting of ten pallets of tin plate having a total weight of 29,734 pounds, referred to as Shipment No. 48; a shipment consisting of one skid of galvanized flat sheets of steel weighing 1,936 pounds, described as Shipment No. 87; and a shipment consisting of four bundles of flat aluminum sheets weighing 16,367 pounds, described as Shipment No. 88. Shipment No. 47 was automatically stacked on the pallets, banded by hand, loaded and unloaded by crane or heavy duty forklift, and this was the shipper's customary manner of handling and selling its products. The Bureau of Law admitted that Shipments Nos. 48, 87 and 88 were within Black's heavy hauling authority and that there was insufficient evidence to establish that Shipment No. 47 differed materially from the three previously mentioned shipments. The basis of the Bureau of Law's admission is stated in its brief as follows:

"Aggregating such shipments would seem to be necessary to enable them to be handled commercially, particularly to avoid their being dented, bent, and otherwise damaged. In the case of this particular type of commodity we think the aggregated package should be considered 'the commodity itself' within the meaning of the Johnson case, and within the respondent's authority to transport 'articles requiring special equipment.'" (Emphasis added.)

The decision in the Black case established an exception to the rule announced in the Johnson case, supra, in connection with bundled or aggregated commodities, as follows:

"With respect to the bundles of sheet metal here involved, we think

\textsuperscript{26} Johnson Common Carrier Application, 61 M.C.C. 783 (1953).
\textsuperscript{27} R. Q. Black—Investigation of Operations, 64 M.C.C. 443 (1955).
bundling was required by the inherent nature of the commodity. Single sheets are unstable, subject to bending or other damage, and, having in mind their size, awkward or impossible to handle without bundling. In the case of sheet tinplate, at least, bundling would also seem to be required as protection against damage to the coated surface of the sheets, and the same is true, to a lesser extent, with respect to the rather soft aluminum sheets. Examination of the facts concerning this method of handling convinces us that the bundling is done, not merely for economy and efficiency, but because it is required by the inherent nature of the commodity. When bundled, the commodities are too heavy to handle without the use of special equipment, and we therefore conclude that these four shipments were within respondent's authority to transport 'articles requiring special equipment.' . . ."

Thereafter, in 1959, in *W. J. Dillner Transfer Co.—Investigation of Operations*, 28 the Commission made clear its intention to construe the *Black* exception within its strictest limits, stating that "only under unusual circumstances may aggregation or bundling result in a situation where such commodities may thereby be recognized as requiring special equipment." In addition, insofar as it relates to palletized or bundled commodities, the Commission held the *Black* decision to be a special exception to the long recognized general rule which looks at the commodity itself, which is not applicable when bundling is done for economy and efficiency, and the mere act of the shipper in tendering a particular size bundle or pallet was held not to be controlling. Insofar as it relates to bundled or palletized commodities, the *Dillner* case holds:

"[1] In bundling, aggregating or palletizing, it should be the general rule of construction (1) that the individual 'commodity itself' is the controlling consideration as respects a carrier's authority; (2) that the limited exception which the *Black* case, 64 M.C.C. 443, represents, where commodities are bundled for protection or as otherwise required by their 'inherent nature,' must be maintained within its strictest limits; (3) that the minimum bundle which is required by the 'inherent nature' of the commodity is the size or type of bundle which must be considered in any determination whether necessity exists for the use of special equipment; and (4) that in order reasonably to maintain these limits it shall be presumed, in the absence of a sound basis for concluding to the contrary, that the

commodities tendered to carrier, in bundles or aggregations, are within the general rule and not within the limited exception thereto;

"[2] Heavy haulers, insofar as bundled or aggregated commodities are concerned, may transport only those which fall within the narrowly excepted group as described . . . next above;

"[3] The usual type general-commodity carrier may transport bundled commodities within the excepted group set forth . . . above only when loaded or unloaded by the consignor or consignee in accordance with the doctrine of the Rowe case, but the general-commodity carrier may transport other types of bundled or aggregated commodities so long as they are transported on ordinary equipment . . . ."

The Commission's holdings in the Dillner case were affirmed by the courts on appeal. 29

II. THE MOSS CASE

In 1963, three proceedings were begun which were to result in the Moss case 30 which is one of the recent landmark decisions involving heavy hauling.

The Aetna Freight Lines Investigation 31

In February of 1963 an investigation was instituted by the Commission into the operations of Aetna Freight Lines, Inc., of Warren, Ohio, to determine whether Aetna had been transporting various commodities, including steel plates, steel sheets, steel coils, steel bars and steel beams, beyond the scope of its operating authority. Aetna held authority to transport heavy machinery, contractor's equipment and steel articles fabricated beyond the primary stage and requiring specialized handling or rigging because of size or weight. The investigation concerned fifty-six representative shipments of steel articles, many of which consisted of a number of individual pieces which had been aggregated and shipped in or on skids, packages, lifts and bundles. All of the shipments were transported on flatbed trailers and were loaded by the consignor and

unloaded by the consignee through the use of cranes, except in a few instances in which the shipments were loaded or unloaded by lift trucks which were owned and operated either by the shipper or receiver, whichever was involved. Some of the shipments consisted of individual commodities and some consisted of aggregated commodities. Insofar as individual commodities were concerned, the shipments consisted of six shipments of steel forgings and one shipment of steel mill rolls, each ranging in weight from 450 to 3,007 pounds; two shipments of steel pipe on which the individual pieces of pipe in the respective shipments weighed 355 and 656 pounds each; shipments of coils of tinplate weighing over 8,000 pounds each; shipments of steel coils which ranged in weight from 11,950 pounds to 39,700 pounds each; shipments of steel plate and rolled sheet steel which ranged in weight from 1,071 to 8,530 pounds each; shipments of structural steel on which each piece weighed over 15,000 pounds and was over eighty feet long; shipments of steel beams which measured over fifty feet long and which varied in weight from 2,208 pounds to 10,572 pounds each; and shipments of steel beams which ranged from 671 to 5,888 pounds each. The aggregated commodities consisted of shipments of tinplate which, as aggregated, weighed from 1,576 pounds to 3,109 pounds per package or skid; a shipment of packaged sheet steel weighing 5,636 pounds and on which the individual sheets weighed 120 pounds and measured 48 inches by 100 inches; a shipment of two bundles of sheet steel weighing 7,980 pounds each, with each sheet involved weighing 257 pounds and measuring 60 by 144 inches, and two bundles of steel bars which weighed 9,485 pounds per bundle with each bar in the bundle measuring sixteen feet in length and weighing 231 pounds; a shipment of six bundles of steel sheets weighing 8,814 pounds with each sheet weighing approximately 756 pounds; a shipment of steel sheets in lifts of 8,288 pounds with each sheet weighing 881 pounds and measuring 72 by 140 inches; and a shipment of forty flat long steel bars which were bundled into bundles of 5,824 pounds each. Fifty-five of the described shipments of individual commodities and aggregated commodities, which were found to have been aggregated because of their inherent nature, required special equipment for their loading and unloading and were held to be within the scope of Aetna's operating authority. Of the fifty-six shipments involved, only one shipment consisting of sixteen bundles of steel bars on which each bar measured two inches square, ranged from eight feet to eight feet, nine inches in length and weighed approximately 113 pounds but which weighed 2,516 pounds per bundle, was found to have been transported outside the scope of Aetna's operating authority. A petition for reconsideration of the Commission's decision in the Aetna
case was filed by one of the intervening carriers and, on February 8, 1966, the Commission reopened the proceeding to deal with "the related heavyhauler problems".

The Aero Trucking Case

On February 21, 1963, Aero Trucking, Inc., of Oakdale, Pennsylvania, filed an application with the Commission seeking either a declaration by the Commission that its size and weight authority authorized it to transport aluminum billets and ingots, including those weighing from six to fifty pounds each, when wrapped in bundles on pallets which had an average weight of 2,000 pounds each, or that its operating authority be extended to permit it to transport such commodities within the territorial scope of its existing authority. The hearing examiner concluded, in his report and recommended order, that Aero's existing size and weight authority authorized it to transport the involved commodities. By its Report of October 29, 1964, Operating Rights Review Board No. 2 dismissed the application as to ingots or billets weighing 1,000 pounds or more because their transportation was authorized by Aero's existing size and weight authority. As to ingots and billets weighing from six to fifty pounds, Review Board No. 2 found such commodities not to be within Aero's size and weight commodity authority, concluding that there was nothing inherent in the nature of such commodities so as to require palletization, and further found that no need existed for an extension of Aero's authority. Aero's petition for reconsideration was denied, and on April 22, 1964, Aero sought review of the Commission's decision in an action filed in the United States District Court for the Western District of Pennsylvania. In its decision, the Court concluded that the Commission's determination that the ingots and billets weighing from six to fifty pounds were without Aero's authority was not supported by substantial evidence and ordered that the Commission's order be set aside. The following holdings of the Court in the Aero case are particularly pertinent:

"In the present case we fail to find the evidence upon which the Commission relied in refusing to apply the Black exception to the commodities in question here. The evidence to support the Black rule is substantial: the inherent nature of the commodities which required aggregation and palletization here were the varying chemical compositions and alloys of the aluminum ingots involved,

which required separation; the soft, fragile and easily abraded quality of individual ingots which required palletizing; the wrapping of the palletized packages to protect them from the corrosive atmosphere in the neighborhood of the shipper's plant; the refusal of customers to accept aluminum ingots and billets loose; and the inconvenience and expense of crating or packaging each individual ingot and billet separately in a form not acceptable to the customer.

"In arriving at its determination the Commission relies upon the possibility that these small aluminum ingots could be loaded manually. But there is no evidence in this record that they were ever so handled. . . . Applying the rule of *Dillner* to the instant case would in effect destroy the exception of the *Black* case which the Commission expressly recognized. . . .

"We feel that in adopting a standard which uses the possibility that the ingots could be individually and manually loaded, the Commission has gone beyond the bounds of reasonable practicality. . . .

"As recently as December 16, 1965, the Commission in *Aetna Freight Lines, Inc.--Investigation of Operation*. . . , Docket No. MC-C-4050, reported in 100 M.C.C. 88, 96, recognized the necessity of reasonableness in the application of the *Black* rule: . . .

"If the bare physical possibility that a commodity could be individually and manually loaded were to be adopted as the standard for determining the 'inherent nature' we see no room for any further application of the *Black* rule. We can see few, if any commodities, which are customarily offered to carriers bundled or palletized which would not be susceptible of being loaded individually if we disregard the economy, efficiency and practical necessity of bundling or palletizing. We must ignore the necessities of the shipper and the requirements and demands of the customers to reach such a result. To adopt such a standard in face of all the evidence to the contrary and based solely upon a conclusion that it is physically possible to handle these items individually, seems to us as reliance solely on a presumption, in face of uncontradicted evidence showing a sound basis for concluding to the contrary."

*The Moss Complaint*

On November 23, 1963, the Commission instituted an investigation into the operations of Moss Trucking Company, Inc., of Charlotte, North
Carolina, to determine whether Moss had been transporting commodities in interstate commerce beyond the scope of its operating authority. In its decision of May 19, 1965, Division 1 of the Commission concluded that Moss had been transporting crated aluminum tanks, wire mesh, steel beams, farm tractors and military vehicles beyond the scope of its heavy hauling authority.33 The farm tractors involved weighed 3,000 pounds and were received as import shipments at Charleston, South Carolina, from the Port Authority warehouses. Such tractors were without fuel or batteries and, when loaded on flatbed trailers, were loaded from truckbed level warehouse facilities by manually pushing such tractors onto the trailer by from three to four men or, on some occasions, such tractors were pushed onto the transporting vehicle by a small tractor operated by the warehouse from which such tractors were loaded. When Moss used double-deck trailers, cranes were necessary to load tractors on the top level. Division 1 concluded that the tractors could have been manually loaded and that the use of cranes for loading did not establish that they were required. The military cargo vehicles involved in Moss weighed from 10,000 to 13,000 pounds each, were slightly over eight feet wide and were from eleven to thirteen feet high. Some of such vehicles were operable and others had their battery cables disconnected and possibly were without gasoline. The width of such trucks was such that when loaded on a trailer the tires of such vehicles would either overhang or be extremely close to the edge of the trailer. Such vehicles were loaded through the use of overhead cranes and, because of the safety aspect, the shipping installation had never attempted to load such vehicles by driving them onto a carrier’s equipment. Division 1 concluded that the Commission’s decision in United Transport v. Gulf Southwestern Transp. Co.,34 which held that heavy hauling authority did not include authority to transport self-loading vehicles transported on regular flatbed equipment, was controlling and held that Moss’ transportation of military cargo vehicles was not authorized. The crated aluminum tanks in Moss individually weighed 273 pounds and measured 224 inches by 30 inches by 30 inches when uncrated and weighed 616 pounds and measured 232 inches by 42 inches by 45 inches when crated. Such tanks were loaded from ground level at origin by forklift or crane and unloaded at destination by crane. The rolls of wire mesh involved weighed 788 pounds each and were loaded and unloaded by crane. Division 1 concluded that the use of cranes was not required but that cranes were used only for the shipper’s convenience. Later, when the

Commission’s decision was appealed, the Court concluded that the Commission had found this transportation improper because of the implied premise that Moss had failed to establish this to be the minimum bundles required by the inherent nature of the commodity. The steel beams transported by Moss moved in connection with the rolls of wire mesh and were approximately 25 feet long, 18 inches wide and weighed less than 200 pounds. Other beams were 32 feet in length, 12 inches wide, and weighed 277 pounds. These beams were bundled and were loaded and unloaded by overhead crane. Manual loading of such items was against the shipper’s regulations. Division I concluded that crane loading of these beams was only for convenience and that special equipment was not required for their loading. Moss’ petition for reconsideration was denied and on September 24, 1965, Moss sought review of the Commission’s decision in the United States District Court for the Western District of North Carolina, Charlotte Division. On December 27, 1965, the Court sustained the Commission’s order.\footnote{Moss Trucking Company, Inc. v. United States, ___ F.Supp. ___ (1965) (1966 Fed.Car.Cases 81,793).} Though the Court sustained the Commission’s order, it observed:

“Moss strongly urges that the word ‘requiring’ in its certificate ought to be given a common sense interpretation with reference to economy, efficiency, and safety . . . . It is persuasively argued that such loading problems are no longer solved with manual labor but with fork trucks or cranes, and that it is arbitrary and capricious to interpret such a certificate without regard to the facts of life in the industry.

"Such an argument, however appealing, is fallacious. The Commission here is not concerned with economy, efficiency, or even safety; but, instead, is concerned with dividing up, consistent with the public interest, the various activities and classifications of service that go to make up the whole transportation industry. What is obviously absurd with respect to efficiency may be quite sensible with respect to drawing a line between ‘heavy haulers’ and general carriers. Such is the case here. We share Moss’ wish, as stated by a member of the Commission in a dissenting opinion, that the Commission may be able to frame its interpretations of operating authorities so that shippers and carriers will know where they stand and will not be drawn into unwitting violations. If it takes, as the dissenting member of the Commission said, ‘a Philadelphia lawyer to determine when a commodity is within the scope of the authority
of a general commodity carrier or within that of a heavy hauler; then it is indeed unfortunate. But the solution, to the extent possible, is within the provisions of the Commission rather than the courts. If the Commission's interpretation of 'requiring' is not 'right,' it is certainly not clearly erroneous."

Moss subsequently filed a petition for rehearing with the Court, relying principally upon the inconsistencies between the Commission's holdings in the Aetna case, supra, and the holdings in its decision involving Moss. On February 18, 1966, the Court opened its judgment and stayed further action pending the Commission's determination of the Aetna case.

The Moss Case on Reconsideration

In its report on reconsideration of the Moss case, supra, the Commission consolidated for disposition the Moss case, the Aero case, and the Aetna case. On reconsideration the Commission pointed out that the problem of interpreting the scope of the operating rights of heavy haulers was not a problem which could be isolated and confined to the operations of one class of motor carriers, but rather was one which bears directly upon two classes of motor carriers, the heavy haulers and the general commodity carriers, and, to a lesser degree, a third type of carrier, the so-called motor vehicle haulers. Thus, in Moss the Commission recognizes that the principal area of controversy involves the so-called "twilight zone". In recognition thereof, the Commission acknowledges that its interpretation of the phrase "requires the use of special equipment" is vital both to the heavy hauler and to the general commodity carrier. In considering the term "require", as used in heavy hauler certificates, the decision of the Commission in the Moss case follows the holding and construction given to such term by the Court in the Aero case, as follows:

"The language of the court in the Aero proceeding demonstrates clearly that our construction of the meaning of the word 'requires' has been too narrow. As the court said, in utilizing a test of bare physical possibility, we have exceeded the bounds of reasonable practicability . . . . The court in Aero, while it did not discuss the specific meaning of the word 'require', criticized the Commission's failure to give consideration to prevalent shipping practices. The court, which also decided the Dillner court case, supra, has made it plain that with respect to aggregation we may not totally disregard economy, efficiency, and practical necessity. Certainly, to say that
the use of special equipment is 'required' does not limit the basis of
that 'requirement' to physical impossibility of handling in any other
manner. Nor do we think the 'inherent nature' test as applied to
palletization represents an unmistakably clear standard.

"... The court merely finds, in construing its own decision in the
Dillner court case, that the Commission has not applied the criteria
properly. It disapproves our stringent application of the Black
exception so as to ignore the 'practical necessities' of the shippers
and receivers.

"It seems to us that what the court in Aero is saying is that more
latitude must be exercised in determining whether the use of special
equipment is required. Industry practice, while not to be the
determinative factor, must be taken into account. Not whether
manual handling is possible, but whether it is 'reasonably practical'
must assume a larger role in our determination... The court's
decision in Aero requires some modification of our views with
respect to aggregation. To say that the inherent nature of the
commodity 'requires' aggregation into pallets or bundles so large
that special equipment is needed for handling cannot be determined
from a test of bare physical possibility, but reasonable practicality
must be considered..."

In applying the more liberal construction of the term "require" in
heavy hauling certificates, the Commission first concluded that the small
aluminum ingots and billets involved in the Aero case were palletized into
bundles of such a size as to require special equipment for three reasons,
such reasons being (1) to segregate the commodities by chemical
composition and palletization was the only practical method of doing so;
(2) to guard the billets from abrasion; and (3) to protect the commodity
from corrosion, the wrapping of the commodities in polyethylene bags
was a necessity. The Commission therefore concluded that the inherent
nature of the aluminum products in the Aero case necessitated their
aggregation into pallets of such size as to require special equipment to
load and unload, and, accordingly, such commodities were within Aero's
existing authority.

Insofar as the Aetna proceeding was concerned, the Commission
affirmed the conclusions of Division 1 in the prior report as to the fifty-
five shipments there involved which were found to be within Aetna's
existing size and weight authority. As to the remaining shipment of sixteen
bundles of steel bars which were held to have been transported by Aetna in
violation of its authority, the Commission reversed the prior report and
held that shipment also to be within Aetna's authorized scope of operations. In this respect, the Commission explained its altered position as follows:

"The record establishes that the steel shipper concerned regularly tenders steel bars in bundled form and we are persuaded that its decision to do so constitutes more than a matter of mere convenience. In this regard and notwithstanding the fact that steel bars could conceivably be loaded one at a time, such handling obviously would be cumbersome, uneconomical, and primitive. Accordingly, we believe that a sound basis exists for placing the movement under the Black exception.

"The same conclusion applies to the shipment of steel bars of 16 feet length and weighing 231 pounds. The division, however, premised its conclusions on the basis that the individual bars could not be handled manually . . . . The problem then arises as to how many men a carrier might reasonably be expected to utilize for manual loading and unloading. Once again, the problem of physical possibility versus reasonable practicality comes to the fore. Obviously, a sufficient number of sturdy individuals, as the court in Moss recognized, might be able to load a very heavy item, provided the shape of that item was such that the strength of all could be utilized. Such theoretical situations manifestly do not comport with the ideal of reasonable regulation, however. In our opinion, the clear implication of the court's opinion in the Aero case is that any Commission determination that a given commodity is susceptible of handling manually should be premised upon record evidence showing that the commodity, in fact, has been or as a practical matter could be handled in that way; an abstract possibility of manual handling will not suffice."

In considering its prior decision in the Moss case, the Commission reaffirmed its prior decision that the farm tractors there involved were not included within Moss' heavy hauling authority, but reversed its prior decision as to military cargo vehicles, wire mesh, crated aluminum tanks and steel beams. In so doing, the Commission considered that special equipment was required to load the military cargo vehicles for reasons of safety and the United Transport v. Gulf Southwestern case, supra, was held not applicable because, contrary to the facts in Moss, the vehicles in the United Transport case were not loaded or unloaded with special equipment. In holding the 788-pound rolls of wire mesh to be within Moss' scope of operations, the Commission held that:
“The theory that the minimum aggregation required by the inherent nature of the commodity is a realistic one when individual unit items are under consideration, but here we are dealing with the length of a reel of wire. To assert that the inherent nature of the wire in question did not require that it be placed in rolls of such size would be unwarranted intrusion into managerial prerogatives. A reel of wire is a single length of wire, not an aggregation of individual units, and, in our judgment, the Dillner criteria with respect to palletization are not applicable . . . .”

Insofar as crated aluminum tanks were concerned, the Commission, on rehearing, held that, even when reducing the weight of the tanks to 273 pounds, the record did not support the conclusion that the loading of such tanks from ground level could be accomplished manually. The Commission further concluded, on rehearing, that it would be unrealistic from a regulatory standpoint to premise its findings relative to steel beams measuring twenty-five and thirty-two feet in length and weighing approximately 200 pounds and 277 pounds upon a theoretical possibility that a sufficient number of men could manually load such beams.

While the Moss decision, strictly speaking, continues to require that, in order to bring a palletized commodity within the orbit of heavy hauler authority, such palletization must be required by the inherent nature of the commodity, such decision is authority for the proposition that reasonable practicability is the standard for determining whether palletization or bundling is required.

The Moss case also limited the applicability of its liberalized construction of the word “required” in an asserted attempt to preclude an unwarranted intrusion by the heavy haulers into the traffic traditionally handled by general commodity carriers, as follows:

“On the other hand, it has been contended from time to time in heavy-hauler cases that any time special equipment is utilized in loading and unloading, or for over-the-road movement, the transportation falls within the permissible range of heavy-hauling operations, regardless of whether the use of such equipment can be said in any sense to be ‘required.’ Such a construction goes too far in that direction, of course, not only because it would render the word ‘require’ virtually meaningless, but also because it would enable the shippers, solely at their discretion, to open up, through palletization or otherwise, a field of service to the heavy haulers which has never been a part of heavy-hauling services and which would constitute unwarranted invasion of traffic traditionally handled by general-commodity carriers.”
III. Decisions Since Moss

Subsequent to Moss, Operating Rights Review Board No. 1 held, in C & H Freightways, Extension—Jute Bagging, that 300-pound to 600-pound bales of jute bagging loaded with "squeeze lifts" were included within authority to transport size and weight commodities. In so finding the Board held that:

"Since one sheet of jute bagging is light, it is possible that it could be loaded by hand, but such a procedure would be time consuming, expensive, and contrary to shipper practice. It is apparent then that the baling of a light and bulky commodity like jute is required by efficiency, economy, and reasonable practicality; it is not baled merely for shipper's convenience. In considering the size or weight of a minimum bundle we also must rely heavily on industrial practice. The number of singular items used to make a bundle, or here, the number of sheets of bagging used to make a bale, is ordinarily shipper's prerogative, determined by its particular business needs.

"Not only whether manual handling is possible, but whether it is reasonably practical must play a part in our determination. The record here shows that the bales have not, in fact, been manually loaded. Nor are we convinced that 300 to 600-pound jute bales can as a practical matter be manually loaded. There is no evidence on this record which would support a conclusion that loading could be accomplished by hand, and we decline to speculate on the theoretical possibility, a practice specifically condemned in the Moss case. Accordingly, we conclude that the mechanical hoisting equipment used by applicant is required to load the jute bales, and that such handling constitutes the required use of special equipment."

Insofar as fungible commodities are concerned, the Commission reached differing results in Parkhill Truck Company—Petition for Interpretation and in International Transport, Inc., Common Carrier Application. The Parkhill case involved the propriety of transporting 50-pound bags of granular polyethylene on pallets and 1,000-pound boxes of granular polyethylene.
granular polyethylene, unpalletized. Granular polyethylene, being a fungible commodity, was held to be a commodity traditionally considered to be outside the scope of a heavy hauler's operation. In finding the transportation of such commodity to be outside the scope of heavy haulers, the Review Board found that:

"... The granular polyethylene is a fungible commodity and, though not shipped by Dow in bulk form, it would appear to be capable of being shipped in this manner if the situation warranted. Such commodities have traditionally been considered as being outside the specialized scope of the heavy hauler. We think this is a logical concept and we are unable to justify the transportation of this commodity under heavy-hauler authority, regardless of the manner in which it is shipped.

"... In a recent decision, Moss Trucking Co., Inc., Investigation of Operation, 103 M.C.C. 91, the Commission found that past interpretation of ordinary heavy-hauler authority had tended to place too rigid a construction upon the word 'requires' and that consideration must be given the practices of the shipping industry...

"Here, the considered bags and boxes of polyethylene are not palletized for protection, but merely for shipper's economy and convenience and because of the requirements of the Baton Rouge port facility, and the evidence establishes that bags of this commodity have been and are handled manually by certain of the protesters. We must conclude, therefore, that it is 'reasonably practical' to manually handle 50-pound bags of this commodity and that it is the practice, at least to some extent, for the shipper to handle and ship them without the use of pallets...

"The 1,000-pound boxes of polyethylene present a different problem, for it would not be 'reasonably practical' to manually load or unload these individual boxes. Nevertheless, there is no indication that the commodity cannot be packed in smaller boxes, the loading and unloading of which would not require the use of special equipment, nor is there any indication that it is the general practice in the industry to ship the commodity in 1,000-pound boxes."

In International Transport, Inc., Common Carrier Application, supra, Review Board No. 3 held that size and weight authority includes the right to transport composite mineral powder, a fungible commodity, as follows:

"... The supporting shipper’s composite mineral powders are
comprised of a relatively minute particle of material other than nickel or cobalt completely surrounded by nickel or cobalt.

"The supporting shipper's products frequently move in palletized shipments consisting of a number of drums or boxes of its products, and... such shipments are usually loaded and unloaded by mechanical equipment;... the net weight of the individual commodity moving in a drum or box is often 400 or 500 pounds, although greater or lesser weights of the commodity also move in drums or boxes; and... a drum or box holding 400 or 500 pounds of the commodity could conceivably be handled manually, but such handling would be, as stated in Moss Trucking Co., Inc., Investigation of Operation. 103 M.C.C. 91, outside the realm of practical reality.

"... The transportation of a drum or box containing 400 or 500 pounds of shipper's products would be in the circumstances within the scope of applicant's pertinent 'heavy hauling' authority."

On June 24, 1967, a complaint was filed under the so-called self-help statute in the United States District Court for the Western District of Missouri seeking to enjoin International Transport, Inc., from transporting Class A and B explosives and related dangerous articles. Under its size and weight commodity authority, defendant International had transported cannon ammunition in twenty-nine- to thirty-nine-pound aluminum tanks and 110-pound boxes in a palletized condition; 500-pound bombs palletized six to a pallet for a total weight per pallet of 3,000 pounds; and 750-pound bombs palletized two to a pallet for a total weight per pallet of 1,500 pounds. The involved munitions frequently had been loaded manually on an unpalletized unit basis and, for other than bombs, the Court found such manual loading to be practical. The Court found that munitions possessed no inherent characteristics which required their palletization; that palletization often was resorted to for purposes of economy and convenience in handling; that palletization was not required to identify or segregate the commodities; that palletization was not required for reasons of safety or to protect the commodity; that munitions, including bombs, were shipped both palletized and unpalletized; and that historically heavy haulers had not undertaken to haul explosives. The Court held that, under the Moss case, supra, it was clear that, with the exception of the described bombs, the transportation

of the other munitions involved was beyond International's authority; that the decision as to the bombs was of the type Congress intended to be decided in the first instance by the Interstate Commerce Commission; and that it was unnecessary to rule on the broad question as to whether heavy haulers are entitled to haul explosives in all instances in which the size or weight of the explosive requires special handling or special equipment in loading, unloading or transportation, stating that such question preferably should be presented to the Interstate Commerce Commission. Thereafter, by order entered September 15, 1967, the Commission instituted an investigation into the operations of International Transport to determine whether the transportation by International of the previously described 500-pound and 750-pound bombs was beyond the scope of International's size and weight commodity authority. The initial decision of the Commission, which found that International had exceeded the scope of its size and weight authority in transporting 500- and 750-pound bombs and which ordered International to cease and desist from the transportation of such bombs, was appealed by International and its supporting intervenors to the United States District Court for the Western District of Missouri, Southwestern Division. By Order of Remand filed March 18, 1970, the Court remanded the International case to the Commission for consideration of a Department of Transportation safety regulation bearing on the handling of explosives, consideration of which inadvertently had been overlooked. The Court, in remanding such proceeding, also suggested that the Commission take additional evidence concerning the manual loading and unloading of 500- and 750-pound bombs during pertinent times and concerning whether such bombs could be coated or equipped with shipping bands so as to permit rolling. By Order dated November 3, 1970, the Commission reopened the proceedings for the receipt of oral evidence confined to the issues raised or suggested in the remand of the proceeding to the Commission. The matter was referred to an examiner for hearing, and the Examiner's Recommended Report and Order affirming the Commission's prior determination that the transportation of 500-pound and 750-pound bombs by International was beyond the scope of its size and weight authority was served on February 11, 1971. Exceptions to such Order may, of course, be filed, and the time for filing such exceptions has now been extended to March 22, 1971. In holding such transportation to be

without the pale of size and weight authority, the Examiner concluded that the Department of Transportation safety regulation relative to loading or unloading of explosives by rolling 42 relates only to explosives which are packed in containers; that the palletization of these bombs could not be considered as the packaging of explosives in containers; that prior to 1966 and at the time of issuance of the heavy hauling certificates involved, 500-pound and 750-pound bombs were equipped with shipping bands and were actually rolled in loading and unloading; that such bombs that have been shipped since 1966 could be rolled in loading and unloading and consequently do not require special equipment; that the current type of 500- and 750-pound bombs have not been coated or provided with shipping bands; that except for the prevention of rust, scratching will not damage such bombs; and that there is no danger in rolling 500- and 750-pound bombs.

In Hughes Transportation, Inc., Extension—Nuclear Materials, 43 the transportation of partially decomposed enriched Uranium 235, spent nuclear fuel, which is a radio-active material that must be shipped in protective lead and steel casks to protect the public from exposure to radiation, was held to be within size and weight commodity authority when the basic individual units in which the liquid was shipped weighed 170 pounds but which, because of its radio-activity, was required to be shipped in 47,000-pound casks. In such instances, it was concluded that the commodity was inherently incapable of manual loading. On the other hand, the Hughes case held that the transportation of deuterium oxide or “heavy water”, which was not sufficiently radioactive to result in bodily harm and was shipped in fifty-five gallon stainless steel drums enclosed in a wooden box, with each filled unit weighing 575 pounds, was not included within authority to transport size and weight commodities. The filled fifty-five-gallon drums were shipped six to a pallet and loaded onto trucks through the use of a six-ton forklift and in holding the transportation of the drums of deuterium oxide not to be included in heavy hauling authority, Division I observed:

“On the other hand, it is our view that with respect to the deuterium oxide, the prior report reached a conclusion which is neither required by the Moss case, nor consistent with the Dillner decision. We agree that 575-pound consignments of any commodity might well fall within the province of heavy hauling. However, this begs the

42. 49 CFR 177.835(b).
question. Heavy water can move in a pint can or in a container of any size for that matter.

"If the container were large enough, the movement thereof would assume the characteristics of bulk transportation as to which heavy haulers cannot intrude. See Ashworth Transfer Co. Extension—Cement [11 Federal Carriers Cases para. 33,319], 64 M.C.C. 99. With like force, if heavy haulers were permitted to transport the involved liquid commodity in 55-gallon drums, they also could transport petroleum products in 55-gallon drums and an endless number of other liquid commodities. Such transportation has traditionally been without the field of service of heavy haulers and is not within the authority of protestant. Were it otherwise, heavy-hauling authority would, in effect, be transformed into general-commodity rights. Thus as stated in the Dillner case at page 352,

"‘The foregoing is no more than a limited application of a long-standing principle that in the construction of heavy-hauler authority the commodity itself is the controlling consideration and not the act of palletizing, the method of packaging, or the type of container in which the commodity is shipped.’

"Moreover, the Moss decision clearly does not authorize incursions by heavy haulers into numerous specialized fields such as chemical and explosive transportation nor into the province of the general-commodity carriers."

In Roy L. Jones, Inc., Extension—Iron and Steel, the heavy hauler applicants therein contended that on the basis of Moss they already held authority to transport 2,000-pound bundles of the iron and steel articles even though the evidence of the supporting shippers failed to give any consideration to the inherent nature of the commodities. The Division pointed out that the Moss case had to be read in light of the Dillner case to determine the permissible extent of heavy hauling operations and concluded that since there was no evidence that the involved iron and steel articles required bundling because of their inherent nature and since there was a lack of evidence to indicate that aggregation was required as a matter of practical reality the presumption in Dillner controlled. Accordingly, the transportation of such 2,000-pound bundles of iron and steel articles was held not to be included within the scope of the size and weight authority of the heavy hauler applicants.

IV. The Ace Doran Case\textsuperscript{45}

By Order entered on February 26, 1964, the Commission instituted an investigation into the operations of Ace Doran Hauling & Rigging Co. to determine if that carrier had operated beyond the scope of its heavy hauling operating rights in transporting various commodities, including earth-moving tractors, telescoping trailers, steel pallets and skids, apparatus cabinets, rails, steel blanks, conduit and wrought steel pipe, steel mine roof bolts, steel bars, structural steel angles, hot top slabs, steel tubing, roof joists, metal lath, steel roofing sheets, highway guard rails, channel iron and steel, corrugated culvert pipe, steel plate, metal grindings and tile roofing. By Order dated September 28, 1967, Division I, acting as an appellate division, found that Ace Doran had exceeded the scope of its operating authority in transporting earth-moving tractors, telescoping trailers, roof bolts and tapered steel tubing. On the other hand, Division I concluded that under the Moss case, supra, the remaining commodities involved were within the scope of Ace Doran's heavy hauling authority.\textsuperscript{46} The proceedings were thereafter opened for consideration and the Commission, in so doing, acknowledged that the controversy and problems there involved concerned the activities which lawfully can be conducted under heavy hauling operating rights and stated that Doran was being utilized as a convenient vehicle for reexamination of those issues with a view toward taking some overall corrective action. The Commission observed that the issues in Doran had implications that affect the scope of size and weight authorities generally and that there existed a pronounced uncertainty as to the intended effect of the Moss case on the competitive balance between the heavy haulers and the non-size and weight commodity carriers. In Doran the Commission observed that the "overall clarification of heavy-hauler authority which the Moss case was intended to achieve is far from a reality". The Commission then concluded that a satisfactory resolution of this problem depends upon a balanced consideration "not only of the Moss case taken in its entirety, but also of certain other case and historical precedents".

In discussing the historical background of heavy hauling authorities, Doran observes that the decisions prior to Moss show that there was little heavy hauler interest in objects which weigh less than 200 pounds. On the other hand, it is noted that items which have exceeded that figure significantly, except where circumstances permitted their loading and

\textsuperscript{45} Ace Doran Hauling & Rigging Co., Investigation of Operations, 105 M.C.C. 801.

\textsuperscript{46} Ace Doran Hauling & Rigging Co., Investigation of Operations, 105 M.C.C. 801.
unloading by non-mechanized procedures other than physical hoisting, have been treated as size and weight commodities. Insofar as controversies between size and weight and ordinary common carriers are concerned, Doran notes that until recently these conflicts have involved certain reasonable well-defined groups of commodities such as iron and steel articles, building and contractor’s materials, motor vehicles, machinery and motor-like objects. It is observed that, generally, the Commission has found that heavy hauler rights do not authorize the carriage of dry fungibles and liquid bulk commodities when “they assume proportions only by reason of the container or conveyance in which they are placed”. Doran acknowledges that the Commission has recognized a limited area of overlap between the commodities authorized to be transported by explosives carriers and by heavy haulers.

The Commission noted that it was appropriate to again set forth in their original form the basic tenets which must be followed in all determinations of whether articles tendered in aggregated form are within the scope of heavy hauler authorities. These are set forth in Dillner, supra, as follows:

“In bundling, aggregating, or palletizing, it should be the general rule of construction (1) that the individual ‘commodity itself’ is the controlling consideration as respects a carrier’s authority; (2) that the limited exception which the Black case, 64 M.C.C. 443, represents, where commodities are bundled for protection or as otherwise required by their ‘inherent nature,’ must be maintained within its strictest limits; (3) that the minimum bundle which is required by the ‘inherent nature’ of the commodity is the size or type of bundle which must be considered in any determination whether necessity exists for the use of special equipment; and (4) that in order reasonably to maintain these limits it shall be presumed, in the absence of a sound basis for concluding to the contrary, that commodities tendered to carrier, in bundles or aggregations, are within the general rule and not within the limited exception thereto. . . .”

In addition, irrespective of whether they are tendered individually or in aggregated form, the Commission adopted a presumption that commodities within the specialized operational spheres customarily excluded from the general commodity carrier certificates, such as Class A and B explosives, household goods, and bulk commodities, are presumed to be beyond the field of service of size and weight commodity carriers. Size and weight commodity carriers proposing to engage in the
transportation of such commodities are charged with the burden of developing a record which will support a valid conclusion to the contrary. *Doran* holds that heavy hauler operations in the involved fields of transportation represent exceptions to the general rule and, as such, are to be strictly construed.

In *Doran*, the Commission recognized that in addition to the basic principles stated in *Dillner* and in the presumption as to the exclusion from heavy hauler service of those commodities normally excluded from general commodity certificates, that additional guidelines were required to assure their proper and fair implementation. The need for workable tests to be used in determining the status under size and weight authority of all articles tendered for shipment was found to exist whether such articles were covered by a presumption or not. The Commission concluded that the necessary guidelines, in one form or another, had been enunciated in prior decisions relating to heavy hauling authority; that, with some variation as to specific details, the status under heavy hauling rights of aggregated and single-item shipments are susceptible to determination through consideration of the same factors; and that a balanced application of those factors, in light of the general rules, which include those in the *Dillner* case and the presumption against the inclusion in size and weight authorities of commodities normally excluded from general commodity authority, will assure the preservation of a healthy scheme of regulated motor carriage along these lines. The additional guidelines are (1) the basic characteristics, if any, of the commodity, which occasion the use of special equipment; (2) prevailing industry practice with regard to such commodity's handling; (3) the manner in which such commodity or analogous commodities have historically been shipped; and (4) the commodity's traditional sphere of carriage.

The "basic characteristics" of the commodity are stated to be the most important determinants of a commodity's requirement for special equipment and such concept encompasses, among other things, the size, weight, shape, or design of an individual unit, its chemical composition, its susceptibility to damage in loading, in unloading and in over-the-road movement, and the handling procedure it requires in the interest of public safety. The first point of industry is the size and weight of the object. In the case of single unit shipments this factor alone in many instances may be determinative. The other considerations assume significance principally in instances in which individual pieces are tendered for transportation in aggregated, bundled, or palletized forms. In such instances a determination must be made as to which, if any, intrinsic properties of the commodity require its movement in aggregated lots.
rather than in individual units. However, once it has been established that aggregation is required for protection or segregation of the commodity, then efficiency and economy, together with reasonable practicality, become material to the subsequent determination of the minimum bundle which is necessary to meet such requirement.

The "prevailing industry practice" is stated not to be a new concept in determining the permissible limits of heavy hauling authority as it relates either to single units or aggregated shipments. The handling of a given product by the use of mechanical devices throughout the interested shipping community, on the surface, tends to indicate that such mechanical devices are required. Little weight is to be accorded to proof of the practices of one or a relatively limited number of shippers. The Commission will, however, in respect to prevailing industry practices, take notice of official determinations made in other proceedings. A conclusion that a commodity is included within size and weight authority based on present day shipping practices is unwarranted if the commodity involved is aggregated almost entirely on the basis of economy and efficiency and such commodity has in the past been handled satisfactorily by manual labor. A carrier should not expect to establish that a heavy hauler is entitled to transport a particular commodity based solely or primarily upon a showing that special equipment is employed as a matter of current industry practice. Conversely, a limited showing of industry practice will not defeat a heavy hauler's claim to transport particular commodities if the remaining concepts are sufficiently persuasive to constitute the commodity as being within the traditional heavy hauling field.

As to "historic methods of handling", a clear showing that a commodity, as a matter of industry practice, currently is being handled by mechanical means to the exclusion of hand labor operates in favor of the heavy hauler. However, consideration also must be given to historical shipping practices in the government of the commodity involved, or of analogous commodities. A showing of prior manual handling of the same or an analogous commodity will tend to show that the current handling by mechanical means is attributable primarily to reasons of economy or efficiency rather than to the commodity's characteristics. To the contrary, the industrywide use of mechanical handling devices both presently and in the past would tend to indicate that such mechanical handling is required. Similarly, a showing that hand labor, when utilized, resulted in an abnormal amount of damage to the lading also would tend to show that mechanical handling is required.

The "traditional sphere of carriage", or field of service, is the principal
consideration underlying the presumption that heavy hauling authorities do not authorize the transportation of commodities which customarily are excepted from certificates authorizing the transportation of general commodities. However, even as to commodities falling within the presumption, the Commission acknowledges that further examination must be made if the Commission correctly is to determine whether a sufficient basis exists for placing a given commodity outside the operation of such presumption. In considering the status of a commodity under heavy hauler authority, the Commission’s position in Doran is that it must take into account the extent to which it or an analogous commodity has previously been regarded as being within a particular sphere of motor carriage. Resolution of the problem is said to involve two separate but related questions, which are:

“(a) whether, and to what degree, the commodity under scrutiny is one which by tradition has been regarded as part of a transportation sphere essentially separate and distinct from heavy hauling; and (b) whether it or an analogous article has historically been considered an appropriate subject for heavy-hauler participation.”

In this respect, the greater the similarity between the commodity involved and a commodity or commodities which have been established to be within the scope of heavy hauler authority, the more persuasive will be the heavy hauler’s position. Also, the fact that, or degree to which, a commodity has not become established as being in a non-heavy hauler service is material to the question of the “traditional sphere of carriage”.

Based upon its conclusions, the Doran case overrules C & H Freightways, Extension—Jute Bagging, supra, and International Transport, Inc., Common Carrier Application, supra, which respectively involved jute bagging and mineral powders, and any other proceeding inconsistent with Doran. In addition, Doran explains that the Commission’s position in the International Transport bomb case, previously discussed, is, in part, based upon the presumption that commodities excluded from general commodity carrier certificates may not, in the absence of countervailing evidence, be transported by heavy haulers, as well as other factors.

In disposing of the shipments involved in the Doran case, the Commission carefully detailed the basis of its findings in respect to each type of shipment involved and explained the manner in which it had applied the general principles, presumptions and guidelines which it had previously set forth in its decision.

Earth-moving tractors weighing from 7,000 pounds to 10,000 pounds
which were driven to the loading area and which were loaded into vans by being driven, but on which the shipper preferred to use flatbed trailers when available, in which instance loading was performed by crane for safety reasons, were held not to be included within Doran’s heavy hauling authority on the basis of actual shipper usage.

Pallets and skids weighing, respectively, 121 pounds and 167 pounds, which were banded at the production line into stacks twelve to fifteen feet high and thence moved by forklift truck to the loading point for loading on trailers by mechanized equipment were held not to be included within Doran’s heavy hauling authority. The basis of the holding was that there was no reason of record indicating any necessity for such pallets and skids being shipped in aggregated form; that such practice was dictated almost entirely by the particular facilities of the shipper; that there was no evidence as to present or past handling of such commodities by other shippers; and there was no evidence or precedent to bring such commodities within the recognized orbit of heavy hauler service.

Apparatus cabinets weighing 95 to 100 pounds which are aggregated and mechanically loaded, not for protection but because the shipper in question had no ramp or dock facilities, were held not to be included within heavy hauling authority. The Commission considered that such cabinets are named as commodities specialized carriers of “store and office fixtures and new furniture” are authorized to transport in the Descriptions case, Ex Parte MC-45, supra, and that they also could be transported by household goods carriers under certain conditions. Such cabinets also were considered to bear scant resemblance to articles regarded either under relative decisions or historical tradition as being within the sphere of heavy hauling.

Steel rails measuring fifteen feet in length and weighing 150 pounds each which were always shipped by the interested manufacturer in bundles which were not capable of manual loading were found not to be included in heavy hauler authorities. The involved rails were not susceptible to damage from handling and, although two men could load such a rail, the layout of the particular shipper’s plant was such as to render manual handling of each rail unsafe and cumbersome. No other evidence of industry shipping practices was introduced. Additionally, the Commission noted that the weight of the individual units, 150 pounds, fell within the weight range that historically has been regarded as non-heavy-hauler traffic.

Three shipments in Doran involved pipe, all of which was produced in lengths of twenty-one feet and threaded with a coupler susceptible to damage in loading and unloading. Units of pipe of less than two inches in
diameter were bundled into lots weighing from 154 to 215 pounds each, with such bundles being consolidated onto lifts for tender to the carrier. Larger diameter pipe was loaded in individual pieces by a crane. The pipe of two inches and over in diameter consisted of diameters of 2 inches, 2 1/2 inches, 3 inches, 3 1/2 inches, 4 inches and 5 inches which, respectively, weighed 74 pounds, 117 pounds, 154 pounds, 193 pounds, 220 pounds and 315 pounds. The 315-pound and 220-pound individual pieces of pipe were held to fall within the weight range regarded by tradition and precedent as being within the heavy hauler sphere. The Commission then concluded that the weights and lengths of the individual pieces of the remaining sizes of pipe did not fall within the recognized sphere of heavy hauling operations so as to justify their one piece movement under size and weight authority. Regarding the necessity for bundling such smaller diameter pipe, the Commission held that, in the absence of evidence to the contrary, it must give credence to the shipper's determination that aggregation of such pipe was necessary to protect the smaller diameter pipe from the possibility of damage to the pipe threads. The Commission observed, however, that aside from establishing the necessity for bundling, a heavy hauler bears the additional burden of establishing that the protection required can practically be afforded only through a minimum bundle which is of such size and weight so as to render impractical the employment of manual labor. Here, there was no evidence of present and past industry practice, and the carrier failed to meet its burden of establishing that the bundles of smaller diameter pipes were of the minimum size necessary to afford the required protection of the commodity. Accordingly, except for 315-pound and 220-pound joints of pipe, the Commission held that Doran had exceeded the scope of its heavy hauling authority in transporting such pipe.

Shipments of conduit pipe having a uniform length of ten feet, varying in weight from eight to twenty-two pounds per unit, which were, as a matter of standard procedure, bundled and banded by the shipper into lifts of 1,000 to 1,200 pounds and thence loaded through the use of a crane, were held to have been transported beyond the scope of Doran's heavy hauling authority. This finding was based upon the record being silent as to the characteristics, if any, that necessitated that conduit pipe be handled in such manner. In the absence of such proof, the Commission concluded that the bundling, banding and loading procedure was employed only for reasons of economy and efficiency.

Wrought steel pipe which was not threaded, ranged up to thirty feet in length, averaged weighing 147 pounds per piece, and which was always crane-loaded by the shipper involved, who owned no dock facilities, was
held to be outside Doran’s authority. The Division had found that the loading of such pipe by manual labor was unsafe. Nevertheless, the Commission found that there was no evidence that unthreaded steel pipe is handled mechanically to the exclusion of other methods on an industrywide basis and that no reference had been shown to precedent or tradition which would bring pipe or any other individual shipment of the weight here involved within the recognized area of heavy hauler operations.

Steel bars measuring 18 feet, 9 inches each and each weighing seventy-one pounds, which as a matter of standard procedure were shipped in palletized lots that could not be loaded or unloaded without the use of automated devices and which steel bars would have been susceptible to being warped or heated out of shape if handled on an individual unit basis, were held to be within heavy hauler authority. This conclusion was reached in the absence of proof of industry practice because the inherent properties of the bars when considered in connection with the practical realities of the matter and the absence of a background showing that such commodities have not been included within the sphere of operations of a non-size and weight commodity carrier are stated to be sufficient to establish the bars as size and weight commodities.

Hot top slabs weighing 105 pounds each were found to be within Doran’s heavy hauling authority when aggregated into sets of four weighing 420 pounds. Such slabs are brittle items that are unusually subject to damage and if exposed to moisture will explode upon contact with molten metal. They must be covered by polyethylene bags while in transit; are manufactured to customer specifications in sets of four; must be separated according to design; and the delivery of such hot slabs in sets of four is required by the receivers. The Commission concluded that the basic characteristics of these commodities were such as clearly to necessitate their aggregation; that they were traditionally within the field of service of heavy haulers; and that practical realities and a need for segregation by design, call for their aggregation into sets of four, which totaled 420 pounds in weight.

Shipments of metal lath on which the necessity for shipping in bundled form was beyond dispute were found not to be included in size and weight commodity authorization. Even though tendered in bundles which required special equipment to load and unload, the load was broken by the consignee at destination into smaller lots and unloaded through hand labor. Shipments tendered to general commodity carriers were similarly broken and unloaded in smaller lots at destination. Accordingly, the Commission concluded that this method of unloading by the consignee
negated the existence of any requirement, either by virtue of its inherent nature or from reasonable practicality, that such lath be aggregated into lots of such size as to require mechanical handling.

Asbestos coated steel sheets which ranged in length from eight to twelve feet each and weighed from fifty-two to seventy-eight pounds were held not to be included in heavy hauling authority. Such sheets were susceptible to scarring or abrasion from individual handling and for this reason as well as to achieve greater economy, efficiency and expedition of movement, were shipped by the shipper involved in bundles of up to 100 sheets which weighed as much as 5,000 pounds. The Commission found its decision on the fact that such sheets had, in the past, been loaded and unloaded to a significant degree as single units with manual labor and that there was no persuasive evidence that such method of loading was unsatisfactory; that neither tradition nor historic usage establish fifty-two- or seventy-eight-pound objects to be within heavy hauling authority; and that the available facts constituted the particular items as primarily being general commodity freight.

Highway guard rails which vary in weight from 92 to 240 pounds and from thirteen to sixteen feet in length, and posts, all of which are painted or galvanized in order to protect them from rust and corrosion with a protective coating that is susceptible to chipping or scratching, and which rails and posts are bundled into bundles which because of their aggregated weight are loaded by mechanical devices, were held to be within Doran's authority. The individual units in the bundles were separated one from the other by protective bands and neither of the two manufacturers involved had manually handled such items both because of their need for protection and also because their sharp edges rendered manual loading unsafe. Here, the Commission concluded that the bundling to guard the coating is required by the basic characteristics, its susceptibility to corrosion if not painted, of the article itself. The Commission further concluded that physical handling had been shown unsafe and that aggregation was required by the inherent nature of the product itself. Because of their size and weight, it was determined that it would be impractical to bundle such products into bundles capable of manual handling. Insofar as these commodities are concerned, there were no field of service factors involved.

As to two bundles of channel steel transported by Doran, the Commission affirmed that the transportation of individual iron and steel pieces weighing 240 pounds each and connecting parts fall within the province of size and weight operations recognized in earlier decisions and, therefore, that the transportation of such items was within Doran's heavy hauling authority. On the other hand, iron and steel objects averaging 114
pounds in weight were found to be well within the size range that precedent has shown manual handling to be reasonably practical and which tradition, as well as prior lack of heavy hauler interest, have placed beyond the permissible orbit of heavy hauling service. Further, there was no evidence of record to establish that handling of the 114-pound iron and steel objects was required for reasons bearing upon their composition.

Individual pieces of corrugated culvert pipe measuring ten feet long and weighing 36, 52, 104, 124 and 148 pounds, and individual pieces of corrugated culvert measuring 20 feet long and weighing 72 pounds on which possible damage by manual handling was minimal and which, in order to obtain a maximum payload, the shipper loaded five pieces at a time by the use of a crane, were held not to be within Doran’s size and weight authority. The shipper regarded the employment of physical labor to load or unload culvert pipe as impractical because of the number of men it would be required to employ and because there was no characteristic of such culvert that would necessitate bundling for protection. The status of each pipe dimension was held to be dependent upon size and weight factors. On the other hand, pieces of culvert pipe which were ten feet long and weighed 240 pounds each were found to be within Doran’s heavy hauler authority.

It is apparent that the Ace Doran decision is intended to be a landmark decision insofar as the interpretation of size and weight commodity authorities is concerned. Even though the Commission has been temporarily enjoined from enforcing the decision in Doran, there is little doubt but that Doran represents the current views of the Commission and that the decision and guidelines therein currently are being used as the standard in determining the propriety of heavy hauling operations.

V. DECISIONS SUBSEQUENT TO THE ACE DORAN CASE

In November of 1969 the Commission followed the guidelines of the Doran case in deciding Steel Haulers, Inc., Extension—Tulsa, Oklahoma. Doran also has been followed in several recent cases involving operating authority applications. In Steel Haulers, supra, authority was sought to transport iron and steel, iron and steel articles and such materials as are used or useful on highway construction projects. The


examiner recommended that the application be granted. Review Board No. 1 concluded that all of the commodities marketed by the supporting shippers required, by reason of their size or weight, movement in special equipment and denied the application. The applicant argues that under a proper construction of the heavy hauler operating authority decisions dealing with heavy-hauler authority, most of the involved traffic is not included within the scope of size and weight authority. The involved traffic consisted of three types of items. One was reinforcing bars which measured from twenty to eighty feet in length, from $\frac{1}{2}$ to $2\frac{1}{2}$ inches in diameter, and which customarily were shipped in 5,000-pound bundles which were loaded and unloaded by a crane, with the number of units per bundle being governed by the individual dimensions of the tendered bars. The second type of commodity was fence posts which were manufactured in five- and ten-foot lengths, with the five-foot long posts weighing 7.5 pounds each and the ten-foot long posts weighing fourteen pounds each. To prevent chipping of the paint, the shipper tendered the posts in 200-piece bundles weighing 1,500 pounds and 2,800 pounds which were loaded and unloaded by forklift trucks. The third type of traffic consisted of metal decking and siding which are relatively thin materials measuring three feet in width and from fifteen to thirty-five feet in length. Depending upon their ultimate use, decking or siding are marketed either in unpainted, gray enameled, or painted form. The painted items require extreme care in shipment, but the gray enameled and unpainted articles require nothing more than normal handling. Whenever possible the shipper aggregated decking for shipment in bundles of 2,000 pounds which, irrespective of susceptibility to damage, the shipper has found to be the most efficient method of tendering its traffic for transportation. On occasions, the size and nature of the shipment precluded aggregation and, in such cases, the order was prepared for shipment on a unit by unit basis. In applying the guidelines of the Ace Doran case, supra, Division 1 held that the commodities which were more than forty feet long, steel bars, compared in measurement to articles previously recognized by Commission decisions as not being susceptible to manual loading even if not aggregated and therefore they were properly within the scope of heavy hauling authority. For the individual units of steel bars which measured from twenty to forty feet in length, it was concluded that the length and diameter of such rods was such to suggest that they weighed less than 200 pounds which historically has been recognized as the weight range in which physical loading and unloading is possible and that there was no evidence that bundling was required because of the bars being susceptible to damage or deterioration. Accordingly, it was concluded that except as
to those bars which exceeded forty feet in length, the bars involved in the application might not be transported under size and weight authority. Transportation of the fence posts involved was held not to be proper under size and weight authority because, even though the necessity for their bundling had been established, there had been no showing that the minimum bundle necessary to protect the commodity required special handling. In addition, the record was silent as to consignee requirements on bundled shipments of posts and, in the absence of such data, the Commission declined to speculate that such fence posts could not as a practical matter be afforded the requisite protection by aggregation into bundles of less than 200 pounds, which weight of less than 200 pounds historically has been recognized as being reasonably capable of manual handling. The transportation of aggregated shipments of unpainted and gray enameled decking and siding was held not to be included within size and weight authority on the basis that such commodities require only ordinary handling; that the individual units are susceptible to manual handling; and that, in accordance with consignee specifications, such commodities periodically were handled with physical labor rather than by mechanical means. The transportation of aggregated shipments of painted decking and siding similarly was held not to be included within size and weight authority on the basis that the manufacturer's occasional preparation and tender of such commodities on a unit by unit basis vitiated any requirement that such commodities be loaded or unloaded by special equipment.

The significance and intended effect of the Doran case is further emphasized in the Commission's decision in Equipment Transport, Inc., Extension—Heavy Hauling in which the Commission referred the applicant to Doran as detailing the permissible scope of heavy hauler operations as follows:

"In the same general connection, applicant's attention is directed to the recent report on reconsideration in Ace Doran Hauling & Rigging Co. Investigation, 108 M.C.C. 717. As was there conceded, the permissible scope of heavy hauler operations generally has been the subject of many interpretive difficulties. Be that as it may, the Doran case extensively reviews this question with respect to both aggregated and single-unit shipments, and, based largely upon actual case precedents, sets forth clearly stated principles and guidelines for determining an article's status under size and weight

authority. The applicable tenets are summarized at page 757 in the cited proceeding, and applicant in its day-to-day implementation of the franchise awarded herein should be guided accordingly."

An additional facet of the Dillner and Doran cases is seen in the decision in Vant Transfer, Inc., Common Carrier Application.\(^50\) In that proceeding Vant Transfer, Inc., sought authority to transport iron and steel articles on expandable and specialized equipment as a common carrier motor carrier. By Decision and Order dated December 5, 1969, Review Board No. 2 adopted the examiner's statement of facts and conclusions, and affirmed his finding that the commodities in issue fell within the scope of operations of a heavy hauler. In addition, the Review Board observed that in operating authority application proceedings, the burden generally rests upon the applicant to establish whether the commodities it seeks to transport are covered by the authority of existing carriers. The Review Board then concluded that because Vant had adduced no evidence as to whether the tender of the involved commodities in bundles which require mechanized handling is the industry practice, Vant had not met its burden of establishing the status of those commodities under the protestant's heavy hauler operating rights. Citing the Dillner case which is affirmed by Doran, Division 1, acting as an appellate division, concluded that the involved items, even though customarily handled by mechanized procedures, were reasonably capable of being loaded and unloaded by manual labor. For that reason and because such commodities were found to have no inherent requirements for shipment in bundled form, such items were found not to be size and weight commodities. In so holding, Division 1 made the following observation:

"... The review board found the lack of such proof to constitute a fatal deficiency in applicant's presentation. Under the Dillner presumption, however, it is the heavy hauler—not the conventional transporter of motor freight—which assumes the burden of establishing the status of an aggregated shipment under size-and-weight authority. In our view, therefore, the paucity of evidence bearing on this issue negates, rather than affirms, International's title to transport most of the items programmed for future production and shipment. . . ."

International was a heavy hauler protestant in the Vant case. Based on the

Vant case, a heavy hauler protestant to an operating authority application bears the burden of establishing the supporting shipper's aggregated traffic to be size and weight commodities as a result of the presumptions set forth in Dillner and affirmed in Doran.

CONCLUSION

As a review of past decisions indicates, the Commission has not been consistent in its standards for determining the size and weight commodity status of articles moving in interstate commerce. The Johnson case which establishes the general rule that reference is to be made to the individual commodities in a shipment to determine their status as size and weight commodities, the Black case which establishes an exception to the general rule in the case of bundled or aggregated commodities; the Dillner case which establishes the criteria for applying the exception to the general rule established by the Black case; and the Moss case which requires a liberal application, based on reasonableness and practical necessity, of the Black exception and the Dillner criteria all remain effective decisions of the Commission to which reference properly is to be made in considering a commodity's status under size and weight commodity authority.

The International Transport bomb case, while not yet a final decision, is an important decision. Thus far, the Commission's decisions in that case have been based almost entirely on negative reasoning which appears designed to achieve the results that the transportation of the 500-pound and 750-pound bombs there involved are not within the scope of size and weight commodity authorities. Although such decisions to date attempt to pay lip service to Moss and other prior decisions of the Commission, it is obvious that the Commission's position in the International bomb case is based on the field of service doctrine which generally presumes that the transportation of explosives is not within the scope of operations of a heavy hauler. Despite the reasoning applied, I submit that there simply is no wording in a size and weight commodity certificate that serves to form the basis for a presumption that any commodity which because of its size or weight requires the use of special equipment is not included within a size and weight commodity carrier's authority regardless of the identity of the commodity involved.

Even though the Commission has been enjoined in its enforcement of its decision in the Ace Doran case, that case undoubtedly represents the current thinking of the Commission insofar as the interpretation of size and weight commodity certificates is concerned and currently is being followed by the Commission in its decisions involving operating authority
applications. It is not my purpose here to speculate on the future legal status of *Doran*. Clearly, *Doran* is indefinite in several respects, one of the most apparent of which is the fact that different results can be achieved under *Doran* depending upon the weight which one elects to give to the various heavy hauling characteristics and guidelines set forth therein. Even though *Doran* purports not to modify or overrule *Moss*, it is obvious that *Doran* clearly establishes more stringent tests of heavy hauling than does *Moss* and that *Doran* is intended to circumscribe and limit the *Moss* case. To the extent *Doran* conflicts with *Moss*, there is widespread belief that *Doran* cannot stand. The basis of this reasoning is, of course, the fact that *Moss* is decided, both by the Commission and by the courts, in consideration of the *Dillner* case and the fact that the *Moss* decision is in keeping with the unassailed decision of the United States District Court in the *Aero* case. For that matter, the opinion is widespread that any attempt by the Commission to limit or expressly overrule *Moss* would be futile and precluded by the Court decision in the *Aero* case.

Here, as in other dynamic areas of the law, no simple test exists for immediate, uniform and satisfactory application to all fact situations. The extreme numbers of commodities and variations in commodities which today, and will in the future, move in interstate commerce when coupled with the various factors involved and the weight which different parties assign to the various criteria indicate that there may never evolve a simple, clear-cut test to determine an item’s status as a size and weight commodity. In the future, the determination of the permissible scope of heavy hauling operations will continue to be decided on a commodity-by-commodity and case-by-case approach in which the importance of well researched evidence and well informed counsel will continue to be of vital importance. The significance of these future proceedings upon the continued existence and effectiveness of the heavy hauling industry is obvious.
A.C. Vs IN CANADA: THE NEED FOR A FRESH APPROACH

BY KENNETH F. DYER*

The twentieth century has been a remarkable one for transportation when one considers the technological progress that has been made during that time. These successes were due in large measure to the invention of the internal combustion engine which has contributed to the improvements made in air, land and sea transport. While much has been spoken in praise of the advances in technology that the internal combustion engine has brought about, very little concern has been shown until recently over the way in which these technological successes were achieved. Man now seems to be asking himself what the effect of these successes will mean in terms of the quality of his life. In effect, modern planners who believe in this approach, weigh the technological advances with the resulting effect upon man in his environment. If a particular proposal lacks in the latter respect, it will be rejected even though significant advances in technology would have been possible.

Such an approach to the problems of modern transportation is called systems engineering. The credit for its development goes to the aerospace industry, which made the first practical application of it. Its measurement of the results produced by computer technology and humanistic philosophy has special significance for the Air Cushion Vehicle (ACV) industry. Like the aerospace industry, it is recently begun, and so provides this novel approach with an opportunity to show the results it can bring about when applied from an industry’s inception.

The use of this approach, if consistently applied, could help the public avoid the unfortunate side effects that the auto industry has brought about in its development to date. Among these side effects are the sizeable demands for real estate that the automobile and its supporting highway system has produced, the blight of advertising signs that has cropped up along the roadways, the industry’s planned obsolescence that has resulted in auto junk yards, the resulting air and noise pollution, the devastating highway fatality rate, the time consuming traffic jams and the expensive theft and vandalism associated with the private car.

Nor is it unlikely that systems engineers would have been swayed by the argument that the auto would suffice until something better came along. They might have foreseen that once entrenched, the industry claiming cost

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expense would have been unwilling to alter its position without a long and bitter struggle.

In short, what I am trying to make clear is that the introduction of the ACV industry into the transportation spectrum of to-day will have to conduct its operations according to the systems engineering philosophy. When it does so, it must make sure that it understands the basic premise on which it is based; that the movement of people and goods, is really one problem. This is in fact a way of saying that transportation is one of the most powerful influences in our society to-day; it literally shapes the world we live in. The ACV industry should bear in mind that any transportation business has the potential to cause undesirable side effects as those that were created by the auto industry. It should take comfort, however, in the fact that such an industry has the power to strengthen and invigorate; and can thus create a beneficial result for society if conducted according to the above-mentioned theory.

The question that must be asked at this point is whether the government and the industry in Canada have proceeded with their respective contributions in accordance with this approach. The government’s contribution in this regard may be measured by its stated policy objectives for regulation and control of the industry and the craft it produces. It becomes important to know, for the proper development of the craft, if there is a sanctioned policy for development and whether or not it is consistently applied. Likewise the industry’s role may be seen through its type of development of the craft for public use. Again it becomes important to ask whether the industry has fulfilled its obligation in producing its craft for whatever purpose in accordance with standards of operation and safety that suit the public interest. The test of whether industry is measuring up to its responsibility may be seen in the characteristics of the craft that it produces. Its capabilities must measure up to such a standard that they will be convenient and safe for the public to use. This double barrelled approach to the problem should indicate to the public the relative merit of the ACV program and the worth of its policies and objectives for the future. It will also be indicative of the areas in which the present program is defective.

It is my belief that this present ACV program is applied without any preconceived policy for its regulation and control in Canada. This becomes especially apparent when one reviews the legislative history of ACVs in Canada to date. The attempt at classification for legislative purposes of the ACV as either a ship, aircraft or a motor vehicle, has not proven satisfactory for the government or the industry. This approach has led to inconvenience for the government in making statutory adjustments,
even to the extent of changing the definition of the craft from one statute to another. For the industry it has meant uncertainty and indecisiveness at a critical stage in its development, as it is especially difficult to manufacture when the operational and safety regulations are still to be written. In effect, the present approach to legislate for ACVs in terms of other vehicles is not answering the fundamental differences that exist between these craft and other vehicles. These differences exist in the areas of operation and safety considerations for the craft. The craft would also seem to require a unique approach in its scheme for passenger and property liability. I selected these areas for specialized consideration because they appear most pressing at this stage of the industry’s development. There are other considerations that will emerge and require solutions in turn as the craft are produced on a larger scale, but which are not readily apparent at this moment.

In order that these issues may be better understood, I will set out the technological distinctions that make ACVs different from other vehicles. From these distinctions will come the unique capabilities of the craft that will help to elucidate the issues outlined above.

II. The A.C.V.; its operating principle, environment and development.

An air cushion vehicle is a machine that floats on a self-expelled cushion of air\(^1\) with little or no aerodynamic lift.\(^2\) The term ‘air cushion vehicle’ is

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2. “An A.C.V. is a surface vehicle that in operation is wholly or partially supported above the surface over which it is traveling, irrespective of the movement of its lifting area, by a self-generated pressurized cushion of air that is retained beneath the vehicle.”

Bill to Define the Legal Status of Hovercraft
7 Hovering Craft and Hydrofoil 27 (9, June 1968)
From House of Commons Debate, 764 Hansard 119 (16/5/68)
British Hovercraft Corporation’s definition in precise terms: “A hovercraft is an air cushion vehicle.

“An air cushion vehicle means a vehicle or craft which depends for its functioning on ground cushion effect and is incapable of rising into the air to a height greater than that at which, in respect of any such vehicle or craft, the ground cushion effect ceases to have any, or substantial influence. For this purpose, the expression ‘ground cushion effect’ shall mean the load bearing and lifting propensities exhibited by a mass of air or other gas vapour when compressed and constrained to interpose itself as a cushion between the underside of such vehicle or craft and substantially within its platform and the surface over which it is intended to operate.”

Norway’s Hovercraft Legislation Ministry of Trade and Shipping
Odelsing Bill 26, (1965-66). 15 Hovering Craft and Hydrofoil\(^2\) (1, August, 1966)
generic as is the term ‘hovercraft’ and both may be used interchagably.\footnote{1} The essential point is that these terms describe a machine in terms of the general air cushion propulsion.\footnote{2} This distinction is often difficult to make as scientists have sometimes used generic terms to describe the methods of propulsion and vice versa.\footnote{3} This verbal imprecision by the scientists has

"Air Cushion craft are characterized by the fact that they rest on a cushion of air when in motion.

The craft are not intended or designed to move in water like conventional craft, or on land or ice like ordinary vessels. They can, however, in an emergency, land in water and keep afloat on tanks while moving at a slow speed. "Furthermore the craft can in certain circumstances also move on (over) land and ice. The ordinary operational field of the air cushion vehicle is, however, the air, with the craft freely raised above the surface at a limited distance (height)."

2. Air Cushion Vehicles: Their Potential for Canada, 514. See also 19.

3. This term is the one Canadian technicians and Government officials use most often to describe the craft.

4. Many other terms are freely used by different countries. For example, the air cushion vehicle has also been called a Surface Effect Ship, a surface effect machine, a ground effect machine, and a captured air bubble.

5. Air Cushion Vehicles: Their Potential for Canada, 515. Some of the more common air cushion propulsion methods are: 1. The Sidewall or Surface Penetrating Air Cushion. An over water craft with rigid sidewalls that penetrate the water. The air cushion is contained laterally by the sidewalls and by flexible seals located fore and aft.

Fielding, P.G., Twentieth Century Yankee Clippers, 6 Air Cushion Vehicles 6, (No. 42 Dec. 65).

"The C.A.B. resembles the Denny Sidewall craft in that air is pumped into a cavity bounded by longitudinal skegs and fore and aft planning surfaces capable of moving with the motion of the surface. Combined air and marine propulsion systems are projected. Speeds in excess of 100 knots in calm water at relatively low installed power are expected."

2. The Annular Jet.

"The Annular jet with flexible extensions maintains an air wall to retain its air cushion. In many ways this concept is somewhat similar to the C.A.B., with the exception that higher installed power is needed due to the need for a continuous flow of air. No surface contact is required, however, thus "making air propulsion feasible at considerable lower installed power."

Air Cushion Vehicles: Their Potential for Canada, 514. 3. "Peripheral Jet Cushion System.

A cushion system in which the cushion is created by a peripheral curtain that maintains the cushion at above ambient pressure by the horizontal change of momentum of the curtain.

4. Plenum Chamber Cushion System. A cushion system in which the pressure is maintained without the use of curtains."


"There are, however, other ways of hovering near the earth. It can be done by a fluid jet; it can be done by a magnetic repulsion; it can be done very effectively as Professor Laithwaite has shown in recent lectures by electromagnetic means. The rate of invention and development is so fast in these days that I am sure it will not be long before practical hovercraft employing means other than an air cushion will be made."
created a great deal of unnecessary confusion for legislators who have had difficulty enough in comprehending the various thrust principles.  

The essential point which must be grasped from the above distinction between the air cushion principle and the method of propulsion classifications is that the former includes all vehicles which operate on the principle, while the latter refers only to craft which utilize the air cushion principle with its particular method of propulsion. I think it important for these craft to be recognized by the principle on which they operate because it avoids the problem of creating a classification of craft that is riddled with exceptions. If all air cushion propulsion systems are included within the classification, a measure of consistency will be achieved amongst the myriad of complex scientific descriptions that currently baffle lawyers and laymen alike.

The issue is further compounded because of the fact that at certain speeds hovercraft operates with slight aerodynamic lift or in the state of

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7. Bill to Define the Legal Status of Hovercraft, 32

Mr. Rees-Davies:

"Can we or ought we to attempt to have common basic rules for the conduct, safety and legal status of all applications of the air cushion principle, or should they be treated case by case? The Bill recognizes that the hovercraft is a vehicle of a new kind, but in the illustrations of present development which I have given, I go a great deal further and suggest that what is new here is the air cushion principle. This is the centre of the new development. It is a new method of propulsion. Its potential application goes wider even than hovercraft as we understand it today, and I have given some examples.

"I compare the air cushion principle with the principle of the internal combustion engine. We all know that the internal combustion engine was originally used as a motive power for locomotion. We also know that the internal combustion engine can be used as a motor to drive an electric generator. This is a very common use of it. Nobody would suggest that the rule of the road which applies to an internal combustion engine in the form of a motor car or a lorry should equally apply to the use of an internal combustion engine as an electric generator.

"I suggest from that example, with which the government departments and the law are non-familiar, that we apply the same approach to the air cushion principle. If, in deciding how to frame all this the Minister and his Department think not in terms of hovercraft, but in terms of the air cushion principle, I think that they may find it a little easier to distinguish between the various applications. I prefer to approach the problem by securing a legal status for what we have been calling hovercraft case by case.

"...Thus the legal status would be defined according to the particular use, or let us say, the primary use to which the air cushion principle is applied in each case, and, what is equally important, according to the environment in which it operates."

8. See 10,11.
'ground effect'. This flight state is only temporary and never replaces the hovercraft's primary lift source, and thus has been noted by scientists with little more than passing interest. For lawyers, however, it created definitional problems which could not easily be resolved.

Again, the use of the general classification of the craft in terms of the air cushion principle would seem to achieve consistency and order. While it cannot be denied that the phenomenon of ground effect exists, it can be easily dismissed as an inconsistency to the air cushion principle if it is viewed in terms of its effect upon that principle. Ground effect only lasts for a short time, at a certain speed when the craft is descending from the air cushion and causes no interference with the primary thrust, the air cushion, in the operation of the craft. Ground effect may thus prove to be worthy of scientific note but, because of its relative insignificance in the operation of the craft, it need not prove to be any more of a difficulty for the use of the air cushion principle in classifying these craft.

Vehicles which rely wholly upon the aerodynamic lift principle are not air cushion vehicles. Examples of this type of craft are the ram wing.

9. See 10, 11.
10. Bill to Define the Legal Status of Hovercraft, 27.
   Mr. Mallalieu for the Government:
   "I am told that the definition, while broadly defining a hovercraft, excludes a hovercraft such as the SRN 6 when it is operating in what they call the "trapped air mode" — that is, when it is entering harbour. I am told by the designers that in this condition it does not expel air but merely maintains it under pressure beneath the aircraft. This is a "point but we must take it into account if we are to get the definition accurate."

11. See 10.
   Bill to Define the Legal Status of Hovercraft, 27
   The B.H. Corp. has stated that
   "The vehicle should be called an ACV and it is necessary in the definition to define a technical term known as ground effect."
   Bill to Define the Legal Status of Hovercraft, 29
   Mr. A.L. Williams stated:
   "... When a hovercraft is moving off the beach and going on to water, it often travels on trapped air which it has itself expelled. This puts it, so to speak, on all fours with the ordinary planning speedboat, the pleasure speedboat which whizzes around off our shores and is generally slithering along a carpet of bubbles trapped between itself and the water. We want to make sure that the definition of hovercraft does not by any mischance include that sort of thing."

12. Air Cushion Vehicles: Their Potential For Canada, 514
13. 8 Air Cushion Vehicles 75 (No. 54, Dec. 66)
   "... the ram wing concept uses the longitudinal sidewalls of air and an aerodynamic lifting body to support the ship at high forward speeds. Power requirements for the air cushion mode of operation are the same for this concept as for the annular jet; however, as speed increases the fore and aft jets are swept
and airplanes flying in ground effect. At the present time, vehicles which operate exclusively on this principle have not been reduced to practical application; their existence remains in conceptual form on the drawing board.\footnote{14} 

If there was any doubt about the way in which the ground effect phenomenon should be approached, there was little of the same regarding the exclusion of the ram wing craft. The clear distinction between the technical\textit{ modus operandi} of the two systems appeared to be decisive. The fact that the ram wing does not derive any support from a self-expelled thrust of air appears to keep it, even on a liberal interpretation of the definitions, from being included within the air cushion principle definition. This definite distinction between the two methods of operating principles indicates in very clear terms the bounds of the air cushion classification with respect to other recently innovated transport principles.

The use of the air cushion principle as a means of vehicle classification appears to give the craft included within the definition a uniformity and preciseness in their description clearly delineating, with one minor exception, the uniqueness from other craft similar in appearance.

The air cushion vehicle is adaptable to the environment. It can travel over water\footnote{15} or land\footnote{16} or both.\footnote{17} The only physical limitations restricting its travel where the terrain consists of such natural barriers as trees\footnote{18} or mountains or heavy seas. Constant changes, however, improve the efficiency of the operation of existing parts for better performance in the environment.\footnote{19}

rearward and eventually shut off. Air propulsion is contemplated for this concept."

15. \textit{Air Cushion Vehicles: Their Potential for Canada}, p. 513.
17. See 21.

"With the development of the hovercraft a new dimension in travel is realized with potential for passenger, freight, private and military transport. Although the principle is simple and is being applied by advanced technology in fluid dynamics
Scientists have been quick to apply the air cushion principle to improve both currently effective as well as older outmoded methods of transportation in various environments. In addition, they have developed by concentrating on the air cushion vehicle as a load lifter, the innovation of "clip on hoverpads." This method of bulk lifting is unique in the sense and propulsion, there appears at present to have been little imagination or creativeness applied to further the original concept. Modern hovercraft are but bulbous in conforming to the shape of their supporting skirt, thus appearing almost invariably oval in shape and clumsy in appearance. For this reason effective streamlining is practically non-existent and much power is wasted.

"...The key to the hybrid design is that the craft is supported by legs, as are some hydrofoils, except that they would be kept buoyant by hoverpads. These pads would be similar to conventional hovercraft skirts, with each pad supporting a leg and thus the craft. An important feature is that the legs are telescopic incorporating damping and return springs similar in principle to the independent suspension systems used on cars. The legs will shorten and lengthen corresponding to each trough and "crest. To assist in reducing air and water resistance, the legs may have fairings. The main joint between the supporting pads and their legs would enable the entire pad to swivel and so allow the pad to conform to the major undulations of the water surface."


"Within the past fifteen years there have been several notable efforts to incorporate the annular jet into an airplane, dispensing with the wheel gear. These approaches have all been rather radical, involving an unusual aircraft design. The concept considered here in relation to civil air transport is more rudimentary and is no more than a direct substitution for the wheels. It is not an integrated lift propulsion system, but an independent subsystem. It has little or no effect upon the aircraft aerodynamics. In ordinary circumstances, it will have little to do with take off and landing distances except that it will permit these to become generally longer."


The replacement of passenger trains with tracked air cushion vehicles. "So far the experimental aerotrain has only been tested on the surface track which was laid down between Gometz-la-Ville and Limours, about 15 miles southwest of Paris. On this 3 1/4 mile experimental track a good deal of testing has been done and on several occasions during the last year it has attained speeds comfortably in excess of 200 m.p.h. with rocket assisted turbojet propulsion. On the ground level track, the upright member of the inverted T section was some 2 ft. in height. For the elevated track, this measurement has been increased to 3 ft. presumably to provide an added factor of safety, this being the member that guides the train and prevents it leaving the track on a curve. The aerotrain runs on four air cushions, two forward and two aft, on either side of the vertical guide member. Four more air cushions bear inward on to the surface of the vertical member itself. All eight air cushions are of the high pressure plenum chamber type, with seals, like miniature skirts, to prevent excessive air leakage."

22. Winter, P.H. Industrial Applications if Air Cushion Technology 15

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that the bulk cargo, whatever the environment, can virtually move itself as a truck or a ship would be simply attaching its "clip on hoverpads." 23

A discussion of the air cushion principle in terms of the environment

\[\ldots\] In all cases the power required for practical purposes depends to a very great degree on the type of surface and the type of skirt. Although no definite conclusions have yet been reached on practical values, general requirements can be inferred from the few examples of large, heavy loads which have been hoverlifted. A spectacular example of the large pallet is the movement of complete oil rigs on air cushions. As oil is discovered in successively more remote areas often in swamp, shallows, or muskeg, it seems air cushions could well become a basic means of movement.

\[\ldots\] Movement is, of course, an essential of the hover principle, and the current revolution in transport towards containers means corresponding rapid handling of containers at interchange points. Air support has something to offer here. A system of clip-on pads for containers has already been developed and when operated by airline pressures could be useful for limited movement.

"Alternative similar clip-on units with their own power source could be used, but this is an expensive and not too convenient method. A mobile master power source, comprising engine-fan units, may serve clip-on pads which remain on the containers as required."

23. Winter, 131

"In a new installation, however, a system of container ways could be installed consisting of hoverpads in reverse. A series of pads similar to those employed on the high pressure pallets are set in the ground and all supplied by a common 'inground' air supply. Each of the pads is pressure activated so that no air is supplied unless there is a load present. Containers need only have a smooth bottom surface or sit on simple flat plates. Trains of containers could be transported considerable distances in dock or marshalling areas with great economy and individual containers maneuvered for loading.

This principle was demonstrated a few years ago by the spectacular hover dodgems of Disneyland where very simple powered hovercraft were supplied with air from under the floor. Use of pressure sensitive air supplies has been made in Elliotts Aeroglide conveyor, where discrete objects are made to slide down a chute by supporting them on a film of air. A logical extension of conveying single objects is the continuous air supported belt type of conveyor, and this could become a major bulk transport system of the future. Conventional conveyors are getting larger and larger as other transport systems, mainly road and railway, become more and more expensive to build. This is particularly important for places where there is no existing transport, yet world economy demands that natural resources are sought in successively more remote areas. Belt conveyors are limited at the moment, both because of the extreme number of moving mechanical parts involved in very long distances, and also by the strength of the belt. An air supported conveyor offers the potential of extremely low friction and, therefore, correspondingly low traction power and belt tension. The maintenance problem of the large number of rollers is also eliminated. These advantages have to be balanced against the power to supply the air support and the engineering of the air
prompts me to ask whether or not the emphasis placed on this principle could be shifted instead to classify the craft in terms of the environment in which it operates. In other words, instead of looking at a craft in terms of its method of propulsion, one might classify it in terms of the environment in which it travels, regardless of its operating mechanism. Thus, ships, ACVs and ram wing craft, would all be classified together because of their common use of the marine environment. The same considerations would apply overland. Automobiles, ACVs and ram wing craft would share the same classification. The obvious advantage of this approach is in its reduction of the number of potential classifications for vehicles to just a minimum of three; namely, the air, land and sea environments. Thus, the invention of a new type of vehicle, such as the ram wing a few years from now, would not make redundant any existing classification based on operating principles and thus necessitate the creation of a new classification.

I see two weaknesses in using this approach. The first involves the inconvenience of classifying ships, ACVs and ram wing craft under one general heading. There are few operational similarities between ships and ACVs. The latter craft move more quickly are more maneuverable and are more affected in their course direction by the wind and less by the waves and the ocean currents than is a ship.

In addition, there is the public interest to consider. I think it is safe to say that it would not be served if passengers on board a ram wing craft were given safety measures created for a ship designed several years earlier to take effect under far more different operating conditions. Likewise, I do not think it would be in the best economic interests of the public to restrict 100 kt. transport ACVs to standard shipping regulations governing the operation of present ocean freighters.

A second consideration would be the difficulty in determining whether

distribution. To be truly economic, the air supported belt would have to run with only a few thousandths of an inch clearance, and it has yet to be shown whether this can be achieved practically.

"... These are some of the industrial applications which appear to be feasible at the moment and perhaps because there has been a concentration of available "effort to date on the development of the transport hovercraft, many of them have yet to get to the stage of serious production. A few specialized services have shown some success, among them the Hoverbed where patients are supported by a warm drying cushion of air, and the Hoverkiln, where ceramics are air floated through a kiln, and have shown the versatility of the hover principle. In spite of the glamour of the high speed marine hovercraft, perhaps the most successful application has been the ubiquitous Flymo hover lawn mower."
ACVs and ram wing craft would be operating in the air or in the marine environment. The difficulty would arise in trying to measure at which point one environment begins and the other ends. Presumably the problem would not arise for ACVs because, by their very operating nature, they are incapable of rising more than a few feet above the earth's surface. Ram Wing craft, however, can supposedly transfer from one to the other, so that the problem would be a very real one for them.

The essence of my argument is that, in order to function properly, ACVs, as well as other craft, must be recognized by an operating principle that gives full scope to the craft to function according to the respective peculiarities of each. A system of classification, the bounds of which are wide enough to include different modes of craft in the same environment, will, in my opinion, act to the detriment of the operators, the customers, and the public. I do not think it would be in their best interests to classify ACVs in this way.

III. The ACV in a Legal Context: Two conflicting theories.

The legal analysis of the ACV to date has attempted to classify the craft in terms of its operating principle rather than the environment in which it operates. The question lawyers have posed to themselves in adopting this approach is technically oriented; namely, is the operating principle of the ACV similar to those principles on which aircraft, ships, or motor vehicles operate, or is it unique in its functioning? Most lawyers have had little difficulty in appreciating that the ACV is technically different from those three other modes in its operation, but they have disagreed as to the best method of recognizing this technical distinction in law.

The one view is that, even though the ACV may represent a new mode of transport in fact, it does not necessarily follow that it should be recognized sui generis in law. Instead, the hovercraft should be classified within one of the existing modes of transport and considered merely as an offshoot of the major mode. The legal system provides statutory definitions of the three existing modes, labelling existing transport vehicles as "aircraft", "vessels" and "motor vehicles". An examination of these terms shows that each possesses an adequately wide scope to include the ACV; equally so it is suggested that regulations issued pursuant to the defining sections contain enabling powers broad enough to include sufficient regulation of the ACV. In short, the proponents of this view feel that it is time wasted when a statute is created for a vehicle that can be accommodated within existing definitions; that the addition of another statute to the field of transportation law will create repetition in some
areas and overregulation in others. The net effect of this result would be harmful, not only for transportation law but for the industry as well.

This group acknowledges that there will have to be amendments made to existing statutes and regulations; this is only natural when one considers the speed and maneuverability of the craft in operation. Likewise, there will have to be changes in safety standards and in the liability of the operator to the passengers and to third parties. The changes in these areas will not be difficult to bring about because a combination of existing navigational procedures, safety regulations and liability legislation can be adopted to suit the needs of ACVs.

The antithesis of this view is that the law should follow science and recognize this new technology with separate legislation. Proponents of this view argue that it is only logical to recognize *sui generis* in statute what the scientists have treated as unique in technology. They contend that for the ACV to adequately develop and operate there must be separate recognition in law of the operating mechanism. From this it follows that any deviation from this norm will bring about innumerable problems both for the administrators and manufacturers, and operators alike.

The argument continues that the greatest number of these problems will occur in the field of operations, safety regulations and in the liability of the operator towards his passengers and other ships or hovercraft. While these areas by no means limit the difficulties that will occur for the craft, they do represent the three areas that will make it difficult for present legislation to cover, especially because of the craft's size, design, speed and maneuverability. This group's view is that these problems will inevitably occur because the craft is a new creation and, as such, cannot be adequately regulated under any statute until all the problems become apparent. These problems can be kept to a minimum, however, if they are resolved within a legal framework that was designed to cope with them.

The views expressed in the former group were those that were initially espoused by the British and Canadian Governments. Both administrations have subsequently changed their policies substantially; the British now have newly enacted hovercraft legislation, while Canada has issued an official statement of intent to do likewise in the future.

I will attempt to show at this juncture that it does not matter how either the British or the Canadian Government classifies these vehicles if they insist in doing so within a narrow definitional framework which does not deal with the issues which make ACVs different in science and thus in law. I have been unable to find in my research any analysis of the particularities that I think would justify the claims some lawyers are making for an independent statutory approach for ACVs. In the ensuing
discussion, I will identify these crucial issues and discuss their distinguishing features, and then suggest to what extent they should be regulated in law, if they are permitted to exist at all.

IV. Two Unique Features: Operation and Safety Requirements.

The operating characteristics of the ACV combine both shipping and aircraft considerations to different degrees, depending upon the weather conditions and the environment. Because the craft rides on a cushion of air it has little contact with the surface over which it travels. Accordingly, the surface of the tide or river currents in a marine environment is minimal. This leaves the wind as the greatest influence upon the operation of the craft over any surface. It has the same effect upon the operation of the ACV as it would have upon an aircraft. The craft is slowed in a headwind and speeded up in a tailwind. But most significant of all is the influence of the wind in causing the craft to slip sideways. This factor must be allowed for by the ACV operator not only so that he can arrive at his destination in the shortest possible time, but also so that he may prevent accidents with other vessels.

Sideslipping is very difficult for other craft approaching an ACV to detect because their course is not affected as much by the wind. The ACV may slip several feet sideways in a momentary gust that may not be realized by an approaching ship at several hundred yards. Add to this operating characteristic a cruising speed of 70 kts. for ocean passenger ferries and the navigators of both craft are faced with a potential collision situation. Aircraft have had this problem rectified considerably for them by having the direction of the flight plan determine the height at which the aircraft will fly. ACVs do not travel over water with this advantage and could certainly cause collisions with other high speed ACVs and other slower vessels.

ACV operators have arrived at a partial solution to this problem by attempting to reduce the crash potential which is increased at night. With ordinary ships' navigational lights an ACV in the dark would appear as another ship and so not give the approaching vessels the added knowledge that the ACV could be sideslipping. In order to prevent a collision in this situation, ACV operators have adopted the use of an all round flashing yellow light by day and by night in addition to the normal navigation lights at night. It is hoped that the implementation of this measure will make other mariners aware of the sideslipping potential so that they may steer clear and avoid a collision.

The use of the flashing yellow light at all times is certainly an
improvement over the use of no identifying indicator at all. It does not, however, answer the problem satisfactorily. When visibility conditions were less than normal there would be no means of determining any approaching ACV other than by the noise of the craft. Thus the effective use of the yellow light is conditional upon clear weather by day or by night. What would seem to be more appropriate would be the segregation of ACVs, certainly in crowded harbour areas into their own access routes to landing pads. In a sense this would be the equivalent of allotting aircraft different heights for different directions of travel. ACVs could avoid the necessity of giving way to other vessels. In addition, their use of these lanes could be allocated by direction which would allow all westbound and eastbound traffic to travel relatively unhampered at high speeds without fear of collision. Course directions could be established as aircraft flights are now charted and craft controlled with the extensive use of radar directional equipment. Even if the use of designated shipping lanes as suggested became too impractical to enforce, the vehicles would still be better controlled by shore based radar in harbour approaches.

An additional operating feature of the ACV which makes it resemble an aircraft is its sensitivity to weight. This sensitivity varies with the surface over which the craft travels. For example, a craft can support more weight on land or ice than it can on water because the support offered by land is greater than it is on water as the thrust of the air cushion displaces the water from beneath the craft. An overweight ACV on water is unlikely to overcome “hump drag” and thus achieve over-hump speed. This speed varies with the type of craft but is between 7 to 15 knots.

By itself, this characteristic is just of passing interest, but when considered with the related characteristic of stability it can create a problem. Stability is critical when operating on water or in transferring from land or ice to water. On water the maximum load is limited by the maximum weight the craft is able to bear to overcome hump drag. If the craft is in the water and is carrying too much weight, it will simply not overcome hump. On land or ice the craft could probably support the same weight without difficulty. If, however, the craft transferred from these surfaces to the water the excessive weight could cause the craft to plough in or worse to overturn. The likelihood of this occurring is increased directly in proportion to the craft’s speed over land or ice surface until the point where it hits the displacable water surface.

This problem would certainly be solved if it is ever forbidden for ACVs to traverse at high speeds from land or ice to water. A further solution might be to limit the weight of the craft at all times to the minimal amount that may be supported on the least resilient surface,
water, and avoid the constant weight changing requirements that might arise if two or more suggested standards were used. Additional requirements might also be imposed, making the design of the craft less balance sensitive, possibly by increasing the stability of the craft in lowering the centre of gravity. In any event, the amphibious operating characteristics should not be regulated out of existence, but should be preserved. It would be ideal if regulations could control it to the extent that the public would be able to use it without serious danger.

Because the surface of the water acting on the skirts increases drag, the ACV is not able to achieve as great a speed on water as on land or ice surface, but it does provide it with an almost immediate stop. This procedure, known as “plough in” occurs when the air cushion is deflated causing the encasing skirts to collapse and the craft to pitch forward into the water. Ploughing in is not normally dangerous if intentionally induced with the craft set in the proper direction and the passengers braced for the impact. The difficulty is that plough in is not always deliberately induced and is therefore unexpected when it occurs. For example, it may be caused in making a turn travelling down wind across the wind direction if the craft does not bank in the direction of the turn. Equally, ploughing in can occur travelling at very high speeds over calm water if a fore and aft rocking motion is induced by the passengers or any external disturbance, such as the wake created by other vessels. In this latter instance, ploughing in can be eliminated by reducing speed in time, and entering the wave formation at the proper angle.

The danger of ploughing in is that the craft is unstable and under certain conditions can overturn especially when it happens unexpectedly. Death could result from either the initial impact if the craft overturned unexpectedly at high speeds or it could be caused by the drowning of the passengers. Even if the craft does not overturn when it ploughs in, it may still cause injury to the passengers inside. If not secured in their seats with seat belts, passengers would likely sustain a serious injury from the sudden stop. In this respect, the plough in conditions facing the ACV are similar to bad weather conditions facing an aircraft. The aircraft pilot and the ACV operator may warn their passengers in advance of the impending storm or plough in conditions, and require the passengers to wear seat belts. Perhaps the passengers should also be prohibited from moving about when the ACV is in a crowded environment where the need for sudden stopping would be increased. Some such regulation would seem to be required as ploughing in could cause injury to passengers.

Probably the most obvious way for plough in to be restricted and thus limit the danger of overturning would be to restrict the speed at which
ACVs would be permitted to travel. Again, what must be weighed in the public interest is the desire of the public to use the ACV for its high speed amphibian capabilities with the public's desire to be protected from unnecessary damage to people and property. One might think that the ACV is an unnecessarily dangerous vehicle for public transport. If improperly designed and handled, this could be the case. A properly executed bow plough in, with the passengers alerted and secured by seat belts would enable the craft to come to an extremely rapid stop in an emergency situation in order to avoid a collision.

If any form of plough in should be avoided it is a sideways plough in. A feature of hovercraft is that they can turn 180° or pirouette (turn 360°) on reasonable surface conditions without any difficulty. If, however, these turns are carried out without regard to the height of the waves or contours of the land a sideways plough in could occur.

The introduction of regulations to prevent the execution of 360° pirouettes might seem to be the answer; this in fact has been done for the larger craft such as the SRN-6s and the SRN-4s. This may not necessarily be required for all ACVs, however. Just as the manoeuvrability of an aircraft is restricted by the design of the craft and the ability of the pilot, so might the manoeuvrability of an ACV be regulated according to the capabilities of its design, and the skill of its operator.

In the end result it would seem that the serious effects of plough in such as overturning could be effectively reduced with a reduction in permissible operating speeds. This would seem to be an area in which the state could exercise its influence in the public interest before the use of these craft becomes widespread, and negligent operation of the craft creates the damage to life and property that is associated with the skidoo.

In a more general discussion of an ACV's speed, it is important to remember that the faster an ACV goes the less wake it makes. Conversely, the slower it goes the more it makes. This characteristic would seem to justify the use of high speed access routes to harbour ports which would be free of other craft and thus allow the ACV to operate without having to reduce its speed and increase its wake. The argument that had been advanced against larger ships' high speed in canals and harbour areas would not hold because no property damage could be done by the ACVs' wake at high speed. In this respect there would seem to be no purpose in restricting ACVs to shipping regulations which could be considered a hamper to the craft's effectiveness.

If ACVs are generally distinguishable as craft with little or no wave making characteristics, it is another equally peculiar operating characteristic that forces them to make concessions to other marine
vehicles because of the waves they create. Power boats, motor launches and ships create waves, large wakes which usually consist of a train of high waves of short distance between the crests. In response to this problem the ACV operator would do well to reduce speed, increase hover height and turn the craft so that it can ride over the waves at 45° to their angle of approach. This action would increase the distance between the crests and allow the craft time to ride over them safely.

The answer to reducing various operating problems could be found in qualifying ACV operators to cope, because, if handled properly ACVs are quite stable. If ACVs are improperly handled the operator could cause the craft to capsize. ACV operators should therefore be required to qualify and pass a test to operate any hovercraft, large or small. A license could be issued after the potential operator has taken a course in ACV theory and has operated a particular craft for a certain number of hours.

The continuing balance between the speed and safety considerations in the operation of the ACV take on a new perspective when they are viewed in regard to small craft used for recreational purposes. In the interests of swimmers, canoeists, and yachtsman who are at a considerable disadvantage when it comes to manoeuvring for safety in a dangerous situation, a restriction on the speed of ACVs when in proximity to recreational centres would seem necessary. This restriction could be imposed when the craft came within a certain distance of swimmers. The setting of such an arbitrary figure is unsatisfactory to an extent because of the variables of wind and water speed which affect the control of the craft considerably from day to day.

The other consideration that cannot be forgotten is the effect of plough in an emergency situation to bring the ACV to an abrupt stop. If it was decided that plough in was to be an effective device, the use and proper execution of which was to be expected of every ACV operator, the authorities might decide that higher speeds in these areas would be permissible. I rather doubt that such high expectations could be held out for the operators. It would be much sounder, in my opinion, to prevent the potential accident situation from occurring by limiting the speed rather than by allowing a high speed usage of the ACV requiring emergency measures to avoid an accident situation.

The major problem with the recreational use of ACVs over land is that there exist no rules of the road by which they should be operated. These rules do not exist because most of the use of vehicles over land has, up until now, been conducted on highways. With the increase in the use of All Terrain Vehicles (ATVs), dune buggies, snowmobiles, and ACVs, and the exclusion of these vehicles one by one from the highways, we are only a
short step away from a repeat of the misfortune and disaster that has
struck because of the unregulated use of snowmobiles.

The development of rules of the road would be most advantageous in
determining the right of way between vehicles in close proximity to one
another. Perhaps the right of way could be established upon the operating
characteristics of the vehicles, so that the more mobile vehicle would give
way to the less maneuverable. In effect, this would approximate the rules
at sea where powered vessels are required to give way to sailboats. Or, the
rules could be drawn up without regard to the particular characteristics of
the craft. If this were decided upon, these vehicles might be regulated
solely by the direction the vehicle was traveling in, with the only
concessions being made on that basis. Then, if these provisions fail to do
the task, it may become necessary to segregate the vehicles by direction or
mode, thus further restricting their potentially unlimited use.

V. The Third Issue: Legal Liability

The third area in which a fresh approach needs to be taken for ACVs is
in liability legislation. A brief look at existing schemes is helpful as a
familiarization with the essentials involved.

In discussing liability in international carriage by air, one is concerned
with principally two agreements—the Warsaw Convention and the Hague
protocol (1955) to which most countries are signatories. The effect of
these agreements is that passengers need not prove negligence in the event
of a claim which is fixed in its limits and that the carrier is unable to
contract himself out of liability.24 There are exceptions to these rules; if the
carrier can disprove negligence on his part, he may escape liability while
the passenger in turn may recover more than the limited amount if he is
able to prove willful misconduct on the part of the carrier, his servants or
agents. These exceptions are rarely useful because of the difficulty of proof
in air line accidents in which witnesses and evidentiary material are rare.

In the field of shipping, the individual’s freedom of contract has been
preserved intact so that it is still possible for a shipping company to relieve
itself of all liability for negligence in a contract with its passengers.25 As to
liability for property, an international convention, namely, the Hague
Rules embodied in The Water Carriage of Goods Act, limit the amount to
be claimed on each package unless its contents are declared before the

voyage. The third and most unique aspect of shipping liability is that, in accidents with third parties, an overall limit of liability is imposed for loss of life, personal injury or property damage based upon the ship’s tonnage.

It is useful to examine how Great Britain dealt with this mix of liability legislation in The Hovercraft Act 1968. Authorities chose to follow the airlines scheme for personal liability while property liability was to be based on the shipping concept of carriage of goods by sea. In relation to personal and property liability incurred in a collision with other ships or hovercraft, an overall limitation was considered for the hovercraft’s all-up weight as opposed to tonnage.

The above mentioned liability schemes for existing transport modes have been compromised to a certain extent in the British Hovercraft Act in an attempt to produce what is felt will be an equitable liability scheme for ACVs by drawing elements from each of the existing systems. The difficulty with this is that it assumes that each of the liability schemes is satisfactory in its own mode and that as such it will be satisfactory for ACVs. That this is a false assumption is borne out by lawyers who argue that aircraft liability agreements based on national boundary lines are inequitable; that the difference in liability claims should be based on something more than the destination printed on the passenger’s ticket. Even more fundamental to this discussion of liability is the question of whether claims should be limited at all, regardless of the destination or mode of transportation. These become relevant considerations when one is pondering the creation of a liability scheme for a new and unique vehicle.

If one starts with the basic common law premise that one should be free to contract, then logically one should not be prevented from limiting or contracting out of one’s own right to liability claims. This notion of freedom of contract is still permitted in personal liability in shipping contracts between the carrier and his passengers. It presumes, as one of its basic tenets, that the contracting parties will negotiate and come to terms in a final agreement that will result in a compromise of the best interests of each. The difficulty with this theoretical belief is that it does not work in practice; the result usually being that the carrier dictates the terms in a standard form. The average prospective passenger is unaware of his rights or unwilling to bargain for them even when he is aware of them because he

is afraid of being faced with a take-it-or-leave-it situation. The result usually is that for whatever reason, the carrier decides on the terms of the liability for the journey and the other party, probably in a hurry, accepts them without question. The passenger is thus denied, in a crash situation, by his own signature on the contract, the right to sue beyond a certain amount or even at all.

Initially, the signing of such a standard form contract may seem to produce only negative effects, but really the signing of such a liability scheme has a beneficial effect upon both signatories. Supposing that a limitation is placed upon the amount that a carrier has to pay in the event of a collision, the carrier’s insurance company will take this into consideration when adjusting its premium rates. The company, in turn, will not have to pass on to the passenger the cost to it of unlimited liability in the price of the ticket. In effect, when the passenger limits or denies himself liability rights whether he knows it or not, he reduces the price of his ticket. He is exchanging his rights to sue in the event of disaster for the commercial advantage of a reduced fare.

The issue that must be determined by the public when formulating a scheme for liability is at what particular point does the commercial advantage gained through low insurance premiums cease to exceed advantages of the right to freely contract one’s own terms of liability? In other words, to what extent is the public willing to sacrifice its commercial advantages for the right to sue for an unlimited amount in the event of disaster? I think the feeling is growing amongst transportation lawyers, and I share this belief, that it is not in the public’s interest to be motivated by its monetary interests; on the theory that it is the duty of the carrier to its passengers to transfer them safely as well as economically. Thus, if the onus for safe passage of its passengers is deemed to be the paramount policy consideration for the carrier, it only follows that unlimited liability for the passenger should be preserved, if necessary, in legislation. In effect, this legislation would be enforced freedom for the passenger’s right to sue for unlimited compensation. The carrier would not be allowed the freedom to limit or eliminate the passenger’s right to sue. The only recourse for the carrier would be for him to improve the safety features and evacuation procedures in an accident situation so that such a costly event might never occur for him. With this extra concern for safety measures the insurance companies would probably be willing to lower their rates, especially if the program resulted in a reduced or accident-free record. In turn, the public interest would be served, because the onus would be returned to the carrier from whom it had strayed in shipping personal liability contracts. The public would be receiving for slightly
higher travelling costs the substantially more worthwhile saving of lives and property through the onus of the unlimited liability scheme upon the carrier.

The issue of property liability could be decided on the same basis, as between passenger and carrier, but there would be complications if this rule was to be extended to carrier-carrier relationships. Here the public concern would centre not between an unprotected passenger and a financially oriented carrier, but would involve two parties in an accident anxious to claim against one another for the damage inflicted.

The determination of such a liability scheme in the event of collision between two carriers turns on two factors. First, the use of tonnage as a multiple in the calculation of a liability claim is open to criticism because it assumes that all vehicles being subjected to this test are comparable when in fact they are not. For example, an SRN-6 passenger ACV, the actual liability tonnage of which is only 12 tons, is diminutive when compared with the tonnage of an average sized passenger ship. Even with the arbitrarily imposed minimum standard of 300 tons, the SRN-6 liability tonnage is considerably below that of the standard passenger vessel. The use of liability tonnage, then, would seem to create too great a disparity between the large and small sized craft and thus make a loss distribution between them based on this difference inequitable.

The second variable factor that may create widely disparate results in the compilation of a liability claim relates to the number of passengers making claims. Thus, depending upon the situation, the number of claims will vary from all of the passengers carried on board to a minimum of a single claim. It only stands to reason that if a single claim is made under this system, instead of several hundred, the claimant has the potential for a much larger liability settlement.

If these factors have built-in prejudices of their own, then they certainly cannot be expected to produce a fairer result when combined in calculating the claims per passenger. A calculation of liability claims based upon these variables would only illuminate further the inequities that these factors could produce when the liability of passenger ships and ACVs were compared.

There appear to be two possible remedies to the problem. The first alternative would be to change the tonnage factor for ACVs and fix it at

31. See attached sheet. These comparative figures were calculated by Captain Doherty and I am indebted to him for the use of them here.
an artificially high level in order to achieve the shipping equivalent when calculating the liability tonnage. The difficulty with this is that it is perhaps too misrepresentative of the truth when in order to achieve this consistency the liability tonnage must be placed at, say, 30,000 tons, when in fact is only 400.

The second potential solution is to switch from liability tonnage as a measurement factor to the ACVs all-up weight. This switch from measurement of cubic space to the weight of the vehicle might prove to be another form of equalizing the difference. It might prove to be rather confusing, however, in administering these different schemes, especially when a standard such as tonnage has been used for such a long time. With this in mind, it might be better if the same standards were maintained and changed from within, instead of confusing the issue by creating a new classification.

VI. The Legal Approach to ACVs in Great Britain; from Administration and Regulation to Legislation sui generis.

As stated earlier, the thinking of British authorities when considering the legal classification of the ACV was to regulate it within the bounds of existing transporation statutes.\textsuperscript{32} There were two motivating factors behind this policy. In the first place, a thorough examination of the scope of existing definitions in air, sea and land law would bring to light the existence of any reference to the vehicle. Even if no mention of ACVs were made, legislators could still determine the scope of one of the definitions to be wide enough to include them. Either way, this approach would eliminate the fears of those officials apprehensive about the creation of unnecessary legislation in trying to recognize a vehicle already described in terms of existing law. The attention of these men could then be focused upon the less onerous task of amending existing Acts.

The second reason for an in-depth examination of existing definitions is supplementary to the first: it goes to the question of whether there is an enabling power under existing legislation to make rules and regulations for hovercraft or whether a fresh specific power is needed for the purpose.\textsuperscript{33}

The examination produced ramifications that were felt outside Britain in that the analysis represented the first such attempt of its kind among

\textsuperscript{32} See attached sheet. These comparative figures were calculated by Captain Doherty and I am indebted to him for the use of them here.

\textsuperscript{33} See, for a greater discussion of these Acts, Martin Peter, \textit{The Hovercraft in Law: A Lawyer Examines The Current Situation}, 6 Air Cushion Vehicles 85 (No. 42, Dec. 65).
common law countries. While this fact alone makes it significant, the study becomes all the more notable because of the thoroughly intensive manner in which it was carried out. These two factors combine to provide a third reason why this study is important; namely, the immeasurable impact it will have had on the minds of the governments of other common law countries such as Canada, where the statutes concerned are very similar to the British legislation.

In attempting to answer the question, is a hovercraft a ship, one is immediately discouraged from reaching a conclusion in the affirmative. The primary cause for this difficulty in producing an affirmative answer to the question, lay in the lack of definition of the necessary classifications in the first instance and the lack of definitions at all in the second. For example, in the Merchant Shipping Act 1894, the term ‘ship’ is defined as “every description of vessel used in navigation not propelled by oars.” The term ‘vessel’ is not much more clearly defined. It is defined as ‘any ship or boat or any description of vessel used in navigation.’ The fact that these terms were so imprecise, coupled with the fact that the term ‘steamer’ was not even defined, leads one to believe that hovercraft could not possibly be included within these definitions.

By another analysis, however, the reasons for rejection of a hovercraft as a ship were different. In examining the standard domestic definition of a ‘ship’ as above, it is possible to find the phrase ‘in navigation’ of vital significance, in that it could be said that marine hovercraft that were used at sea were used in navigation and thus would be within the definition. The major problem with this approach is that this definition ignores the inherent amphibious nature of hovercraft, which would probably raise strong enough doubts as to whether the craft could still be considered a ship.


“From a lawyer’s point of view the question, ‘Is it a ship or an aircraft?’ goes essentially to the question whether there is an enabling power under existing shipping or aviation or other means of transport legislation to make rules and regulations for hovercraft or whether a fresh specific power needs to be sought for this purpose. In this context, therefore, it is worthwhile looking at existing definitions of ships and aircraft to see “whether a hovercraft falls within those definitions.”

35. Martin, 85, sections, 742, 271, 743 were relevant.
36. See 44, s. 742.
37. See 44, s. 742.
38. Martin, 85.
39. Martin, 85. “We therefore have a situation where it seems most unlikely that an ACV is a ship . . .”.
40. A British legal expert on Hovercraft.
The second question to be asked, 'is the hovercraft a motor vehicle' falls prey to the same pitfalls as the former question does. Keeping this in mind, it was surprising to find that the Road Traffic Act 1962 already contained references to 'hover vehicles.' A hover vehicle is a motor vehicle, whether or not it is adapted or intended for use on roads, but at the same time is not a motor car, motor cycle, a light locomotive or a heavy locomotive defined in the previous Road Traffic Act. Also of note was the fact that there were provisions in this Act and one other, for the Minister to make regulations for hovercraft or to exclude them from regulation but, to this date, no action had been taken under this provision.

The difficulties of considering an air cushion vehicle as a "motor vehicle" within the Road Traffic Act 1962, were obvious. The craft possessed operational capabilities peculiar to it, not the least of which was the amphibious quality which would allow it to operate on more than one terrain without difficulty. The Act, of course, would only be applicable when the craft was on the highway which poses limitations to say the least. Secondly, although the Act stated that hover vehicles would be covered by its provisions "whether or not it is adapted or intended for use on roads", its primary overland usage has always been designed for non-highway routes. Any transportation system of the future designed to transport people at high speeds between two points overland will almost certainly involve the operation of the Tracked Air Cushion Vehicle or the Hovertrain. There are no plans as far as I am aware, for hovercraft to be used on highways.

The third and final question that can be posed, namely, is a hovercraft an aircraft, was ultimately the one British authorities decided to answer in the affirmative. The initial decision was made well before the question was formally posed, but the form of the decision did not call for an official statement of the government's position, but rather called for a de facto application. The reason given for this unofficial de facto recognition of air cushion vehicles as aircraft was that the Board of Trade did not want to risk invalidation of operation by virtue of an after the fact announcement that retroactively made hovercraft aircraft. The government's means of achieving this end were ingenious. By insisting that each hovercraft

42. Beckett, 380.
43. Martin, 85.
44. Martin, 85, The Road Traffic Act, 1960, s.253 (2).
45. Martin, 85.
46. Martin, 85, The Road Traffic Act, 1962, s.19(1).
47. Planners consider that ACVs used for travel overland between two points are best off on tracks. See 44.
operate according to the provisions of the *Civil Aviation Act, 1949*, which stipulated that each craft must have a certificate of airworthiness before flying, the government effectively dealt with air cushion vehicles as aircraft.48 If this provision were not complied with, the Minister would simply have to make an Order in Council prohibiting the craft from operating, as he was empowered to do under the Air Navigation Order of 1960.49 The most curious aspect of all, however, is the fact that neither of these two Acts defines the term ‘aircraft.’50 This surprising fact tends to confirm my conviction that the decision to recognize hovercraft as aircraft was based on regulatory policies that emphasized continuity and convenience of administration for the government’s agencies. I do not believe that the government made any attempt to objectively examine the needs of the industry.

In the absence of any domestic definition, it was deemed only logical to turn to international law for the answer. Authorities turned to the charter of the International Civil Aviation Organization for it because Britain, as a signatory to the original charter of the Chicago Convention of 1944, was subject to it. The charter does not define the term ‘aircraft’ but an annex to it does.51 In it, the term ‘aircraft’ is defined as “any machine that can derive support in the atmosphere from the reaction of the air.” Two interpretations seem possible from this wording.52 The first is that a


“The issue of a permit to fly in respect of hovercraft was against the possibility that it might be so regarded, and, accordingly, without a permit operations might be held to be unlawful. This *de bene esse* treatment of hovercraft as aircraft—if held to be an aircraft the permit would be a very necessary legal document to possess, but if not so held the permit would nevertheless do no harm—provided the only means of control of hovercraft constructional and operational requirements.”

49. Beckett, 380, see 65.


“Lord Kings-Norton, Chairman of the Air Registration Board, said that “for the last ten years, at the request of the Government, the Board had taken on the responsibility for the worthiness of hovercraft. This had always been on an informal basis and this arrangement had been unsatisfactory in its informality. The Board and everyone concerned with this difficult and unusual kind of worthiness would welcome it if the Air Registration Board was given a more formal mandate.

When any new hovercraft authority is set up it should be given a wider title and the wider responsibility for all high speed over-water craft. This should include hovercraft, hydrofoils and fast boats.”

51. Martin, 85.
52. Martin, 85.
hovercraft fits within the definition because the craft operates "from the reaction of the air" if a strict interpretation of the reading is made. The detractors of the idea argued that in order for there to be a "reaction of the air" there had to be a surface for it to react against, which was not necessary for the operation of "real" aircraft.

Apparently convinced by the arguments of the proponents, that a hovercraft could fit within the ICAO definition of an aircraft, the British Government decided for its purposes, the air cushion vehicle was an aircraft.\textsuperscript{53} The practical results of this decision are best described in terms of its effect upon the construction and operation of the craft in the small developing industry.

The industry's reaction to the government's proposal were never favourable and yet were not initially negative.\textsuperscript{54} This was understandable if one takes into account the preoccupation of the industry at the time with survival as capital was in short supply and initial operating costs high. In these circumstances the industry failed to organize a united front on the issue of the craft's recognition and regulation in law.

As the industry began to stabilize itself and production and operation increased sufficiently, the industry could turn its attention, still on an individual and not on a collective basis, to probe the relevance of aircraft legislation to hovercraft. Criticism of the Government's action was directed to three areas.

First, the treatment of the craft as an aircraft did not take into account the non-amphibian models such as the HM-2 sidewall passenger ferry.\textsuperscript{55} Mr. Norman Piper was concerned at the inconsistency of treatment this would cause the HM-2\textsuperscript{24} as a common sense approach would show that it should not be considered an aircraft in its exclusively marine environment. Nevertheless, the Government was not swayed by this criticism; it chose to

\textsuperscript{53} Martin, 85.\n
"This definition gives rise to a great deal of argument. There are those who consider that an ACV is an "aircraft" within the meaning of the definition because it cannot move without the presence of the cushion of air which it creates and that this satisfies the term "reaction of the air", and there are those who say that a hovercraft cannot be an aircraft within this definition because, although the ACV cannot move without the cushion of air, it cannot, equally, move without the existence of the ground or water against which that cushion of air is created and sustained. This, they claim, makes it a surface vehicle."

\textsuperscript{54} Martin, 85.

\textsuperscript{55} Bill to Define the Legal Status of Hovercraft, 24.

\textsuperscript{56} Interview with Mr. Norman Piper, Sales Manager, Hovermarine, Ltd. (U.K.), July, 1969.
continue classifying ACVs as aircraft. The failure of the Government to respond to Hovermarine's request for what its management felt was a matter for urgent reclassification left them dissatisfied and uncertain about the future. They were not at ease being regulated under an aircraft classification and they were apprehensive as to how these regulations would cope with the unforeseen problems of the future.

The second complaint made against the Government's action dealt with safety regulations. Operating as aircraft the hovercraft would be subject to the air safety regulations which some observers felt were not designed with the idea of saving "all souls on board" as were marine regulations. This argument was devised with the idea in mind that in an air crash there would only be a handful of survivors because air casualty results show that this is the likely survival rate. The fact also remains that most aircraft disasters occur high in the sky or, if low to the earth's surface, overland. It is not likely then that a great deal of attention has been given to crashes that might take place at low level over water, especially when the other party in the collision is a ship.

The third criticism made of the proposal was that ACVs as aircraft would be subject to the provisions of the Warsaw Convention and the Hague Protocol (1955) governing the liability of international carriage by air. The effect of these conventions is that the passengers need not prove negligence in the event of a claim which is fixed in its limits. While there is nothing unusual about this approach in itself, the maritime context in which it is set makes in inappropriate. The legislation was not written with disasters at sea in mind. The most striking example of this is the lack of a provision for liability to third parties which is a standard consideration in shipping conventions. ACV operators were naturally concerned about those inadequacies in the law itself but were also wary about the effect it would have upon their insurance rates. The operators knew that any

57. Mr. Piper, former Managing Director of Hovermarine, Ltd. was one of those businessmen dissatisfied with the Government's course of action, particularly so because of its classification of sidewalls as aircraft.
58. See 65.
59. See 65.
60. Bill to Define the Legal Status of Hovercraft, 28.
   Mr. Gresham-Cooke.
   "I must say that I much prefer the marine philosophy of trying to save every
   soul on board. The aircraft philosophy is not so exacting. If there is an air crash,
   frequently one feels that the operating company think that they have done very
   well if they have saved four or five people."
suggestion of unlimited liability could cause their insurance premiums to price them out of business.63

Just what the practical results of the application of this legislation will show is only speculation at this juncture. What can be stated with a degree of certainty is that the confusion would be lessened if the issue of aircraft based accident claims were not utilized in an essentially marine crash situation. Aircraft based liability claims bear no relation to the environment in which an accident might take place and thus should not be employed in situations for which they were never written.

The above criticisms of the government's treatment of air cushion vehicles as aircraft were, in effect, rendered insignificant, when in 1967 the ICAO amended its definition of 'aircraft' to effectively exclude hovercraft.64 The amendment added "other than the reaction of the air against the earth's surface" effectively dispelling doubts that were created by the earlier wording.

The effect of the ruling had profound consequences for those nations which were signatories to the charter. It meant that any countries that had classified hovercraft as aircraft would have to redefine the vehicles or remain at odds with the international legislative body. At least two countries, Great Britain and Canada, were in this category. Other countries, such as the United States and Japan, which had classified their air cushion vehicles as ships, did not need to make a change.

For those countries that were forced to change, there were two options open. If they wished, they could treat their hovercraft as ships and thus achieve uniformity with two large maritime nations. In the alternative, they could strike new legislative ground and recognize hovercraft sui generis. Canada decided to treat the hovercraft as ships with plans to enact separate legislation in the future.65 Great Britain was the lone forerunner of a new experiment in transportation law; the recognition of hovercraft sui generis.

An analysis of The British Hovercraft Act 1968 at this juncture would serve no useful purpose because although it represents the first attempt by a country to legislate for hovercraft sui generis, it is largely enabling in character. Thus aside from the definition66 of the craft, the statute contains little or no reference to the operational safety and liability aspects discussed above. Thus at this stage of its development it remains a

statutory shell conceived as a legal respository for these vital issues yet to be settled.

To this point the discussion of the legal status of ACVs has been centered about the British methods of legislation and regulation. By making reference to their experiences and the legislative means by which they sought to regulate hovercraft one can approach the issue of legal control of ACV development in Canada with a much greater understanding. It is appropriate that the Canadian review follows the British development from a chronological standpoint; major development and control in that country was several years in advance of the state of the art in Canada. One can reasonably say, then, that the British background serves as the source upon which Canada was able to draw when first formulating a legislative scheme for ACVs; it also serves as the most advanced example that Canada can look to when devising hovercraft regulation in the future.

VII. ACVs in Canada: Past and Present Legal Regulation.

Hovercraft first came to Canada in 1963 when an SRN-2 underwent trials on the St. Lawrence River and was successful in negotiating the Lachine Rapids.\textsuperscript{67} While this event was of purely scientific and not legal importance, events which took place in preparation for it were. Realizing that a legal vacuum existed for the recognition of these craft, the Department of Transport, under whose auspices the trials for the craft were being conducted, sent a letter to the Justice Department requesting an opinion on their legal status.\textsuperscript{68} The presumption was, and this was ultimately confirmed in the opinion, that an air cushion vehicle was an aircraft under the definition of the Aeronautics Act.\textsuperscript{69} This definition, just as in the British scheme, was derived from the Annexes to the ICAO Charter of 1944.\textsuperscript{70} Justice Department lawyers were primarily interested with the wording of the definition, which, as pointed out earlier in the British case, was open to this interpretation before the amendment in 1967. Mr. Lochhead\textsuperscript{71} suggests that the Department may have also been

\textsuperscript{67} The Hovercraft Act 1968, c.59, s.4(1).

"In this Act

"hovercraft" means a vehicle which is designed to be supported when in motion wholly or partly by air expelled from the vehicle to form a cushion of which the boundaries include the ground, water or other surface beneath the vehicle;"

\textsuperscript{68} Lochhead, I.G. The Legal Status of The Air Cushion Vehicle in Canada, 2 (unpublished, March 1, 1970).

\textsuperscript{69} Lochhead, 5.

\textsuperscript{70} Lochhead, 5.

\textsuperscript{71} Lochhead, 5.
influenced by the effects of insurance and liability schemes which would vary with the craft's status. 72 Undoubtedly, too, the British precedent in classifying ACVs as aircraft must have influenced the Department's decision to a certain degree.

The full consequences of this ruling were not felt until Hoverwork Canada, Ltd. applied for a license to operate a commercial hovercraft service at Expo 67. 73 The confusion that arose when several regulatory agencies each sought to apply a measure of control through taxation or safety regulations, 74 indicated the worth of the Justice Department's decision. Quite clearly the classification of the Air Cushion Vehicle as an aircraft under the Aeronautics Act caused unforeseen administrative problems, and the ones that did arise could not be properly handled by the Flight Standards Branch, its regulatory agency.

Realizing that corrective measures had to be taken, the Department of Transport reacted to the situation by making two important changes within the Department. Both changes were administrative in nature and did not alter the recognition of the vehicles in law. The first change involved the recognition of hovercraft as separate transport vehicles and, to this end, the Air Cushion Vehicle Division in the D.O.T. was established. 75 Captain Doherty was appointed to head this new section, which was to deal exclusively with ACVs. Even though this move was non-legislative, it was the first government recognition of these vehicles as distinct from aircraft up until this time.

The second, and equally important change involved the transfer of the responsibility for hovercraft within the Department from the Flight Standards Branch to the Marine Regulations Branch of the Department. 76 According to Mr. Lochhead the transfer was motivated by the application

72. Mr. Graham Lochhead is a government official in the Department of Industry who is responsible for the development of the hovercraft industry in Canada.
73. Lochhead, 5.
74. Lochhead, 5.
75. Lochhead, 5.
76. "The craft was imported to Canada, classed as an automobile. It was placed on the Civil Registry of Aircraft, aircraft identification stencilled on its rudders, and an operator's certificate obtained from the Air Transport Board. It was inspected and approved for use by civil aviation officials, Canada's Steamship Inspectors, and the Montreal Harbour Board. A land mobile radio operator's license was obtained from the Department of Transport and the small docks where the vehicle landed were licensed as airports. The final blow came when the Quebec government applied its diesel fuel tax on the premise that the hovercraft was similar to a truck.

76. Air Cushion Vehicle Division, Marine Regulations Branch, Hunter Building, Ottawa, Ontario.
of a commercial operator's license for travel between Vancouver and Victoria by Pacific Hovercraft.  

D.O.T. felt at this time that hovercraft operating solely in the marine environment would be better regulated by an agency with marine and not aeronautic interests. The Government's decision was prompted in part by interested observers in the industry, familiar with the degree of control that the Air Registration Board in Great Britain exercised over what was an essentially maritime use of the vehicles in that country, and who were anxious to avoid the recurrence of such problems here.  

The net effect of these changes was to leave the situation unclear. If one looked only to the fact that hovercraft were subject to a new section within D.O.T. that dealt exclusively with hovercraft in the Department, one would tend to believe that ACVs had achieved a measure of autonomy. The proof that this was not so, however, was in the defining section in the Aeronautics Act which classified a hovercraft as an aircraft. This assumption was, in turn, negated to an extent when the Marine Regulations Branch was appointed the new regulatory agency for hovercraft. Thus hovercraft were to be considered aircraft in law and air cushion vehicles in general administration with a nautical influence because of their use in a mostly marine environment. 

Once again, realizing that its administrative scheme was inadequate, the D.O.T. decided a change was in order. In point of fact it used the occasion of a government inter-departmental committee which was originally set up to assess the performance of ACVs in previously held trials to announce that ultimately air cushion vehicles would be subject to their own legislation and regulatory agencies. The initial steps that were to be taken to achieve this long range proposal would eliminate the dual recognition of amphibious air cushion vehicles as aircraft and sidewalk hovercraft as ships and would substitute in their places the recognition of air cushion vehicles under amendments to the Canada Shipping Act.  

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77. Lochhead, 6.  
78. Lochhead, 6.  
80. Lochhead, 6.  

"Recently, Mr. Hellyer announced that the responsibility for ACVs had been transferred from Air Service to the Marine Regulations Branch. This time many of my friends asked "Why on earth had D.O.T. called an ACV a boat?" For the record, it is not a boat; the Marine Regulations Branch will regulate ACVs under the Aeronautics Act. The Department, however, has every intention of proposing legislation changes that will remove ACVs from the Aeronautics Act, and which
These new provisions are supposed to provide the hovercraft with a distinct statutory definition and thus recognition of its own, albeit within the confines of the Canada Shipping Act. The Government feels that any separate recognition of hovercraft beyond this is unnecessary considering the fledgling state of the industry at this time.

In making my concluding remarks, I have shown the extent of existing legislative attempts at classifying ACVs and how I think these approaches have fallen short of what the public, the industry and the government requires for the development of the craft in accordance with the systems engineering concept. I think the development of legislation, both within existing modes and even when attempted sui generis, have reflected this failure, because to date, lawyers have been too preoccupied with the

will permit them to be controlled when operating in the Marine environment under the Canada Shipping Act.”

"At present in Canada amphibious air cushion vehicles are classified as aircraft and are subject to the Aeronautics Act and Air Regulations.

"Air cushion vehicles which have underwater propellers and operate in the water at all times are classified as ships and are subject to the Canada Shipping Act and Regulations made under that Act.”


In the explanation of these amendments the D.O.T. published the following statement.

"The classification of air cushion vehicles as aircraft or ships will in the near future be no longer applicable. The reason for this is that legislation changes have been passed which will remove Air Cushion Vehicles from the jurisdiction of the Aeronautics Act and allow them to be regulated under the Canada Shipping Act.”


Lochhead, 10.

"This separate treatment of the air cushion vehicle, albeit under the statutory authority of the Canada Shipping Act, is most significant and augurs well for the future development of entirely separate legislation. It treats air cushion vehicles sui generis: it recognizes its right to an identity quite separate from aircraft, ships or motor vehicles or any other known form of transport, and therefore will give the courts clearance to regard it in a clear minded way, unhampered by precedents established through past litigation and regulation of existing transportation.”

D.O.T. release 1/28/70.

"The amended legislation defines an air cushion vehicle as a specific "type of vehicle, not as a vessel, applies what are believed to be appropriate parts of the Canada Shipping Act to ACVs and provides statutory authority for the making of special air cushion vehicle regulations . . . .”


"To summarize, our policy is to continue to regulate ACVs under existing statutes, suitably amended to cover their unique qualities, until such time as we have gained sufficient experience to prove if separate legislation is necessary.”
definition of the craft. They have been concerned more with the eventual location of the definition in the statutory transportation framework than they have been with the key issues which really point out the uniqueness of the ACV. What I am saying, in a sense, is that it does not matter how the craft is classified, either *sui generis* or otherwise, if the problems facing ACVs in their operation are not dealt with. I have shown that operation, safety and liability considerations are unique when compared with their equivalents in other transportation modes and that they can only be recognized in law with an approach which is unfettered by existing concepts.

Thus I am asserting that the ACV must be recognized *sui generis* in law with its own statute; but I feel that this approach to the problems of ACVs would only be beneficial if the issues as I have outlined above were solved. The provision of a new statute in the form of a shell within which these ACV problems could be grouped together, and attempted to be solved according to existing concepts, would not advance the legal state of the art; it would simply reidentify the problem. But by first exposing and solving these issues with a fresh approach and by providing them with a separate legal sphere within which to develop, I think the recognition of ACVs *sui generis* would have a beneficial result. The ACV statute in effect, would take on a more original appearance as new issues requiring special treatment became serious. Only if it was constructed in this way would the statute serve a meaningful purpose in presenting to the public, the industry and the government, a legal framework constructed according to the needs of the vehicle.
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<tr>
<td>Ambrose Shea</td>
<td>Passenger</td>
<td>1967</td>
<td>8,485</td>
<td>$11.8 m.</td>
<td>$1,877,676</td>
<td>16.1%</td>
<td>32.5% of Passenger Liability</td>
<td>5.2%</td>
<td>Pass. Crew 98</td>
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<tr>
<td>Atlantic Gennis Fishing Trawler</td>
<td>1967</td>
<td>1,284</td>
<td>$2.45 m.</td>
<td>$285,048</td>
<td>11.6%</td>
<td>&quot;</td>
<td>&quot;</td>
<td>3.7%</td>
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<tr>
<td>Canadian Progress Seaway Bulk Carrier</td>
<td>1968</td>
<td>20,196</td>
<td>$12.55 m.</td>
<td>$2,241,867</td>
<td>18.9%</td>
<td>&quot;</td>
<td>&quot;</td>
<td>6%</td>
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<tr>
<td>H1070 Cargo</td>
<td>1966</td>
<td>18,937</td>
<td>$11.95 m.</td>
<td>$2,102,007</td>
<td>17.6%</td>
<td>&quot;</td>
<td>&quot;</td>
<td>5.7%</td>
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<tr>
<td>Our Polaire</td>
<td>Tanker</td>
<td>1963</td>
<td>4,312</td>
<td>$4.2 m.</td>
<td>$478,632</td>
<td>11.4%</td>
<td>&quot;</td>
<td>3.8%</td>
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<tr>
<td>SRN-6 Pass. ACV.</td>
<td>1966</td>
<td>300 (actual 12)</td>
<td>$350,000</td>
<td>$66,600</td>
<td>19%</td>
<td>&quot;</td>
<td>6%</td>
<td>Pass. Crew 35</td>
<td></td>
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<tr>
<td>SRN-4 Pass. ACV.</td>
<td>1968</td>
<td>410</td>
<td>$4.7 m.</td>
<td>$91,020</td>
<td>1.9%</td>
<td>&quot;</td>
<td>.61%</td>
<td>Pass. Crew 254, Cars 30, or Pass. 600, Crew 20, No Cars.</td>
<td></td>
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Notes:
1. Passenger liability calculated on $222. per ton
2. Passenger liability 3,100 Gold francs per ton.
3. Property liability 1,000 Gold francs per ton.
4. If all passengers in Ambrose Shea lost, maximum average - $6,025.
5. If all passengers in SRN-4 lost, maximum average - $358 for 254 passenger version - $152 for 600 passenger version.
THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970
AND THE TRANSPORTATION INDUSTRY

BY
DENIS M. NEILL* AND HARRY A. RISSETTO**

The transportation industry has traditionally held a preeminent position in the development and implementation of safety procedures. In large part this has been the result of the public's interest in insuring that it could get from place to place with the minimum risk of injury. The regulation developed in a Balkanized fashion with each agency developing and applying standards for the mode under its jurisdiction. Only recently has the Secretary of Transportation established the position of Assistant Secretary of Transportation for Safety and Consumers Affairs1 whose function it will be to develop intermodal safety standards.

This coordination of regulatory effort has come at an appropriate time, because the industry will soon be required to coordinate its safety efforts with those of a new agency whose jurisdiction extends to all areas of interstate commerce not presently regulated under existing safety standards. Consequently, there will be increasing legislative and administrative pressure in the transportation industry to insure that the standards implemented by the Bureau of Motor Carrier Safety, the Bureau of Railroad Safety, the Office of Merchant Marine Safety, the Federal Aviation Administration and the Hazardous Materials Regulations Board are at least as stringent as those currently being promulgated by the Occupational Safety and Health Administration of the Department of Labor.

While many companies have established safety programs that exceed the current requirements of their modal regulatory agencies, the Occupational Safety and Health Act (OSHA) standards will govern all employers whose employees' job functions are not presently the subject of safety standards.

As more fully explained below, the new job safety law does apply to the transportation industry. The purpose of this article is twofold: (1) to discuss the interrelationship of OSHA to existing transportation safety laws and regulations and (2) to discuss briefly the salient points of the new


law. This discussion, then, is designed to introduce the new law rather than to analyze its every detail.

THE SCOPE OF THE ACT

The scope of the Act's application is as broad as Congress' power to regulate interstate commerce. The Act applies to every "employer" defined as "a person engaged in a business affecting commerce who has employees . . . ." Consequently, the jurisdiction of the Department of Labor in enforcing this statute is as broad as the statutory jurisdiction of the National Labor Relations Board. It is not, however, subject to the self-imposed limitations promulgated by the National Labor Relations Board to narrow its jurisdiction. The Act is applicable to employment performed in any state, the District of Columbia, the Commonwealth of Puerto Rico and various other United States possessions.

OSHA and Existing Regulation

The relationship of OSHA to pre-existing federal safety legislation is not clearly delimited in the Act. The new safety law does not apply to "working conditions" of employees with respect to which other federal agencies (and state agencies acting under Section 274 of the Atomic Energy Act of 1954) exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health. Given its broadest possible interpretation, this section of the law would exclude industries regulated, as to safety, by the Bureau of Motor Carrier Safety and other federal agencies charged with safety responsibility.

The legislative history of the Act, however, indicates a Congressional intention to apply narrowly this statutory exclusion:

The Senate Bill said the Act should not apply to working conditions with respect to which other federal agencies exercise statutory

authority affecting occupational safety and health, while the House amendment excluded employees whose working conditions were so regulated. The House language had an additional exclusion relating to employees whose safety and health were regulated by state agencies acting under section 274 of the Atomic Energy Act of 1954. The House receded on the first point; the Senate receded on the second. 7

The House Bill, if passed, would have created an employee-oriented exclusion and would have limited OSHA jurisdiction over transportation employees in almost the same manner as the Interstate Commerce Commission exemption from the Fair Labor Standards Act limited the jurisdiction of the Department of Labor over drivers. 8 If the House version had been enacted a convincing argument may have nevertheless been raised that OSHA jurisdiction would have been limited only with respect to employees over whom another federal agency actually exercised regulatory control, 9 whereas Fair Labor Standards Act jurisdiction is limited with respect to employees over whom another federal agency (I.C.C.) has power to establish regulation.

The Senate language, on the other hand, is oriented toward and creates an exemption only to the extent that other federal agencies exercise authority to regulate a working condition. 10 The argument that the exemption applies to working conditions over which another federal agency has unexercised regulatory power is a weak one, at best. The I.C.C. has general power to establish classifications of motor vehicles and to establish such rules as it deems necessary or desirable and in the public interest. 11 To exempt any working condition over which the I.C.C. has "power" to establish regulations would be to exempt the entire motor carrier industry. Such a jurisdictional division would result in OSHA having more limited authority than if the House language had been adopted. This is clearly contrary to the Congressional intent to apply the Act expansively.

The crucial jurisdictional question is this: "Does a federal agency actively exercise its statutory authority to prescribe or enforce standards or

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regulations affecting occupational safety or health over the working conditions sought to be regulated by OSHA?"

OSHA and Transportation Regulation

An apt illustration of the interrelationship of OSHA to existing law and regulation is found in the trucking industry. Many separate working conditions of a motor carrier driver are the subjects of detailed regulations administered by the Bureau of Motor Carrier Safety, the Office of Highway Safety and the National Highway Traffic Safety Administration.

The driver's vehicle must meet the performance requirements of the Federal Motor Vehicle Safety Standards.\textsuperscript{12} His vehicle must be properly equipped,\textsuperscript{13} inspected and maintained;\textsuperscript{14} and the driver himself be physically, mentally and morally qualifie.\textsuperscript{15} His hours are regulated,\textsuperscript{16} as is almost every other aspect of the actual operation of the vehicle.\textsuperscript{17} If he hauls explosives or dangerous articles,\textsuperscript{18} or if his cargo is hazardous,\textsuperscript{19} further regulations apply.

Although it may appear that the motor carrier driver's every imaginable "working condition" is regulated as to safety and health, let us reflect briefly on what is not yet regulated—and thus subject to possible OSHA standards. What if the driver assists in loading his truck with cargo other than explosives, dangerous articles or hazardous materials? What if he unloads such cargo on the property of an employer regulated under the Longshoremen's and Harbor Workers' Compensation Act?\textsuperscript{20} What about the lunch room at the carrier's terminal? The locker room? The shower?

It is easy to see instances of actual OSHA regulation and many more examples of potential OSHA regulation over the working conditions of motor carrier drivers. Of course, OSHA applies far more extensively to the working conditions of nondriver personnel. Standards governing almost every aspect of warehousing,\textsuperscript{21} including a specific standard

\begin{itemize}
\item[2.] 49 C.F.R. § 571.21.
\item[13.] 49 C.F.R. §§ 393.1-393.96.
\item[14.] 49 C.F.R. §§ 396.1-396.9.
\item[15.] 49 C.F.R. §§ 391.1-391.65.
\item[17.] 49 C.F.R. §§ 392.1-392.68.
\item[18.] 49 C.F.R. §§ 397.01-397.1.
\item[19.] 49 C.F.R. §§ 177.800-177.861.
\end{itemize}
regulating the handling and storage of materials, have been promulgated. Safety programs should be redesigned to comply with these standards.

Similar tandem regulation exists in the other modes of transportation. While the Federal Aviation Administration regulates a great portion of the employees’ working environment, numerous work areas are unregulated and are thus the subject of OSHA regulation. Railroads owe an analogous twofold responsibility to both the Federal Railroad Administration (Department of Transportation) and the Occupational Safety and Health Administration (Department of Labor).

In the maritime industry, dual safety regulation has been in existence for quite some time. Standards promulgated by the Bureau of Labor Standards (Department of Labor) regulate the safety and health in ship repairing, shipbuilding, shipbreaking, and longshoring. Other regulatory authority is exercised by the Office of Merchant Marine Safety, U. S. Coast Guard (Department of Transportation).

OSHA expressly centralizes the Labor Department’s various safety functions under the jurisdiction of the Occupational Safety and Health Administration. The disparate safety standards promulgated pursuant to the Walsh-Healy Act, the Longshoremen’s and Harbor Workers’ Compensation Act, the Contract Work Hours Safety Standards Act, the Service Contract Act of 1965, and the National Foundation on Arts and Humanities Act became OSHA standard on April 28, 1971, and will remain such until expressly superseded by other standards. Until such other standards are promulgated, the industries covered by the prior legislation are subject to dual enforcement procedures, limited, however, by the application of the collateral estoppel and res judicata doctrines.

The Act expressly preserves existing employee remedies under  

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23. These safety regulations are scattered throughout Chapter I of Title 14, C.F.R.
24. 49 C.F.R. § 1.49; 49 C.F.R. §§ 211.1-240.3.
26. These safety regulations are scattered throughout Chapter I of Title 46, C.F.R.
workmen's compensation laws and common law, and further preserves the many statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases or death of employees arising out of, or in the course of, employment. This provision is consistent with the intent of Congress to rectify the condition rather than to remedy any injury that might result from the condition. Thus, OSHA exists independently from statutorily provided remedies for employment injuries.

Standards

The heart of the Occupational Safety and Health Act is its delegation of authority to the Secretary of Labor to establish standards governing the working conditions of employers under its jurisdiction. OSHA provides for three types of standards: (1) interim standards that are based on existing federal standards and national consensus standards; (2) permanent standards that would replace or supplement the interim standards; and (3) temporary emergency standards that could be issued immediately when new health and safety findings indicate that employees are exposed to serious dangers.

Interim Standards

Between April 28, 1971 and April 27, 1973, the Secretary of Labor is authorized to promulgate as occupational safety and health standards any national consensus standard or any established federal standard. In the event of a conflict among existing standards, the Secretary is required to promulgate the standard that assures the greatest protection of the safety or health of the affected employees.

These initial standards are not subject to the rule-making provisions of the Administrative Procedure Act and may go into effect, at the discretion of the Secretary, immediately upon publication in the Federal Register. An established federal standard is one which has been promulgated by another federal agency; national consensus standards are the result of work by a standards-setting organization such as the American National Standards Institute, Inc., or the National Fire Protection Association.

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35. Once promulgated, an interim standard will continue in effect until rescinded or superseded by the Secretary of Labor. The April 27, 1973 date is merely a deadline for the issuance of interim standards.
National consensus standards are themselves subject to narrow statutory restrictions: (1) they must have been adopted and promulgated by a nationally recognized standards-producing organization; (2) procedures used must be such that the Secretary can determine that persons interested and affected by the scope of the standards have reached substantial agreement on their adoption; (3) they must have been formulated in a manner which afforded an opportunity for diverse views to be considered; and (4) they must have been designated as such standards by the Secretary after consultation with other appropriate federal agencies. The guidelines governing the adoption of national consensus standards are designed to afford the affected parties substantial input into the formulation of the occupational safety standards by which they are to be governed.

The Secretary may not modify an existing federal standard or a national consensus standard without following the administrative procedures utilized to develop permanent standards. The Act establishes the same statutory procedures for modifying or revoking any standard as it does for promulgating permanent standards.

Many interim standards have already been promulgated. These standards consist of both national consensus standards and standards previously promulgated pursuant to other federal legislation. Interim or "initial" standards cover walking-working surfaces; means of egress; powered platforms, manlifts and vehicle-mounted work platforms; occupational health and environmental control; hazardous materials, personal protective equipment; general environmental controls; medical services and first aid; fire protection; compressed gas and compressed air equipment; materials handling and storage; machinery and machine guarding; hand and portable powered tools and other handheld equipment; welding, cutting and brazing; and electrical equipment and materials. Although the basic effective date is August 27, 1971, additional compliance periods, of up to 180 days beyond that date, have been provided for certain standards requiring substantial modification of equipment or procurement of safety devices. An example of such an extension of time is that afforded by the regulation requiring fork lift trucks to be equipped with overhead guards.

37. Id., § 3(9).
38. Id., § 6(b).
Temporary Emergency Standards

Section 6(c) of the Act provides for the promulgation of emergency standards which are not subject to the processes of the Administrative Procedure Act. In order to promulgate an emergency standard, the Secretary must determine: (1) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful, or from new hazards, and (2) that such emergency standard is necessary to protect employees from such danger. An emergency standard will remain in effect for six months after publication. Immediately upon publishing the emergency standard, it is incumbent upon the Secretary to commence a proceeding designed to result in a permanent standard.

Permanent Standards

The procedures of section 6(b) of the Act provide the Secretary with a great deal of flexibility in developing and promulgating permanent standards. Whenever the Secretary concludes that a permanent standard is appropriate, he has one of two options. He may either directly publish the standard for comment in the Federal Register or he may appoint an advisory committee to analyze the standard and report its recommendations.

The appointment of an advisory committee is discretionary and will consist of not more than fifteen members and shall include in that number, one or more persons designated by the Secretary of Health, Education and Welfare. Additionally, it shall include equal numbers of employer and employee experts, as well as one or more representatives of the state health and safety agencies. If the Secretary elects to use an advisory committee, he must afford the committee between 90 and 270 days to make its findings. Within 60 days after the submission of the advisory committee's report or within 60 days after the expiration of its time to report, the Secretary must publish the proposed standard in the Federal Register.

If the proposed standard differs substantially from an existing national consensus standard, the Secretary must publish, with the proposed

42. 5 U.S.C. § 551.
43. Pub. L. No. 91-596, § 6(c)(3).
44. Id., § 6(b)(1).
45. Id., § 7(b).
46. Id., § 6(b)(1).
47. Id., § 6(b)(2).
standard, a statement of the reasons why the proposed rule, if adopted, will better effectuate the purposes of the Act than the national consensus standard. 48

Interested parties will be afforded 30 days to comment on the proposed standard and to request, at their option, a public hearing. If an interested party requests a hearing, an informal rulemaking proceeding (without record) will be conducted. 49 Within 60 days after the expiration of the comment period, or within 60 days after the hearing, the Secretary must either issue a rule containing the new standard or make a determination that a rule should not be issued. However, he may delay its implementation for up to 90 days to afford the affected employers an opportunity to adapt to the new standard. 50

Judicial Review

Any person who is adversely affected by any standard may challenge the standard in a United States court of appeals within 60 days after it is promulgated. Unless otherwise ordered by the court, the filing of a challenge will not stay the operation of a standard. The standard will be affirmed on review if it is supported by substantial evidence in the record considered as a whole. 51

Variances

An employer faced with an onerous standard may seek a variance from the standard. The Secretary of Labor is authorized to issue either temporary or permanent variances, depending upon the needs of the employer and his ability to protect his employees adequately.

Temporary Variances

There is some ambiguity regarding the application of temporary variances to other than permanent standards. The interpretation that temporary variances apply solely to permanent standards is based on the location of the temporary variance provision within the statute. The first

48. Id., § 6(b)(8).

49. Id., § 6(b)(3). The absence of a record may find judicial resistance in subsequent court review.

50. Pub. L. No. 91-596, § 6(b)(4). The permanent standards procedures are potentially cumbersome. If an advisory committee is appointed, it can take as long as a year and a half to put a standard into effect.

three subsections of section 6 cover standards: § 6(a) deals with interim standards, § 6(b) deals with permanent standards, and § 6(c) deals with emergency standards. The temporary variance provisions appear as part of subsection (b).\footnote{Id., § 6(b)(6)(A).} Apparently, because of its position as a subparagraph of the permanent standard subsection, some commentators have reasoned that the temporary variance rules apply only to variances from a permanent standard.\footnote{Id., § 6(b)(6)(A).}

It is our opinion, however, that the provision for temporary variances applies to interim and emergency as well as to permanent standards. We base this interpretation on two arguments:

First, the language of the subparagraph 6(b)(6)(A) is clear and unequivocal.

"(A) Any employer may apply to the Secretary for a temporary order granting a variance from a standard or any provision thereof promulgated under this section." [Emphasis added.]

If the Congress had intended the temporary variance procedure to apply only to permanent standards it would have undoubtedly used the term "subsection" (referring to subsection (b)) rather than "section". That Congress certainly realized the distinction between the two terms is illustrated by its use of the term "subsection" in § 6(b)(7) which states, in pertinent part, "any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warnings as are necessary . . . ." [Emphasis added.] The studied differences in the statutory language appearing in two successive paragraphs of the statute supports our interpretation.

Second, common sense dictates that because the interim standards are intended to have a degree of permanency, they should be subject to temporary variances. Although interim standards may be promulgated only during the initial two years of the Act, they will remain in effect until rescinded or modified.\footnote{The Act contains no termination date or limiting duration for interim standards. See note 35, supra.} Consequently, there is no logical basis for distinguishing between interim and permanent standards in determining the authority of the Secretary to issue a temporary variance.

The existence or absence of the right to obtain a temporary variance from the operation of an interim standard will be of practical importance. The Secretary is given substantial flexibility in authorizing a temporary
variance. Section 6(b)(6) provides that an employer may obtain a temporary variance if he establishes that: (i) he is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to comply with the standard or because necessary construction or alteration of facilities cannot be completed on the effective date, (ii) he is taking all available steps to safeguard his employees against the hazards covered by the standard, and (iii) he has an effective program for coming into compliance with this standard as quickly as practicable.

Permanent Variances

In order to obtain a permanent variance, the employer must show "that the conditions, practices, means, methods, operations, or processes used or proposed to be used by an employer will provide employment and places of employment to his employees which are as safe and healthful as those which would prevail if he complied with the standard." \(^{56}\) [Emphasis added.] It is reasonable to expect that permanent variances will be much more difficult to obtain than temporary variances.

National Defense Exemptions and Variances

The law also provides that the Secretary, "to avoid serious impairment of national defense," may issue reasonable variations, tolerances and exemptions from any or all provisions of this Act.\(^ {56}\) The first sentence of Section 16 provides that the Secretary may provide reasonable limitations and make rules and regulations allowing reasonable variations after notice and an opportunity for a hearing on the record. This would seem to imply that the interested parties have an opportunity to appear and give evidence before the variation or tolerance is granted. However, the last sentence of the section reads as follows: "Such action shall not be effective for more than six months without notification to affected employees and an opportunity being afforded for a hearing." The last sentence appears to contradict the first sentence. The regulations promulgated by the Secretary support an interpretation that gives precedence to the first sentence. They require that each application for a national defense exemption include a description of how affected employees had been informed of "their right to petition the Assistant Secretary for a hearing."\(^ {57}\)

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55. Pub. L. No. 91-596, § 6(d).
56. Id., § 16.
Variance Application Regulations

The Secretary of Labor has promulgated regulations governing applications for variances. Applications for temporary variances are required to contain ten specific items, including a showing of inability to comply, a demonstration of interim measures to meet safety and health needs and a statement of when the employer expects to comply. The temporary variance application must also contain a description of how affected employees were informed of the application and their right to petition the Assistant Secretary for a hearing.

An application for a permanent variance must contain an appropriate substantive showing that the conditions, practices, means, methods, operations or processes to be used are as safe and healthful to employees as those required by the standard. The applicant must certify that he has given a copy of his application to his employees' authorized representative, that he has posted a summary of the application where employee notices are usually posted and that he has taken other appropriate means to notify employees of the application and of their right to petition the Assistant Secretary for a hearing.

An application for a national defense exemption or variance must contain six specific items, including a demonstration of how the variance or exemption is necessary and proper to avoid serious impairment of the national defense. As indicated above, employees have a right to petition the Assistant Secretary for a hearing and must be notified of this right.

Applicants may also request an interim order for a variance until a final decision is rendered. The interim order application should include a supporting statement of fact establishing a basis upon which the Assistant Secretary of Labor for Occupational Safety and Health may exercise his discretion to issue the interim variance. Interim orders will be published in the Federal Register and the applicant is required to so notify his employees.

Either applicants or affected employees may request a hearing in any variance proceeding. Hearing applications must demonstrate how the petitioner would be affected by the relief sought. It should also include any statement or representations in dispute and a summary of evidence and

63. OSHA Regs. §§ 1905.10(c), 1905.11(c), 1905.12(c), 36 Fed. Reg. 12291-92 (1971).

The interim order may be issued in an ex parte fashion.
argument on any issue of fact or law presented. Other specific regulations have been promulgated regarding government hearings, including rules for service, prehearing conferences, discovery procedures, and summary decisions. Careful study of these procedures is advised for those who expect to file variance applications.

**General Duty Provision**

OSHA also contains a “general duty” provision which requires an employer “to furnish to each of his employees, employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees . . . .” This catch-all provision is intended to supplement the standards promulgated by the Secretary. An OSHA investigator may issue a citation charging a violation of the general duty provision as well as any violation of a standard, rule, or order promulgated pursuant to the Act.

The legislative history of the Act supports an interpretation that a proposed penalty may not be assessed initially for a violation of the general duty provision. (Penalties are assessable upon discovery of a violation of a standard.) However, a penalty could result from the failure to abate a general duty violation. In a lengthy statement discussing the general duty provisions, Senator Harrison A. Williams (D.-N.J.) stated:

“...There is no penalty for violation of the clause; it is only if the employer refuses to correct the unsafe condition after it has been called to his attention and an abatement order issued that a penalty may attach. Before that is done, the employer would be entitled to a full administrative hearing, followed by judicial review, if he disagrees that the situation in question is unsafe.”

Similar general duty provisions appear in other federal safety standards laws, as well as in the safety provisions of thirty-five or more states. In a statement on the floor of the House, Congressman William A. Steiger (R.-Mich.) offered his personal observation that the Labor Department has not yet enforced general duty provisions in the absence of specific standards. However, language in the Act’s penalty provision supports an

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66. Id., § 9(a).
67. Id., §§ 17(b), (c).
68. Id., § 17(d).
interpretation that would authorize the Secretary to impose a civil fine for violation of the general duty provision.\textsuperscript{71} There is as yet no indication of the Secretary’s position on this question.

\section*{Investigations and Inspections}

The first step in the enforcement procedures of the Act is an investigation of the employer’s premises by an OSHA investigator. The investigations may be categorized into two groups based on the method of initiation: a spontaneous investigation, and a complaint investigation.

\textit{Spontaneous Investigations}

OSHA authorizes the Department of Labor to hire inspectors with the following authority:

\begin{quote}
“(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer . . .

“(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.”\textsuperscript{72}
\end{quote}

This section authorizes the investigators to enter and inspect a workplace without a prior complaint by an employee or other interested party. It is the policy of the Occupational Safety and Health Administration to make spontaneous inspections on a “worst, first” basis.

\textit{Inspection Upon Complaint}

There are two provisions in the statute which provide for inspection upon employee complaints. Any employee or representative of an employee who believes that a violation of a safety or health standard exists and that the violation threatens physical harm or causes imminent danger, may request an inspection by giving notice to the Secretary.\textsuperscript{73} This limited

\textsuperscript{71} Pub. L. No. 91-596, §§ 17(a), (b), (c).
\textsuperscript{72} Id. § 8(a).
\textsuperscript{73} Pub. L. No. 91-596, § 8(f)(1).
procedure does not encompass complaints that allege a mere violation of either a standard or a general duty; it includes only those violations which threaten physical harm or create an imminent danger.

Another provision contains a broader complaint procedure. It states that "prior to or during any inspection of a workplace, any employee or a representative of employees employed in such workplace may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this Act which they shall have reason to believe exists in such workplace."\textsuperscript{74} The words "prior to" clearly indicate that an employee may initiate an investigation by filing a complaint. Furthermore, the internal review procedure in section 8(f)(2)—triggered by the failure of an inspector to issue a citation on an employee complaint—necessarily implies that an inspection should be carried out following a complaint unless it is frivolous on its face. Proposed enforcement regulations \textit{require} an investigation if the Occupational Safety and Health Area Director finds "reasonable grounds to believe that such violation or danger exists."\textsuperscript{79}

\textit{Advance Notice}

Section 17(f) of the Act presupposes an inspection without advance notice. It provides for the imposition of a fine on any person who gives advance notice of inspection without authority of the Secretary or his designees. However, proposed regulations and a policy statement by the Assistant Secretary of Labor for Occupational Safety and Health George C. Guenther indicate that in order to facilitate efficient inspections, upon authorization by the OSHA Area Director or the Compliance Officer, up to twenty-four hours advance notice may be given.\textsuperscript{78} This policy, however, is not intended to preclude an inspection without notice in appropriate cases.

\textit{Inspection Procedure}

The inspection procedure is set out in detail in the statute and proposed regulations. The inspector must be allowed to investigate any workplace

\textsuperscript{74} \textit{Id.}, § 8(f)(2) (emphasis added).
\textsuperscript{75} Proposed OSHA Reg. § 1903.8, 36 Fed. Reg. 8377 (1971). Arguably, this regulation would apply only to § 8(f)(1) (imminent danger) complaints. However, this interpretation does not appear consistent with the intent of the Act and with the proposed regulations as a whole.
during regular working hours and at other reasonable times. In general, the rule of reason will govern the inspection.\textsuperscript{77} The inspector has the right and duty during the inspection to question either the employees or their representatives, and the agents of the employer. He may require the attendance and testimony of witnesses and the production of evidence under oath.\textsuperscript{78}

Where the employees in any separate workplace in a business establishment are represented by a union, a representative of the union must be given an opportunity to accompany the inspector during the physical inspection of that particular workplace. There appears to be no impediment, statutory or regulatory, to having employees authorize, by appropriate procedure, a representative for such inspections who need not be an employee. Where there is no union representative or other authorized representatives, the investigator must consult with a reasonable number of employees concerning matters of health and safety in their particular workplace.\textsuperscript{79} The consultations will probably be in the nature of informal interviews with a cross section of employees.

As noted earlier, an employee may notify the inspector of a violation during the inspection. This notice should be in writing.\textsuperscript{80} Apparently, the inspector will carry complaint forms and supply one to any employee who wishes to note a complaint. While the inspector will undoubtedly consider oral complaints, the informal intra-agency review proceedings are dependent on the filing of a written complaint by the employee.

\textit{Records}

During the inspection the employer must make available to the inspector such records as are required to be maintained pursuant to the appropriate regulations.\textsuperscript{81} Employers are required to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses other than minor injuries requiring only first-aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfers to another job.\textsuperscript{82}

\textsuperscript{77} Pub. L. No. 91-596, \S\ 8(a); Proposed OSHA Reg. \S\ 1903.5, 36 Fed. Reg. 8377 (1971).
\textsuperscript{78} Pub. L. No. 91-596, \S\ 8(b).
\textsuperscript{79} Id., \S\ 8(3).
\textsuperscript{80} Id., \S\ 8(f)(2).
\textsuperscript{81} Id., \S\ 8(c).
\textsuperscript{82} OSHA Regs. \S\S\ 1904, 1904(a) and 1908, governing suplementary records, temporary rules and fatality or multiple hospitalization accident reporting, are effective July 2, 1971. Unless otherwise indicated, other record-keeping procedures are effective August 1, 1971. 36 Fed. Reg. 12612 (1971).
Additionally, the law requires the promulgation of procedures to measure and maintain records of employee exposure to potentially toxic materials. Regulations will be promulgated that will provide employees and their representatives with an opportunity to observe the monitoring and measuring of the exposure to toxic substances as well as with access to the records that are maintained pursuant to this program. The employer is obliged to notify promptly any employee who has been exposed to toxic materials or harmful physical agents in concentrations or levels that exceed those prescribed by standards to be promulgated in cooperation with the Department of Health, Education and Welfare. The employer is also obligated to inform any employee who has been exposed about the corrective action that the employer is taking.\footnote{3}

**Confidentiality of Trade Secrets**

Section 15 provides that all information received by the Secretary or his representatives which might reveal a trade secret shall be considered confidential. However, this information may be disclosed to other employees concerned with administering the Occupational Safety and Health Act when the information is relevant to any proceeding under Act. In any such proceeding, the Commission, the Secretary, or the court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets.\footnote{4}

We have paraphrased section 15 almost verbatim because there has been some dispute as to its implications. Some commentators have taken the position that the "law, as passed, provides that no witness or any other person will be required to divulge trade secrets or secret processes."\footnote{5} We can find no provision in the Act expressly providing for such immunity from producing trade secrets. The Act merely states that when required to be produced, trade secrets shall be treated as confidential and the appropriate body governing the proceeding is required to issue protective orders to preserve their confidentiality.

**Enforcement**

Citations

The enforcement provisions of the Act commence with the issuance of a

\footnote{3. Pub. L. No. 91-596, § 8(c)(3). The retroactivity of these notice requirements remains an open question.}

\footnote{4. Pub. L. No. 91-596, § 15.}

\footnote{5. \textit{Bureau of National Affairs, The Job Safety and Health Act of 1970}, at 91 (1971).}
citation indicating that the employer has violated either a safety standard or the Act's general duty provision. Each citation must be in writing, describing with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation or order alleged to have been violated.

If the violation is of a de minimis nature, a notice in lieu of a citation may be issued. The compliance officer need not issue a citation at the time of the inspection but must furnish one with reasonable promptness thereafter. The citation will fix the time for the abatement of the violation. It need not, however, include a proposed assessment of penalty, for the statute provides that the proposed assessment of the penalty may be supplied at some future time.

No citation may be issued more than six months after the occurrence of a violation. However, in many cases it would seem that the violation might be of a continuing nature, thereby tolling the limitation period. The employer is obliged to post at the location of the violation a copy or copies of the citation, and is subject to a fine at $1,000 for each day that he fails to meet this duty. Additionally, the time limit for employee appeals challenging the time allowed for abatement will undoubtedly be tolled if the employer fails to post a copy of the citation.

Penalties

Shortly after receiving a copy of the citation, or, ideally, at the same time, the employer will be notified by certified mail of the penalty, if any, proposed for the violation.

Section 17 of the Act contains a broad spectrum of penalties designed to encourage adherence to the standards, rules or orders promulgated under the Act. If an employer commits a serious violation of the Act, he will be assessed a civil penalty of up to $1,000 to each violation. An employer who willfully or repeatedly violates the Act may be assessed a civil penalty of up to $10,000 for each violation. If the citation is for a violation which is specifically determined not to be serious in nature, the

87. Id., § 10(a).
88. Id., § 9(c).
89. Id., § 9(b).
90. Id., § 17(d).
91. Id., § 10(a).
92. Id., § 17(b).
93. Id., § 17(a).
employer may be assessed a civil penalty of up to $1,000 for each violation.\textsuperscript{94}

The seriousness of a violation determines whether or not the penalty will be discretionary on the part of the Secretary. A serious violation is one which causes a substantial probability that death or serious physical harm could result from a condition which exists or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in such place or employment unless the employer did not, or could not with the exercise of reasonable diligence, know of the presence of the violation.\textsuperscript{95} If the Commission finds a violation to be of a serious nature, section 17(b) requires the assessment of some monetary civil fine. It appears, however, that the Secretary has discretion regarding less than serious violations.

If an employer fails to abate a violation within the period permitted for its correction (which period begins with the final order of the Commission affirming the action of the Secretary) he may be assessed a civil penalty of not more than $1,000 a day for each day he fails to abate the violation.\textsuperscript{96} If an employer’s willful violation of any standard rule or order results in the death of an employee, the employer is subject to criminal prosecution, and may be fined not more than $10,000 and imprisoned for not more than six months or both.\textsuperscript{97} Criminal penalties apparently do not apply to violations of the general duty to provide safe working conditions, even though a violation results in an employee’s death.

Appeals

The employer has fifteen working days from receipt of this latter notice to notify the Secretary that he wishes to contest the citation or proposed assessment of the penalty. Since the limitation period for contesting a citation is triggered by the receipt of the notice of proposed penalty, it appears that the Labor Department must formally notify the employer even in the case where no penalty is proposed.\textsuperscript{98} The employer’s notification of his intention to seek review of the citation or proposed penalty will probably be sent to the Occupational Safety and Health Commission, via the OSHA Area Director.\textsuperscript{99}

\textsuperscript{94} Id., § 17(c).
\textsuperscript{95} Id., § 17(k).
\textsuperscript{96} Id., § 17(d).
\textsuperscript{97} Id., § 17(e).
If the employer fails to notify the Secretary of his intention to challenge either the citation or the proposed assessment of penalty, the citation and the assessment shall be deemed the final order of the Commission not subject to review by any court or agency.\textsuperscript{100} For this reason, citations should contain a finding that the employer is within the jurisdiction of the Act.

The employer cannot avoid paying the penalty by abating a violation of a standard, rule or order. The initial penalty is triggered by the violation itself rather than the failure to abate it.\textsuperscript{101} However, the Act's provision that "whenever the Secretary compromises, mitigates, or settles any penalty assessed under this Act, he shall include a statement of the reasons for such action, which shall be published in the \textit{Federal Register}" clearly indicates that the Secretary has the authority to compromise, mitigate or mitigate or settle an assessed penalty.\textsuperscript{102} Consequently, if the violation is abated, the employer might petition the Secretary to mitigate, reduce or otherwise modify the penalty.\textsuperscript{103}

If the employees are dissatisfied with the time allotted for the abatement of a violation, they must file a notice of appeal with the Secretary within 15 days of receipt of the \textit{citation}.\textsuperscript{104} This is to be contrasted with the appeal period afforded an employer, who must appeal within 15 days after receipt of the notice of proposed penalty. Since the penalty notice will probably be received some time after the citation, the employer has a longer period within which to appeal.

The employees have no right to a Commission appeal of either the amount of the penalty proposed to be assessed or the contents of the citation issued. If the inspection was based on a written employee complaint, the Secretary must provide at the request of the complaining party, an intradepartmental, informal review of the inspection. An employee may seek formal Commission review, however, of the time allotted for abating the violation. The employer, on the other hand, may challenge the citation, the proposed penalty assessment, as well as the time for abatement. If the employer should take an appeal, the Commission's rules will allow the employees to intervene at the time of the hearing.\textsuperscript{105}

\textsuperscript{100} Pub. L. No. 91-596, § 10(a).
\textsuperscript{101} Id., § 17(b).
\textsuperscript{102} Id., § 6(c).
\textsuperscript{103} In its Guidelines for Compliance Officers, the Occupational Safety and Health Administration is reported to have provided for fifty percent discounts for penalties assessed for \textit{de minimis} violations abated within the allowed time. Bureau of National Affairs, \textit{6 Occupational Safety and Health Reporter} 103 (1971).
\textsuperscript{104} Pub. L. No. 91-596, § 10(c).
\textsuperscript{105} Ibid.
If the employer has not abated the violation within the time provided in the penalty notice, he will be notified of this failure by certified mail, together with any additional penalty to be assessed. The employer has 15 days within which to challenge this proposed penalty. His failure to make such a challenge converts the notification and assessment into a final order of the Commission not subject to review by any court or agency.\textsuperscript{106}

If the employer finds that he cannot abate the violation within the time limit set out in the citation, and the abatement cannot be completed because of factors beyond his reasonable control, he may petition for an order modifying the abatement requirements. The statute provides that the "Secretary" shall hold a hearing on such a request and shall provide the affected employees or representatives of affected employees with an opportunity to participate as parties to the hearing.\textsuperscript{107}

Once the Secretary is notified that the employer plans to challenge a citation or proposed penalty or that either an employer or an employee plans to challenge the time period for abatement, jurisdiction over the enforcement procedure is transferred to the Occupational Health and Safety Review Commission. The Commission is composed of three members appointed by the President with the advice and consent of the Senate.\textsuperscript{108} They are independent of the Secretary of Labor and serve terms of six years.\textsuperscript{109}

Proceedings before the Commission are \textit{de novo}, that is, the Commission will appoint a hearing examiner to take testimony on the reasonableness and evidentiary support for the citation, proposed penalty assessment and the abatement period. The hearing examiner will hear evidence and make a report to the Commission. The report will contain his determination whether the Act has been violated and whether the abatement period and the penalty are authorized and reasonable. The statute provides no automatic right of review for the employer or employee to the Commission from the report of the hearing examiner. The hearing examiner's report shall become the final order of the Commission after thirty days unless a Commission member has directed that such a report shall be reviewed by the Commission.\textsuperscript{110}

\textsuperscript{106} Id., § 10(b).
\textsuperscript{107} This hearing will undoubtedly be conducted by the Commission. The use of the word "Secretary" rather than "Commission" in Section 10(c) was the result of legislative oversight that came about when the bill was amended to make the Commission independent from the Secretary. See S. Rep. No. 91-1282, 91st Cong., 2d Sess. 32-33 (1970).
\textsuperscript{108} Pub. L. No. 91-596, § 12(a).
\textsuperscript{109} Id., § 12(b).
\textsuperscript{110} Id., § 12(j).
Injunctions against Imminent Dangers

If an OSHA inspector discovers that a condition exists that could reasonably be expected to cause death or serious physical harm immediately, or before imminence of such danger can be eliminated through the enforcement procedures in the Act, he must notify employers and employees that he is recommending that the Secretary seek an injunction. The Secretary is then authorized to petition in the United States district court for a complete cessation of operations at the plant, or an order requiring the immediate correction of the imminent danger. The statute expressly states that the employees may bring an action in mandamus to require the Secretary to so petition the court. The court may issue an injunction or a five-day temporary restraining order.

Judicial Review

The Act provides that any person affected or aggrieved by a final order of the Commission may obtain review of such order in the United States court of appeals for the circuit in which the violation is alleged to have occurred, or where the employer has its principal office, or in the Court of Appeals in the District of Columbia, within 60 days of its issuance. The commencement of court proceedings will not stay the order unless the court of appeals rules otherwise. In the absence of extraordinary circumstances, no objection that has not been urged before the Commission will be considered by the court. On questions of fact, the Commission will be sustained if supported by substantial evidence on the record considered as a whole.

The Act also contains an expeditious enforcement provision. The Secretary may obtain enforcement or review of any final order of the Commission if an employer or employee has not petitioned for review within 60 days after service of the Commission’s order. In such a case, the Commission’s findings of fact shall be conclusive. In this circumstance, as well as in the case of the uncontested citation or notification, the statute authorizes the clerk of the court to enter a decree enforcing the order.

111. Id., § 13(e).
112. Id., § 13(d).
113. Id., § 13(d).
114. Id., § 13(b).
115. Id., § 11(a).
116. Id., § 11(b).
SAFETY AND HEALTH

EXISTING STATE PLANS

The Act envisions active participation by the states in the regulation of workplaces and employment facilities. The federal law provides that a state agency or court has jurisdiction over occupational safety and health issues with respect to which no standard has been promulgated.\textsuperscript{117} There is thus no possibility of conflict until the Secretary has acted. Once the Secretary has promulgated standards, however, and overlapping and possibly inconsistent federal and state standard do exist, the Act contains a procedure for resolving such differences without emasculating the state's enforcement effort.

For the first two years of the Act's existence, the Secretary is authorized to enter into an agreement with the states under which the states will be permitted to enforce their own health and safety standards until such time as the Secretary has had an opportunity to evaluate the adequacy of the state safety and health plan.\textsuperscript{118} Once this initial, temporary approval for a state plan is given, a period of overlapping jurisdiction begins during which either the Secretary or the state agency may enforce its respective standards.

During this two-year period the state must submit a plan designed to result in the state's receiving a permanent exemption from the Secretary. This plan may cover one or more occupational health or safety areas with respect to which federal standards have been promulgated.\textsuperscript{119} If the Secretary finds that the state plan meets the statutory criteria set out in section 18(c), he may refrain from enforcing the parallel federal standards. If, following three years of state-plan enforcement, the Secretary determines that the standards are being effectively enforced by the state, he may withdraw federal jurisdiction over the occupational health and safety issues covered in the state plan. The Secretary, of course, retains the authority to rescind such withdrawal of jurisdiction after notice and hearing, if he finds that the state's administration has not been in substantial compliance with its plan.\textsuperscript{120}

The state has the right to appeal to the United States Court of Appeals any action by the Secretary either rejecting or rescinding approval of a state plan. The Secretary's decision will stand, however, unless it is found to be unsupported by substantial evidence on the record.\textsuperscript{121}

\textsuperscript{117} Id., § 18(a).
\textsuperscript{118} Id. § 18(h).
\textsuperscript{119} Id., § 18(b).
\textsuperscript{120} Id., § 18(f); OSHA Regs., §§ 1901.1-1901.7, 36 Fed. Reg. 7006-07 (1971), discuss in detail procedures and criteria for state plans and agreements.
\textsuperscript{121} Pub. L. No. 91-596, § 18(g).
MISCELLANEOUS PROVISIONS

OSHA contains other provisions of marginal importance to the transportation industry. Among these are the establishment of a National Institute for Safety and Health,122 the authorization of grants for training and employee education123 and other grants to the states124 and a provision for audits for these grants.125 Section 20 imposes primary responsibility for research and related activities on the Secretary of Health, Education and Welfare, and section 27 establishes a National Commission on State Workmen's Compensation Laws.

Finally, OSHA provides that whenever the standards set by the federal government are so severe that they will cause real and substantial economic injury, the Small Business Administration may assist a small business in effecting additions to or alterations in equipment, facilities, or methods of operations necessary to comply with applicable standards.126 This provision may be of importance to qualifying business in the transportation industry.

CONCLUSION

The transportation industry has traditionally been the subject of extensive safety regulation. That regulation, however, has developed in a piecemeal fashion and thus many working conditions have not been adequately regulated by federal safety standards. The Occupational Safety and Health Act will fill the interstices of existing regulatory schemes. Consequently, it is incumbent on all employer in the transportation industry to carefully define in their own companies the jurisdictional lines of applicable safety regulation and to initiate the necessary changes to insure that previously unregulated working conditions are in conformity with the standards and general duty provisions of the Occupational Safety and Health Act.

122. Id., § 22.
123. Id., § 21.
124. Id., § 23.
125. Id., § 25.
126. Id., § 28(a).
BOOK REVIEW


Professor Jordan has as his basic premise that the air travel markets within the State of California constitute a microcosm of all the airline markets in the United States. Therefore, measurement of the effects of the regulation of the Civil Aeronautics Board on interstate air transportation may be made by comparing the differences between interstate operations (regulated by the CAB) and service between the various markets within the State of California which are largely unregulated. Professor Jordan then observes that during the study period (1949-1965) sixteen separate carriers operated within the State of California serving at one time as many as 32 markets within the State of California. Without significant regulation, there is at the end of the study period one carrier serving three markets. From this historical experience Professor Jordan reaches the rather appalling conclusion that no regulation is better than regulation. I fail to see how the traveling public is served by these non-existent carriers operating non-existing aircraft over non-existing routes—albeit at low fares.

The simple fact is that the basic premise is not true and that the comparisons of data in the book are not only between “markets in California” but are in fact between the markets San Diego-Los Angeles, San Diego-San Francisco and Los Angeles-San Francisco. Because of the heavy amount of traffic, the actual comparison is between interstate services and the San Francisco-Los Angeles market. Thus the comparison also becomes one between (during the study period) the largest air travel market in the U.S. and the rest of the United States air travel markets. Absolutely no consideration is given at any point throughout the book (regardless of the rather remarkable conclusions drawn) to this fundamental fact—that is, that the city pair happens to be within the State of California but at the same time represents the two cities between which more people travelled than between any other two cities in the world. The book fails utterly to take account of the fact that certificated carriers

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* Member Troutman, Sanders, Lockerman & Ashmore, Atlanta, Ga. B.A., Emory University (1961); J.D., Emory University (1964).
operate route systems and that they do not and cannot operate only in the largest market in the United States. The author does make a slight attempt to deal with this problem by attempting to refute the possible argument that the California carriers operating in this market are merely "skimming the cream". However, the total rebuttal consists of a demonstration of the number of other markets within the State of California served by the carriers understudy. None of these markets was served for longer than six months by a carrier still in business at the end of the study—and none were served at the end of the study by any carrier. Even during the time some of these markets were served the major thesis of the book, i.e., unregulated carriers charge lower fares, was not present in that the "unregulated" (i.e., California intrastate) carriers charged more in thinner markets.

All that can be said for the entire study is that it is possible for a carrier operating only in the United States' largest air travel market to make money at a lower fare level then carriers must charge who also serve thinner markets!

Consequently, the great effort made to expand these facts into something more is utterly an exercise in futility.

The book contains many other logical errors but the bulk of them pale into significance compared to the gigantic fallacy underlying the logical structure of the entire book.

Nevertheless, some attention should be made to the rather wide-eyed astonishment evidenced by the author at the discovery (after 255 pages of analysis and an additional 85 pages of nothing but data) that the CAB certificated air carriers constitute a "cartel". Assuming that he is using the word (which actually means an international oligopoly maintaining prices above a certain level) to mean "oligopoly" he could save himself a considerable amount of trouble by reading the statute creating the Civil Aeronautics Board which charges it with a duty to determine the need (e.g. of the public convenience and necessity) for new and additional service before that service is authorized by it. Under those conditions it is difficult to see how there can be anything but a limited number of carriers. It is as if someone spent years studying the trucking industry only to conclude that an interstate trucker had to get a certificate of public convenience and necessity from the ICC before it could do business. Professor Jordan might be surprised to learn that there are many monopolies and oligopolies in our society including most electric, gas and telephone service. Indeed, the very reason de etre for "regulation" is the existence of limited competition.
Obviously the use of the word "cartel" was selected to indicate some type of evil conspiracy. One of the evil goals of a monopolist (by whatever name called) is to utilize their monopoly power to maintain high prices and make excess profits. While Professor Jordan notes, with a "Look What I Found" tone in his voice that the CAB has found that 10.5% would be a lawful rate of return for air carriers, he omits entirely to also note that the industry has never achieved such a rate of return. The present state of the earnings of the industry indicates that "cartels" should be made of sterner stuff.

In charity toward the author, Shakespeare's quotation should be changed to read only "It is a tale ... full of sound and fury, signifying nothing".