Vanderbilt Journal of Transnational Law

Volume 10
Issue 4 *Fall 1977*

Article 1

1977

The Contemporary Evolution of Intermodal and International Transport Regulation under the Interstate Commerce Act

Paul S. Dempsey

Vanderbilt Journal of Transnational Law

VOLUME 10 FALL 1977 NUMBER 4

THE CONTEMPORARY EVOLUTION OF INTERMODAL AND INTERNATIONAL TRANSPORT REGULATION UNDER THE INTERSTATE COMMERCE ACT: LAND, SEA, AND AIR COORDINATION OF FOREIGN COMMERCE MOVEMENTS*

*Paul Stephen Dempsey***

TABLE OF CONTENTS

** Attorney-Advisor, Office of General Counsel, Civil Aeronautics Board; Attorney-Advisor (1975-77), Office of Proceedings, Interstate Commerce Commission. J.D., 1975, University of Georgia. The opinions expressed herein are those of the author, and should not be attributed to the CAB, the ICC, or any other governmental agency or official.

I. INTRODUCTION

In our era of rapidly diminishing impediments to the free flow of capital, goods, technology, and services between nations, transnational commercial activity has become extremely important to our national economy. New frontiers are being broken as raw materials and manufactured products move more freely between nations which have heretofore shared little in culture, history, religion, race, or economic and political philosophy. Certainly, governmental initiatives designed to eliminate trade inhibitions are responsible for much of this growth. Tariff walls are crumbling. The world economy is prospering. The interdependencies that flourish between members of the world community as a result of bilateral and multilateral trade agreements enhance the possibility of achieving long-term political stability, economic growth, and global peace. It has become the position of the United States that increased international economic cooperation will inevitably lead to increased political toleration and peaceful coexistence.

Innovations in the field of transportation have made possible increased commercial activity promoting greater interdependency between nations. Intermodal transport innovation in the United States has been of essentially two kinds: (1) technological innovation, enabling commodities and individuals to move with greater speed, efficiency, and economy; and (2) regulatory innovation by federal agencies responsible for regulating the rates and routes of international carriers.

Of the technological innovations, the "container revolution" is perhaps the most significant, for it has done more to foster the growth of international trade than any other single intermodal breakthrough. Containerization permits individual commodities to be loaded by the consignor at the point of origin without interim handling again until the container arrives at its ultimate destination and is unloaded by the consignee. Between the points of origin and destination, the trailer or container may be transported as a single unit by motor, rail, water, or air carriers with a substantial reduction in transit time, expense, loss, damage, and theft from

that experienced under traditional break-bulk carriage.[1] Containerization may also produce greater energy efficiency in trans-

1. In *Berry Transport, Inc., Ex.—Containers,* 124 M.C.C. 328, 337-38 (1976), evidence was adduced demonstrating the following characteristics of containerized movements:

(1) Containerization of ocean cargo provides a faster, safer, more reliable door-to-door service at lower costs. The major economic advantage of containerization lies in its potential to reduce greatly the unit costs. Containerization transforms general cargo into a uniform size and shape which is provided by the container. In terms of unloading costs, containerization saves approximately 1.0 man-hour per ton of cargo, or 19 man-hours per container in handling. At a direct labor rate of $7 per man-hour, containerization saves over $13 on each ton of cargo loaded for labor alone.

(2) U.S. trade in containerable commodities has been increasing steadily in the past 5 years. Containerable imports increased by 49 percent and exports by 38 percent from 1967 to 1970.

(3) Year by year, increasing percentages of liner cargo have been containerized on all major U.S. trade routes. The annual capacity of full containerships in the Pacific Coast-Far East trade route will total 450,000 40-foot container equivalents in each direction by 1975. This capacity is of the order of 5 million long tons in each direction annually.

(4) The large, fast containerships have high daily cost. Therefore, it is especially important to minimize port time through investment in shoreside container handling equipment. Based upon a ship's discharging and loading 780 containers, 2 extra days in port would cost $30 additional per container for just the ship's time, and does not include additional costs for berth rental time.

(5) Containership berths with high productivity are very expensive to equip and require high throughput to achieve economical unit costs. One hundred percent utilization of a two-crane berth results in a cost of $12.50 per container; when utilization is reduced to 50 percent, the handling costs for each container is [sic] increased to $25.

(6) The combination of high containership daily costs and high container terminal throughput requirements makes it economically feasible to transfer cargo overland between nearby ports at a lower total cost than by moving the ship. A containership which operates at 25 knots, and which is loaded and unloaded at each terminus in 3 days, completes a trans-Pacific round trip voyage totaling 9,000 miles in 21 days. This totals 17 voyages annually. However, if the time required for loading and unloading is increased to 5 days at each port terminus, the time required for each round trip increases to 25 days, and the number of annual voyages are [sic] reduced to 14.25, a reduction in productivity of 15 percent.

(7) Containerized cargo increases the market for truckers' services for pickup and delivery or for transfer between relatively close ports. Handling costs per ton are reduced for truckers vis-a-vis conventional cargo, but line-haul costs per ton are increased because container dimensions are not optimal for over-the-road movements. Long hauls of containers appear to be unattractive to truckers. The primary role of motor carriers in container operations is the pickup and delivery of container loads at distances from

portation and stabilize transport costs.[2] Containerized trailer-on-flatcar (TOFC) movements today represent 7.2 percent of tonnage moved by rail.[3] If rail/motor and rail/water intermodal movements continue to accelerate at existing rates, more than 1.5 million carloads will be transported during 1977, representing a ten percent increase from the previous year. It is also anticipated that air/motor through movements will exceed 6.5 million billion-ton miles during this period, a growth rate of approximately six percent.[4] Moreover, there are a number of recent developments that may cause this trend to accelerate.[5]

Regulatory innovation has also contributed to the enormous contemporary growth of transnational commercial activity. This latter type of innovation shall be explored in this article. The instant discussion shall emphasize recent developments in intermodal in-

---

the ports of less than about 400 miles, and the transfer of containers between nearby ports to save costly ship calls. In order to preserve inherent advantages to the shippers of through container movements it is necessary to provide for effective and proper coordination between water carriers and motor carriers. Only those carriers with flexible operations dedicated to container carriage can provide this coordinated service.

2. Fox, *Containerization: Present and Future,* TRAFFIC WORLD, June 20, 1977, at 26.

3. D. O'NEAL, INTERMODALISM AND INTERAGENCY COOPERATION 2 (1977) (unpublished speech).

4. V. BROWN, IMPROVED PRODUCTIVITY THROUGH MERGER AND INTERMODAL COOPERATION 5 (1977) (unpublished speech).

5. The largest innovation in intermodal hardware was undoubtedly the switch from breakbulk liner cargo service to containerization in the maritime industry. The change is little short of revolutionary. After initial innovations the railroads have operated a standard 89-foot line-haul vehicle for almost 20 years. That industry now appears to be on the brink of major innovations in line-haul piggyback equipment.

The Santa Fe Railway recently unveiled an articulated car capable of carrying six trailers and dubbed it the "six pack." We understand another major carrier is actively developing a stacked container car.

Car manufacturers are working on additional innovations of their own, including a new version of the "road-railer," a van containing both highway and railroad wheels. Congress has recognized the problems inherent in clearance restrictions in serving Long Island and all of the New England states. Recent hearings have called for research to develop a low profile trailer car capable of operating within the clearances posed by tunnels in the Northeast corridor.

A major research program is underway at the Federal Railroad Administration to look at the fuel consumption, wind resistance, and other factors affecting Piggyback and includes a major systems analysis of rail/highway.

Id. at 7-8.

ternational transportation under the regulatory authority of the Interstate Commerce Commission (ICC)—the nation's oldest and largest independent regulatory agency.

II. The Role of the Interstate Commerce Commission in the Federal Regulatory Scheme

In the United States the economic regulation of transportation in foreign commerce is divided among three separate regulatory agencies. The ICC has jurisdiction over some 18,000 rail, motor, and water carriers, brokers, and freight forwarders. By far the largest of the three "sister" agencies, it performs its regulatory responsibilities pursuant to the Interstate Commerce Act (ICA).[6] The Civil Aeronautics Board (CAB) regulates domestic and international direct air carriers (airlines) and indirect air carriers (*e.g.*, air freight forwarders).[7] Finally, the Federal Maritime Commission

6. The ICC regulates domestic and foreign for-hire common and contract carriers pursuant to the Interstate Commerce Act of 1877, 49 U.S.C. §§ 1-27, 301-27, 901-23, and 1001-22 (1970 & Supp. V 1975) [hereinafter cited as ICA]. The ICA is divided into four parts, each corresponding to a different mode of transportation subject to ICC regulation: part I concerns railroads, ICA §§ 1-27, 49 U.S.C. §§ 1-27 (1970 & Supp. V 1975); part II deals with motor carriers, ICA §§ 201-27, 49 U.S.C. §§ 301-27 (1970 & Supp. V 1975); part III concerns domestic water carriers, ICA §§ 301-23, 49 U.S.C. §§ 901-23 (1970 & Supp. V 1975); and part IV involves freight forwarders, ICA §§ 401-22, 49 U.S.C. §§ 1001-22 (1970 & Supp. V 1975).

7. The CAB regulates air carriers pursuant to the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542 (1970 & Supp. V 1975). The regulation of air transportation by the CAB was instituted in 1938 under the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (codified at 49 U.S.C. §§ 1301-1542). For an excellent analysis of the historical development of air regulation, see Keplinger, *An Examination of Traditional Arguments on Regulation of Domestic Air Transport,* 42 J. Air L. & Com. 187, 188-201 (1976). *See also* Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards,* 75 Harv. L. Rev. 1055, 1072-73 (1962).

The CAB has jurisdiction over both domestic and foreign air carriers. An "air carrier" is defined by section 101(3) of the Federal Aviation Act of 1958 [hereinafter FAA], 49 U.S.C. § 1301(3) (1970), as one who engages, either directly or indirectly, in air transportation. *See also* FAA § 101(19), 49 U.S.C. § 1301(9) (1970). A "direct air carrier" is generally defined as a person engaged in the operation of aircraft. *See, e.g.*, 14 C.F.R. § 296.1(d) (1977). This definition embraces a United States-flag air carrier holding a certificate of public convenience and necessity issued pursuant to FAA § 401, 49 U.S.C. § 1371 (1970), a foreign air carrier operating pursuant to a permit issued under FAA § 402, 49 U.S.C. § 1372 (1970), or an air carrier operating pursuant to authority conferred by any applicable regulation or order of the CAB. *See* FAA § 416(b), 49 U.S.C. § 1386(b) (1970); *cf.* 14 C.F.R. Part 298 (1977). The term "indirect air carrier" is

(FMC) has jurisdiction over common carriers operating United States and foreign flag vessels (VOs, or maritime carriers) and non-vessel operators (NVOs, or ocean freight forwarders).[8] The inevitable legal problems that have arisen as a result of this overlapping jurisdiction have stimulated much of the current quasi-judicial and quasi-legislative activity in each of the three agencies.

Of these three agencies, the ICC has been charged by Congress with a unique statutory directive to promote the coordination of *all* modes of transportation, even those not subject to its jurisdiction.[9] Thus, it has been recognized that the development of a coordinated system of transportation must take precedence over the more narrow interests of those carriers directly subject to ICC jurisdiction.[10] Similarly, the ICC has noted that the public must have available not only a multiplicity of transport modes from which to choose, but also a working flexibility that permits an optimum utilization of each mode of transportation in coordinated through movements.[11] Moreover, the ICC has further recognized that it is in the public interest to adopt regulatory policies that promote the free flow of international commerce between the United States and its neighbors.[12] These general principles have guided the ICC in its regulation of foreign commerce and should

---

generally defined as one who, although engaged in air transportation, is not engaged directly in the operation of aircraft, 14 C.F.R. § 296.1(e) (1977). Included within the classification of indirect air carriers are air freight forwarders and cooperative shipping associations subject to 14 C.F.R. Part 296 (1977), international air freight forwarders subject to 49 C.F.R. Part 297 (1976) and 14 C.F.R. § 287.1(a) (1977), domestic and foreign tour operators, 14 C.F.R. § 378.2(d), (d-1) (1977), and charter organizers and operators, 14 C.F.R. §§ 371.2, 372.2, 372a.2, 373.2 (1977). *See* Diederich, *Protection of Consumer Interests Under the Federal Aviation Act,* 40 J. AIR L. & COM. 1, 3-8 (1974).

8.. The FMC regulates ocean carriers pursuant to two statutes; the Shipping Act of 1916, 46 U.S.C. §§ 801-42 (1970 & Supp. V 1975); and the Intercoastal Shipping Act of 1933, 46 U.S.C. §§ 843-48 (1970 & Supp. V 1975).

9. *See* 49 U.S.C. preceding § 1. *Compare* 49 U.S.C. § 1302 (1970) *with* 46 U.S.C. § 1302 (1970). *See also* Dempsey, *Foreign Commerce Regulation Under the Interstate Commerce Act: An Analysis of Intermodal Coordination of International Transportation in the United States,* 5 SYRACUSE J. INT'L L. & COM. ____ (1977).

10. Emery Air Freight, Freight Forwarder Applic., 339 I.C.C. 17, 35 (1971).

11. C.O.D. and Freight-Collect Shipments, 343 I.C.C. 692, 729 (1973).

12. *See* 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, 742 (1969) [hereinafter cited as International Boundary Lines].

be borne in mind as we explore the recent developments in international transport regulation.

III. ENTRY

A. *Motor Carriage*

1. Containerized Movements

The ICC had developed great regulatory expertise in intermodal transportation even before the advent of the contemporary "container revolution," for it had regulated trailer-on-flatcar (TOFC) or "piggy-back" service for a considerable period. TOFC essentially involves the bimodal transportation of trailers on rail flatcars for a portion of a through movement, and the movement of the trailers attached to the tractors of motor carriers for the remainder thereof.[13]

The ICC has frequently acknowledged the innovative nature of containerization, which permits the efficient and economical coordination of intermodal operations.[14] In a recent decision, *Zirbel Transport, Inc., Ext.—Containers,*[15] the Commission emphasized, with particularity, the benefits to be derived from increased employment of containerized operations:

> [I]t has always been the policy of this Commission to encourage the development of intermodal transportation, and we believe that containerization is a useful, innovative tool in that development. The

13. *See* Substituted Service-Piggyback, 322 I.C.C. 301 (1964), *aff'd sub nom.*, Atchison, T. & S.F. Ry. v. United States, 244 F. Supp. 955 (1965), *rev'd sub nom.* American Trucking Ass'ns, Inc. v. Atchison T. & S.F. Ry., 387 U.S. 397 (1967); Trucks on Flat Cars Between Chicago and Twin Cities, 216 I.C.C. 435 (1936); Note, *Piggyback Transportation and the I.C.C.*, 41 S. CAL. L. REV. 377 (1968). The ICC is continuing its evaluation of proposals designed to improve TOFC transportation. For example, in Ex Parte No. 320 (Sub—No. 4) it is considering a petition for a further enlargement in the amount of operational circuity reduction than is already permitted pursuant to 49 C.F.R. § 1090.5 (1976). *See also* Containerized Freight, From and to Pacific Coast, 340 I.C.C. 388, 391 (1971); Ext.—Ex-Rail, 111 M.C.C. 251, 267 (1970) Mutrie Motor Transp., Inc.

14. *See, e.g.*, Moran Towing & Transp. Co., Ext.—Great Lakes, 314 I.C.C. 287, 291 (1961); Berry Transp., Inc.,—Ext.—Containers, 124 M.C.C. 328 (1976); AAA Transfer, Inc., Ext.—Cargo Containers, 120 M.C.C. 803, 820 (1974); Iron or Steel, In Containers—Central Territory, 54 M.C.C. 139, 153 (1952). *Cf.* Five Transp. Co. Ext.—Savannah, Ga., 125 M.C.C. 381, 387 (1976) (ICC denied applicant motor carrier operating authority to transport containerized commodities but explicitly affirmed the principle of fostering intermodal containerized services).

15. 125 M.C.C. 663 (1976).

> services proposed in this and other recent applications offer numerous benefits directly to the shipping public. Among these benefits are: a reduction in packaging requirements; increased shipment integrity resulting in a reduction in loss, damage, and pilferage; less handling and warehousing; avoidance of terminal congestion and interchange delays; faster transit times; energy conservation; and more efficient use of equipment. The bottom-line benefit is, of course, less costly transportation of goods for the public at large.[16]

Similarly, in *AAA Transfer, Inc., Ext.—Cargo Containers,*[17] the ICC recognized the following characteristics of containerized transportation:

> The benefits to be derived from the utilization of intermodal transportation of freight in containers include reduced (1) costs, (2) transit time, (3) in-transit damage to lading, (4) difficulty in affixing responsibility for loss and damage, and (5) incidence of components becoming separated from concurrently shipped base commodities. Successful containership service depends to a substantial degree upon rapid operation of vessels between ports and concomitantly, reduction of the time consumed in port for unloading and loading cargo. Containerships now generally call only at the largest of ports, and often hundreds of containers are unloaded at one time from a single vessel. Offloaded containers must promptly be removed from the port facilities, and arriving containers must be delivered according to the water carrier's loading schedule if they are to make the intended sailing. Coordination of movements is also required in the repositioning of empty containers and of chassis and flat-bed trailers. In addition, certain receivers of freight require timed pickups or deliveries in order to facilitate the unloading or loading of shipments and to prevent disruption of plant production. Without expeditious motor common carrier service the full potential benefits of intermodal containerized freight service cannot be realized.[18]

This regulatory philosophy has facilitated a tremendous increase in the employment of containers in through intermodal carriage. Moreover, the ICC has explicitly emphasized its policy of promoting containerization, intermodal coordination, and cooperation in transportation.[19] Operating authority has been granted for the

16. *Id.* at 677.
17. 120 M.C.C. 803 (1974).
18. *Id.* at 818.
19. Brown Transport Corp. Ext.—General Commodities in Containers, 126 M.C.C. 684, 712 (1977); Holt Motor Express, Inc., Ext.—Baltimore, Md., 120

movement of empty containers between port facilities and inland points,[20] thus maximizing efficiency by permitting the freer transfer of containers between break-bulk and stuffing points. Authority is not required for the return movement of empty containers to the point of origin when the containers have been utilized in authorized outbound transportation.[21] Operating authority is required, however, for the transportation of empty containers to a point other than the origin of the initial loaded container shipment.[22]

2. Foreign Commerce Regulation and the Land Bridge Exemption

Pursuant to section 202(a) of the ICA,[23] the ICC has jurisdiction over the transportation of passengers and property by motor carriers engaged in foreign commerce. Foreign commerce is defined by section 203(a)(11) of the ICA as

> commerce, whether such commerce moves wholly by motor vehicle, or partly 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.[24]

M.C.C. 323, 329-30 (1974); IML Freight, Inc., Ext.—Containerized Freight, 118 M.C.C. 31, 32 (1973).

20. *See, e.g.*, Berry Transport, Inc., Ext.—Containers, 124 M.C.C. 328 (1976); Air Land Transport, Inc., Common Carrier Applic., 120 M.C.C. 530 (1974).

21. Eastern States Transp. Pa., Inc., A Delaware Corp., Ext.—Malt Beverages, 123 M.C.C. 725, 737-38 (1975); P.B. Mutrie Motor Transp., Inc., Ext.—Benzyl Chloride, 83 M.C.C. 123, 131 (1960).

22. Daily Express, Inc., Ext.—Intermodal Container Traffic, 123 M.C.C. 343 (1974).

23. 49 U.S.C. § 302(a) (1970).

24. 49 U.S.C. § 303(a)(11) (1970). The term "foreign commerce" is also defined to include transportation between points in a foreign country, or between points in two foreign countries, insofar as such transportation takes place within the United States. Such movements are, however, subject to regulation for purposes of insurance, designation of an agent for service of process, qualification and working hours of employees, and safety. *Id.* Motor carriers operating in foreign commerce are also required to file with the ICC a certificate of insurance, surety bond, proof of qualification as a self-insurer, or other securities or agreement to pay final judgment for bodily injuries or for the loss or damage of property. 49 C.F.R. § 1043.11 (1976).

Although Puerto Rico is not a foreign nation, it is a place outside the United States within the purview of part III of the ICA. It was declared by specific legislative enactment that the ICA is inapplicable to Puerto Rico. 48 U.S.C. § 751

This statutory definition creates the *land bridge exemption,* which exempts commerce moving from a foreign country in a continuous movement through the United States to another foreign country from economic regulation by the ICC.[25] For example, commodities originating in London and destined for Ontario could be transported from the port of New York to points on the international boundary line between the United States and Canada as an exempt motor carrier movement. The exemption might also encompass a much more lengthy segment of surface transportation. Thus, for example, commodities manufactured in Hong Kong might be transported by an FMC regulated ocean vessel to San Francisco, then across the United States by motor carrier to Savannah in an unregulated exempt movement, and then by FMC carrier to Rotterdam.

In determining what constitutes foreign commerce within the meaning of section 203(a)(11) of the ICA, the federal courts have not applied this statutory language in a mechanical and inflexible manner, but have instead weighed the totality of the factual circumstances against both the intent of Congress and the words of the statute to determine the essential character of the commerce.[26] It has frequently been held that the determination of whether a particular shipment is in foreign commerce (and thus subject to the exemption) is governed by the fixed and persisting intent of the shipper at the time of the shipment and such ascribed intention is retained throughout the uninterrupted movement of the shipment.[27] Where commodities are transported under a shipper's fixed

---

(1970). Thus, the issue of whether a public need exists for transportation to and from points in Puerto Rico is beyond the jurisdiction of the ICC. Trans-Caribbean Motor Transport, Inc., Common Carrier Applic., 66 M.C.C. 593, 596 (1956). However, transport operations performed between points in the continental United States and points in Puerto Rico appear to fall within the definition of "foreign commerce" contained in ICA § 303(a)(11), 49 U.S.C. 303(a)(11), to the extent that such operations are performed within the United States. Moreover, through transport movements between Puerto Rico and foreign nations which traverse the continental United States appear to fall within the land bridge exemption, although no ICC decisions have specifically so held.

25. Melburn Truck Lines (Toronto) Co., Ltd., Common Carrier Applic., 124 M.C.C. 39, 49 (1975).

26. Farmers U. Coop. Mktg. Ass'n v. State Corp. Comm'n, 302 F. Supp. 778, 783 (D. Kan. 1969); North Carolina Util. Comm'n v. United States, 253 F. Supp. 930. 933 (E.D.N.C. 1966).

27. *See* Texas v. Anderson, Clayton & Co., 92 F.2d 104 (5th Cir. 1937), *cert. denied* 302 U.S. 747 (1937). For an excellent examination of "the essential character of the commerce" (whether intrastate, interstate, or foreign), see Rogers

and persisting intent to engage in commerce between points in the United States and points in a foreign nation, the entire movement is deemed to be in foreign commerce pursuant to part II of the ICA, and any portion of the through movement which traverses the territory of the United States is subject to economic regulation by the ICC.[28] The contractual details of the transaction, such as through billing, the passage of title, or actual physical continuity, are not conclusively determinative of the nature of the shipment when the fixed and persisting intent is otherwise demonstrated.[29] In *Melburn Truck Lines (Toronto) Co., Ltd., Com. Car.*,[30] it was held that the transportation by a Canadian carrier[31] of bananas

---

Transfer, Inc., Petition for Declaratory Order, 126 M.C.C. 448 (1977); Petroleum Products Transported Within a Single State, 71 M.C.C. 17 (1957). *Compare* Iron and Steel Articles, Wilmington to Points in N.C., 323 I.C.C. 740, 742 (1965), *aff'd sub nom.* North Carolina Util. Comm'n v. United States, 253 F. Supp. 930 (E.D.N.C. 1966).

28. Leamington Transport Ltd., Ext.—Auto Parts, 119 M.C.C. 795, 801 (1971); D. S. Scott Transport Ltd., Ext.—General Commodities, 100 M.C.C. 1, 6 (1965); East-West Transport Common Carrier Applic., 88 M.C.C. 352, 355 (1961).

29. Baltimore & O.S.W.R.R. v. Settle, 260 U.S. 166 (1922); G. Arrendendo Transfer Co.—Petition for Determination of the Commission's Jurisdiction over Motor Carrier Operations Between the United States and Mexico at Laredo and Hidalao, Tex., 103 M.C.C. 210 (1966). The ICC has determined that the transportation of commodities to or from overseas points by a rail carrier whose operations are confined to a single state is subject to regulation under ICA § 1(2)(a), 49 U.S.C. § 1(2)(a) (1970), regardless of whether the immediately preceding or subsequent transportation is performed in for-hire or proprietary carriage. *See* Long Beach Banana Dist., Inc., v. Atchison, T. & S.F. Ry., 407 F.2d 1173 (9th Cir. 1969), *cert. denied*, 396 U.S. 819 (1969); Southern Produce Co. v. Denison & Pac. S. Ry., 165 I.C.C. 423 (1930). In a recent decision, however, the ICC concluded that the single-state motor transportation of commodities originating at overseas points, although deemed to be in continuous foreign commerce, is not subject to regulation under part II of the ICA if performed subsequent to movement via private carriage. J.W. Allen, et al., A Partnership—Investigation of Operations and Practices, 126 M.C.C. 336 (1977). In this proceeding bananas originating in Central America were transported by private maritime carrier to Galveston, Texas, and were subsequently moved by motor carrier to Forth Worth, Texas. For an analogous decision involving the single state transportation by pipeline of oil previously moved by water carrier, see United States Dep't of Defense v. Interstate Storage, 353 I.C.C. 397 (1977), which held that such transportation was subject to regulation under part I of the ICA.

30. 124 M.C.C. 39 (1975). *Cf.* Rogers Transfer, Inc., Petition for Declaratory Order, 126 M.C.C. 448 (1977) (ICC explained the legal concepts of "the essential character of the commerce" and shipments having a "prior movement by water").

31. Before the ICC will issue a certificate or permit to a Canadian-domiciled applicant authorizing operation in foreign commerce between points on the boundary between the United States and Canada and points in the United States

(an operation which is a portion of the carrier's through movement to or from points in Canada), the applicant must submit a sworn statement that he has obtained complementary authority from the proper Canadian authorities. *See* Leamington Transport Common Carrier Applic., 91 M.C.C. 647, 651 (1962). This requirement need not be met, however, at the time the ICC makes its initial determination on whether to grant the application for authority to operate within the United States. At that time, a Canadian-domiciled applicant need only demonstrate that he is diligently seeking complementary authority from the proper Canadian authorities, if it is required, for the Canadian portion of the proposed operation, and that an appropriate application is pending. Moreover, a denial of an applicant's first request for complementary Canadian authority is of no moment where another application is pending. Yelle Contract Carrier Applic., 115 M.C.C. 408, 413 (1972).

The ICC has recognized the need for cooperation between the United States and Canada so that international through transportation regulated by the ICC and the various Canadian provincial governments might be viewed in its entirety and evaluated pragmatically to promote the efficient flow of commerce between the two nations. *See* Diversified Transp. Ltd. Common Carrier Applic., 120 M.C.C. 289, 292 (1974). When a Canadian applicant seeks authority to operate between points in the United States and already holds appropriate authority between the Canadian points of origin and points on the boundary between the two nations, the ICC will not consider the need for service at points in Canada or the potential effect that a grant of authority might have upon its existing Canadian competitors. It is presumed that these issues have already been resolved to the satisfaction of the Canadian authorities. Norton Common Carrier Applic., 92 M.C.C. 82, 87 (1963). *Compare*, Chemical Leaman Tank Lines, Inc., Ext.—Wyandotte Chemicals, 123 M.C.C. 873 (1975) *with* Cadline Transport Ltd., Common Carrier Applic., 126 M.C.C. 357 (1977).

In Diversified Transp., 120 M.C.C. 289, a Canadian motor carrier sought authority to operate a charter passenger tour service beginning and ending at points in Canada and traversing the United States. Because the applicant, protestants, and passengers were domiciled in Canada, and because the interlining of passengers at the boarder was unfeasible, it was held that the greatest zone of interest rested with the appropriate Canadian authorities. 120 M.C.C. at 292.

In Balazs Common Carrier Applic., 98 M.C.C. 522, 527, the ICC expressed the following rationale:

> 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.

See also Ayers & Maddux, Common Carrier Applic., 107 M.C.C. 764, 774 (1968). A policy statement released by the ICC indicated that in applications for operating authority filed on or subsequent to March 3, 1975, involving transportation to or from Canada, the Canadian points and the port of entry points are to be specified, and that grants of authority will be limited accordingly. 39 Fed. Reg. 42,440 (1974).

(which were harvested in Central America and imported through Atlantic ports) from United States port facilities to Canada was within the land bridge exemption, despite the fact that the Canadian-destined portions of the shipments frequently were not specified until unloading from the ocean carriers. The decision recognized that the expeditiousness of the transfer at the port facilities from water to motor carriers evidenced the unbroken continuity of the shipments and, therefore, did not break the flow of the movement from Central American shippers to Canadian consignees.[32]

The land bridge exemption is entirely consistent with article V of the General Agreement on Tariff and Trade (GATT),[33] which provides, *inter alia,* that "[t]here shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties." The exemption is also alluded to in most treaties of friendship, commerce, and navigation (FCN), into which the United States has entered with over 40 nations. The FCN treaty between the United States and Japan,[34] for example, includes the typical provision regarding freedom of transit. Article XX provides:

> There shall be freedom of transit through the territories of each Party by the routes most convenient for international transit . . .

---

32. It is well established that authority to serve points in a described territory embraces authority to serve ports of entry on the United States-Canadian boundary within that territory. Freeport Transport, Inc., Ext.—Insulation, 121 M.C.C. 66, 71 (1975); Maas Transport, Inc., Ext.—Salt From Williston, N. Dak., 92 M.C.C. 534, 541 (1963); Kingsway Transport-Pur.—Charles A. Kuhns Delivery, 85 M.C.C. 287, 300 (1962). Thus, for example, a carrier holding authority to transport specified commodities between points in the states of Washington and California could originate such traffic in British Columbia and transport it to points in California, provided the carrier held complementary Canadian authority and provided the movement traversed the boundary between Washington and British Columbia. *Compare* Gorski, Ext.—Chemicals to Canada, 118 M.C.C. 589, 601 (1973) *with* Provost Cartage Inc., Ext.—Norfolk, Va., 117 M.C.C. 459 (1971). In Red Star Express Lines of Auburn, Inc., v. Maislin, 110 M.C.C. 23 (1969), however, it was held that motor carrier operating authority to serve Buffalo, N.Y., as part of authorized regular route operations performed between Buffalo and New York, N.Y., did not allow the carrier to lawfully transport traffic that originated or was interlined at Buffalo for subsequent movement in foreign commerce to Canadian destinations. It could, however, lawfully transport shipments that originate or are interlined at any of its other authorized points (except Buffalo) through the Buffalo port of entry. 110 M.C.C. at 26-27.

33. Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

34. Treaty of Friendship, Commerce & Navigation, April 2, 1953, United States—Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863.

> for products of any origin en route to or from the territories of such other party. Such persons and things in transit . . . shall be free from unnecessary delays and restrictions.[35]

It has consistently been held by the ICC, however, that the transportation of passengers in round-trip charter operations through points in the United States, beginning and ending at points in a foreign nation, constitutes foreign commerce subject to the jurisdiction of the ICC if it is the purpose of any passenger transported to visit, en route, a point in the United States.[36] In contrast, the transportation of passengers or property between terminals in an adjacent foreign country through the territory of the United States is subject to the land bridge exemption when the carrier neither accepts nor delivers shipments in the United States.[37]

---

35. Id. at 2078, T.I.A.S. No. 2863. *See* Dempsey, *supra* note 9.

36. *See* Inglis Common Carrier Applic., 31 M.C.C. 209, 210 (1941); Cripps Common Carrier Applic., 24 M.C.C. 19, 21 (1940). Such round-trip transportation beginning or ending at points in Canada or Mexico and performed through points in the United States is not perceived by the ICC as transportation "between places in a foreign country" within the meaning of ICA § 203(a)(11), 49 U.S.C. § 303(a)(11). It is instead viewed as transportation for the purpose of sightseeing, pleasure, business, or other reason from a point in a foreign nation to a point in the United States. The return trip is treated likewise from the place in the United States to the point of beginning in Canada or Mexico and involves a constructive delivery and pickup in the United States. Vancouver Airline Limousines, Ext.—Charter Operations, 66 M.C.C. 587, 590 (1956). Through a legal fiction, these round-trip operations are constructively perceived as two separate movements. For a recent decision granting authority to transport passengers in an international tour service, see All World Travel, Inc., Common Carrier Applic., 126 M.C.C. 243 (1977). *Cf.* Diversified Transp., 120 M.C.C. 289 (ICC emphasized that a certain measure of regulatory cooperation must be maintained where the through movement is international in character).

37. Vancouver Airline Limousines, 66 M.C.C. at 589-90. A passenger motor carrier operating between an airport and a point within the same state, selling no through tickets, and having no common arrangement with out-of-state or foreign carriers is not performing interstate or foreign transportation subject to the ICA when passengers have an immediately prior or subsequent movement by air, regardless of the intentions of any passengers to continue or complete an interstate or foreign journey. Motor Transp. of Passengers Incidental to Transp. by Aircraft, 95 M.C.C. 526, 536 (1964). Similarly, a passenger travel agent arranging tours utilizing both bus and air transportation is not a broker under ICA § 203(a)(18), 49 U.S.C. § 303(a)(18) (1970), if the motor carrier portion of the movement is performed wholly within a single state and does not involve the honoring or selling of through tickets or the performance of common arrangements between the motor carrier and the connecting out-of-state or foreign air carriers, even though the tour as a whole constitutes interstate or foreign commerce.

3. The Commercial Zone Exemption

Section 203(b)(8) of the ICA[38] provides a partial exemption from regulation for transportation in interstate or *foreign* commerce performed, *inter alia:*

> 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 . . . .

Thus, to avail itself of the *commercial zone exemption,* a motor carrier subject to part II of the ICA must (1) perform transportation wholly within a single municipality or between contiguous municipalities, or within a zone adjacent to and commercially a part of such municipality or municipalities, and (2) must not perform transportation under a common control, management, or arrangement for a continuous carriage to or from a point located outside such municipality, municipalities, or zones. The first criterion requires a geographic evaluation of the proximity of the points between which the traffic is moving.[39] The latter criterion requires evaluation of the relationships between the carriers performing the through movement—transportation which may involve more than a single mode of carriage.

(a) *International Boundary Municipalities.*—An issue that has confronted the ICC on numerous occasions is whether the language

---

Wisconsin-Michigan Coaches, Inc., Petition for Declaratory Order, 124 M.C.C. 448, 451 (1976).

In Peter Pan World Travel, Inc., Broker Applic., 125 M.C.C. 728 (1976), the Commission reaffirmed its policy of encouraging the development of intermodal transportation services by granting an application for operation as a passenger broker of air and motor movements for groups of foreign tourists touring in the United States. 125 M.C.C. at 735, 737. *See* Paragon Travel Agency, Inc., Ext.—Atlanta, Ga., 120 M.C.C. 1 (1974). In Entry Control of Brokers, 126 M.C.C. 476 (1977), however, the ICC promulgated regulations which significantly relaxed entry control in the field of brokerage operations (except in the household good area).

38. 49 U.S.C. § 303(b)(8) (1970).

39. The ICC has emphasized that it does not affirmatively create a particular commercial zone, but that it recognizes the existence thereof surrounding and embracing each municipality as an economic entity born by reason of trade practice, the uses to which the region is part, and by political or geographical considerations. Washington, D.C. Commercial Zone, 103 M.C.C. 256, 259 (1966). Commercial Zones and Terminal Areas, 46 M.C.C. 665, 672 (1946).

"between contiguous municipalities" of section 203(b)(8) of the ICA applies to motor carrier operations performed in foreign commerce between municipal regions situated on or near the international boundaries between the United States and its two North American neighbors, Canada and Mexico.[40] Initially, the ICC took the position that the section 203(b)(8) exemption was applicable and exempted such local operations from economic regulation. Thus, it was held that although Detroit, Michigan, and Windsor, Ontario, are located in separate nations, they nevertheless face each other on the banks of the Detroit River and are therefore contiguous municipalities to which the commercial zone exemption appropriately applies.[41] In a later decision[42] in which authority was sought to perform passenger operations between El Paso, Texas, and Juarez, Mexico, however, it was held that the section 203(b)(8) exemption was inapplicable to transport operations performed in foreign commerce[43] between points within the United States and points in Mexico. A subsequent but more elaborate discussion of this position indicated that inasmuch as the jurisdiction of the ICC embraces only that portion of a through international movement that is performed wholly within the boundaries of the United States, "it does not appear that the exemption provided by 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."[44] It was, therefore, held that the statutory language referred only to municipalities and commercial zones located within the United States.[45]

---

40. For an historical analysis of the regulation of foreign commerce between United States and Mexico or Canada by the ICC, see Consolidated Truck Lines, Ltd. v. Fess & Wittmeyer Trucking Co., 83 M.C.C. 673 (1960).

41. Ethier Contract Carrier Applic., 14 M.C.C. 785, 786 (1938); Goyeau Contract Carrier Applic., 11 M.C.C. 519, 520 (1938), Goyeau Contract Carrier Applic., 8 M.C.C. 359, 360 (1938). In each of these cases, it was found that there was no evidence of any performance by the applicants of transportation under a common control, management, or arrangement with any other carrier for a continuous carriage to or from points located beyond Detroit or Windsor. *Compare* Barnett Common Carrier Applic., 44 M.C.C. 578 (1945) *with* Hinton Common Carrier Applic., 28 M.C.C. 81 (1941).

42. Resler Ext. of Operations—Juarez, Mex., 44 M.C.C. 733, 738 (1945).

43. *See* 49 U.S.C. § 303(a)(11) (1970).

44. Commercial Zones, 46 M.C.C. at 686.

45. 46 M.C.C. at 688. *See also* Commercial Zones & Terminal Areas, 54 M.C.C. 21 (1952) (commercial zones of municipalities situated on the international boundary line do not in any instance extend beyond the territorial limits of the United States).

The lack of uniformity on this issue was ultimately resolved by the federal courts in *Verbeem v. United States,*[46] in which it was specifically held that the commercial zone exemption of section 203(b)(8) of the ICA was indeed applicable to transportation which, albeit performed in foreign commerce, was nevertheless conducted within the commercial zone of contiguous municipalities situated on the international boundary between the United States and its two North American neighbors.[47] Since *Verbeem* the ICC has generally held that local cartage operations performed between contiguous municipalities are partially exempt from economic regulation by virtue of section 203(b)(8) of the ICA, even if performed in foreign commerce and between municipalities located in separate nations.[48] This interpretation creates the potential for inequitable treatment of United States carriers, since foreign carriers may lawfully operate within the exempt zone in the United States, whereas United States carriers are prohibited from performing similar operations in foreign nations without operating

---

46. 154 F. Supp. 431 (E.D. Mich. 1957), *aff'd sub nom.* Amlin v. Verbeem, 356 U.S. 676 (1958) (per curiam). This decision also involved a determination of whether the involved exemption included local cartage operations performed between Detroit and Windsor. *See also* Commercial Zones & Terminal Areas—Detroit, 96 M.C.C. 709 (1965) [hereinafter cited as Detroit], in which it was emphasized that the *Verbeem* decision did not hold that Windsor fell within the commercial zone of Detroit (*i.e.*, "within a zone adjacent to and commercially a part of" Detroit), but was instead transportation performed in foreign commerce between contiguous municipalities and therefore fell within the exemption. 96 M.C.C. at 713.

47. Verbeem v. United States, 154 F. Supp. at 434-35. *See* Rio Grande Border Municipalities—Commercial Zones & Terminal Areas, 110 M.C.C. 51, 55-56, 58 (1969).

> If wholly local transportation is of insufficient importance to the economy of the United States to justify economic regulations—and no one disputes that this essentially is the legislative reasoning underlying the commercial zone exemption—then such transportation is not of sufficient significance to the national economy whether it be performed between contiguous municipalities or those within a single commercial zone, or whether it is performed wholly within the United States or between a point in the United States, on the one hand, and, on the other, a point in a foreign country.
>
> Indeed, 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 envisioned anything other than the 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.

110 M.C.C. at 60.

48. *See* International Boundary Lines, 110 M.C.C. at 732.

authority because neither Canada nor Mexico has any statute or regulation comparable to the section 203(b)(8) exemption.[49]

This precedent, however, has been held inapplicable to international motor operations that are not restricted to the transportation of *local* traffic between contiguous municipalities but instead involve a line-haul movement beyond a particular commercial zone or contiguous municipalities.[50] Similarly, the exemption is inapplicable with respect to traffic interlined at one of the two international boundary municipalities and originating at or destined to points outside the commercial zone thereof, for it is "under a common control, management, or arrangement for a continuous carriage to or from a point without the municipalities."[51] Thus, with respect to motor carrier operations performed in foreign commerce, the commercial zone exemption is applicable only when the traffic originates at a point located within one of the contiguous municipalities and is destined to a point in the "sister" municipality.[52]

(b) *Under a Common Control, Management, or Arrangement.*—It has frequently been held by the ICC that the "common control, management, or arrangement" that excepts a particular movement from the applicability of the section 203(b)(8) exemption is one between the carriers participating in the through movement.[53] This interpretation of the statutory language was

49. Commercial Zones & Terminal Areas, 124 M.C.C. 130, 180 (1976). Two solutions have been suggested by the ICC: (1) the filing of a petition finding that the adjacent foreign territory does not fall within the commercial zone of a United States municipality; and (2) legislative relief. 124 M.C.C. at 180.

50. Soo-Security Motorways, Ltd., Ext.—Pembina, N. Dak., 84 M.C.C. 661, 662-63 (1961); Consolidated Truck Lines v. Fess & Wittmeyer Trucking Co., 83 M.C.C. at 676-77.

51. Detroit, *supra* note 46, 96 M.C.C. at 715. The ICC has frequently given consideration to that segment of the through international movement performed in a foreign nation. *See* Consolidated Truck Lines, Ltd. v. Fess & Wittmeyer Trucking Co., 83 M.C.C. at 676.

52. *See* Adam's Cartage Ltd., Common Carrier Applic., 121 M.C.C. 115, 122 (1975).

53. G. Arrendendo Transfer, 103 M.C.C. at 225; Pacific Motor Trucking Co. Common Carrier Applic., 34 M.C.C. 249, 263 (1942); Motor Rail Co. Common Carrier Applic., 31 M.C.C. 353, 358 (1941); Blinn, Morill Co. Contract Carrier Applic., 28 M.C.C. 299, 302 (1941); Bleich Common Carrier Applic., 14 M.C.C. 662, 665 (1939); Bigley Bros., Contract Carrier Applic., 4 M.C.C. 711, 714-15 (1938); 4 FED. CARR. REP. (CCH) ¶ 96.03 (1976); 2 Fed. Carr. Cas. ¶ 7720 (1976). Thus, local transportation performed under an agreement with a shipper or consignee and not under an arrangement with a connecting carrier does not require authorization for performance wholly within a commercial zone. Brashear Freight

first articulated by the ICC in *Bigley Bros. Contract Carrier Application*,[54] in which this phrase was deemed to have essentially the same meaning as that ascribed by the United States Supreme Court to identical language in section 1(1)(a) of the ICA,[55] in *United States v. Munson S.S. Lines*.[56] In *Munson*, the Supreme Court held that the phrase "under a common control, management, or arrangement for a continuous carriage or shipment" conveyed the following meaning:

> It is apparent that a mere practical continuity in the transportation is not enough, as the question under the statute is not simply whether there was a continuous carriage or shipment, but whether that carriage or shipment was pursuant to a common arrangement. The provision of the statute, expressing a distinction in the policy of the Congress with respect to water transportation, clearly indicates that it is permissible for a water carrier, receiving at its port a shipment which has been carried by rail from an interior point, to keep its own carriage distinct and independent. While a common arrangement may exist without the issue of a through bill of lading or any particular formality, it is not to be inferred from circumstances which are entirely consistent with the independence which the statute recognizes. In this instance, the facts show that the respondent undertook to maintain its own carriage as distinct and independent by having its separate contract, its independent rate, its direct instructions from the shipper as to its own transportation.[57]

The statutory language, "under a common control, management, or arrangement," has thus been judicially characterized as referring to the activities of those carriers participating in the through movement. This construction arose initially under the Supreme Court's interpretation of part I of the ICA in *Munson* and was later expanded to embrace identical statutory language contained in part II of the ICA in *Bigley Bros.*[58] Its significance to the instant discussion is that the through transportation involved in

---

Lines, Inc., Common Carrier Applic., 33 M.C.C. 279, 285 (1942); Signal Trucking Service, Ltd., Contract Carrier Applic., 32 M.C.C. 516, 517-18 (1942).

54. 4 M.C.C. at 714-15.

55. 49 U.S.C. § 1(1)(a) (1970).

56. 283 U.S. 43 (1931).

57. 283 U.S. at 47.

58. 4 M.C.C. at 714-15. *See* Atlanta Bonded Warehouse, Inc., Common Carrier Applic., 91 M.C.C. 104, 108-09 (1962); Dick's Transfer & Truck Terminal Contract Carrier Applic., 20 M.C.C. 785, 791-92 (1939). *Cf.* Bud's Moving & Storage, Inc., Petition for Declaratory Order, 126 M.C.C. 56, 60 (1976) (discussion of the "pack and crate" or "kingpack" exception to the commercial zone exemption of section 203(b)(8) of the ICA).

such a movement may be intermodal as well as international.[59] For example, let us imagine the transnational intermodal movement of auto parts from a consignor domiciled in Stockholm, Sweden, to a consignee domiciled in Norfolk, Virginia. Let us assume that this through movement is controlled by an international maritime carrier (of, say, Panamanian registry) that itself performs that segment of the movement traversing the Atlantic Ocean and which makes arrangements with a local motor carrier for the delivery of the auto parts to the consignee's Norfolk facility. Since the "common control, management, or arrangement" in this example would be between those carriers participating in the through foreign commerce movement, the commercial zone exemption would be inapplicable. Thus, operating authority would ordinarily be required for the lawful performance of these motor carrier operations between points in the commercial zone of Norfolk, even though the local cartage consisted only of the transportation of the involved commodities from the ocean vessel moored at the port facilities of the involved municipality to the consignee domiciled within the same commercial zone.[60]

Quite a different regulatory result may arise, however, when separate arrangements are made by either the consignor or the consignee with each of the carriers performing the through movement from or to points located outside the involved commercial zone. Since the "common control, management, or arrangement" in such instances is not between the carriers performing the movement, but is, instead, between the shipper and each of the carriers participating therein, such transportation has ordinarily been held

59. The apparent purpose of Congress in promulgating the section 203(b)(8) exemption was to remove from regulation those operations which, although in foreign commerce, nevertheless have a distinctly local and urban character. Consolidated Freightways, Inc., Ext.—Seattle, Wash., 74 M.C.C. 593, 597 (1958); Los Angeles, Cal., Commercial Zone, 3 M.C.C. 248, 252 (1937); New York, N.Y., Commercial Zone, 2 M.C.C. 191, 192-93 (1937). One commentator has asserted that a common arrangement under this statutory provision should be held to exist only where (a) "there is no arrangement for an actual through movement with joint responsibility," and (b) "any agreement that does have these features is not between the carriers involved . . . ." Reed, *Commercial Zones and Terminal Areas—What's the Difference,* TRAFFIC WORLD, Dec. 13, 1976, at 85, 87.

60. The extent to which a local movement performed in conjunction with another carrier may be partially exempt from economic regulation pursuant to the terminal area exemption of the ICA will be discussed in detail below. As will be seen, because an ocean carrier subject to the jurisdiction of the FMC has *no* terminal area under the ICA, the regulatory result in the posed hypothetical would be no different than that reached therein.

to fall within the commercial zone exemption.[61] Thus, it has been held that if an applicant seeking motor carrier authority to transport commodities within a single commercial zone is not affiliated with another carrier participating in the through movement and it performs services under a separate agreement, independent rate, and direct instructions from each of its customers (*i.e.*, consignors or consignees in control of the local movement), the movement falls within the commercial zone exemption and operating authority is therefore not required.[62]

4. The Terminal Area Exemptions

(a) *Ex-Water Movements.*—The combined effect of the commercial zone exemption of section 203(b)(8) and the terminal area exemption of section 202(c)(2) of the ICA is partially to exempt from regulation local motor carrier movements performed in interstate or foreign commerce within a municipality and its immediately adjacent commercial zone or terminal area.[63] However, the

---

61. Bud's Moving & Storage, Inc., petition for Declaratory Order, 126 M.C.C. at 61; Detroit, 96 M.C.C. at 715-16; W.E. Stanchfield Transfer Co., Common Carrier Applic., 34 M.C.C. 31, 33 (1942); Gerosa Hauling & Warehouse Corp., Common Carrier Applic., 26 M.C.C. 109, 114 (1940). *See* Greyhound Corp.—Investigation and Revocation of Certificates, 84 M.C.C. 169, 175 (1960).

62. Blinn, Morill Co., 28 M.C.C. at 302.

63. Commercial Zones, 46 M.C.C. at 669. *Cf.* Washington D.C., Commercial Zone, 103 M.C.C. 256, 259 (1966) (noting the purpose of section 203(b)(8)). In Bartz Cartage Co., Common Carrier Applic., 107 M.C.C. 378, 381-82 (1968), the statutory exemptions were summarized as follows:

> In summary, then, if property is transported wholly within a municipality and its "commercial zone," such transportation is exempt from economic regulation pursuant to section 203(b)(8) if it is not performed under a common control, management, or arrangement for a through movement to or from a point without the municipality or zone, and is exempt from direct economic regulation pursuant to section 202(c)(2) if the incidental transfer, collection, or delivery service is performed as an agent of, or under a contractual arrangement with, a line-haul common carrier for a through movement to or from a point without the line-haul carrier's terminal area. This latter section does not, however, permit the local carrier, as a participant in a through rate, to perform a through service with line-haul carriers. Such service must be performed by the local carrier for the line-haul carrier under the latter's tariff rather than under through rates published by the local and line-haul carrier.

See also United States v. Motor Freight Express, 60 F. Supp. 288, 293 (D.N.J. 1945).

Perhaps the most significant decision in this area of the law in the past several decades is the recent ICC decision in Triangle Trucking Co., Inc., Contract Car-

surface transportation between points located within the commercial zone of a port city of commodities having a prior or subsequent movement by water is generally not held to fall within either the commercial zone or the terminal area exemptions to the ICA. Indeed, local motor pickup and delivery services performed in connection with carriers not subject to ICC regulation (such as FMC regulated maritime carriers) are not exempt from economic regulation even though such transportation takes place wholly within a single commercial zone or terminal area.[64]

The terminal area exemption of section 202(c)(2) of the ICA[65] exempts from regulation motor carrier collection, delivery, and transfer services performed for and within the terminal area of railroads subject to part I of the Act, motor carriers subject to part II, water carriers subject to part III, and freight forwarders subject to part IV. Ocean carriers operating in foreign commerce, although subject to regulation by the FMC,[66] are not water carriers within part III of the ICA,[67] and may not, therefore, avail themselves of

---

rier Application, 128 M.C.C. 386 (1977), in which a motor carrier sought contract carrier authority to transport Coca-Cola between points in the Baltimore commercial zone. A segment of the involved traffic had its ultimate destination in Europe, while another distinct segment was ultimately destined for Latin America. With respect to the European traffic, the local motor carrier movement was arranged and controlled by the transatlantic FMC ocean carrier. Because this segment was under a common control, management, or arrangement between the two carriers participating in the through international movement, it was held to fall within the commercial zone exemption of section 203(b)(8) of the ICA. *Id.* at 392. Additionally, it was found that inasmuch as the European traffic was performed on behalf of a maritime carrier not subject to the ICA, the terminal area exemption of section 202(c)(2) was also inapplicable. *Id.* at 393. Thus, operating authority was clearly required for the European traffic. The local cartage movement (within Baltimore) of the Latin American traffic, however, was arranged and controlled by the local consignor (*i.e.*, Coca-Cola). With respect to this segment of the involved traffic, the ICC concluded that no operating authority was required by virtue of the commercial zone exemption. *Id.*

64. *See* Dempsey, *supra* note 9.

65. 49 U.S.C. § 302(c)(2) (1970).

66. The Federal Maritime Commission regulates ocean transportation in domestic-offshore or foreign commerce by vessel operators, non-vessel operators, and independent ocean freight forwarders. Shipping Act of 1916, 46 U.S.C. §§ 801-42 (1970 & Supp. V 1975); Intercoastal Shipping Act of 1933, 46 U.S.C. §§ 843-48 (1970 & Supp. V 1975).

67. Sections 302(c-e) of the ICA, 49 U.S.C. § 902(c-e), defines water carriers to embrace persons engaged in the transportation of passengers or commodities by water in interstate or foreign commerce. The term "interstate or foreign transportation" is limited by section 302(i) of the ICA, 49 U.S.C. § 902(i), essentially to domestic maritime movements, or movements in foreign commerce transpiring

the benefits of the aforementioned exemptions. Thus, the surface transportation of commodities between points in the commercial zone of a port city as part of a continuous foreign commerce movement in connection with ocean transportation requires certified authority issued by the ICC.[68]

Let us take as an example the movement of Portuguese wines from Lisbon to warehousing facilities located within the commercial zone of New Orleans. Their movement across the North Atlantic would ostensibly be subject to the jurisdiction of the FMC. However, their subsequent for-hire motor carrier movement from the port facilities of New Orleans, situated on the Mississippi River, to the consignee's inland warehouse facilities, located within the commercial zone of New Orleans, would require licensed authority and would fall neither within the commercial zone exemption of section 203(b)(8) nor within the terminal area exemption of section 202(c)(2) of the ICA, although the local cartage movement was controlled by the FMC ocean carrier.[69]

A line-haul motor carrier that holds authority to serve a particular point (either as a terminal or intermediate point) may not at that point perform local cartage operations that are not connected with its own line-haul services. Authority to serve a point as a terminal or intermediate point in connection with a carrier's authorized regular route operations does not enable it to perform, as part of a continuous movement in foreign commerce, nonexempt local operations that are not connected with its line-haul services.[70] Although a carrier may hold extensive authority to serve a port city as both an intermediate and terminal point, such authority does not encompass pickup and delivery services within the commercial zone of a port city in connection with a maritime carrier not subject to part III of the ICA.[71] Thus, in the above example involving Portugese wines, a licensed regular route motor

---

prior or subsequent to transshipment. *See* notes 134-143 *infra,* and accompanying text. Thus, the jurisdiction of the ICC is effectively limited to those carriers engaging in such transportation, and does not embrace FMC carriers.

68. Drive Away Auto Transp., Inc., Common Carrier Applic., 99 M.C.C. 75, 79 (1965); Trans-Caribbean Motor Transp., 66 M.C.C. at 597; Oregon Draymen & Warehousemen's Ass'n v. Sellwood Transfer Co., 61 M.C.C. 701, 702-03 (1953); Douglas Transfer, Inc., Common Carrier Applic., 30 M.C.C. 384, 386 (1941).

69. *See* AAA Transfer, Inc., 120 M.C.C. at 821; Consolidated Freightways, Inc., Ext.—Seattle, Wash., 74 M.C.C. 593, 594-97 (1958).

70. Service Transfer, Inc., Contract Carrier Applic., 115 M.C.C. 29, 34 (1972).

71. Berry Transport, Inc., Ext.—Containers, 124 M.C.C. 328; Marine Stevedoring Corp. Common Carrier Applic., 119 M.C.C. 514, 517 (1974).

carrier authorized to transport general commodities between Atlanta and New Orleans would, nevertheless, not be authorized to transport the wine from the port facilities of New Orleans to points within the New Orleans commercial zone.

The ICC has recently granted a number of motor common carrier applications to transport commodities having a prior or subsequent movement by water between points located within the commercial zone of a port city.[72] This is entirely consistent with the Commission's established policy of promoting coordination of efficient intermodal transportation services.[73] The intended effect of these efforts has been "to foster the growth of coordinated sea-land services in port cities in harmony with [the] Commission's policy of encouraging such intermodal development.[74]

The ICC is presently considering in Ex Parte No. MC-105 proposed regulations that would exempt certain ex-water movements from economic regulation. Such regulations would be based, not on the terminal area exemption of section 202(c)(2), or on the commercial zone exemption of section 203(b)(8) of the ICA, but on the exemption for motor carrier operations performed wholly within a single state pursuant to section 204(a)(4)(a) of the ICA.[75] The proposed regulations, if promulgated, would exempt the local cartage transportation of shipments moving in interstate or foreign commerce, having a prior or subsequent movement by maritime carrier, where the motor carrier segment is performed wholly within the commercial zone of a port city and does not extend beyond the

72. *See, e.g.*, Aqua Gulf Corp., Ext.—Port Elizabeth, No. MC-133350 (Sub-No. 4) (I.C.C. July 27, 1977) (transportation of commodities between Puerto Rico and the continental United States); Florida Master Movers, Inc., Ext.—Jacksonville, No. MC-136975 (Sub-No. 2) (I.C.C. Mar. 7, 1977); Newport Trucking, Inc., Common Carrier Applic., No. MC-141883; (Sub-No. 2) (I.C.C. Nov. 19, 1976); Merry Shipping Co., Ext.—Savannah, No. MC-140260 (I.C.C. Sept. 7, 1976); E.E. Henry—Norfolk Zone, No. MC-123387 (Sub-No. 3) (I.C.C. Mar. 24, 1976); Trailer Marine Transp. Corp. Common Carrier Applic., No. MC-141323 (I.C.C. Feb. 17, 1976).

73. *See* Emery Air Freight Corp. Freight Forwarder Applic., 339 I.C.C. 17 (1971).

74. *E.g.*, Holt Motor Express, 120 M.C.C. at 329-30.

75. 49 U.S.C. § 304(a)(4a) (1970). Recently, in J.W. Allen, et al., a Partnership—Investigation of Operations and Practices, 126 M.C.C. 336 (1977), the ICC concluded that the single state transportation of commodities by motor vehicle, having a prior movement by private maritime carrier not subject to the jurisdiction of either the FMC or the ICC, although comprising a movement in continuous foreign commerce, is nevertheless not subject to economic regulation under part II of the ICA.

boundaries of the state in which the port is located.[76]

(b) *The Air Terminal Area Exemption.*—Section 203(b)(7)(a) of the ICA[77] provides a limited exemption from economic regulation by the ICC of the motor carrier transportation performed "incidental to transportation by aircraft."[78] For purposes of this discussion, it shall hereinafter be referred to as the air terminal area exemption. Its significance to the instant analysis does not lie in its establishment of a regulatory framework governing exclusively international transport movements. The rules established by this statutory provision are applicable regardless of whether the incidental transportation is performed in conjunction with a domestic or a foreign air carrier and regardless of whether the through intermodal movement involves a domestic or foreign route or rate. This statutory provision is significant because it is essential to the delineation of the line at which CAB air regulation ends and ICC motor regulation begins. The Federal Aviation Act affords to the CAB jurisdiction over "service in conection with . . . air transportation,"[79] and over transportation performed partially by aircraft and partially by other modes of transportation.[80] Thus, defining precisely the limitation of the air terminal area exemption is necessary to diminish the problems that inevitably arise as a result of an assertion of overlapping jurisdictional authority by two separate federal agencies performing their independent regulatory responsibilities. Moreover, the through air-motor movement subject to this exemption frequently embraces an underlying transnational sales

76. In Consolidated Freightways, 74 M.C.C. 593, the ICC concluded that a similar movement could not be exempted from regulation pursuant to ICA §§ 202(c)(2), 203(b)(8). "[T]he result here is highly technical and probably undesirable from a regulatory standpoint; but the remedy appears to lie in additional legislation rather than a forced construction of the law which we now administer." 74 M.C.C. at 597. *Cf.* Sea-Land Service, Inc. v. Federal Maritime Comm'n, 404 F.2d 824, 828 (D.C. Cir. 1968) (approving the result of the statute).

77. 49 U.S.C. § 303(b) (1970). This section was inserted into the ICA by the Civil Aeronautics Act of 1938, ch. 601, § 1107(j), 52 Stat. 1029. This latter statute was subsequently replaced by the Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731.

78. An exception to this exemption exists with respect to the applicability of ICA § 204, 49 U.S.C. § 304 (1970), pertaining to qualifications and hours of employees and safety of equipment. *See* note 77 *supra.*

79. 49 U.S.C. § 1373 (1970).

80. Section 101(3) of the Federal Aviation Act of 1958, *as amended*, 49 U.S.C. § 1301(3) (1970), defines an air carrier as one who engages in air transportation either directly or indirectly. *See* note 7 *supra. See also* 49 U.S.C. §§ 1371(a), 1372(a) (1970). *See* 49 U.S.C. § 1301(13), (19-21) (1970). Air Dispatch, Inc. v. United States, 237 F. Supp. 450, 452 (E.D. Pa. 1964), *aff'd* 381 U.S. 412 (1965).

transaction and, therefore, involves the transportation of persons or property ultimately originating at or destined to points in foreign nations.

Pursuant to this statutory provision, motor carrier collection or delivery services performed as part of a continuous intermodal movement of commodities on a through bill of lading issued by a direct air carrier or air freight forwarder (subject to the regulation of the CAB) is exempt from economic regulation by the ICC.[81] In deciding whether a motor carrier movement is "incidental" to a prior or subsequent air movement within the meaning of section 203(b)(7)(a), distance, although a significant factor, has not been deemed to be the controlling criterion.[82] The ICC has determined that the more important elements requiring evaluation include the essential character of the commerce and whether the surface movement is performed in connection with a immediately prior or subsequent movement by aircraft.[83] In fact, for this exemption to be held applicable, the motor carrier segment of the through intermodal movement must have an *immediately* prior or subsequent movement by air.[84] Moreover, it must involve a service subordinate

---

81. Air Dispatch, Inc. v. United States, 237 F. Supp. at 451-52. The motor carrier segment of the through intermodal air-motor movement may be performed wholly within a single state and, unless otherwise exempt from regulation, require operating authority. *See* Fourmen Delivery Service, Inc.—Petition for Declaratory Order, 112 M.C.C. 866, 871 (1971).

82. Golembiewski Common Carrier Applic., 48 M.C.C. 1, 4 (1948).

> [S]uch considerations as door-to-door rates and air-carrier billing and responsibility are not necessarily controlling and would not require a finding of an exempt operation should it appear that the motor-carrier service involved was so extensive as to constitute, in fact, a line-haul part of a through interline service, rather than a bona fide collection or delivery service incidental to air-carrier service.

48 M.C.C. at 5. *Cf.* Woodrum Field Airport Limousine Service, Ind., Common Carrier Applic., 82 M.C.C. 647, 649 (1960) (holding 75 miles to be a line-haul operation).

83. Sky Freight Delivery Service, Inc., Common Carrier Applic., 47 M.C.C. 229, 241 (1947).

84. Teterboro Motor Transp., Inc., Common Carrier Applic., 47 M.C.C. 247, 254-55 (1947). This does not mean that every operation involving transportation of passengers who receive a prior or subsequent movement by air is within the exemption in question, or that the exemption applies to motor carrier operations in the nature of substituted motor-for-air service. Incidental surface transportation must be clearly distinguishable from line-haul surface transportation. The involved motor carrier movement must not consume so substantial a distance as to take on the character of an independent journey approaching in significance the prior or subsequent air movement. Exempt Zone—La Guardia and Kennedy Int'l Airports, 111 M.C.C. 284, 288 (1970).

to the air segment of the through intermodal movement or one that is an adjunct or result of the prior or subsequent air transportation.[85] Additionally, to be exempt, the motor carrier operation must be limited to a bona fide collection, delivery, or transfer service performed within the air carrier's terminal area adjacent to the airport.[86]

> [I]ncidental-to-air motor operations are limited to services in the nature of collection, delivery, and transfer services within what may be said to be the terminal areas of the air carriers at each point served. The corollary to such conclusion is that when a motor service goes beyond the limits of bona fide collection, delivery, or transfer service and becomes in effect an interterminal or intercity service it can no longer be found to be merely "incidental" or subordinate to the prior or subsequent transportation by air but, on the contrary, must be looked upon as an independent line-haul service of a connecting carrier which is part of an interline movement and subject to regulation as such. The question whether a particular motor service, which immediately precedes or immediately follows transportation by air, exceeds the bounds of bona fide collection, delivery, or transfer services and is, in fact, line-haul in character, must be determined by the facts in each particular case, and on that issue the length of the haul, though very significant, is not controlling.[87]

---

85. The word "incidental" within this statutory exemption has been interpreted by the ICC to embrace those movements "occurring in the course of or coming as a result of an adjunct of something else . . . foreign or subordinate to the general purpose." Sky Freight Delivery Service, 47 M.C.C. at 241 (quoting FUNK & WAGNALLS, NEW STANDARD DICTIONARY). *See* Woodrum Field Airport Limousine Service, 82 M.C.C. at 649.

86. Koch Common Carrier Applic., 49 M.C.C. 555, 557 (1949).

> In *Peoples Exp. Co. Extension—Air Freight,* 48 M.C.C. 393, it was pointed out that the line of demarcation between partially exempt incidental-to-air motor service and non-exempt motor service is the line where a motor-carrier service preceding or following transportation by air goes beyond the limits of what may be a bona fide collection, delivery, or transfer service of the air lines and becomes in effect an interterminal or intercity connecting carrier line-haul service. The mere fact that the proposal involved is restricted to traffic having an immediately prior or subsequent movement by air is not enough, standing alone, to require the conclusion that the proposed motor service is subject to the partial exemption.

49 M.C.C. at 558. Where a carrier has not established its intention to limit its operations to service performed incidental to transportation by aircraft, however, it has been held that the air terminal area exemption of ICA § 203(b)(7)(a) is inapplicable. Alexandria, Barcroft & Washington Transit Co. Ext. of Operations—Washington Nat'l Airport, 30 M.C.C. 618, 619 (1941).

87. Graff Common Carrier Applic., 48 M.C.C. 310, 315 (1948).

Thus, daily interterminal line-haul motor carrier operations performed in connection with air carriers subject to the jurisdiction of the CAB are generally held to fall outside the air terminal area exemption. An exception to these general principles has been developed, however, for sporadic and irregular emergency motor carrier operations performed at the airline's expense and as a substitute for impractical or impossible air transport, rather than as an auxiliary to regularly scheduled air service.[88]

The most frequently cited language in this area is that initially expressed in *Kenny Extension—Air Freight,*[89] which has subsequently been embraced by the applicable federal regulations promulgated by the ICC. In *Kenny* it was held that the applicability of the air terminal area exemption was

> confined to the transportation in bona fide collection, delivery or transfer service of shipments which have been received from, or will be delivered to, an air carrier as part of a continuous through movement under a through air bill of lading covering in addition to the line-haul movement by air the collection, delivery, or transfer service performed by motor carrier.[90]

The criteria expressed in *Kenny* may be divided into a tripartite definition of exempt incidental-to-air transportation: (1) it involves the surface transportation of commodities having an immediately prior or subsequent movement by a direct air carrier; (2) it is performed as a segment of a continuous line-haul movement under a through bill of lading issued by a CAB regulated direct or indirect air carrier; and (3) it is performed within the terminal area

88. 48 M.C.C. at 315-16. *See* National Bus Traffic Ass'n v. United States, 249 F. Supp. 869, 872-73 (N.D. Ill. 1965); Woodrum Field Airport Limousine Service, 82 M.C.C. 647; Vanden Heuvel Ext.—Bendix and Midway Airports, 78 M.C.C. 41 (1958); Michaud Common Carrier Applic., 73 M.C.C. 677 (1957). This result permits the delivery of air freight even when the air carrier is prohibited or inhibited by poor weather or equipment failures from providing the requisite transportation. Motor Transp. of Property Incidental to Transp. by Aircraft, 95 M.C.C. 71, 87-88 (1964) [hereinafter cited as Motor Transp.] *aff'd sub nom.,* Air Dispatch, Inc. v. United States, 237 F. Supp. 450 (E.D. Pa. 1964), *aff'd,* 381 U.S. 412 (1965) (per curiam).

89. 61 M.C.C. 587 (1953).

90. 61 M.C.C. at 595. *Accord,* ICC v. Howard, 342 F. Supp. 1112, 1115-16 (W.D. Mich. 1972); Motor Transp., *supra* note 88, 95 M.C.C. at 84-85; Scari Ext.—Airports, 76 M.C.C. 319, 323, 325 (1958); Southern Pac. Transp. Co.—Air Freight, 73 M.C.C. 345, 346 (1957); Commodity Haulage Corp., Common Carrier Applic., 69 M.C.C. 527, 529 (1957). An excellent discussion of the historical developments leading to this construction of the section 203(b)(7)(a) exemption is set forth in Hatom Corp. Common Carrier Applic., 91 M.C.C. 725 (1962).

of either the direct or indirect air carrier according to its tariff filed with the CAB.[91] Motor carrier movements performed on behalf of air carriers within the carrier's terminal area must, however, be clearly distinguished from surface transportation, which, although essentially a segment of a through intermodal movement, extends beyond the air carrier's terminal area as a line-haul service of a motor carrier, for only the former service falls within the exemption.[92]

Because of the significant differences between airports, the ICC initially concluded that no specific territorial boundaries could appropriately be drawn.[93] It recognized, however, that the terminal areas of air carriers might be somewhat larger than those of surface carriers.[94] The ICC, having appropriate jurisdiction to determine the extent of the section 203(b)(7)(a) exemption,[95] has drawn precise geographical limitations governing the exemption. Although a delineation of a particular terminal area by the CAB may differ from the terminal area boundaries recognized by the ICC, the ICC is required only to afford nonconclusive respect to the CAB determination. Neither agency is precluded from establishing differing territorial limits for purposes of their respective statutory provisions.[96] The terminal area of the air carrier is construed to be that established by the air carrier in its tariffs filed with the CAB. The

91. Philadelphia Int'l Airport, Philadelphia, Pa.—Exempt Zone, 123 M.C.C. 228, 230 (1975).

92. Film Transit, Inc., and Air Dispatch, Inc.—Investigation of Operations, 98 M.C.C. 145, 151 (1965); Con-Ov-Air Air Freight Service, Inc., Common Carrier Applic., 92 M.C.C. 526, 528 (1963); Fischer Common Carrier Applic., 83 M.C.C. 229, 233 (1960).

93. Teterboro Motor Transp., 47 M.C.C. 247.

94. Kenny Ext.—Air Freight, 61 M.C.C. 587, 595 (1953). Indeed, it has been recognized that the port-to-port character of water and air movements has required the establishment of relatively larger terminal areas than those established for surface carriers. Zantop Air Transport, Inc.,—Investigation of Operations, 102 M.C.C. 457, 461 (1966).

95. Wycoff Co. v. United States, 240 F. Supp. 304, 308 (D. Utah 1965).

96. *See* Law Motor Freight, Inc. v. CAB, 364 F.2d 139, 145 (1st Cir. 1966). The ICC has made it clear that, although it intends to defer to the judgment of the CAB in most instances, any substantial geographic enlargement of the air terminal areas beyond the generally established 25-mile radius (except in such major urban centers such as New York or Chicago) must be fully supported by evidence that the motor segment of the intermodal through movement is in connection with air transportation and that it involves a bona fide pickup and delivery service confined to a homogeneous community. Motor Transp. of Property Incidental to Transp. by Aircraft, 112 M.C.C. 1, 21-22 (1970) [hereinafter cited as Incidental Transp.].

ICC presumes that the CAB would reject tariff publications that might result in an unreasonable geographic enlargement of the terminal area.[97]

Rather than limit the air terminal area to the commercial zone[98] of a particular municipality, the ICC has more recently followed the rule of thumb initially developed by the CAB, delineating the terminal area for carriers subject to its jurisdiction as the area within a 25-mile radius of the airport or city limits.[99] With respect to the transportation of *property,* the ICC has adopted regulations providing that the section 203(b)(7)(a) terminal area is that established in the tariffs filed with the CAB by the air carrier or within the 25-mile rule of thumb to which the CAB generally adheres.[100] With respect to the surface transportation of *passengers,* the ICC has promulgated regulations defining a 25-mile zone as the appro-

97. Air Cargo Terminals, Inc., Ext.—San Bernardino, Cal., 88 M.C.C. 468, 469 (1961); Panther Cartage Co. Ext.—Air Freight, 88 M.C.C. 37, 40 (1961). In *Panther Cartage,* the ICC concluded that traffic tendered by an air freight forwarder (a CAB indirect air carrier) under its own bill of lading would fall within the air terminal area exemption if the motor carrier segment of the intermodal through movement was performed within those points specified in the air freight forwarder's tariff and within the terminal area established by the air carrier that performs the air segment of the involved transportation. 88 M.C.C. at 40-41. *See* Wycoff Co., Ext.—Airfreight, 89 M.C.C. 369, 371 (1961). In Motor Transp., *supra* note 88, 95 M.C.C. at 88-89, however, this holding was modified somewhat, for it was held that the question whether the commodities moved under the billing of a direct air carrier or an air freight forwarder was irrelevant for purposes of the section 203(b)(7)(a) exemption. Today, the transportation of commodities by a motor carrier falls within the air terminal area exemption when it is

> confined to bona fide collection, delivery, or transfer service within the terminal area as delineated in the air carrier's or air freight forwarder's tariff filed with and accepted by the Civil Aeronautics Board, and is part of a continuous movement performed on a through air bill of lading. Substituted motor-for-air transportation is within the section 203(b)(7a) exemption when performed in emergency situations . . . on a through air bill of lading, and without regard to the extent of the involved air terminal area.

Airline Freight, Inc., Ext.—Philadelphia Air Terminal Area, 108 M.C.C. 197, 200 (1968).

98. *See* 49 U.S.C. § 303(b)(8) (1970); 49 C.F.R. § 1048.1-.102 (1976).

99. Zantop Air Transport, Inc.—Investigation of Operations, 102 M.C.C. 457, 461 (1966).

100. 49 C.F.R. § 1047.40 (1976). These regulations were promulgated in Incidental Transp., *supra* note 96, 112 M.C.C. 1, and Motor Transp., 95 M.C.C. 71. The language employed in these regulations is remarkably similar to that expressed by the ICC in Kenny Extension—Air Freight, 61 M.C.C. 587, 595. *See* text at note 90 *supra.* The CAB's 25-mile rule of thumb was adopted in 1964 and is set forth at 14 C.F.R. § 222.2 (1977).

priate terminal area, subject to procedures permitting the establishment of different boundaries under certain circumstances.[101] These regulations were adopted as a result of interagency collaboration between the CAB and the ICC designed to minimize the conflicts in the CAB's interpretation of section 403(a) of the Federal Aviation Act[102] and the ICC's interpretation[103] of section 203(b)(7)(a) of the ICA.[104] The ICC is presently considering the adoption of regulations redefining the air terminal area to embrace a zone including the area within 100 miles of the boundaries of each airport.[105]

B. *Freight Forwarding*

Freight forwarding is, in many respects, a unique mode of transportation. It is the only mode subject to the jurisdiction of each of the three federal transport regulatory agencies. Surface freight forwarders subject to part IV of the ICA are regulated by the ICC. Airfreight forwarders (indirect air carriers) and non-vessel-operating common carriers by water (NVOs)—the counterparts to

---

101. 49 C.F.R. § 1047.45(a) (1976). The regulations were promulgated by the ICC in Motor Transp. of Passengers Incidental to Transp. by Aircraft, 95 M.C.C. 526 (1964). *See* Portland Airport Limousine Co.—Petition for Declaratory Order, 118 M.C.C. 45, 48 (1973). The ICC has also adopted regulations that specify the circumstances in which licensed motor carriers may serve air freight terminals located beyond the physical boundaries they are authorized to serve. 49 C.F.R. 1041.23 (1976). *See* Interpretation of Operating Rights Authorizing Service at Designated Airports, 110 M.C.C. 597, 600 (1969).

102. 49 U.S.C. § 1373 (1970). This statutory provision affords to the CAB regulatory jurisdiction over "services in connection with . . . air transportation." The CAB also holds express statutory authority over transportation performed partially by aircraft and partially by other modes of transportation. 49 U.S.C. §§ 1371(a), 1372(a) (1970). *See* 49 U.S.C. § 1301(21) (1970).

103. *See* note 100 *supra.* The complementary CAB regulations are set forth at 14 C.F.R. § 222.

104. 49 U.S.C. § 303(b)(7a) (1970).

105. *See* 42 Fed. Reg. 26, 667-69 (1977) (to be codified in 49 C.F.R. 1047, 1082). *See also* Stephenson, *Air Freight Regulation: The Twenty-Five Mile Rule,* 43 J. AIR L. & COM. 55 (1977).

On November 9, 1977, President Carter signed into law a piece of legislation which essentially eliminates the authority of the CAB over entry in all-cargo air movements, and significantly diminishes the Board's power to regulate air freight rates. *See Air Freighter Service Deregulated as Carter Urges More 'Reforms',* TRAFFIC WORLD 40 (November 14, 1977). Should the ICC expand its air terminal area to a 100-mile radius, the combined effect of these two deregulatory efforts, one statutory and the other regulatory, would be to exempt from regulation virtually all through intermodal movements of commodities having a prior or subsequent movement by air.

ICC regulated surface freight forwarders—are subject to the jurisdiction of the CAB and the FMC respectively.[106] The performance of forwarding operations thus frequently entails interagency jurisdictional considerations. Moreover, because forwarders do not actually perform the underlying transportation movement, they must enlist the assistance of motor, rail, water, or air carriers to move goods. Thus, freight forwarding is inevitably an intermodal operation.

Freight forwarding is usually defined as the aggregation of numerous small shipments of individual consignors into a single consolidated shipment tendered to a carrier for subsequent movement.[107] From the carrier's perspective, the service is analogous to that performed by a shipper of its own commodities.[108] The term "freight forwarder" is defined by section 402(a)(5) of the ICA[109] as any person, other than a carrier subject to parts I, II, and III of the ICA, who purports to provide transportation for compensation and who (a) assembles and consolidates shipments and performs break-bulk and distribution operations with respect to such consolidated shipments, (b) assumes liability for the transportation thereof from the point of origin to point of destination, and (c) employs a carrier subject to parts I, II, or III of the ICA for the performance of any portion of such underlying transportation. Each of these requirements must be fulfilled before freight forwarding status will be *ascribed.*[110] They may be summarized into five separate requirements:

---

106. In Common Carriers by Water—Status of Express Companies, Truck Lines and other Non-Vessel Carriers, 6 Dec. Fed. Mar. Comm'n 245 (1961), the FMC concluded that entities that undertake to transport in foreign commerce commodities from one port to another, but which do not operate ocean vessels, are to be treated as common carriers by water and subject to its jurisdiction.

107. *See* Motor Rail Co., Determination of Status, 296 I.C.C. 205, 211 (1955); Barge Service Co. Freight Forwarder Applic., 285 I.C.C. 104, 106 (1951). For an analysis of the historical development of freight forwarding, see Investigation into Status of Freight Forwarders, 339 I.C.C. 711, 716-29 (1971). *See generally* Ahearn, *Freight Forwarders and Common Carriage,* 14 ICC PRAC. J. 401 (1947); Coddaire, *Freight Forwarders and Federal Regulations,* 17 ICC PRAC. J. 393 (1950); Givan, *Air Freight Forwarding,* 15 ICC PRAC. J. 671 (1948); Morrow, *Updating Transportation Law as It Applies to Freight Forwarders,* 36 ICC PRAC. J. 1315 (1969); Morrow & Wilson, *Some Problems of Freight Forwarders,* 11 ICC PRAC. J. 171 (1943).

108. *See* Dempsey, *Entry Control Under the Interstate Commerce Act: A Comparative Analysis of the Statutory Criteria Governing Entry in Transportation,* 13 WAKE FOREST L. REV. 729 (1977).

109. 49 U.S.C. § 1002(a)(5) (1970).

110. *See* Central Forwarding, Inc., Ext.—Household Goods, 107 M.C.C. 706,

(1) holding oneself out to the general public as a common carrier (other than one subject to Part I, II or III of the Act) to transport or provide transportation of property, for compensation, in interstate commerce;
(2) assembly and consolidation or provision therefor;
(3) performance of break-bulk and distribution, or provision therefor;
(4) assumption of responsibility for the transportation from point of receipt to point of destination; and
(5) utilization of the services of a carrier subject to part I, II, or III of the Act.[111]

The absence of any of these requirements may preclude freight forwarding status.[112] Yet, each of these component elements of section 402(a)(5) need not exist on every shipment handled, nor need such movements be performed solely within the territorial confines of the United States.[113]

Section 410(c) of the ICA[114] provides that a permit to operate as a freight forwarder shall be granted if the applicant demonstrates that it is ready, able, and willing to perform the proposed service and that operations will be consistent with the public interest and the national transportation policy. A permit may not be denied solely because it would authorize operations in competition with existing services.[115] The "public interest and national transportation policy" criteria employed in the licensing of freight forwarding operations is not as stringent as the "public convenience and necessity" test utilized in motor common carrier operating authority application proceedings, but, instead, involves a consideration of factors other than those relating to the adequacy or inadequacy of existing operations.[116]

---

708 (1968); National Motor Freight Traffic Ass'n v. Pacific Shippers Ass'n, 105 M.C.C. 199, 240 (1966).

111. Japan Line, Ltd. v. United States, 393 F. Supp. 131, 136 (N.D. Cal. 1975).

112. *See* National Motor Freight Traffic Ass'n v. United States, 242 F. Supp. 601, 605 (D.D.C. 1965); Kagarise Freight Forwarder Applic., 260 I.C.C. 745, 747 (1946).

113. Compass, Nippon, & Transmarine—Investigation, 344 I.C.C. 246, 278 (1973), and cases cited therein.

114. 49 U.S.C. § 1010(c) (1970).

115. 49 U.S.C. § 1010(d) (1970). *See* Acme Fast Freight v. United States, 146 F. Supp. 369, 374 (D. Del. 1956).

116. Aloha Consolidators Int'l v. United States, 395 F. Supp. 1006, 1010 (C.D. Cal. 1975); Florida-Texas Freight, Inc. v. United States, 373 F. Supp. 479, 486 (S.D. Fla. 1973), *aff'd* 416 U.S. 976 (1974); Yellow Forwarding Co. v. I.C.C., 369

1. Air Freight Forwarders

Any individual or firm that performs the function of a freight forwarder beyond the air terminal area of a direct or indirect air carrier subject to the jurisdiction of the CAB, in conjunction with a carrier subject to parts I, II, or III of the ICA, is a surface freight forwarder requiring appropriate operating authority pursuant to part IV of the ICA.[117] Stated differently, the operations of air freight forwarders performed beyond the boundaries of air terminal areas and involving surface forwarding within the meaning of section 402(a)(5) of the ICA are subject to the jurisdiction of the ICC pursuant to part IV of the ICA.[118]

Indirect air carriers, however, may lawfully perform forwarding services in conjunction with ICC regulated carriers even when such services are not performed within an air terminal area and the indirect air carrier does not hold appropriate surface forwarding authority pursuant to part IV of the ICA, provided that the indirect air carrier does not assume liability for the movement of the involved commodities beyond the boundaries of the air terminal area.[119] Indirect air carriers are not considered to be performing operations subject to part IV of the ICA when they do not assume responsibility or receive consideration for that portion of the through movement transpiring beyond the boundaries of an air terminal area.[120]

Indirect air carriers have frequently been granted authority by the ICC to perform motor common carrier operations.[121] However,

---

F. Supp. 1040, 1045 (D. Kan. 1973); Home-Pack Transp., Applic. for Forwarder Permit, 340 I.C.C. 98, 102 (1971); D.C. Andrews & Co. of Ill. Inc., Ext.—Baltimore, Md., 326 I.C.C. 743, 755 (1966). *See* Dempsey, *supra* note 108.

117. *See* Airline Freight, Inc., Ext.—Philadelphia Air Term., 108 M.C.C. 197, 204 (1968); Motor Transp., *supra* note 88, 95 M.C.C. 71; Panther Cartage, 88 M.C.C. 37.

118. Savage Contract Carrier Applic., 108 M.C.C. 205, 216 (1968).

119. *See* Emery Air Freight, 339 I.C.C. at 29-30; Savage Contract Carrier Application, 108 M.C.C. 205; Dempsey, *supra* note 9.

120. Motor Transp., *supra* note 88, 95 M.C.C. at 89. *See also* 49 C.F.R. § 1082.1 (1976).

121. *See, e.g.*, Direct Air Freight Corp., Common Carrier Applic., 106 M.C.C. 785 (1968).

In *Long-Haul Motor/Railroad Carrier Air Freight Forwarder Authority Case*, C.A.B. Order 77-6-126, the CAB established a policy of ordinarily approving the acquisition of control of air freight forwarders by surface carriers. This decision significantly expanded the CAB's traditional policy of free entry in the air freight forwarding industry to an area from which long-haul motor carriers of general commodities had theretofore been excluded. Moreover, the CAB has recently

Emery Air Freight Corp. Freight Forwarder Applic.[122] was the first proceeding in which an indirect air carrier sought (and was granted) freight forwarding authority to perform integrated air-surface operations beyond an air terminal area. In the *Emery* proceeding, the ICC recognized that since single-carrier liability would facilitate shipment tracing, customer billing, claims servicing, and shipment promptness and punctuality, the proposed freight forwarding operations would be consistent with the public interest and the national transportation policy.[123]

2. Sea Freight Forwarders

An NVO is effectively limited to the performance of operations pursuant to an FMC vessel operator's all-motor tariff.[124] In the absence of appropriate freight forwarding authority issued by the ICC, it ordinarily cannot lawfully arrange for surface transportation, select the motor carriers to be employed, or compensate such carriers for performance of the underlying movement.[125] An NVO operation performed in conjunction with carriers subject to the jurisdiction of the ICC is unlawful (in the absence of the issuance of appropriate surface freight forwarding authority by the ICC) when there exists a "substantial commercial connection" between the NVO and a carrier subject to part I, II, or III of the ICA.[126]

The ICC has expressly disclaimed jurisdiction over the maritime services of ocean carriers, but has instead acknowledged that its jurisdiction over freight forwarding is limited to those instances in which the underlying transportation services of the through intermodal movement are provided by a carrier subject to part I, II, or III of the ICA.[127] Thus, the ICC has emphasized that although an NVO remains subject to the exclusive jurisdiction of the FMC

---

approved applications for air freight forwarding authority involving the *de novo* entry of various long-haul motor carriers into the air freight forwarding industry. *See* C.A.B. Order 77-10-12; C.A.B. Order 77-11-35; C.A.B. Order 77-11-98; and C.A.B. Order 77-12-72. *Compare* C.A.B. Order 77-11-88.

122. 339 I.C.C. 17 (1971).

123. 339 I.C.C. at 31.

124. *See* Compass, Nippon, & Transmarine, 344 I.C.C. at 260; CTI-Container Transp. Int'l Freight Forwarder Applic., 341 I.C.C. 169, 185-88 (1972).

125. Harry H. Blanco & Co. Freight Forwarder Applic., 349 I.C.C. 36, 41 (1973).

126. IML Sea Transit, Ltd. v. United States, 343 F. Supp. 32 (N.D. Cal. 1972), *aff'd sub nom.*, Interstate Commerce Comm'n v. IML Sea Transit, Ltd., 409 U.S. 1002 (1972).

127. CTI-Container Transp., 341 I.C.C. at 186-87.

while utilizing the services of a vessel-operating common carrier by water (an ocean carrier), it becomes subject to the jurisdiction of the ICC as a freight forwarder when it employs the services of an ICC carrier.[128] In so ruling, the ICC places the NVO in essentially the same position as an indirect air carrier subject to the jurisdiction of the CAB performing the functions of a freight forwarder subject to part IV of the ICA.[129]

In *CTI-Container Transport Internat., Frt. Forwarder Applic.,*[130] the ICC granted an NVO authority to operate as a freight forwarder, emphasizing that:

> Applicant plans to offer, in conjunction with its NVO services, a unique, coordinated intermodal service on containerized shipments moving aboard ocean vessels and by land transportation, with single-carrier responsibility, thus facilitating the tracing of shipments, the servicing of claims, billing, expediting of shipments, and quoting of rates, and by assuring maximum intermodal coordination, the reduction of pilferage and other loss damage . . . . We have recently recognized the inherent advantages offered by coordinated intermodal service in *Emery Air Freight Corp. Freight Forwarder Applic.,* 339 I.C.C. 17 (1971), wherein we granted forwarder permits to applicants to perform an intermodal (air-surface) service of a type not then being offered by other carriers. [Footnote omitted.][131]

Similarly in *Modern Intermodal Traf. Corp.—Investigation,*[132] the ICC indicated that it had no objection whatsoever to an NVO performing any portion of an international through movement not subject to the ICA and combining such services into a single, integrated operation:

> To the contrary, our stated policy is to foster the expeditious movement of international shipments through intermodal cooperation, and to this end, we have regularly granted the motor carrier or freight forwarder authority necessary to the development of an "intermodal" forwarder in the public interest and consistently with the Congressionally declared national transportation policy.[133]

---

128. 341 I.C.C. at 187.
129. *Id.*
130. *Id.*
131. *Id.* at 195. *Cf.* Compass, Nippon, & Transmarine, 344 I.C.C. at 283-85 (ICC concluded that freight forwarding authority was a precondition to the performance of such operations by an FMC regulated ocean carrier).
132. 344 I.C.C. 557 (1973).
133. 344 I.C.C. at 571.

When evidence proferred in a particular application proceeding does not establish a public need for the transportation of international traffic, the authority granted will ordinarily be restricted against participation in "import-export traffic."[134]

C. *Water Carriage*

Part III of the ICA defines interstate and foreign transportation to embrace water carriage only insofar as it is performed between points in the United States.[135] However, the statutory language has been judicially construed as extending ICC jurisdiction to the entire through movement of commodities that originate at and are destined to points in the United States, even though such transportation may traverse international or foreign territorial waters and foreign ports during the interim voyage.[136]

1. Transshipment

Domestic water movements subject to the jurisdiction of the ICC frequently involve an intermodal coordination of through shipments of commodities. Part III of the ICA explicitly contemplates the establishment of intermodal through routes and joint rates between water and rail common carriers.[137] The regulation of water carriage also may require the interagency coordination of through movements in foreign commerce. Thus, part III of the ICA gives the ICC jurisdiction over water movements in interstate or foreign commerce prior or subsequent to "transshipment" to or from a foreign territory.[138] In contrast, the FMC has jurisdiction over the maritime carriage of commodities moving between United States and foreign points.[139] Congress has restricted the jurisdiction of the FMC vis-a-vis that of the ICC because it has recognized that the transport regulation of domestic commerce involves economic considerations that differ significantly from those involved in the regulation of foreign commerce.[140]

---

134. *See* American Delivery Systems, Inc., Freight Forwarder Applic., 340 I.C.C. 776, 789 (1972).

135. 49 U.S.C. § 902(i) (1970). The criteria governing entry in water carriage are discussed in detail in Dempsey, *supra* note 108. *See also* Union Mechling Corp. v. United States, 390 F. Supp. 411 (W.D. Pa. 1975).

136. Pennsylvania R.R. v. United States, 55 F. Supp. 473, 484-85 (D.N.J. 1943), *aff'd in part and rev'd on other grounds,* 323 U.S. 612 (1944).

137. 49 U.S.C. § 905(b) (1970).

138. 49 U.S.C. § 902(i) (1970).

139. 46 U.S.C. §§ 801, 814, 817 (1970).

140. Japan Line, Ltd. v. United States, 393 F. Supp. at 135.

The concept of a "transshipment" is essential in determining the scope of ICC jurisdiction, for domestic water transportation is subject to the ICA when preceded or followed by a "transshipment" of the involved cargo. This concept essentially delineates where FMC jurisdiction ends and ICC regulation begins, and vice versa.[141] Although not statutorily defined, the term was interpreted by the ICC in *Sacramento-Yolo Port District, Petition.*[142] This proceeding involved the inland barge movement of containerized commodities (having a prior movement in foreign commerce by ocean vessel) between the ports of Sacramento and San Francisco, California. The significance of the concept of "transshipment" was expressed by the ICC in the following language:

> Subsection (i) of section 302 defines the meaning of interstate or foreign commerce when that phrase is used with respect to this Commission's jurisdiction over water carriers. Parts (1) and (2) of that subsection define "interstate commerce," while part (3) defines "foreign commerce." The latter definition is, in our view, not used to limit the sweep of our jurisdiction, but rather requires us to assert regulatory control over certain designated operations in foreign commerce. The extent of the jurisdiction thereby established is that portion of the transportation service that takes place within the United States if there is a "transshipment" of lading. Once the lading is on the ship that will carry it to the foreign port, there is no regulation of it by this Commission, no matter how many times that ship may stop to pick up additional lading. But if that lading, once loaded in the United States, is transferred to another ship there is a transshipment within the meaning of the act; and, to the extent performed within the United States, the transportation becomes subject to the regulatory jurisdiction of this Commission. The same is true with respect to traffic moving into the United States.[143]

In *Sacramento-Yolo* the ICC held that "the transfer of lading among vessels generally is sufficient to bring the inland water movement within the jurisdiction of this Commission,"[144] even where the inland water portion of the through movement is performed in substituted service for an ocean carrier, and where such substituted service is performed under a single or common ownership.[145]

---

141. *See* 46 U.S.C. § 832 (1970), which essentially provides that the assertion of overlapping and concurrent jurisdiction by both the FMC and ICC is not the intention of Congress.

142. 341 I.C.C. 105 (1972). *See* Grace Line, Inc., Common Carrier Applic., 310 I.C.C. 685, 687 (1960).

143. 341 I.C.C. at 111.

144. 341 I.C.C. at 112.

145. *Id.* at 107.

2. LASH

It has been held that, legally and factually, "the transfer of a LASH lighter from the mother vessel to a towboat operator is not materially different from the transfer of a container to a barge as was the situation in *Sacramento-Yolo.*"[146] LASH (lighter-aboard-ship) is an innovative contemporary transportation development that is now a significant component of the grand "container revolution." LASH involves the through movement of floating barge-like containers aboard a large "mother" vessel. LASH offers a great potential for increased economy and efficiency of operations. The recent development of LASH operations has necessitated a re-evaluation of existing legal and economic concepts in transport regulation.

Both the United States Department of Transportation and the FMC have argued that the ICC has no jurisdiction over LASH movements, claiming that no transshipment can be said to transpire.[147] However, the federal district court in *Port Royal Marine Corp. v. United States,*[148] expressly disagreed with these assertions, concluding that:

---

146. Port Royal—Declaratory Order—"LASH" Operations, 344 I.C.C. 876, 881 (1973).

147. Port Royal—Declaratory Order, 344 I.C.C. at 879. The FMC has also argued that it has exclusive authority over inland water operations performed incidentally to ocean transportation subject to FMC jurisdiction that are not effectuated through a joint arrangement of the participating water carriers, even where transshipment has occurred. Sacramento-Yolo Port District, 341 I.C.C. at 113. The ICC noted that a bill then pending before both houses of Congress stated that "all transportation of merchandise by barge between ports of the United States and furnished as a service substituted in lieu of direct vessel call by a common carrier by water in foreign commerce shall be under the exclusive jurisdiction of the Federal Maritime Commission." 341 I.C.C. at 115, *citing* H.R. 9128 & H.R. 9614, 92nd Cong., 1st Sess. (1971). Such a proposal has never been promulgated into law; the concept has been explicitly rejected by the federal courts.

However, the ICC and FMC have made an attempt to reach some agreement on their respective jurisdictional authority in the LASH area. In Sacramento-Yolo Port District, 341 I.C.C. at 112, the ICC noted the joint policy statement released by the two "sister" agencies on May 12, 1977, which provided:

> For purpose of this statement of policy, the transfer of cargoes from one barge to another barge of the same mother vessel or another mother vessel of the same carrier or commonly controlled by it shall not be deemed to constitute transshipment. However, the towage of barges between the United States ports, when undertaken by other than the ocean carrier, is subject to the jurisdiction of the Interstate Commerce Commission.

148. 378 F. Supp. 345 (S.D. Ga. 1974). This was a case of first impression in the economic regulation of surface transportation.

> The movement of cargo by ocean going vessels to a central mooring point in this country where floatable cargo containers are discharged from the mother ship and are towed by tug to destination may not constitute "transshipment" in the traditional sense. But that term, as employed in Part III, is neither a word of art nor one to be parochially construed. Transshipment contemplates a significant, identifiable change in the nature, the mode and the conveyance used in the carriage of cargo. The statutory meaning of transshipment has the capacity to accommodate itself to technological advances transforming the method thereof although producing the basic result obtained by traditional means in the transshipping of cargo.
>
> . . . .
>
> The Shipping Act is clearly inconsistent with 49 U.S.C. § 902(i)(3)(B) if a "transshipment" of property occurs. We conclude that cargo stored in LASH containers is transshipped when same is discharged from the mother vessel and the barge-containers are turned over to the towboat carrier for transportation to inland destinations at other ports or places by a different mode of conveyance and means of propulsion. In the reverse movement, transshipment occurs upon the transfer of the outbound cargo-bearing lighter-containers aboard the mother ship.[149]

LASH transportation is even more economical and efficient than traditional containerized movements. While the inland maritime containerized movements require loading and unloading of individual containers from barges or inland vessels, the LASH lighter floats, and therefore, the necessity of procuring a barge and loading and unloading from it is eliminated.

IV. RATE REGULATION

A. *Policy Considerations*

An international joint rate may be defined as a through tariff established by agreement between two or more carriers (ordinarily operating in different transport modes) for through service between United States and foreign points. Containerization has made joint rates feasible by replacing the traditional loading, unloading, and reloading requirements of break-bulk cargo with the economical, efficient, and expeditious transfer of containers.[150]

---

149. 378 F. Supp. at 352, 357. *See generally* Dempsey, *supra* note 9. *See also* Brooks, *Recent Decisions of the Interstate Commerce Commission,* 9 TRANSP. L. J. 9, 24-26 (1977).

150. PROMOTING COMPETITION IN REGULATED MARKETS 128 (A. Phillips ed. 1975) [hereinafter cited as A. Phillips].

Numerous advantages may be derived from through service and the establishment of joint intermodal tariffs by international carriers. They promote international trade by enabling shippers to contract with a single carrier for the through movement of cargo from its origin to its ultimate destination at a total rate published in a single tariff. Through service and joint rates also facilitate the utilization of simplified documentation in international transport[151] and stimulate carriers to provide coordination and integration of intermodal services.[152]

Joint, single-factor rates also permit an exporter or importer to calculate his transportation costs with relative ease and predictability. A joint rate should theoretically be lower than the aggregate component rates, for it should allow the economies of operation to be passed through to the shipper. Even if joint rates do not result in lower transportation costs in foreign trade, the increased convenience to the shipper would appear to justify a permissive regulatory policy enabling all carriers to enter into such agreements.[153] Thus, the creation of procedures for the filing of tariffs covering the intermodal movement between interior United States origins and overseas destinations is unquestionably a desirable objective.[154]

The ICC has, since the inception of transport regulation, permitted the filing of import-export tariffs by rail carriers subject to its regulation on traffic originating at or destined to Canada and Mexico.[155] Moreover, the ICC has specifically supported joint intermo-

151. The Uniform Commercial Code has attempted to confront the legal problems attending the contemporary increase in intermodal transportation. For example, the U.C.C. provides that a C.I.F. contract involving an intermodal land-sea movement under a through bill of lading is valid and that shipment from the specified inland point under the through bill is timely despite an inadvertently delayed loading aboard the ocean vessel. U.C.C. § 2-320, Official Comment 13.

152. A. Phillips, *supra* note 150, at 129. A "joint rate" is a through rate consummated by the carriers performing their respective transport segments of the through route. A "through route" is a continuous route effectuated by an express or implied agreement between connecting carriers. Through Routes & Through Rates, 12 I.C.C. 164 (1907).

153. Note, *Legal and Regulatory Aspects of the Container Revolution,* 57 GEO. L.J. 533, 538 (1969). *Compare* Prabhu, *Freight Rate Regulation in Canada,* 17 McGILL L.J. 292 (1971) *with* Prabhu, *International Freight Rate Regulation,* 18 McGILL L.J. 60 (1972).

154. Ullman, *The ICC's Decision in Ex Parte 261—Its Residual Value,* 4 J. MAR. L. & COM. 455 (1973); Note, *Rate Regulation in Ocean Transport,* 59 CAL. L. REV. 1299 (1971).

155. *See* Tariffs on Export and Import Traffic, 10 I.C.C. 55 (1904). *See also* 49 CFR § 1306.67. When carriers subject to the jurisdiction of the ICC voluntarily establish joint through rates with foreign carriers between points in the United

dal transportation because it fosters the free flow of commerce and promotes more economical integrated transport services between the United States and its neighbors.[156]

B. *ICC-CAB Intermodal Coordination*

Indirect air carriers (*e.g.*, air freight forwarders) subject to CAB jurisdiction are statutorily prohibited from establishing joint rates or charges with common carriers subject to the ICA.[157] ICC common carriers and CAB direct air carriers may, however, lawfully establish through routes and joint rates if they are just and reasonable and are filed with the agencies having appropriate jurisdiction

---

States and points in Mexico or Canada, the ICC has jurisdiction to evaluate their reasonableness and to require United States carriers to abstain from joining in the maintenance of unlawful rates. *See* E. A. Brown Produce Co. v. Atchison, T. & S. F. Ry., 278 I.C.C. 433 (1950); W.C. Reid & Co. v. Boston & M.R.R., 276 I.C.C. 397, 399 (1949). However, with respect to traffic originating in Canada or Mexico, or destined to those nations, the ICC has asserted rate jurisdiction only over that part of the movement performed on United States territory. *See* Albee Fruit Co. v. Atlantic Coast Line R.R., 293 I.C.C. 785, 787 (1955); Clark-Cutler-McDermott Co. v. New York, N.H.& H.R.R., 293 I.C.C. 773, 775 (1954); Consolidated Mining and Smelting Co. of Canada v. Baltimore & O. R.R., 286 I.C.C. 313, 317 (1952); Barshop v. Atchison, T.& S. F. Ry., 277 I.C.C. at 18.

The ICC has exercised no jurisdiction over transportation occurring wholly within a foreign nation at a separately published rate. Marine Eng'r & Supply Co. v. Pacific Elec. Ry., 294 I.C.C. 276, 276-77 (1955). It found itself without authority to determine the reasonableness of a rate from a Canadian origin to the boundary between the United States and Canada. *See* Western Peat Co. v. Illinois Cent. R.R., 297 I.C.C. 273, 275 (1955); Elliott Packing Co. v. Duluth, W. & P. Ry., 292 I.C.C. 12, 13 (1954). Moreover, the ICC has asserted no jurisdiction to require the establishment of through international rates or to require United States carriers to participate in such through rates or charges. Great N. Ry. v. Sullivan, 294 U.S. 458 (1935); Lewis-Simas-Jones v. Southern Pac. Co., 283 U.S. 654 (1930); News Syndicate Co. v. New York Cent. R.R., 275 U.S. 179 (1927); Dallas Produce Co. v. Atchison, T. & S. F. Ry., 278 I.C.C. at 750 (1950); Publication of Rates Between the United States & Canada, 147 I.C.C. 778 (1928); Black Horse Tobacco Co. v. Illinois Cent. R.R., 17 I.C.C. 588 (1910). Moreover, a land bridge exemption has been held to exist with respect to rates involving movement of commodities between two points in a foreign nation but traversing the United States under ICA §§ 1(1)(a)-(b). *See* Iron Ore from Norfolk, Va., to Toledo Dock, Ohio, 291 I.C.C. 93, 94 (1953); Dempsey, *supra* note 9.

156. International Joint Rates and Through Rates, 337 I.C.C. 625, 627 (1970). The need for coordination of the various transport agencies has long been recognized in this nation. As early as 1933, the federal government took concerted action to effectuate coordination of the several transport modes. *See* Atchison, *The Evolution of the Interstate Commerce Act: 1887-1937*, 5 GEO. WASH. L. REV. 289, 384-90 (1937).

157. Federal Aviation Act of 1958, 49 U.S.C. § 1483(b) (1970).

over the carriers participating therein.[158] Although indirect air carriers may not establish such joint rates, they may participate in through shipments beyond an air terminal area in conjunction with motor common carriers, provided the CAB carriers do not assume liability for the shipment prior to its receipt from, or subsequent to its delivery to, an ICC motor carrier.[159] Air freight forwarders may file with the ICC a tariff establishing both a rate pertaining exclusively to that segment of the through movement performed by carriers subject to the ICA[160] and a single-factor, through intermodal tariff filed for informational purposes only.[161] Should the pending proposal for expansion of the air terminal area from its present 25-mile radius to the proposed 100-mile radius be adopted, ICC jurisdiction over air-surface intermodal movements would be significantly diminished, and the CAB would concurrently assume sole and exclusive responsibility over a large majority of those shipments having a prior or subsequent movement by air.

C. *ICC-FMC Intermodal Coordination*

The ICC has traditionally accepted the filing of joint motor-water rates between points in the continental United States and points in Alaska and Hawaii despite the fact that the maritime portion of the intermodal through movement has been performed by ocean carriers not subject to its jurisdiction.[162] With the promulgation of the Alaskan and Hawaiian statehood acts, Congress explicitly affirmed the retention of jurisdiction by the FMC over ocean transportation between the continental United States and its two most recently admitted states.[163] However, through a 1962 amendment to section 216(c) of the ICA,[164] Congress authorized the establishment of through routes and joint rates between ICC and

158. *Id.*

159. Investigation Into Status of Freight Forwarders, 339 I.C.C. 711, 727 (1971).

160. Savage Contract Carrier Applic., 108 M.C.C. 205 (1968). *See* Modern Intermodal Traffic Corp.—Investigation, 344 I.C.C. 557 (1973); Emery Air Freight, 339 I.C.C. 17 (1971).

161. CTI-Container Transp., 341 I.C.C. 169, 187 (1972).

162. *See, e.g.,* Containerized Freight, From and To Pacific Coast, 340 I.C.C. 388 (1971); Increased Rates and Charges, Sea-Land Service, Inc., 339 I.C.C. 96 (1971).

163. Alaska Statehood Act of 1958, 48 U.S.C. *preceding* § 21 (1970); Hawaii Statehood Act, 48 U.S.C. *preceding* § 491 (1970).

164. 49 U.S.C. § 316(c) (1970).

FMC carriers performing through intermodal transportation services between the continental United States and Alaska or Hawaii and vested such jurisdiction exclusively with the ICC.[165] Thus, since 1962 the ICC has developed increased regulatory expertise over through routes and joint rates in intermodal transportation in which a segment of the underlying transportation is performed by a carrier subject to FMC jurisdiction.[166] Prior to 1969, however, the ICC adhered to the position that it was not statutorily empowered to accept the filing of joint *international* tariffs between common carriers subject to its jurisdiction and ocean carriers subject to the jurisdiction of the FMC.

In 1969 the ICC instituted a rulemaking proceeding[167] to consider a proposal for an amendment to its existing tariff regulations, or the promulgation of superceding regulations, that would authorize the establishment of international joint rates and through routes for rail, motor, and water carriers subject to parts I, II, and III of the ICA, respectively, and vessel operating common carriers by water (VOs) subject to the jurisdiction of the FMC. This proceeding was instituted pursuant to the following policy declaration:

---

165. Pipe Line Mach. & Equip., Various States to Alaska, 349 I.C.C. 799, 806 (1975). *See* Joint Rail-Water Rates to Hawaii, Matson Nav. Co., 351 I.C.C. 213, 217 (1975).

166. The ICC regularly considers proceedings involving intermodal tariff issues. *E.g.*, Regulations, Constr., Filing, & Posting of Tariffs, 355 I.C.C. 95 (1977) (ICC revised its regulations governing the filing and posting of the intermodal tariffs of motor and water common carriers); ASG Indus., Inc. v. Aberdeen & Rockfish R.R., 355 I.C.C. 1 (1977) (domestic TOFC rates found unjust and unreasonable); Chrysler de Mexico, S.A. v. Penn Cent., 353 I.C.C. 512 (1977) (certain rates and charges on export shipments for commodities destined to Mexico found to be unjust and unreasonable); Operational Circuity Reduction, TOFC Serv. Rules, 353 I.C.C. 1 (1976) (regulations adopted enlarging the amount of operational circuity reduction permitted to motor carriers utilizing TOFC services in lieu of their authorized line-haul operations); Regulations, Constr., Filing, & Posting of Tariffs, 352 I.C.C. 46 (1976); Soybeans & Wheat, Ark. & La. to La. Ports, 341 I.C.C. 898 (1972) (proposed reduction of all rail export commodity rates not shown to be just and reasonable); Containerized Freight, From and To Pacific Coast, 340 I.C.C. 388 (1971) (proposed increase in maritime charges pertaining to containers or trailers on flatcars in foreign trade, and a proposed incorporation thereof into line-haul rates found not shown to be just and reasonable); Clay, Points in Georgia to Savannah & Port Wentworth, 340 I.C.C. 377 (1971) (proposed cancellation of multiple car-rates on export shipments by certain rail carriers not shown to be just and reasonable).

167. 351 I.C.C. 490 (1976), *aff'd sub nom.* Pennsylvania v. ICC, ___ F. Supp. ___ (D.D.C. 1977); 350 I.C.C. 361 (1975); 346 I.C.C. 688 (1974); 341 I.C.C. 246 (1972); International Joint Rates and Through Routes, 337 I.C.C. 625 (1970).

> [I]t is our goal to facilitate the through transportation of freight by intermodal carriers between the United States and foreign countries. A shipper is benefited when he can make a contract with the originating carrier which covers a movement through to the destination at a total charge published in a single tariff. Moreover, the national transportation policy should be fostered and the free flow of commerce spurred by encouraging the establishment of more economical and integrated transportation services between the United States and foreign countries.[168]

In *Ex Parte No. 261,*[169] the ICC authorized the establishment of these international joint and through routes.[170] Such rates may also be established with conferences of VOs. Sections 1(1), 203(a)(11) and 302(i)(3) of the ICA,[171] however, limit the jurisdiction of the ICC to transportation that transpires within United States territory.

The ICC had theretofore construed section 1(1)(a) of the Act[172] (which extended part I of the ICA to common carriers engaged in transportation wholly by railroad or in rail-water intermodal operations) as limited to through routes and joint rates between the United States and its adjacent North American neighbors, Canada and Mexico.[173] This interpretation persisted despite the deletion of the word "adjacent" by the Transportation Act of 1920 from the phrase "from any place in the United States to an adjacent foreign country," contained in section 1(1)(a) of the ICA. However, in *Ex Parte No. 261,* the ICC reversed the line of cases[174] that had held that the agency would not accept the filing of tariffs establishing joint rates between rail and water carriers operating between the United States and any nonadjacent foreign nation.

> It is now our position that this self-imposed restriction on jurisdiction over tariffs of joint rates was unfounded. We take this position

168. 337 I.C.C. at 627.

169. *See* note 167 *supra.*

170. The regulations ultimately promulgated in 1976 in *Ex Parte No. 261,* are set forth at 49 C.F.R. §§ 1300.0, .67, 05.0, 07.22, 07.49, 08.0.

171. 49 U.S.C. §§ 1(1), 303(a)(11), 903(1)(3) (1970).

172. 49 U.S.C. § 1(1)(a) (1970). The then-existing rail tariff regulations permitted the filing of every type of through rate, except a joint rate. *See* 49 C.F.R. § 1300.67 (1970).

173. *Cf.* News Syndicate Co. v. New York Cent. R.R., 275 U.S. 179 (1972) (consideration of a through international rate filed by a United States and a Canadian railroad).

174. *See, e.g.,* Hill v. Nashville, C. & St. L. Ry., 44 I.C.C. 582 (1917); Cosmopolitan Shipping Co. v. Hamburg-American Co., 13 I.C.C. 266 (1908).

> because the unequivocal language and plain meaning of section 1(1)(a) confirms our authority to regulate tariffs of joint rates and through movements by rail and water carriers between the United States and any foreign country, to the extent that the transportation takes place within the United States. There is no compelling reason why this Commission should not exercise the same jurisdiction over tariffs for rail-water movements to or from a nonadjacent foreign country as it has long asserted over tariffs for transportation to or from Canada or Mexico. As shown by our practice in connection therewith, it is of no consequence that we lack power over the participating connecting carrier. Our jurisdiction over such joint rates is not diminished merely because we can issue orders affecting those rates only against the domestic carriers subject to our authority.[175]

With respect to part II of the ICA, section 202(a)[176] extends the jurisdiction of the ICC to the transportation services provided by motor carriers in foreign commerce. Foreign commerce is defined by section 203(a)(11) of the ICA[177] to embrace transport operations performed between the United States and both adjacent as well as nonadjacent foreign nations. Moreover, section 216(c) of the ICA[178] authorizes the establishment of reasonable joint rates and through routes between motor common carriers on the one hand, and other motor carriers, rail carriers, and/or water carriers on the other. In 1962, Congress amended this statutory provision by specifying that "common carriers by water" included only those carriers subject to the jurisdiction of the ICC.[179]

In *Ex Parte No. 261,* the ICC reached essentially the same conclusion with respect to part III of the ICA.[180] Section 302(i) of the ICA[181] gives the ICC jurisdiction over transportation in foreign commerce, and section 305(b)[182] gives it authority over through routes and joint rates. The ICC concluded its analysis by stating:

> The aforementioned statutory provisions specifically authorize us to accept for filing tariffs of international joint rates and to regulate

175. 337 I.C.C. at 629.
176. 49 U.S.C. § 302(a) (1970).
177. 49 U.S.C. § 303(a)(11) (1970).
178. 49 U.S.C. § 316(c) (1970).
179. 337 I.C.C. at 631. However, by participating in a joint rate with a United States carrier, a foreign carrier subjects itself to the jurisdiction of the ICC and, to the extent of the joint rate, becomes subject to the requirements of the ICA. Fess Transp. Common Carrier Applic., 91 M.C.C. 924, 927 (1963).
180. 337 I.C.C. at 631-32.
181. 49 U.S.C. § 902(i) (1970).
182. 49 U.S.C. § 905(b) (1970).

> them to the extent of the participation of carriers subject to our jurisdiction, and there is no prohibition against the voluntary filing of joint intermodal rates by rail, motor, and water common carriers subject to our control. Such voluntarily established joint intermodal rates over through international routes would be desirable in the public interest.[183]

The FMC became concerned during the course of the rulemaking proceeding with the suspension powers that might be invoked by the ICC should the proposed regulations be promulgated. The FMC insisted that since the Shipping Act of 1916 effectively prohibits the suspension of ocean rates in foreign commerce, the ICC would have no authority to suspend joint international rates in their entirety.[184] In response, the ICC emphasized its statutory obligations to determine whether single-factor rates published jointly with a foreign carrier would be lawful.[185] Such a determination might necessitate the investigation and suspension of the joint international rate of carriers engaged in ocean-rail, ocean-motor, or ocean-water transportation. However, only those carriers subject to parts I, II, or III of the ICA are subject to the ICC's determination in such proceedings,[186] VOs are not. Nevertheless, the ICC's insistence that a carrier subject to its jurisdiction cancel its participation in a joint international rate which is violative of the ICA has the practical effect of rendering the entire rate inoperable, including that portion of the rate attributable to the FMC portion of the through movement.[187] Nevertheless, this is entirely consistent with

---

183. 337 I.C.C. at 632.

184. 346 I.C.C. at 696.

185. The ICC has jurisdiction to determine the lawfulness of an entire international joint rate. *See* Canada Packers v. Atchison T. & S.F. Ry., 385 U.S. at 183-84 (1962).

186. For example, the ICC has concluded that it may require a domestic rail carrier subject to its jurisdiction to cease and desist from participating in an international joint rate that it determines is unreasonable or unlawful, or it may require revision or cancellation thereof. *See* Commodity Rates to Mexico, 209 I.C.C. 370 (1935); Arizona Corp. Comm'n v. Atchison, T. & S.F. Ry. Co., 156 I.C.C. 418 (1929); Cyanamid and Cyanide from Niagara Falls, 155 I.C.C. 488 (1929).

187. 346 I.C.C. at 696-97. Since the ICC has jurisdiction over that portion of a through intermodal foreign commerce movement only insofar as transportation occurs within the United States, the Commission has emphasized that regulation by it will be invoked to affect only the domestic carrier's segment of the through rate. Therefore, challenges to a joint rate will not be entertained unless they are directed against the domestic carrier's portion of the international through rate. Thus, the ICA will not be applied to those segments of the tariff pertaining only to the operations of FMC-regulated VOs. *Supra* note 167, 350 I.C.C. at 361.

sections 1(1), 203(a)(11), and 302(i)(3) of the ICA, which limit the jurisdiction of the ICC to foreign commerce only insofar as such transportation is performed within the United States.[188]

In a recent decision, *Joint Rail-Water Rates to Hawaii, Matson Nav. Co.*,[189] the ICC held that it possesses no jurisdiction over an ocean carrier's proposed cancellation of a tariff providing joint, single-factor, rail-water rates for containerized commodities moving between the continental United States and Hawaii. Section 15(3) of the ICA[190] gives the ICC the authority, under certain circumstances, to order the establishment of through routes and joint rates between rail carriers or between rail carriers and water carriers subject to part III of the ICA. The ICC may also evaluate the lawfulness and prohibit the termination of these rates. Similarly, section 216(c) of the ICA[191] authorizes the voluntary establishment of through routes and joint rates between motor common carriers or between such carriers and rail, motor, or water carriers. Despite the voluntary nature of their establishment, the ICC has concluded that cancellation of these rates or routes may be unlawful in the absence of adequate justification.[192] The ICC has explicitly affirmed a policy of promoting the utilization of through routes and joint rates to encourage the movement of small shipments and create a unified common carrier network.[193] Although FMC-regulated VOs[194] fall within the definition of "common carriers by water" and are therefore subject to the provisions of sections 1(1)(a) and 216(c) of the ICA, the Commission, in *Matson*, concluded that the decision of an ocean carrier to discontinue a joint

188. For example, through rates consisting, *inter alia*, of rates published by Canadian rail carriers have been found by the ICC to be unreasonable and prejudicial. Consequently, the ICC ordered the carriers to terminate their participation therein insofar as such transportation was performed within the United States. Porter Co. v. Central Vt. R.R., 366 U.S. 272 (1961); Thermoid Co., S. Div. v. Baltimore & O.R.R., 303 I.C.C. 743 (1958).

189. 351 I.C.C. 213.

190. 49 U.S.C. § 15(3) (1970).

191. 49 U.S.C. § 316(c) (1970).

192. Interchange Between McLean Trucking and Manning, 340 I.C.C. 38 (1971), *aff'd sub nom.* McLean Trucking Co. v. United States, 346 F. Supp. 349 (M.D.N.C. 1972), *aff'd* 409 U.S. 1121 (1973) (per curiam); Restrictions on Service by Motor Common Carriers, 111 M.C.C. 151 (1970).

193. Restrictions on Service by Motor Common Carriers, 119 M.C.C. 691, 703 (1974).

194. The FMC regulates vessel operating common carriers pursuant to the Shipping Act of 1916, 46 U.S.C. § 801 (1970), and the Intercoastal Shipping Act of 1933, 46 U.S.C. § 843 (1970).

movement that had theretofore been performed pursuant to ICC regulation removes the joint operation from the jurisdiction of the agency.[195]

In *Ex Parte No. 261* the ICC revised its tariff regulations pertaining to transnational import and export traffic to allow the filing of joint rates between ICC-regulated rail, water, and domestic water carriers on one hand, and FMC-regulated VOs, on the other. In a related proceeding, *Ex Parte No. 261 (Sub-No. 1),*[196] instituted in 1975, the ICC evaluated a proposal that would have allowed the filing of international through rates by FMC-regulated non-vessel-operating water common carriers (NVOs) in conjunction with the services provided by rail, motor, and water carriers subject to parts I, II, and III of the ICA respectively. NVOs perform a transportation service analagous to that provided by ICC-regulated surface freight forwarders. In *Sub-No. 1* the ICC found that surface freight forwarders subject to part IV of the ICA have no specific statutory authority to participate in international joint rates with VOs. It further concluded that, as a matter of policy, NVOs should be prohibited from entering into international joint rates with ICC-regulated rail, motor, or water carriers. The policy considerations essential to such a conclusion included the potential for discrimination and rate abuses, the deleterious effects arising from competition by uncertificated NVOs with licensed freight forwarders, the inability of the ICC to insure the fitness of an NVO, and the established policy of Congress against the filing of joint rates between freight forwarders and their underlying carriers.[197]

Furthermore, the decision in *IML Sea Transit, Ltd. v. United States*[198] effectively limits an NVO to the performance of transport operations restricted to the ocean carrier's all-water tariff. Therefore, in the absence of appropriate surface forwarding authority granted by the ICC, an NVO is precluded from arranging for surface movements or compensating such carriers for their transport services.[199] Thus, an NVO is prohibited from moving a container

195. 351 I.C.C. at 217. *See* United States v. Munson S.S. Line, 283 U.S. 43 (1931).

196. *Tariffs Containing Joint Rates and Through Routes—Freight Forwarders and Non-Vessel Operating Common Carriers by Water (NVO)*, Ex Parte No. 261 (Sub-No. 1) (I.C.C. February 14, 1977).

197. *Id. See* Morison, *NVOs Are Barred From Offering Through Rate*, J. COM., February 16, 1977, at 1; *Forwarders Can't Participate in Joint International Through Route Tariffs*, TRAFFIC WORLD, February 21, 1977, at 33.

198. 343 F. Supp. 32 (N.D. Cal. 1972).

199. Modern Intermodal Traffic Corp.—Investigation, 344 I.C.C. 557, 566

loaded with commodities consolidated at its facility to the port facilities of a particular harbor, regardless of the distance, unless it holds freight forwarding authority pursuant to part IV of the ICA.[200] An NVO holding appropriate surface forwarding authority issued pursuant to part IV of the ICA may, however, lawfully file with the ICC a tariff including the rate for that portion of the through movement subject to ICC jurisdiction and, for informational purposes, delineate the single-factor, through charge.[201]

The ICC has traditionally required freight forwarders having international movements to file tariffs covering only that segment of the through movement performed within the United States. However, the Commission is presently considering the promulgation of regulations that would require such forwarders to file rates specifying the total charges for all transportation services performed, including through international import and export tariffs, and to submit a separate statement delineating the domestic portion of the through rates. Should this proposal be adopted, it would alter the Commission's established policy prohibiting freight forwarders from publishing tariffs beyond the scope of their operating authorities. One means of circumventing this policy would be to amend freight forwarding permits to name those foreign ports to be served.[202]

V. CONCLUSION

During the past decade the ICC has dedicated itself to the promotion of the free flow of foreign commerce by diminishing those regulatory impediments that have traditionally inhibited the intermodal coordination of international transportation.[203] This has necessitated an intensive evaluation of the overlapping jurisdictional authority of the three independent regulatory agencies responsible for through international movements. The ICC has sought to coordinate its efforts with those of other agencies by removing regulatory barriers that have impeded the efficient and

(1973). *See generally,* Brown, *Ex Parte 266 Forwarder-Rail Contract Rates,* 39 ICC PRAC. J. 831 (1972); Riddick, *Ex Parte 266 Forwarder-Rail Contract Rates: Another View,* 40 ICC PRAC. J. 28 (1972).

200. Davis, *ICC Limits NVO Pier Activity,* J. COM., March 18, 1977, at 6.

201. Modern Intermodal Traffic Corp.—Investigation, 344 I.C.C. 557, 568 (1973); CTI-Container Transp., 341 I.C.C. 169.

202. *ICC to Issue Rulemaking Notice on Tariff Filing Rules for Forwarders,* TRAFFIC WORLD, August 22, 1977, at 18.

203. *See* Dempsey, *supra* note 9.

economical movement of passengers and property essential to transnational commercial activity. For example, the ICC and FMC currently have on file approximately 150 effective tariffs by ocean, rail, and motor carriers.[204]

The Interagency Committee on Intermodal Cargo (ICIC) has, since its creation in 1973, stimulated interagency cooperation in this area. The ICIC is comprised of staff members of the ICC, FMC, CAB, and the Department of Transportation (DOT) who meet on a monthly basis to share information and discuss common problems.[205] Notwithstanding the ICIC's efforts to facilitate the growth of intermodal transport, there is still much to be done. The ICC, in granting an innovative proposal for the establishment of intermodal transportation services, succinctly summarized its efforts and its objectives in this area:

> Efforts to effect intermodal coordination and cooperation in large measure must stem from within the industry itself. On the other hand, this Commission has in recent years sought to make a significant regulatory contribution in this vital area by exploring piggyback practices, by examining in depth the "incidental-to-air" exemption, and by joining in cooperative inter-agency liaison programs with the CAB and the Federal Maritime Commission. Our recent activities, thus, represent our best judgment of what is lawful under the present statutes, and what will, at the same time encourage fair and orderly development of coordinated transportation for the benefit of the shipping public. The granting of the present applications will, we believe, be another step in the intermodal development being encouraged by this Commission.[206]

As has been indicated in this survey of the recent developments in the regulation of international intermodal transportation under the ICA, the ICC has taken numerous steps to ease existing barriers to free trade between the United States and its neighbors. The law in this area shall continue to develop to keep pace with our nation's rapidly expanding transportation requirements. The ICC policy of fostering the growth of intermodal transportation in foreign commerce is essential to the nation's economic development during this final quarter of the century and is, therefore, well within the public interest.

---

204. *Status of Intermodal Transport Weighed at Conference in Oakland,* TRAFFIC WORLD, October 18, 1976, at 21.

205. O'Neal, Intermodalism and Interagency Cooperation, at 7 (1977) (unpublished manuscript).

206. Emery Air Freight, 339 I.C.C. at 37.