

## Work in Progress—The Latest Solution to the Small Shipment Problem

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### I. INTRODUCTION

The quest of the Interstate Commerce Commission for a solution to the age-old "small shipment problem" continued unabated in 1978. The most recent tome on the subject, entitled *Ex Parte No. MC-98, New Procedures in Motor Carrier Restructuring Proceedings*, is the result of a voluminous rulemaking proceeding commenced by notice served January 7, 1976. Simply stated by the Commission, the rulemaking had "the purpose of solving what has been referred to as the 'small shipments' problem."<sup>1</sup>

The culmination of that rulemaking proceeding was the issuance of several recommendations by the Commission, with regard to the treatment of small shipments, as well as the institution of two additional rulemaking proceedings.<sup>2</sup> The two rulemaking progenies of this multi-year proceeding included one investigation into the classification system, as utilized by the motor carrier industry,<sup>3</sup> and a rulemaking proceeding on released rates in

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1. *Ex Parte No. MC-98, New Procedures in Motor Carrier Restructuring Proceedings* 3 (Interstate Commerce Comm'n, March 20, 1978) [hereinafter cited as *Restructuring Proceedings*].

2. *Id.* at 135-36.

3. *Ex Parte No. MC-98 (Sub-No. 1), Investigation of Motor Carrier Classification System* (Interstate Commerce Comm'n, April 10, 1978).

conjunction with a small shipments tariff.<sup>4</sup> The purpose of this article is to analyze the conclusions of *Ex Parte No. MC-98*, in light of the history of the small shipment problem in the motor carrier industry, from both a service aspect and a rate aspect. It is from these two separate, but interrelated, areas that the small shipment problem appeared as a troublesome controversy with service a continuing complaint from the vantage point of the shipping public and inadequate rates and charges a vexing issue to the motor carrier industry. The Commission has capsulized, repeatedly, the point of view of the shippers, the carriers, and indeed, the perplexed regulatory body itself in past pronouncements. From the shippers' point of view, [t]he lack of adequate transportation of small shipments of small shippers at small communities is a problem of monumental proportions and continuing duration . . . Here, independent motor carriers show minimal interest in all of the involved traffic except that of a few shippers at . . . larger cities . . . It is clear that any effective solution to the problem must include the development of reliable and continuous motor service to small communities. Effective regulation must include the authorization of for-hire motor service which will ameliorate the distressing and long-lamented plight of such small shippers.<sup>5</sup>

On the other hand, the motor carriers "speak of the small shipment problem and submit that the chief cause of the difficulty is that the vast majority of the smaller weighted shipments, particularly those weighing less than 500 pounds, are transported at noncompensatory rates."<sup>6</sup>

Voicing its own difficulties in attempting to reconcile these two polar viewpoints, the Commission has stated: "In recent years the problems associated with the transportation of small shipments have become among the most troublesome and difficult of those with which the transport agencies and the Commission have to deal."<sup>7</sup>

The Commission's latest solution to the confusing issues involved in the transportation of small shipments can best be evaluated, then, in light of an historical framework of small shipment service, and the cost of providing that service.

## II. MOTOR CARRIER SERVICE IN THE TRANSPORTATION OF SMALL SHIPMENTS

The crucial nature of motor carrier service, in the area of small shipments, is underscored by the fact that motor carriers are the primary mode of transportation of such shipments. Not only are they the most common mode but, in many cases, they are the only means of transportation available to shippers.<sup>8</sup> It is not a new development that shippers have relied

4. *Ex Parte No. MC-98* (Sub-No. 2), Proposed Rulemaking on Released Rates in Conjunction with a Small Shipments Tariff (Interstate Commerce Comm'n, May 10, 1978).

5. *Santa Fe Transp. Co. Ext.—Colo. & Kan. Points*, 111 M.C.C. 224, 232 (1970).

6. *Restructured Rates and Charges, Central States Territory*, 352 I.C.C. 502, 524 (1976).

7. *General Increases, Eastern Central Territory*, 316 I.C.C. 467, 484 (1972).

8. *American Delivery Systems, Inc., Freight Forwarder Applic.*, 346 I.C.C. 465, 479 (1974).

upon transportation means other than rail to move their small shipments. As the Commission noted in *In Re Express Companies*,<sup>9</sup> one of its very first pronouncements on the unique characteristics of the transportation of small shipments,

Railroad companies prefer that freight in small parcel and of the nature in other respects considered appropriate to the express business, especially when quick transit is essential, should be handled by those agencies. The public is no doubt better served by them in some respects than it would be by the ordinary methods of rail transportation.<sup>10</sup>

This disaffection between rail carriers and the small shipment did not necessarily mean that the nascent motor carrier industry would look upon the small shipment field as one attractive to it. In fact, in the years immediately following the passage of the Federal Motor Carrier Act,<sup>11</sup> motor carriers exhibited little interest in the transportation of small shipments, as the Commission noted at the time.<sup>12</sup> The sole surviving express company at that time, Railway Express Agency, Inc. (REA), had had its traffic diverted, not by motor carriers, but by the Parcel Post, on small shipments.<sup>13</sup> The motor carriers, then, came to the small shipment field later, and virtually by default, as the rail carriers discontinued their less-than-carload (LCL) service and reduced greatly the territory that they served, while their surviving express company, REA, in the face of an ever-dwindling volume of freight, became less and less able to provide the shipping public with an adequate service.

As conditions changed, so too did the definition of the "small shipment." Thus one study as late as 1974 reported that the Commission was still basing its small shipment definition on the railroad LCL weight break of 10,000 pounds or less.<sup>14</sup> Yet, in a 1954 proceeding, the Commission referred to small shipments as those weighing under 5,000 pounds.<sup>15</sup> One Commissioner, dissenting in that proceeding, argued that small shipments should be those weighing not more than 300 to 350 pounds.<sup>16</sup> In *Ex Parte*

9. 1 I.C.C. 349 (1887).

10. *Id.* The Commission held that "so-called" independent express companies, *i.e.*, independent from rail carrier control, were, albeit regretfully, outside the coverage of the Interstate Commerce Act, 49 U.S.C.A. § 10101 (West Supp. 1979).

11. 49 U.S.C. § 305 (1976).

12. Express Rates, 1938-1939, 231 I.C.C. 471 (1939). In this proceeding, the Commission noted that Railway Express Agency, Inc. (REA) had, unlike motor carriers, traditionally been "a carrier of small packages and its organization and operations have been developed accordingly." 231 I.C.C. 471, 499.

13. *Id.* at 498.

14. AMERICAN UNIVERSITY, SMALL SHIPMENTS—A MATTER OF NATIONAL CONCERN 3 (1974). That study suggested that "[f]or practical purposes, we can accept shipments between 50 and 750 pounds as 'small shipments' requiring special handling." *Id.* at 4. Any shipment under 50 pounds, according to the study, was a parcel.

15. Surcharge on Small Shipments Within Central States, 63 M.C.C. 157, 160 (1954).

16. *Id.* at 205 (Comm'r Arpaia, dissenting).

No. MC-98, however, the Commission determined that "[t]he problems which are of primary concern affect shipments weighing 500 pounds and under."<sup>17</sup> Accordingly, the Commission determined that small shipments now are those which fit within that classification. As is obvious, the handling and other characteristics of a shipment do not change magically when it increases in size from 500 pounds to 501 pounds. Yet this line-drawing by the Commission is in keeping with many recent rate proposals with regard to the pricing of small shipments<sup>18</sup> and is a reference point, albeit arbitrary, for the measurement of the small shipment.

As motor carriers began to handle more of this traffic, service problems surfaced. As a result, the Commission began to issue certificates of public convenience and necessity to motor carriers desiring to specialize in the transportation of small shipments. These operating rights application proceedings themselves traced the service problems encountered by shippers in the handling of small shipments.<sup>19</sup> Indeed, the shipping public recited a virtual litany of horrors against the service being received from existing carriers. In *United Parcel Service, Inc., Common Carrier Application*,<sup>20</sup> the shipping public complained of exorbitant minimum charges, both at the hands of REA and motor common carriers.<sup>21</sup> The supporting shippers in that proceeding also pointed to the advantages of a daily pickup, utilizing the United Parcel Service (UPS) system, as well as a next day delivery. In granting the applicant a certificate of public convenience and necessity after evaluating the statutory criteria in the Act,<sup>22</sup> the Commission analogized the minimum charges then in effect by motor carriers to an embargo of the traffic.<sup>23</sup>

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17. Restructuring Proceedings, *supra* note 1, at 3.

18. See Restructured Rates and Charges, Central States Territory, 352 I.C.C. 502 (1976); Small Shipment Rate Revision, Central and Southern Territory, 337 I.C.C. 158 (1970). These two rate proposals focused on shipments weighing less than 500 pounds (*i.e.*, 499 pounds or less).

19. These application proceedings by motor carriers do not all involve requests for and the issuance of authority limited to the transportation of shipments weighing not more than 500 pounds from one consignor to one consignee in a single day (the common wording utilized by the ICC in restricting a grant of authority to "small shipment" traffic). To the contrary, one small shipment grant may be limited to shipments weighing less than 100 pounds, as in *United Parcel Service, Inc., Com. Car. Applic.*, 68 M.C.C. 199 (1956), while another may be limited to shipments weighing less than 1,000 pounds, as in *Allied Delivery Sys., Inc., Ext., Small Shipments—Mich.*, 120 M.C.C. 110 (1974).

20. 68 M.C.C. 199 (1956).

21. The general freight carrier minimum charge on a shipment was then about \$3.00; the REA minimum was at \$1.80, while UPS was at 24¢ for a one pound package. *United Parcel Service, Inc., Com. Car. Applic.*, 68 M.C.C. 199, 203 (1956). The disparity today between the UPS rate and general freight carrier rate is even greater, with the UPS rate being 1/20 that of the freight carriers in some instances. However, as the size of the shipment increases, the disparity between the two levels decreases substantially.

22. 49 U.S.C.A. § 10922 (West Supp. 1979).

23. *United Parcel Service, Inc., Com. Car. Applic.*, 68 M.C.C. 199, 204 (1956). This deci-

Features of UPS in the movement of small shipments that were not available to the shipping public through Parcel Post or REA were cited in *United Parcel Service of New York, Inc., Common Carrier Application*.<sup>24</sup> The Commission there pointed to what shippers in that proceeding termed service advantages of UPS, including (1) daily pickup of small shipments, (2) faster delivery on small shipments, (3) signed delivery receipts, (4) \$100 coverage per package, under the released rates authority of UPS, (5) the automatic return of refused or rejected small shipments without charge, (6) three attempts at delivery, if the consignee was not at home, (7) the acceptance of both checks and cash on C.O.D. shipments, (8) the prompt tracing of shipments, and (9) the less rigid packing requirements of UPS.<sup>25</sup> The Commission only referred in passing to the service offered by motor carriers on small shipments, but had nothing good to say about such service. It entered a disclaimer as to viewing the application as a "contest" between UPS and Parcel Post. However, the Commission noted that it could not "overlook the realities of the situation, and in particular, the vast amount of traffic now moving in the inferior service of Parcel Post mainly due to the prohibitive cost of using other modes of transportation."<sup>26</sup> That so many shipments were moving via Parcel Post, in the Commission's opinion was "an indictment of existing services in the small package field."<sup>27</sup>

In affirming the Commission's grant of the certificate to operate, Judge Friendly, authoring the opinion of a statutory three judge district court, stated:

The evidence of the shipper witnesses, painstakingly reviewed in the report of Division 1, shows that UPS was offering not simply a cheaper but a better mousetrap. It was better than Parcel Post because of the pickup, assured delivery times, repeated attempts to effect delivery, and other features . . . it was better than any service offered by existing motor carriers because although some of these carriers may have duplicated some particular feature of applicant's proposed service, none offered one so flexible and complete.<sup>28</sup>

The Commission had, long before these United Parcel Service proceedings, recognized the differentiating features involved in retail store delivery, which again generally involved the handling of small shipments. In fact, UPS itself was one of the first carriers to benefit from the receipt of a retail store delivery grant of authority.<sup>29</sup> The Commission held repeatedly that the granting of retail store delivery authority would not be unduly detri-

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sion was upheld in *Railway Express Agency, Inc. v. United States*, 153 F. Supp. 738 (S.D.N.Y. 1957), *aff'd* 355 U.S. 270 (1957).

24. 79 M.C.C. 629 (1959).

25. *Id.* at 649-50.

26. *Id.* at 652.

27. *Id.*

28. *Yale Transp. Corp. v. United States*, 185 F. Supp. 96, 102 (S.D.N.Y. 1960).

29. See *United Parcel Service of Pennsylvania, Inc., Contr. Car. Applic.*, 10 M.C.C. 83 (1938), *modified*, 20 M.C.C. 799 (1939), *modified further*, 22 M.C.C. 243 (1940); *United Parcel*

mental to the services of regular route general commodities common carriers.<sup>30</sup>

The packages transported by UPS in its common carrier service grew rapidly from a level of 5,921,228 in 1951 to 63,908,677 by 1959.<sup>31</sup> In 1952, only 2,113 shippers were receiving a daily pickup from UPS, but that number had grown to 31,569 by 1959.<sup>32</sup> The Commission continued to view UPS' chief competition as the Parcel Post although REA strenuously objected that its express service was being jeopardized by the diversion of freight. REA even argued that the dilution of available traffic among different carriers was a major cause of the small shipment problem.<sup>33</sup> The Commission continually held that "the proposed service (of UPS) will not result in appreciable diversion from REA . . . ."<sup>34</sup>

While UPS continued to receive additional grants of authority, and, concurrently, to expand its service area,<sup>35</sup> other motor carriers were also specializing in the transportation of small shipments. The shipper complaints made in these proceedings were similar. In one proceeding, the Commission referred to delays in transit on small shipments, damaged shipments resulting from excessive handling, tracing difficulties, claims processing difficulties, frequently missed pickups, the absolute refusal to handle small shipments, the refusal to make inside deliveries to small shops and factories, as well as homes, and the refusal to provide a protective service during the winter months on freezable commodities.<sup>36</sup> Reference in these cases was frequently to motor carrier service, as opposed to the service of REA or Parcel Post. Thus, in an application granting a freight forwarder small shipment authority, the Commission stated: "The most persistent and vexing problems appear to occur because of the motor carriers' reluctance to handle so-called 'small shipments', . . . excessive de-

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Service of Portland—Purchase—A. J. Wiese, 37 M.C.C. 473 (1941). The latter case, particularly, is instructive on the scope of early UPS retail store delivery operations.

30. Easton Motor Freight, Inc., Ext.—Phillipsburg, N.J., 74 M.C.C. 136, 138 (1958).

31. United Parcel Service, Inc., Ext., Midwestern States, 89 M.C.C. 709, 718 (1961).

32. *Id.*

33. *Id.* at 726.

34. *Id.* at 741.

35. Other application proceedings by this carrier include United Parcel Service, Inc., Ext. Ariz. and Cal., 83 M.C.C. 810 (1960) (not printed in full); United Parcel Service, Inc., Ext., Midwest Territory, 96 M.C.C. 10 (1964); United Parcel Service, Inc., Ext., Nine States, 111 M.C.C. 372 (1970); United Parcel Service, Inc., Ext.—Memphis, Tenn., Ark., and Miss. Points, 117 M.C.C. 621 (1972); United Parcel Service, Inc., Ext.—48 States, 120 M.C.C. 747 (1974) and United Parcel Service, Inc., (Ohio)—Merger—United Parcel Service, Inc. (New York), 127 M.C.C. 292 (1978). Also of note are the pending petitions by UPS to remove its 100-pound-per-shipment aggregate weight restriction (see note 19 *supra*) altogether, so that its service would be limited only by its 50-pound-per-piece and its size-of-package restrictions, in Docket No. MC-115495 (Sub-Nos. 3, 4, 7, 14, 16, 20, 22, 24G and 25G) and Docket No. MC-116200 (Sub-Nos. 2, 3, and 5).

36. See Allied Delivery Sys., Inc., Ext., Small Shipments—Mich., 120 M.C.C. 110, 112, 116, 117 (1974).

lays in transit; and poor unreliable claims and tracing services."<sup>37</sup> The Commission went on to summarize the numerous difficulties experienced by the public witnesses with regard to the movement of small shipments by the vehicle of motor common carriers, stating:

The major problems encountered are split deliveries, inadequate claim service, poor tracing of shipments, delayed and excessive transit times, almost prohibitive rates, and refusal of many motor common carriers to handle shipments. More specifically, it appears that all of the pieces of a multipiece shipment are all too often not delivered simultaneously. Claims regarding damages and lost shipments are handled slowly, if at all. Tracing the whereabouts of small shipments is, at best, time consuming, cumbersome, and expensive. Transit times from pickup to delivery are greatly in excess of that which can be tolerated by shippers and consumers in a competitive market. Finally, carrier refusals to handle small shipments take the form of prohibitive rates, intolerably slow service, and even outright refusal.<sup>38</sup>

Based on records such as this, numerous motor carriers seeking to specialize in the transportation of small shipments were granted authority in that area.<sup>39</sup> In fact, some of these small shipment specialists were even able to successfully oppose encroachments by UPS into their service areas.<sup>40</sup>

The Commission had occasion to address the small shipment problem not only in operating right cases, but also in other investigative or rulemaking proceedings. Thus, in *Restrictions on Service by Motor Common Carriers*,<sup>41</sup> the Commission scrutinized the problems of restrictions placed in tariffs to evade service on small shipments by common carriers. The Commission there stated:

By way of background, it is evident that some degree of motor carrier selectivity of traffic by means of self-imposed service limitations, through the use of tariffs and of other means, is not a new innovation. An awareness of the existence of such questionable conduct more recently generated two complimentary reports on what is now commonly referred to as the 'small shipments problem.'<sup>42</sup>

The restrictions which the Commission examined generally were aimed at cutting back on small shipment service altogether, or on traffic originating

37. American Delivery Sys., Inc., Freight Forwarder Applic., 340 I.C.C. 776, 783 (1972). See also note 8 *supra*.

38. *Id.* at 786.

39. See also, Santa Fe Transp. Co., Ext.—Colo. & Kan. Points, 111 M.C.C. 224 (1970); Merchants Delivery, Inc., General Commodities, 76 M.C.C. 155 (1958). The Commission did not see fit to grant all small shipment applications, however. See Film Transit, Inc., Ext.—Express Service, 86 M.C.C. 201 (1961), and Transway, Inc., Ext.—General Commodities, 89 M.C.C. 513 (1962). In the former case, the Commission stated that "the existing motor and express services appear to be completely satisfactory for the transportation even of small and expedited shipments." 86 M.C.C. 201, 209.

40. See United Parcel Service, Inc., Ext. — Memphis, 117 M.C.C. 621 (1972); United Parcel Service, Inc., Ext. — Nine States, 111 M.C.C. 372 (1970).

41. 111 M.C.C. 151 (1970).

42. *Id.* at 152.

or terminating at points in rural or relatively inaccessible areas. As a result of the proceeding, the Commission promulgated a new rule prohibiting carriers from restricting service in tariff provisions to less than the carrier's full operating authority.<sup>43</sup>

The Commission had occasion to address the small shipment problem frequently in its Annual Reports.<sup>44</sup> Also, an Ad Hoc Committee of the Commission reported on the small shipment problem in 1967. It cited numerous shortcomings among motor carrier service, including (1) withdrawal of service from low traffic density points, (2) service inadequacies in small towns and cities, (3) carrier inability or unwillingness to interline on small shipment, (4) carrier avoidance of small shipments, and (5) cessation of service to cities not on the interstate highway system.<sup>45</sup>

This, then, was the regulatory background, in terms of service, existing at the time that the Commission issued its notice of rulemaking in *Ex Parte* No. MC-98.

### III. COSTS AND RATE PROBLEMS INHERENT IN THE HANDLING OF SMALL SHIPMENTS

It was recognized by the Commission, early on, that small shipments were treated differently from a rates and charges standpoint than heavier weighted shipments, at least where express shipments were concerned. As early as 1887, for example, the Commission stated: "It is known, moreover, that in the express business there is very little classification of freight, the tariffs being usually on a uniform basis for 100 pounds . . . ."<sup>46</sup>

Not only were such shipments treated differently on a rates and charges basis, but, with the advent of the motor carrier industry, the Commission pointed out that the only way motor carriers regarded the small package traffic as profitable was "at rather high minimum rates."<sup>47</sup> Even though small shipments were moving via motor carriers at a rate higher than that charged by Parcel Post, there was still a substantial question as to the profitability of those small shipments. In the years immediately following the conclusion of World War II, the Commission expressed repeated concern about the revenue derived from the handling of small shipments in a period

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43. 49 C.F.R. § 1307.27(k)(1) (1977).

44. See *Santa Fe Transp. Co., Ext.—Colo. & Kan. Points*, 111 M.C.C. 224, 235-38 (1970), for excerpts of statements on the Small Shipments Problem drawn from 13 different Interstate Commerce Commission Annual Reports.

45. AD HOC COMMITTEE OF THE COMMISSION, ICC BUREAU OF ECONOMICS, SMALL SHIPMENT PROBLEM (1967).

46. *In Re Express Companies*, 1 I.C.C. 677, 682 (1887).

47. *Express Rates*, 231 I.C.C. 471, 499 (1939).

of rampant inflation.<sup>48</sup> In one proceeding approving a dramatic increase in minimum charges applied on small shipments, the Commission correctly predicted that "reasonable minimum charges for the future will be substantially higher than the prior minimum charges."<sup>49</sup> A history of this pricing and revenue dilemma since that time reveals the Commission as a foot-weary referee placed between two uncompromising and stubborn combatants in the shipper and the motor carrier interests. They have fought over the quality of service. They have tangled over the level of rates. They have sparred over the profitability of transporting the shipments themselves. Each new rate plan designed to price small shipments that was, in the opinion of the motor carrier, compensatory for the costs of providing that service was vigorously opposed by shipper groups.

The dispute itself, in the Commission's view, had its origin in numerous factors common to small shipments. For one thing, the Commission believed that such shipments required more handling.<sup>50</sup> It was also believed that the pickup and delivery facilities of consignors and consignees, respectively, were inadequate. Frequently, small shipments involved consumer goods, as opposed to industrial products. Motor carriers were more likely to encounter traffic congestion in making such pickups and deliveries. Additionally, the smaller shipments were more susceptible to loss and damage than the larger, heavier shipments. There was a pronounced need for expedited service in the transportation of small shipments. There was also a problem in developing effective systems to trace small shipments.<sup>51</sup>

In one of its earliest responses to a motor carrier proposal relating to the revision of the rates to be applied to small shipments, the Commission recognized that the cost differences between the handling of a small shipment and the handling of a larger shipment could be attributed principally to the carrier's higher cost of terminal handling services associated with the smaller shipment.<sup>52</sup> Such elements of carrier costs in transporting small shipments as picking up, handling, and delivering the shipment were independent of the weight of the shipment itself. In the Commission's opinion, the costs of such elements were several times as great per 100 pounds for a 100 pound shipment as for a 1,000 pound shipment.<sup>53</sup> The entire matter was accentuated by the inflationary growth of wage costs at a rate faster than that of other transportation costs.<sup>54</sup>

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48. Minimum Charges in Central Territory, 47 M.C.C. 259, 274 (1947) and Central Territory Gen. Increases, 49 M.C.C. 4, 9 (1948).

49. Minimum Charges in Central Territory, 47 M.C.C. 259, 276 (1947).

50. Surcharge on Small Shipments Within Central States, 63 M.C.C. 157, 168 (1954).

51. *Id.* at 168-69.

52. General Increases, Eastern Central Territory, 316 I.C.C. 467 (1972).

53. *Id.*

54. *Id.* For an earlier recognition of the same trend, see Central Territory Gen. Increases, 49 M.C.C. 4, 9 (1948).

Accompanying this trend was a change in the balance between the amounts of small shipments handled by rail carriers and those handled by motor carriers.<sup>55</sup> The LCL traffic of the rail carriers was decreasing significantly during the late 1950's and early 1960's, with motor carriers being tendered more and more small shipments.<sup>56</sup> The motor carriers viewed their burden as being more oppressive when the rail carriers began to draw off the lucrative truckload (TL) traffic by the institution of trailer-on-flatcar (TOFC) service.

In the course of ruling on one small shipment rate proposal, the Commission commented on this rail-versus-motor development and its concomitant effect on motor carriers.

For several years, the transportation of the so-called small shipments by motor common carriers has represented a perplexing problem to the carriers, the shippers and the Commission. The successful inauguration by the railroads of trailer-on-flatcar (TOFC) service concurrently with the general elimination of the less-than-carload (LCL) service, made the movement of freight shipments weighing less than 10,000 pounds, and particularly those less than 1,000 pounds, an increasingly significant part of the traffic of the motor carriers. The TOFC service forced the motor carriers to reduce their rates on truckload traffic to be more competitive, and the resulting loss of revenue necessitated a review of the pricing on the other segments of the traffic. This review led the carriers to the conclusion that the rate structure would have to be revised to more narrowly reflect the cost of transporting the different traffic segments if they were to maintain the capability of performing an adequate service on all traffic.<sup>57</sup>

The respondent in that proceeding, Eastern Central Motor Carriers Association, Inc. (ECMCA), on behalf of its member carriers, maintained adamantly that, although the railroads had discontinued their LTL service, there had been no corresponding shift to other modes of transportation, such as the freight forwarders or REA. Accordingly, the shippers were dependent upon the motor carrier for the transportation of small shipments, but the transportation of such shipments by the motor carriers, especially shipments under 1,000 pounds,<sup>58</sup> were responsible for the operating deficits of the motor carriers.<sup>59</sup>

Various suggestions were made to reduce costs on small shipments. At the most basic level, the Commission urged that shippers and carriers cooperate in that regard. It was suggested that the better planning and scheduling of shipping and receiving department operations would also assist in obtaining the goal of lowering the costs of providing the small shipment service. If such departments could be open longer hours, it was felt,

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55. 71 ICC ANN. REP. 27-28 (1957); 75 ICC ANN. REP. 36-38 (1961).

56. Small Shipment Rate Revision—Eastern Central Territory, 335 I.C.C. 547, 549 (1969).

57. *Id.* at 548.

58. Again, the weight criteria for the definition of small shipments has undergone a downward metamorphosis. See text accompanying notes 14-18 *supra*.

59. Small Shipment Rate Revision—Eastern Central Territory, 335 I.C.C. 547, 552 (1969).

an improvement would also be noted.<sup>60</sup> Similarly, the availability of additional dock space by shippers could cut carrier costs, as could the sorting of shipments according to designated carriers. Other cases recognized that the manner in which small shipments were handled by motor carriers, in providing cross-dock terminal service, could affect the costs of handling such shipments.<sup>61</sup>

The various rate bureaus, upon being confronted by this economic crisis, submitted numerous rate proposals to the Commission to alter substantially the charges on small shipments. In addition to setting forth what they believed to be the economic merits of their respective proposals, the bureaus occasionally included veiled threats with regard to the future quality of small shipment service that would occur unless rate restructuring were allowed. For example, one carrier noted that it had

made every effort to contain our costs without sacrificing our service. We have modern terminals, the latest equipment and good personnel. Our I.B.M. model 360 computer provides us with the latest data and information so that we can pin-point any cost that goes out of line, yet in spite of this, we find the costs of doing business increasing to the extent we need this additional revenue on those shipments which we are losing money on. The lack of such an increase could only mean the sacrifice in the service on that segment of traffic that is costing us money to operate and handle.<sup>62</sup>

Other carriers were more subtle in their evidentiary submissions. For example, one carrier's representative stated that, if the Commission were to allow a restructuring of the small shipment traffic so that rates were increased on shipments weighing less than 500 pounds, then "[s]uch a step would also tend to improve service on small shipments in general. With the return more in line with the cost of handling, the service problem on small shipments would largely resolve itself."<sup>63</sup>

Numerous proposals were submitted by the various rate bureaus in order to reduce, or eliminate altogether, the deficit experienced by motor carriers in the handling of small shipments. One of the first proposals involved the designation of "constant charges" on shipments weighing 300 pounds or less.<sup>64</sup> The Commission there held that: "The increases on this traffic are clearly justified in order to minimize the subsidization of this traffic

60. 70 ICC ANN. REP. 5-7 (1956).

61. The Commission noted in *Small Shipment Rate Revision—Eastern Central Territory*, 350 I.C.C. 586, 608-09, 615-18 (1975), that the various methods of platform handling for small shipments, such as two-wheel carts, four-wheel carts, forklifts, draglines, or hand-carrying, could affect the costs of such an operation.

62. Statement of Robert G. Bouman, Holland Motor Express, Inc. at 10-11, (July 31, 1972), submitted in *In re Restructured Class Rates, Central States Motor Freight Bureau*, Docket No. 70740.

63. Statement of Dick Butler, Anderson Motor Service, Inc. at 6 (July 31, 1972) submitted in *In re Restructured Class Rates*, Docket No. 70740.

64. *General Increases Eastern Central Territory*, 316 I.C.C. 467, 484 (1972).

by larger shipments."<sup>65</sup> That proposal, filed by the ECMCA, and regarded by the Commission as "bold and imaginative",<sup>66</sup> was based on the belief that the various factors utilized in classifying commodities had become irrelevant insofar as small shipments were concerned.<sup>67</sup> Yet, despite the fact that the Commission greeted this proposal enthusiastically, the respondent carriers, after having received the Commission's blessing for the plan, cancelled the constant charges.<sup>68</sup> This development occurred after the larger members of the association declined to continue the constant charges in effect.<sup>69</sup> The Commission, in any event, continued to refer to its belief that the smaller shipments were carrying too large a burden in providing motor carriers with needed revenues.<sup>70</sup>

The Eastern Central carriers followed up their constant charge proposal with another rate proposal, one based on the so-called COR (cost-oriented rates) scale.<sup>71</sup> The COR scale involved a single uniform system of rates and charges for the transportation of LTL and any-quantity (AQ) shipments weighing less than 5,000 pounds. In justification of the COR scale, the carriers asserted a need both for increased revenue and for a restructuring, so that smaller shipments would pay a greater share of their cost burden. Although agreeing with the general principle advanced by Eastern Central that rates and charges should be oriented to the cost of providing a particular transportation service, the Commission found that the proposed rates had not been shown to be just and reasonable,<sup>72</sup> as required by the Interstate Commerce Act.<sup>73</sup> In addition to finding that there was no revenue need, the Commission refused to accept certain of the study data submitted by Eastern Central in support of its proposal. Of significance was the fact that the Commission itself developed an alternative class rates structure on small shipments. The Commission emphasized that the carriers were responsible for the initiation of rates, not the Commission.<sup>74</sup>

The next proposal by Eastern Central did receive Commission approval, however.<sup>75</sup> In that proposal, the charges for small shipments applied regardless of the classification of the articles included in the

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65. *Id.* at 482.

66. *Id.* at 485.

67. *Id.* at 483.

68. LTL COR Rates—Between East and Territories West, 326 I.C.C. 174, 177 (1966).

69. General Increase, Between East and Territories West, 329 I.C.C. 626, 629 (1965).

70. General Increase—Middle Atlantic and New England Territories, 319 I.C.C. 168, 175 (1963).

71. LTL COR Rates—Between East and Territories West, 326 I.C.C. 174, 178 (1966).

72. *Id.* at 204.

73. 49 U.S.C.A. § 10701(a)(West Supp. 1979) provides that "(a) rate, classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable."

74. LTL COR Rates—Between East and Territories West, 326 I.C.C. 174, 204 (1966).

75. Small Shipment Rate Revision—Eastern Central Territory, 335 I.C.C. 547, 549 (1969).

shipments, except in those instances where the multiplication of the weight by the otherwise applicable rate per 100 pounds would result in a higher charge.<sup>76</sup> Shippers attacked this Eastern Central proposal, as they had the earlier ones. Among other charges, it was argued that the proposal did not adhere to the classification principles required by the Act.<sup>77</sup> It was also argued that the costs and traffic studies contained numerous deficiencies. The Commission accepted the Eastern Central argument that the various classification principles, with the exception of weight, lost their significance with regard to the transportation of shipments weighing less than 200 pounds.<sup>78</sup> As it had been in the Eastern Central constant charges proposal, the Commission was extremely receptive to the approach presented.

Yet the Commission was not to have the final say in the matter. In *National Small Shipments Traffic Conference, Inc. v. United States*,<sup>79</sup> a three judge district court reversed the ICC's decision. Judge Friendly, writing for the court, found that the Commission had erred in predicating its decision on a "through basis" cost analysis as opposed to a "carried basis" cost analysis.<sup>80</sup> The Commission, on remand, retreated from its earlier finding that the classification principles other than weight lost their significance with regard to small shipments. The Commission found that density and type of handling were partial substitutes for the classification elements.<sup>81</sup> However, the Commission, after further analysis, upheld the use by Eastern Central of the through basis as the proper method for determining costs-revenue relationships. Such a through basis "best reflects the total traffic at issue from origin to destination,"<sup>82</sup> the Commission stated. The net effect of the Commission's decision, given its ruling on the classification principles, was that the proceeding was discontinued. Still another

76. *Id.* at 550.

77. 49 U.S.C.A. § 10702(a)(1) (West Supp. 1979).

78. 335 I.C.C. 547, 564. The classification principles include (1) shipping weight per cubic foot (density); (2) liability to damage; (3) liability to damage of other shipments with which a shipment is transported; (4) perishability; (5) liability to spontaneous combustion or explosion; (6) susceptibility to theft; (7) value per pound in comparison with other commodities; (8) ease or difficulty in loading or unloading; (9) stowability; (10) excessive weight; (11) excessive length; (12) care or attention necessary in loading or transporting; (13) trade conditions; (14) value of service; and (15) competition with other commodities transported. See *Motor Car. Rates in New England*, 47 M.C.C. 657, 660-61 (1948) and *Small Shipment Rate Revision—Eastern Central Territory*, 350 I.C.C. 586, 602 (1975).

79. 321 F. Supp. 500 (1970).

80. The through basis cost analysis involved inclusion of non-study carriers' traffic handled on an interline basis with the study carriers in its survey, as opposed to a carried basis limited to study carriers' traffic alone. 350 I.C.C. 586, 589. Carried costs have been relied upon primarily in establishing cost-revenue relationships, and they involve transportation costs incurred by a carrier from origin to destination on its own line, as well as those costs incurred by the study carrier also on its interline traffic, whether involving origin, intermediate, or destination service. *Id.* at 598.

81. *Id.* at 618.

82. *Id.*

appeal was taken, however, by shippers opposed to various holdings in the Commission's decision. In *National Small Shipments Traffic Conference, Inc. v. ICC*,<sup>83</sup> the Commission's order was vacated and the cause remanded a second time. The court struck down the use of the through basis cost-revenue study once again, despite the Commission's further analysis, and, additionally, disapproved the reliance by the Commission on a controversial platform service cost study.<sup>84</sup> The Eastern Central proposal has since been the subject of a third appeal, in which the Commission was again reversed by the United States Court of Appeals for the District of Columbia Circuit.<sup>85</sup>

While the Eastern Central controversy was ongoing, another rate restructuring proceeding was achieving success; this proceeding was instituted by members of the Central States Motor Freight Bureau, Inc. In referring to that proposal, the Commission explained:

The purpose of the restructuring before us is to align rates and charges more narrowly with cost and to spread more evenly over the rate structure the burden of producing needed revenues. Restructuring assertedly is also a means of preventing any continued loss of the heavier less-than-truckload (LTL) traffic. While additional revenues will be realized from the increased rates on minimum charge and under 500 pounds small shipments, respondents note that this increase will be largely offset by lower revenues on the heavier LTL shipments as a result of the rate reduction.<sup>86</sup>

The Commission, in approving the Central States' restructuring, accepted the use of a platform study made by the Commission's own staff, which study assigned platform handling cost primarily according to shipment size.<sup>87</sup> This was the same platform study, of course, which had been relied upon by the Commission in the much-appealed Eastern Central proceeding.

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83. No. 76-1114 (D.C. Cir., Oct. 21, 1977).

84. The Commission had addressed the question of the "through" versus "carried" basis cost revenue comparisons in Ex Parte No. MC-82, *New Procedures in Motor Carrier Revenue Proceedings*, 339 I.C.C. 324, 332 (1971), 340 I.C.C. 1, 10 (1971) and 351 I.C.C. 1, 19 (1975). The Commission, in each proceeding, refused to preclude carriers from submitting additional data on a through basis, as long as the use of the basis did not result in a substantial sampling bias.

85. Following the second remand, the Commission discontinued the Eastern Central proceeding, and indicated the platform study issues would be considered in *Restructured Rates and Charges, Central States Territory*, 352 I.C.C. 502 (1976). See also note 73 *supra*. The Court, in *National Small Shipments Traffic Conference, Inc. v. ICC*, No. 78-1099 (D.C. Cir. Oct. 26, 1978), severely chastised the Commission and directed it to adduce evidence regarding the platform study method in the Eastern Central proceeding as originally directed. In the interim, *Restructured Rates and Charges, Central States Territory* remains open.

86. *Restructured Rates and Charges, Central States Territory*, 352 I.C.C. 502, 503-04 (1976). See also note 85 *supra*.

87. ICC Bureau of Accounts, *Motor Carrier Platform Study*, Statement No. 2551-70, (1971). The Commission plans to have available a new platform study during the first part of 1979. With regard to the continued validity of the 1971 study, see note 85, *supra*, and note 186, *infra*.

Still another recent restructuring proceeding resulted in the cancellation of the proposed rates. This proceeding, as in the above-mentioned Central States proceeding, involved an increase on shipments weighing less than 500 pounds, no change in shipments weighing 500 pounds to 999 pounds, and decreases in shipments weighing over 999 pounds.<sup>88</sup> Because the proponent, the Central & Southern Motor Freight Tariff Association, Inc., failed to present evidence concerning the density of traffic actually moving in its territory, the Commission found that it had failed to meet its burden of proving that the rates were just and reasonable. It also rejected a comparison urged in that proceeding that the Coordinated Freight Classifications used in the New England territory provided a solid basis for ascertaining the average density of certain commodities in the National Motor Freight Classification, the classification system used by Central & Southern.<sup>89</sup> This failure of Central & Southern to determine actual density of its shipments essentially led to the failure of its proposal.<sup>90</sup>

This, then, represents the turbulent atmosphere in which *Ex Parte No. MC-98* was launched. Attempts to resolve the small shipment problem, both from the standpoint of service and from the standpoint of rates,<sup>91</sup> have resulted in continuing controversy. As the topical nature of these proceedings suggest, small shipments have been, and remain, one of the most pressing issues with which the Commission must deal.<sup>92</sup> *Ex Parte No. MC-98* represented a major attempt by the Commission to deal with this conundrum.

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88. Importantly, several restructurings on small shipments by the Central States Carriers have been effected since 1972, which have been directed at "achieving reasonably compensatory cost revenue relationships on all weight brackets." Evidentiary Submission of Central States Motor Freight Bureau in Support of Proposed Restructured Rates and Charges at 3, *submitted in Restructuring Proceedings*, *supra* note 1. These restructurings have not involved any departure from the classification system, however.

89. Class Rate Restructuring, Central & S. Motor Freight Tariff Ass'n, 355 I.C.C. 866, 868 (1977).

90. *Id.* at 880.

91. *Id.* at 872. An earlier attempt to revise its small shipments rate structure by Central & Southern met with success in Small Shipments Rate Revision, Central & S. Territory, 337 I.C.C. 158 (1970).

92. For an excellent review of restructuring as it relates to small shipments from the motor carrier's viewpoint, see Initial Statement of Central States Motor Freight Bureau, Inc., Eastern Central Motor Carriers Association, Inc., Middle Atlantic Conference, Midwest Motor Freight Bureau, The New England Motor Rate Bureau, National Motor Freight Traffic Association, Niagara Frontier Tariff Bureau, Inc., Pacific Island Tariff Bureau, Inc., Rocky Mountain Motor Tariff Bureau, Inc., Southern Motor Carriers Rate Conference, Appendix, A History of Restructuring, Restructuring Proceedings, *supra* note 1, at 1-26 [hereinafter cited as A History of Restructuring]. See also Milner, *Pricing of Small Shipments and Other Difficult Traffic*, in TRANSPORTATION LAW INSTITUTE PAPERS AND PROCEEDINGS 343 (1971).

## IV. EX PARTE NO. MC-98

The Notice of Proposed Rulemaking in *Ex Parte No. MC-98* termed the problem of restructuring LTL rates as one "vital to the economic health of the regular route common carrier system."<sup>93</sup> It was noted by the Commission that the motor carrier LTL rate structure in use was basically a copy of the classification-based system developed by the railroads. Although the classification system had initially worked to the advantage of the motor carriers, the trucking industry found, as had the rail industry before it, that competitive pressures had siphoned off much of the most desirable freight, which freight had subsidized the less desirable traffic. There is a need for both rates low enough to allow shippers to utilize existing service for LTL shipments, and, at the same time, rates high enough to guarantee continued service by the motor carrier industry at a reasonable profit.<sup>94</sup> The Commission, in the rulemaking notice, did not refer to small shipments as those weighing less than 500 pounds, but referred repeatedly to both LTL and small shipment traffic.

The Commission proposed seven questions to be answered by shippers, motor common carriers, and other interested parties.<sup>95</sup> These questions concerned the level of small shipment service received and the cost to carriers of providing that service, as well as problems with the existing rate structures. Alternative suggestions were solicited with regard to rates and service. The Commission also submitted revisions to 49 C.F.R. §1104.3

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93. *Ex Parte No. MC-98, New Procedures in Motor Carrier Restructuring Proceedings, Notice of Proposed Rulemaking*, 41 Fed. Reg. 1923 (1976).

94. *Id.*

95. *Id.* The seven questions were:

(1) What problems, if any, have you experienced in connection with LTL or small shipment traffic? If you have experienced any problems, *e.g.* in costs, service, handling, or other, would you please describe them in detail? Can, or should anything be done to change, improve, or replace the present LTL and small shipment rate structure?

(2) Can action be taken to increase the volume of small shipment traffic, other than subsidization by other traffic?

(3) Are there any alternatives to the present physical methods of handling LTL and small shipments by carriers which could, or should, replace current methods?

(4) In light of the criticism of shippers that motor common carriers do not provide adequate small shipment service, and the complaints of carriers that the existing rate structure does not compensate them adequately for the cost of handling small shipment traffic, what can be done to reconcile the need for an adequate rate structure for motor carriers and the need for LTL rates which shippers can afford to pay?

(5) Where certain shippers, industries, or localities have no alternative means of transportation and require LTL service, is there a point at which the carrier burden should be deemed to outweigh the need for the service?

(6) Could, or should, alternative rates based on differing service needs, *e.g.* expedited, standard, and standby, be offered for LTL service? How could, or should, such alternative rates be constructed?

(7) If you feel certain commodities or classes of traffic are unfairly priced under the existing rate structure, please give specific examples, and suggest how this unfairness can, or should, be eliminated.

which would require the furnishing, under so-called MC-82 procedures, of breakdowns of operating ratios applicable to all categories of traffic, including LTL, in a uniform manner.<sup>96</sup> Evidence was to be submitted by the parties in writing.

#### A. SHIPPER REPRESENTATIONS

As could be easily predicted, the participating shippers, many of which had been active opponents of the rate restructuring proposals presented to the Commission during the prior 15 years, recited the familiar refrain of shipper complaints. Included among the service problems experienced by shippers were such recognizable items as high minimum charges, unreliable transit times, inability to obtain protective service, the necessity to utilize a plethora of carriers because of limited operating rights, the unavailability of pickups for small shipment protective service on Thursday or Friday, and the inability to obtain pickups at all.<sup>97</sup> Other shipper organizations mentioned carrier failures with regard to the settlement of loss and damage claims and the multitude of complex tariffs which governed small shipment movements.<sup>98</sup> Still other difficulties cited included problems with tracing shipments, obtaining off-highway delivery, obtaining redelivery, obtaining proof of delivery, the level of charges for redelivery, and carrier lack of equipment.<sup>99</sup> The impetus behind these service gaps, the shipper representatives charged, was an attempt on the motor carriers' part to discourage the transportation of small shipments.<sup>100</sup> Additionally, shippers charged that carriers refused to serve areas authorized, cancelled routing concurrences, established arbitrary charges with regard to small shipments, and, through purchases by long haul carriers of regional carriers, cut back on the amount of local service.<sup>101</sup> The effect of these service breakdowns was both direct and indirect. As an example of an indirect effect, one shipper complained that the present pricing structure complexities virtually precluded the application of the latest data processing techniques to the motor

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96. *Id.* at 1924. See note 84, *supra*, with regard to the MC-82 procedures.

97. Initial Statement of Drug and Toilet Preparation Traffic Conference (DTPTC) and National Small Shipments Traffic Conference, Inc. (NSSTC) at 3, *submitted in Restructuring Proceedings*, *supra* note 1; Initial Statement of National Retail Merchants Association (NRMA) at 5, *submitted in Restructuring Proceedings*, *supra* note 1.

98. Initial Statement of National Industrial Traffic League (NIT League) at 4, *submitted in Restructuring Proceedings*, *supra* note 1.

99. Initial Statement of Builders Hardware Manufacturers Association, Gift Wrappings and Tyings Association, Mass Market Paperbacks Operations Committee, National Association of Electrical Distributors, New York Retail Traffic Association, Inc., and Pencil Makers Association, Inc. at 11, *submitted in Restructuring Proceedings*, *supra* note 1.

100. Initial Statement of Bell & Howell Business Equipment Group at 3, *submitted in Restructuring Proceedings*, *supra* note 1.

101. Initial Statement of NCR Corporation, Systemedia Division, at 3, *submitted in Restructuring Proceedings*, *supra* note 1.

carrier industry, creating problems for both shippers and carriers.<sup>102</sup> Yet, if there was one complaint expressed more frequently than the rest, it was the virtually unanimous sentiment that charges on small shipments were much too high.

Thus, the shippers and receivers not only felt that the service being provided them was woefully deficient, but also that the price of receiving that inadequate service was too high.<sup>103</sup> This is not to say that the shippers generally felt that small shipments should be cross-subsidized. To the contrary, there was support for the proposition that rates should reflect the cost of service. As was stated by the National Industrial Traffic League (NIT League) in its initial statement:

The League supports the concept of rates reflecting the cost of service so that no one element of carrier traffic is called on to subsidize other traffic. But the cost of service must be a proven, reliable cost, to the extent any costing, by definition, involves the broad use of estimates and assumptions. At best, cost allocation is an art, not a science.<sup>104</sup>

Similarly, the National Retail Merchants Association (NRMA), in its initial statement, stated: "Obviously, the carriers must have compensatory rates if they are to adequately provide the service."<sup>105</sup> The area of disagreement with the carriers was whether existing rates on small shipments were in fact compensatory, however. Such a conclusion could not be made, the shippers argued, based upon present cost analysis.<sup>106</sup> It would first be necessary to develop and apply new accurate and reliable costing systems and analysis.<sup>107</sup> One shipper organization went so far as to allege that the small shipment traffic had been, in fact, subsidizing the larger shipments, which were underpriced.<sup>108</sup>

There was one element of the current costing system utilized by the Commission that was attacked by the shippers. It was the much-maligned platform study.<sup>109</sup> It was submitted that a moratorium be placed by the Commission on restructuring, until such time that there was a new platform

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102. Initial Statement of Western Electric Company, Inc. at 3, *submitted in Restructuring Proceedings, supra* note 1.

103. There was, however, a great diversity of opinion not only between shippers and carriers, but between shipper and shipper. One company exclaimed: "We have not experienced any problems in connection with LTL or small shipment traffic." Initial Statement of Armstrong Cork Company at 1, *submitted in Restructuring Proceedings, supra* note 1.

104. Initial Statement of NIT League at 2-3, *submitted in Restructuring Proceedings, supra* note 1.

105. Initial Statement of NRMA at 8, *submitted in Restructuring Proceedings, supra* note 1.

106. Initial Statement of NIT League at 5, *submitted in Restructuring Proceedings, supra* note 1.

107. Initial Statement of NRMA at 11, *submitted in Restructuring Proceedings, supra* note 1.

108. Initial Statement of The Southern Traffic League at 6, *submitted in Restructuring Proceedings, supra* note 1.

109. See note 87, *supra*.

study and more reliable cost analysis.<sup>110</sup> One organization asserted that it was unfair to assign the great bulk of platform handling cost to the small shipments, in that one of the major reasons why the "smalls" underwent such excessive platform handling was because of conscious operation decisions on the part of the carriers themselves. Such platform handling was purportedly engaged in to reduce other expenses, such as line-haul costs which fell most heavily on the larger shipments. By consolidating the small shipments and placing them on trailers with larger shipments, the line-haul costs for larger shipments were accordingly reduced.<sup>111</sup> The occasion was also utilized to denigrate the "through" as opposed to "carried" method of costing. It was stated that: "To the extent that the through costing method does attribute such additional platforming services to the delivery carrier, the present costing techniques are significantly misleading."<sup>112</sup> Thus, although there was general agreement that a cost of service rate structure was a commendable goal, it was argued that there were no suitable methodologies for determining the cost of service at this time.

Disagreement among the shipper representatives was more widespread with regard to the merits of the classification system itself. Some groups steadfastly defended the classification system because, in part, of the nature of the commodities they shipped as related to the classification system.<sup>113</sup> The NIT League stated that it knew of no examples of unfair pricing.<sup>114</sup> Yet, other organizations attacked the classification system. As was stated by the New Orleans Traffic and Transportation Bureau:

A conclusion appears that the present system of rating of small shipments through commodity classification is an unsuitable vehicle. That the inherent difficulties of handling small shipments are shared by shipper and carrier with some degree of likeness. That the impact of expense upon the small shipment is most prominent in areas of shipper inefficiency in packaging and tender, compounded by incapability of motor carriers to effectively cope with the problem.<sup>115</sup>

Likewise, other shippers urged the Commission to resolve the shortcomings of the classification system in a separate proceeding.<sup>116</sup>

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110. Initial Statement of DTPTC and NSSTC at 2, 13, *submitted in Restructuring Proceedings, supra* note 1. Initial Statement of Spring Mills, Inc. at 2, *submitted in Restructuring Proceedings, supra* note 1.

111. Reply Statement of NIT League at 7, *submitted in Restructuring Proceedings, supra* note 1.

112. Initial Statement of NIT League at 14, *submitted in Restructuring Proceedings, supra* note 1.

113. Reply Statement of Southern Furniture Manufacturers Association at 5, *submitted in Restructuring Proceedings, supra* note 1.

114. Initial Statement of NIT League at 19, *submitted in Restructuring Proceedings, supra* note 1.

115. Reply Statement of New Orleans Traffic and Transportation Bureau at 8, *submitted in Restructuring Proceedings, supra* note 1.

116. Initial Statement of Traffic Managers Conference of California at 6, *submitted in Restruc-*

The shippers' representatives propounded numerous recommendations to the Commission for the improvement of the small shipment problem. It was suggested that the Commission should grant small shipment operating certificates of a two year limited term nature for all shipments under 1,000 pounds, over broad geographic areas, with the certificate renewable at the end of the two years if the carrier was in fact adequately serving the public.<sup>117</sup> The issuance of such a certificate would be conditioned on individual ratemaking. It was suggested, furthermore, that carriers use joint terminals, for the handling of small shipments, and pool freight. Similarly, joint agents for pickup and delivery could be utilized. It was also suggested that a UPS-type service be authorized for shipments weighing up to 300 pounds, and that existing carriers establish separate divisions to transport smaller shipments.<sup>118</sup> Other participants specifically urged that the weight limits of the UPS authority be increased, as well as those of other small shipment specialists.<sup>119</sup> One organization expressed the view that, for small shipments to be handled efficiently, a carrier must specialize exclusively in that field.<sup>120</sup>

The Traffic Managers Conference of California, searching for a more equitable basis on which to structure current small shipment rates, drew an example from other transportation modes. It observed:

Airline and air forwarding companies appeared to have solved this problem by allowing for a break-out in charges between pickup, line-haul and delivery of an order. In many instances they also provide rates on multiple pickup and/or delivery of shipments. We recommend that the Interstate Commerce Commission consider a similar requirement for motor common carrier LTL rates and tariff publications under its jurisdiction.<sup>121</sup>

Other shippers suggested rate discounts for multiple pickups,<sup>122</sup> a pickup and delivery allowance, and special rates for a component service only, including pickup, terminal handling, billing, line-haul, and delivery.<sup>123</sup>

Thus, while steadfastly maintaining their ground on such issues as

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turing Proceedings, *supra* note 1; see also the Reply Statement of Norris Industries at 4, *submitted in Restructuring Proceedings, supra* note 1.

117. Initial Statement of DTPTC and NSSTC at 7-8, *submitted in Restructuring Proceedings, supra* note 1.

118. *Id.* at 8-9.

119. Initial Statement of Norris Industries at 4, *submitted in Restructuring Proceedings, supra* note 1; see also Initial Statement of NCR Corporation, Systemedia Division at 7, *submitted in Restructuring Proceedings, supra* note 1.

120. Initial Statement of Steel Office Furniture Traffic Association at 4, *submitted in Restructuring Proceedings, supra* note 1.

121. Initial Statement of Traffic Managers Conference of California at 3-4, *submitted in Restructuring Proceedings, supra* note 1.

122. Initial Statement of General Mills, Inc. at 6, *submitted in Restructuring Proceedings, supra* note 1.

123. Initial Statement of DTPTC and NSSTC at 6, 9, *submitted in Restructuring Proceedings, supra* note 1.

through versus carried costs and the controversial platform handling study, the shippers' organizations submitted numerous proposals to ameliorate the small shipment problem. What was wanted most strongly in the interim was a moratorium on any rate restructuring until such time as more sophisticated costing methods could be devised.

#### B. GOVERNMENTAL AGENCIES

A total of five departments and agencies of the federal government submitted statements in *Ex Parte No. MC-98*. Two of those statements, those of the Department of Defense (DOD) and the General Services Administration (GSA), were submitted from the viewpoint of users of motor carrier service in the transportation of small shipments. The statements of the United States Department of Transportation (DOT), United States Department of Justice (DOJ), and Federal Energy Administration (FEA), addressed the policy question of the proceeding from the point of view of those departments themselves.

Despite these two differing viewpoints, there was unanimity of voice among the agencies with regard to the establishment of cost-oriented rates. As was stated by DOJ, "[m]otor carrier LTL rates should, to the greatest extent possible, be constructed on the basis of motor carrier costs properly allocable to the handling of that type of traffic."<sup>124</sup> Even GSA, with its shipper orientation, supported restructuring, if the restructuring was supported by accurate carrier evidence reflecting differences in the cost and handling of transporting respective categories of traffic.<sup>125</sup> There was simply no sentiment in favor of any rate system where cost subsidization was allowed to exist.<sup>126</sup>

The DOJ accepted the view that small shipments were in fact being subsidized by larger shipments. It was stated that:

At present it appears that small shipment tariffs are too low while larger shipment rates are excessive. The result is a system of cross-subsidization or wealth transfers from shippers of large shipments to shippers of small shipments. Small shipment products are wastefully promulgated and large shipment products are artificially suppressed. In this way the waste reaches far beyond the regulated industry itself into society at large.<sup>127</sup>

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124. Initial Statement of Dep't of Justice at 2, *submitted in Restructuring Proceedings, supra* note 1.

125. Initial Statement of General Services Administration at 3, *submitted in Restructuring Proceedings, supra* note 1. The State of Michigan Department of Management and Budget, the one state agency to participate in the proceeding, also supported such a view in its Initial Statement at 4, *submitted in Restructuring Proceedings, supra* note 1.

126. Initial Statement of Federal Energy Administration at 7, *submitted in Restructuring Proceedings, supra* note 1.

127. Initial Statement of Dep't of Justice at 6, *submitted in Restructuring Proceedings, supra* note 1.

DOT called such a view "virtually unchallenged."<sup>128</sup> The criticism of the governmental departments extended also to the classification system itself. The existing classification system was challenged by DOJ,<sup>129</sup> DOD,<sup>130</sup> and FEA.<sup>131</sup> FEA suggested that density-based rates, such as the coordinated freight classification utilized by the New England Motor Rate Bureau in the New England territory, were superior.<sup>132</sup>

GSA cited various service failures which it encountered in the movement of small shipments, but these were no different than those which had been cited by the various shipper representatives. Not surprisingly, because of the amount of traffic controlled by it and the corresponding leverage obtained, DOD indicated that it had received satisfactory small shipment service in the past.<sup>133</sup>

In the area of rates and operations, suggestions were submitted to improve the small shipment situation. DOD voiced approval for the utilization of freight-all-kinds (FAK) rates, noting that it had experience with such rates moving at a reduced level, as is permitted on government traffic by the Interstate Commerce Act.<sup>134</sup> DOJ suggested that flexibility should be permitted carriers to raise and lower rates in accord with short term developments.<sup>135</sup> DOT also proposed greater pricing flexibility, as well as the availability of alternative rates based on differing service.<sup>136</sup> FEA supported the establishment of aggregate tender rates, distribution rates on a FAK basis, and released rates on small shipments.<sup>137</sup>

The possibility of achieving operating efficiencies in the transportation of small shipments was an important part of the departments' submissions. GSA proposed a centralized pickup and delivery on the "cluster concept"

128. Initial Statement of Dep't of Transportation at 2, *submitted in Restructuring Proceedings*, *supra* note 1.

129. Initial Statement of Dep't of Justice at 13, *submitted in Restructuring Proceedings*, *supra* note 1.

130. Initial Statement of Dep't of Defense at 7, *submitted in Restructuring Proceedings*, *supra* note 1.

131. Initial Statement of Federal Energy Administration at 32, *submitted in Restructuring Proceedings*, *supra* note 1.

132. *Id.* The New England area is the only region of the country where the National Motor Freight Classification is not utilized.

133. Initial Statement of Dep't of Defense at 8, *submitted in Restructuring Proceedings*, *supra* note 1.

134. Property transported for the United States Government, as well as state and municipal governments, may move at reduced rates pursuant to the provisions of 49 U.S.C.A. § 10721(b)(1) (West Supp. 1979).

135. Initial Statement of Dep't of Justice at 8-10, *submitted in Restructuring Proceedings*, *supra* note 1.

136. Initial Statement of Dep't of Transportation at 3, 9, *submitted in Restructuring Proceedings*, *supra* note 1.

137. Initial Statement of Federal Energy Administration at 23, 26, 30, *submitted in Restructuring Proceedings*, *supra* note 1.

for urban services.<sup>138</sup> GSA also advanced the concept of utilizing automated equipment in terminal, unitization hardware, and motor vehicles to handle palletized or containerized small shipment loads.<sup>139</sup> FEA added its support to a pooling concept, the elimination of deadhead miles on backhauls, and the use of transportation facilitation centers (TFC), where one carrier would be assigned the task of performing pickup, delivery, consolidation, and breakbulk for all common carriers operating in a metropolitan area.<sup>140</sup> FEA was also a proponent of substituted intramodal services in which a common carrier with excess capacity would transport shipments along the same traffic lane for other common carriers encountering equipment shortages.<sup>141</sup> It was felt by DOT that the Commission should provide some incentive for continued improvements in efficiency in the transportation of small shipments. It proposed that restructuring should be based, at least in part, on efforts by the carriers to improve their efficiency in this regard.<sup>142</sup>

One of the most novel ideas was that for the establishment of a subsidy revenue fund. DOJ advanced that such a fund should be set up to subsidize shippers directly if a judgment were made that the continued business activity of those shippers would be in the public interest, even though there was inadequate demand for their products to cover the shipment cost. (This assumes, of course, an end to cross-subsidization of small shipments.)<sup>143</sup> DOT believed that with freer entry, this situation would not exist except in very isolated instances.<sup>144</sup> The governmental departments generally supported the ICC's examination of the small shipment problem. The Commission was urged to take an activist role in implementing reforms.<sup>145</sup>

### C. CARRIER REPRESENTATIONS

Submitting a joint statement were numerous tariff bureaus, including the Central States Motor Freight Bureau, Inc., the Eastern Central Motor

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138. Initial Statement of General Services Administration at 6, *submitted in Restructuring Proceedings, supra* note 1.

139. *Id.*

140. Initial Statement of Federal Energy Administration at 8, 19, *submitted in Restructuring Proceedings, supra* note 1.

141. *Id.* at 12.

142. Initial Statement of Dep't of Transportation at 13, *submitted in Restructuring Proceedings, supra* note 1.

143. Initial Statement of Dep't of Justice at 16, *submitted in Restructuring Proceedings, supra* note 1.

144. Initial Statement of Dep't of Transportation at 6-9, *submitted in Restructuring Proceedings, supra* note 1.

145. Initial Statement of Federal Energy Administration at 38, *submitted in Restructuring Proceedings, supra* note 1.

Carriers Association, Inc., the Middle Atlantic Conference, the Middlewest Motor Freight Bureau, the New England Motor Rate Bureau, the National Motor Freight Traffic Association, the Niagara Frontier Tariff Bureau, Inc., the Pacific Inland Tariff Bureau, Inc., the Rocky Mountain Motor Tariff Bureau, Inc., and Southern Motor Carriers Rate Conference (hereinafter the MC-82 Bureaus<sup>146</sup>). Submitting separate statements were two other bureaus, the Motor Carriers Traffic Association, Inc., and the Central & Southern Motor Freight Tariff Association, Inc. The Regular Common Carrier Conference (RCCC) of the American Trucking Associations, as well as five carriers individually, also submitted statements in response to the *Ex Parte* No. MC-98 proceeding.

The MC-82 Bureaus pointed to numerous problems encountered by them in the transportation of small shipments. It was noted that there was a multitude of individual demands for service. Shippers often possessed outmoded and inadequate loading and unloading facilities, making it difficult for the general freight carriers to provide service. Certain shippers demanded that extra copies be provided of freight bills and other shipping documents, leading to an excessive amount of paperwork on small shipments. General freight carriers encountered single shipment tenders, instead of multiple tenders, on frequent occasions. Poor packaging was another factor cited in the handling of small shipments by general freight carriers. Some shippers insisted that pickups and deliveries be performed at specific times of the day, even down to the exact hour. Other shippers required that appointments be made before pickup or delivery, sometimes as much as 48 hours in advance. Still other shippers refused to receive any freight on one or more days of the week.<sup>147</sup>

The heart of the matter, however, from a carrier standpoint, had to do with the pricing of small shipments. As shipper representatives thought that the pricing on small shipments was too high, the carriers were convinced that the converse was true. As was stated by the MC-82 Bureaus,

The basic competitive problem to which the Commission refers does not lie in the maintenance of the classification-based rate structure on LTL traffic. Rather, it lies in the fact that shipments under 500 pounds, as a category of traffic, do not pay their way under the present system of class rates and minimum charges. The consequence is that shipments of heavier weights are required to bear a disproportionate share of the burden for meeting the carrier's need for overall revenues sufficient to enable them to discharge their duty to render adequate service. The unavoidable result of this is the actual or threatened diversion of the heavier weighted shipments to other forms of carriage.<sup>148</sup>

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146. *Ex Parte* No. MC-82, *New Procedures in Motor Carrier Revenue Proceedings*, 339 I.C.C. 324 (1971).

147. *A History of Restructuring*, *supra* note 92, at 6-7.

148. *Id.* at 3.

A similar view was expressed by RCCC, that some shipments produced large deficits while others were burdened with the task of making up for those deficits.<sup>149</sup> Likewise, individual carriers participating in *Ex Parte No. MC-98* echoed the view that there was a need for the cessation of this cross-subsidization.<sup>150</sup>

The agreement ended, though, among the carrier submissions, with regard to the continued viability of the classification system. The MC-82 Bureaus commenced their statement with a defense of the National Motor Freight Classification (NMFC).<sup>151</sup> Their enthusiasm, however, was not seconded by other motor carrier participants. Yellow Freight System, Inc., for example, referred to the existence of truckload classes and minimum weight factors, stating that it was time "to remove the shackles of this historic pitfall. . . from the National Motor Freight Classification."<sup>152</sup> Jones Transfer Company referred to the existence of flat charges applying on shipments less than 500 pounds, varying with distance and by 50-pound increments and applying on interstate traffic moving within the state of Michigan, as a superior pricing system.<sup>153</sup> Georgia Highway Express, Inc., stated:

That actually up to 500 pounds and even to 1,000 pounds—other than in light and bulky and in high value traffic—there really is very little difference in characteristics, and classification principles have really little to do with the minimum charge for the traffic other than in the amount of weight that moves under the minimum charge. Actually, the number of pieces in the shipment would probably have more cost impact than classification.<sup>154</sup>

Neither were the Central & Southern carriers enamored with the NMFC system. They also urged the establishment of a density-related classification.<sup>155</sup> In addition to a revamping of the classification system, other carriers felt that tariff incentives should be initiated, such as multiple pickup allowances.<sup>156</sup>

149. Initial Statement of Regular Common Carrier Conference (RCCC) of the American Trucking Association, Inc. at 5, *submitted in Restructuring Proceedings*, *supra* note 1.

150. Initial Statement of Jones Transfer Company at 3, *submitted in Restructuring Proceedings*, *supra* note 1; Initial Statement of Yellow Freight System, Inc. at 4, *submitted in Restructuring Proceedings*, *supra* note 1; Initial Statement of Transamerican Freight Lines, Inc. at 1, *submitted in Restructuring Proceedings*, *supra* note 1.

151. A History of Restructuring, *supra* note 92, at 2-3.

152. Initial Statement of Yellow Freight System, Inc. at 1-2, *submitted in Restructuring Proceedings*, *supra* note 1.

153. Initial Statement of Jones Transfer Co. at 3, *submitted in Restructuring Proceedings*, *supra* note 1.

154. Initial Statement of Georgia Highway Express, Inc. at 17, *submitted in Restructuring Proceedings*, *supra* note 1.

155. Initial Statement of Central & Southern Motor Freight Tariff Association, Inc. at 34, *submitted in Restructuring Proceedings*, *supra* note 1.

156. Initial Statement of Alvan Motor Freight, Inc. at 1, *submitted in Restructuring Proceedings*, *supra* note 1.

Various tariff incentives were also suggested by the MC-82 Bureaus in their joint statement. They submitted, as Appendix B to their initial statement, a model tariff, denoted "Tariff 499." Tariff 499 is actually the product of the Middle Atlantic Conference. As explained by the MC-82 Bureaus,

It is a small shipments tariff embodying a pricing system of rates, charges, allowances, and discounts which can be tailored to the needs of each individual shipper. Thus, it provides freight-all-kinds rates and charges graduated by weight, number of pieces, and volume. It offers discounts on shipments tendered to the carrier at its terminal, on shipments that are prepaid, on shipments that are tendered in multiples.<sup>157</sup>

Crucial to the actual publication of this tariff, however, according to the MC-82 Bureaus, was the receipt of released rates authority from the Commission, pursuant to the terms of the Act.<sup>158</sup>

In addition to this innovative tariff, a creative alternative to present pricing systems was submitted by Georgia Highway Express. That carrier urged the adoption of a transaction charge rate structure. Such a rate structure would impose a flat transaction charge to reflect the costs incurred solely because a carrier handled a particular shipment. This would include all costs except those related to the number of pieces in a shipment, weight, and distance.<sup>159</sup> Added to the flat transaction charge<sup>160</sup> would be a hundredweight rate times the actual weight of the shipment.<sup>161</sup> Thus, although the carrier would receive compensation for each additional pound in a shipment, the cost per hundredweight to the shipper would reduce substantially with an increase in weight. This, in the opinion of the proponent, would provide a significant incentive to the shipper to transport larger shipments and to the receiver to order larger shipments.<sup>162</sup>

Both the RCCC and the MC-82 Bureaus felt it necessary to defend the Commission's controversial platform study from attack by various shipper interests.<sup>163</sup> Yet both groups urged upon the Commission speed in the completion of a new platform study.<sup>164</sup> At the same time, the MC-82 Bureaus emphasized that "cost finding is not a science but a constantly evol-

157. A History of Restructuring, *supra* note 92, at 5.

158. 49 U.S.C.A. § 10730 (West Supp. 1979) provides that the Commission may authorize or require motor carriers to furnish transportation under limited liability, as opposed to full liability, if the "value would be reasonable under the circumstances surrounding the transportation."

159. Initial Statement of Georgia Highway Express, Inc. at 24, *submitted in Restructuring Proceedings*, *supra* note 1.

160. The example transaction charge suggested by Georgia Highway Express was \$7.00. *Id.*

161. *Id.*

162. *Id.* at 25.

163. A History of Restructuring, *supra* note 92, Reply Statement at 3; Reply Statement of RCCC at 4, *submitted in Restructuring Proceedings*, *supra* note 1.

164. See note 87, *supra*.

ing art."<sup>165</sup>

The MC-82 Bureaus acknowledged their duty to establish rates, but at the same time admonished the Commission that it had the duty to provide guidelines for the carriers.<sup>166</sup>

The battlelines drawn, then, by the submissions of the parties in *Ex Parte No. MC-98* were changed only slightly from the earthworks of earlier skirmishes. The challenge presented to the Commission, in light of this record, was not so much to declare a winner but to prevent, once again, a theoretical stalemate. Only in this manner could progress finally be made toward solving both small shipment problems—the shippers' and the carriers'.

#### D. THE COMMISSION'S DECISION

The Commission's decision, served March 27, 1978, is comprised of some 136 pages of text with over 100 pages of appendices. Only one Commissioner, of the then seven sitting members, dissented from the issuance of the decision, and that dissent was only a partial one.<sup>167</sup> The Commission made 16 specific recommendations focusing on the service and rate areas. As a result of the rulemaking, two new proceedings were spawned by *Ex Parte No. MC-98*, including an investigation into the classification system and a rulemaking proceeding on released rates to be applied to a small shipment tariff. The decision will be discussed in terms of both service and rates, although, again, the two issues are inextricably intertwined, as they have been in prior discussions of the small shipment problem.

#### 1. Service

The Commission, in one recommendation, indicated that it would encourage the specialization of carriers in the transportation of small shipments in the future. The shipper allegations that small shipment service was in any way deficient had been contested strenuously by the RCCC and the MC-82 Bureaus in their evidentiary submissions in this proceeding.<sup>168</sup> The Commission, however, implicitly found that small shipment service was in fact deficient by its pronouncements on carrier specialization. It is true that the Commission did not state any intention of discouraging general freight carriers from handling small shipments in the future. Rather, the Commission found that small shipments could be handled most efficiently

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165. A History of Restructuring, *supra* note 92, at 14.

166. *Id.* at 16.

167. Restructuring Proceedings, *supra* note 1, at 3.

168. A History of Restructuring, *supra* note 92, and Reply Statement of RCCC at 2, *submitted in Restructuring Proceedings*, *supra* note 1; Reply Statement.

either through the utilization of carriers specializing solely in small shipments, or by the establishment by general freight carriers of a special division to handle the transportation of small shipments.

As the Commission stated in this regard:

It is not our intention to limit the authority of general commodities carriers. We do intend, however, that more carriers will specialize in the transportation of small shipments. We believe that these specialized carriers, handling the traffic economically and efficiently, will serve as a positive competitive impetus in the trucking industry.<sup>169</sup>

In order to accomplish this specialization, the Commission stated that it would continue to issue certificates of public convenience and necessity containing weight limitations in the small shipment area.<sup>170</sup> The Commission indicated that then if the Applicant can demonstrate that its proposal is responsive to a public need, then the certificates would be granted.<sup>171</sup> The Commission made a specific finding that there was a particular need for the transportation of small shipments in the area between the 100-pound-per-shipment weight restriction of United Parcel Service, Inc., and the 500-pound weight cut-off of the small shipment problem itself.<sup>172</sup>

In encouraging the establishment of small shipment specialists, the Commission explicitly disavowed the view that the transportation of small shipments was inherently unprofitable. Even within the category of shipments weighing less than 500 pounds, the Commission identified the existence of various subgroups, including (1) parcel delivery, comprised of shipments weighing in the main less than 50 pounds; (2) package freight, weighing generally anywhere from 50 pounds to 300 pounds; (3) furniture, appliances, and small machine cartage; and (4) small-shipment pool distribution.<sup>173</sup> The Commission commented on these various subdivisions, noting that:

Each of these divisions of small shipments places a somewhat different burden upon the carriers' vehicles, handling equipment, and terminals. Carriers with profitable LTL and small shipment specialties generally recognize and capitalize on the differences. Such recognition is reflected in the design of and placement of terminals, fleet selection, and in handling equipment and management.

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169. Restructuring Proceedings, *supra* note 1, at 94.

170. See note 19 *supra*.

171. The standard utilized by the Commission in issuing common carrier certificates is governed by 49 U.S.C.A. § 10922 (West Supp. 1979), which provides that an applicant must show that it is "fit, willing, and able—(A) to provide the transportation to be authorized by the certificate; and (B) to comply with this subtitle and regulations of the Commission; and (2) the transportation to be provided under the certificate is or will be required by the present or future public convenience and necessity."

172. Restructuring Proceedings, *supra* note 1, at 92.

173. Restructuring Proceedings, *supra* note 1, at 90. These same divisions had been first suggested by one authority on the small shipment problem in Wasserman, *The Cause of The Small Shipment Problems and An Effective Solution*, THE ALPHIAN, September, 1976, at 3.

This explains, at least in part, why some carriers complain about inefficiencies associated with small shipments traffic and the comparative high cost of handling it, while others pursue this traffic.<sup>174</sup>

The Commission thus took notice of that which several shippers' representatives had pointed out, i.e., that numerous carriers specialized in the transportation of small shipments and still possessed extremely favorable operating ratios.

With regard to the service area, the Commission also commented on various other suggestions that had been proposed by the parties in *Ex Parte No. MC-98*. The Commission stated that it would encourage the computerization of rates, through the use of a mathematical formula, so that it would be possible for shippers to readily ascertain the correctness of any particular rate. (Although this recommendation concerns the actual construction of the rates, many shippers mentioned the complexity of small shipment rates as a service problem, in that it was impossible for them, without extensive calculations, to determine the correctness of rates.)<sup>175</sup> Although it was pointed out that it would be virtually impossible for the Commission to mandate an "efficient" packaging method, as suggested by carriers and shippers, the use of more efficient packaging methods was supported by the Commission.<sup>176</sup>

The Commission also informed carriers that they were not prohibited from establishing different types of small shipment service, including expedited, guaranteed, premium, and other special service, by the publication of applicable tariffs. It specifically disclaimed the notion that it had, in a past decision, meant to prohibit the filing of such provisions altogether.<sup>177</sup> The Commission acknowledged that it already could approve pooling arrangements, pursuant to the provisions of the Act, as long as the pooling provisions resulted in better service to the public and would not unduly restrain competition.<sup>178</sup> However, with regard to pooling, the Commission stated that it would urge that the statutory provision be amended, in order that it could provide for the summary informal approval of a substantial proportion of such proposals without engaging in the complex proceedings currently mandated by the statute. Such an amendment, the Commission

174. Restructuring Proceedings, *supra* note 1, at 90-91.

175. *Id.* at 111.

176. *Id.* at 105.

177. *Id.* at 102-03. The Guaranteed Service, Pacific Intermountain Express, 351 I.C.C. 90 (1975) proceeding was not meant to be a statement of general disapproval of guaranteed service provisions, the Commission underscored, pointing out that the P.I.E. tariff in question therein did not involve a special service, and the complete refund of rates involved amounted to a rebate, in violation of 49 U.S.C.A. § 11903 (West Supp. 1979).

178. See, Pacific Intermountain Exp. Co.—Invest. and Revoc., 122 M.C.C. 649, 665 (1977), 49 U.S.C.A. § 11342 (West Supp. 1979) permits pooling or division of traffic or services, if specifically approved by the Commission.

felt, would allow the expeditious implementation of the energy-efficient pooling arrangements.<sup>179</sup>

Along a similar line, the Commission referred to the concept of transportation facilitation centers. It found that experiments with TFC's had failed in the past, so that their future feasibility had not been clearly demonstrated.<sup>180</sup> Still, the Commission cautiously recommended continued future experimentation with the concept. With regard to loss and damage claims, the Commission indicated that there was a public demand and need for remedial legislation in this area also. It referred to its past efforts in the area<sup>181</sup> and indicated that it would support remedial legislation. Examining overcharge claims, the Commission noted<sup>182</sup> that it had commenced its own rulemaking proceeding<sup>183</sup> because of shippers' problems with regard to the practices and procedures of carriers. Also, the Commission reiterated that, in order to promote more efficient use of motor carrier equipment, it would support the standardization of size and weight restrictions on the nation's highways through legislation.<sup>184</sup>

Moreover, the Commission indicated that, with regard to the service complaints regarding pickup and delivery, the failure of existing carriers to meet the scheduling requirements of shippers and receivers would receive renewed emphasis in all types of proceedings, including operating rights, finance, and rate matters.<sup>185</sup> Thus, across an extremely broad front, the Commission addressed the problems of shippers with existing service and the suggestions put forth by carriers, shippers, and government departments for the amelioration of the service aspect of the small shipment problem.

## 2. Rates

The Commission's treatment of the rate area was no less comprehensive. The Commission began by addressing the suggestion that a moratorium be placed on all rate restructuring and held that there would be no such moratorium.<sup>186</sup> It confronted the issue of costing, observing that "[c]osting is a developing science, and as such, will continue to progress.

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179. Restructuring Proceedings, *supra* note 1, at 116.

180. *Id.* at 126.

181. See Ex Parte No. 263, Rules, Regulations and Practices of Regulated Carriers with Respect to the Processing of Loss and Damage Claims, 340 I.C.C. 515 (1972).

182. Restructuring Proceedings, *supra* note 1, at 121.

183. Ex Parte No. MC-342, Procedures Governing the Processing, Investigation and Disposition of Overcharge, Duplicate Payment, or Overcollection Claims, 358 I.C.C. 114 (1978). This action has been concluded by the Commission, and new regulations have been promulgated.

184. Restructuring Proceedings, *supra* note 1, at 172.

185. *Id.* at 68.

186. *Id.* at 6. The action of the United States Court of Appeals for the District of Columbia Circuit may have the same practical effect, however. See note 85 and accompanying text. Bu-

Even though present cost analysis can be improved, it is not so invalid as to justify a moratorium on rate restructuring.<sup>187</sup> Yet the Commission recognized the need for more precise costing and, accordingly, required the one-time submission of cost-revenue information from MC-82 Bureaus and adopted the additional reporting requirements of Appendix E.<sup>188</sup> Also on the subject of costing, it was emphasized that costing was not the end-all of the rate-making process, and the parties were cautioned against any adherence to this view.<sup>189</sup>

The Commission faced once again the classification problem. It was pointed out that "[c]lassification, as it was originally conceived, has become somewhat distorted, resulting in the anomaly of having a multiplicity of classes for any one given commodity . . . . Further, innovations in pricing can be, and often are, inhibited by the present classification system."<sup>190</sup> The Commission noted that the Coordinated Classification System, however, as an alternative to the National Motor Freight Classification, had not resulted in an end to the small shipment problem in New England.<sup>191</sup> Further evidence was needed, the Commission concluded, before any ultimate determinations could be made concerning improvements in the present system. Accordingly, it instituted an investigation into the continued validity of the classification system.<sup>192</sup>

Discussing the inclusion in a small shipment tariff of a FAK rate, where rates would include the transportation of any commodity named in a freight classification system, whether in straight shipments of any one commodity or in mixed shipments, the Commission declined to support such a provision. It was stated that such FAK rates would ignore the classification and commodities principles.<sup>193</sup> Those who would be participants in the classification investigation were invited, however, to present proposals concerning the manner in which FAK rates could be utilized without discriminating against shippers of consistently low-rated commodities. The continued authorization of pickup and delivery allowances was supported by the Commission for situations wherein shippers arrange for the separate pickup and/or delivery of their freight. In the future, allowances for pickup and delivery must be increased whenever there is a rate increase, so that the shipper will continue to be compensated for assuming part of the transpor-

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reus using the platform study may have their filings rejected or set for further hearing, as in Rocky Mountain Tariff Bureau, I & S M-29941, December 1, 1978.

187. Restructuring Proceedings, *supra* note 1, at 6.

188. *Id.* at 11, 14-15.

189. *Id.* at 16-17.

190. *Id.* at 27.

191. *Id.* at 28.

192. *Id.* The investigation was docketed as Ex Parte No. MC-98 (Sub-No. 1).

193. *Id.* at 33.

tation service.<sup>194</sup> Again, the Commission noted that pickup and delivery allowances had been well-established under past Commission precedent.<sup>195</sup>

The Commission went beyond the mere reiteration of its support for pickup and delivery allowances, however. If the carrier elected not to file pickup and delivery allowances, then the carriers would be required to have small shipment tariffs that set forth two sets of rates. The first set of rates would be for pickup and the second for line-haul and delivery of the shipment. Pickup would be performed at the option of the shipper only. The Commission refused to require the publication of separate delivery allowances; it felt that such a provision might overtax the terminal facilities of carriers, which were not designed for warehousing.<sup>196</sup>

The Commission believed that its action with regard to pickups and deliveries was significant, since these two elements of a carrier's costs comprised a substantial portion of the total expense of handling small shipments.<sup>197</sup> Because of the importance of pickup costs, the Commission also indicated its support for aggregate tender provisions. As stated by the Commission, "[i]t is only logical that if a carrier can pickup two or more small shipments at one time rather than making a trip for each, its expenses will be reduced."<sup>198</sup> The Commission approved of the publication of such aggregate tender rates, which provide an incentive to shippers tendering several shipments to the carrier at one time. The pickup charges published by the carriers should be the same regardless of the amount of shipments tendered at one time.<sup>199</sup> This is to be the method whereby shippers receive incentive for tendering multiple shipments, as opposed to any allowance system. Again, the Commission noted that it had found in the past that reduced rates based on the ability of the shipper to tender large or aggregate shipments did not discriminate between shippers.<sup>200</sup>

The Commission also discussed the issue of the propriety of discounts on prepaid shipments. It had, only recently, instructed carriers that no restrictions on C.O.D., freight-collect, and order-notify shipments could be imposed.<sup>201</sup> However, the Commission clarified that ruling, with regard to the specific issue of prepaid discounts, by stating:

We no longer view such discounts as 'undue' discrimination. There will always be a measure of unfairness or discrimination in the business world, due to

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194. *Id.* at 38.

195. Pickup and Delivery Allowance at St. Louis and Kansas City, 64 M.C.C. 163, 165 (1955).

196. Restructuring Proceedings, *supra* note 1, at 39.

197. *Id.* at 45.

198. *Id.*

199. *Id.* at 46.

200. Aggregate Class Rates Between Points in the South, Midwest and East, 332 I.C.C. 524 (1968).

201. C.O.D. and Freight Collect Shipments, 356 I.C.C. 37 (1978).

many factors, economies of scale being only one. It is not the Commission's duty to prevent all discrimination, but only that which is 'unjust' and that prejudice and preference which is 'undue'.<sup>202</sup>

Carriers were cautioned to relate discounts to costs and to provide a significant enough incentive for prepaid or prepayment shipments.

Another important area addressed by the Commission centered on the permissibility of released rates provisions as applied to all small shipments.<sup>203</sup> The Commission felt that, by authorizing released rates, it could make the service of regular route general commodities common carriers more attractive, since lower rates could be offered if carrier liability were limited. The fundamental consideration of the Commission, in determining whether to grant released rates, is "the surrounding transportation circumstances and conditions."<sup>204</sup> The Commission had recognized over 50 years ago that small shipments have traditionally moved in express service on a released-rates basis.<sup>205</sup> Despite the Commission's interest in the utilization of released rates as a device to attract more small shipment traffic to general freight carriers, it did not believe that there was sufficient data, based on the record in *Ex Parte No. MC-98*, to authorize their institution. Accordingly, it announced that a survey of shippers was to be taken and that a second rulemaking proceeding would be instituted on the subject of released rates for shipments weighing 500 pounds or less in conjunction with a small-shipments tariff.<sup>206</sup>

The Commission also encouraged the publication of other kinds of discounts. For example, if a shipper would allow a carrier to pick up its small shipments at any time, or at an odd time, such as at night, the carrier could offer such shippers a discount based on its reduced costs. Similarly, if a shipper required that its small shipments be picked up at a set time, the carrier could impose extra charges based on its increased costs.<sup>207</sup>

One other reporting requirement was also imposed in an amendment to 49 C.F.R. §1104.10. Carriers, in rate proceedings, would be required to provide summaries of what steps had been taken to reduce costs on small shipments within the year prior to the time of filing of the revenue proceeding. Subjects to be included were rate innovations, terminal changes, technology developments, and any other operational improve-

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202. Restructuring Proceedings, *supra* note 1, at 65.

203. See note 158, *supra*, and accompanying text.

204. Restructuring Proceedings, *supra* note 1, at 55. See also, General Commodities-American Delivery Systems, Inc., 351 I.C.C. 760, 766 (1976).

205. In the Matter of Express Rates, Practices, Accounts and Revenues, 43 I.C.C. 510 (1917).

206. Restructuring Proceedings, *supra* note 1, at 55. This rulemaking proceeding was docketed as *Ex Parte No. MC-98* (Sub-No. 2). It, like *Ex Parte No. MC-98* (Sub-No. 1), is pending at this time before the Commission.

207. *Id.* at 68.

ments affecting small shipment costs.<sup>208</sup>

Finally, the Commission commended the MC-82 Bureaus and Georgia Highway Express for their tariff submissions. Tariff 499 revisions with regard to FAK rates, as well as released rates, were not approved, pending the Commission's investigation on both of these issues.<sup>209</sup> The Georgia Highway Express tariff proposal was not adopted because its transaction charge did not provide for optional pickup and delivery. However, the Commission believed that its separate pickup charges accomplished an end similar to that of the transaction charge recommended by Georgia Highway Express but was more effective.<sup>210</sup> The Commission also stated generally that both tariff proposals, which provided for allowances, should include alternative charges instead.<sup>211</sup> Yet, "[b]oth of these tariffs proposed by the carriers have merit."<sup>212</sup>

#### V. EFFECTIVENESS OF *EX PARTE* NO. MC-98

The title of *Ex Parte No. MC-98, New Procedures in Motor Carrier Restructuring Proceedings*, is a misnomer, because it refers only to motor carrier restructuring proceedings. In fact, this rulemaking proceeding represents one of the most comprehensive efforts to date by the Commission to solve the small shipment problem from the dual aspect of service and rates. It is significant that the title of the proceeding did not dissuade the participants from providing the Commission with evidentiary input, allowing a complete survey of the field. Although generally partisan in tone, the representations of the parties, taken collectively, provided a forward-thinking and creative dialectic aimed at the betterment of the small shipment problem.

This is not to say that *Ex Parte No. MC-98* is a radical departure from the history which preceded it, as this examination has shown. For example, in the area of service deficiencies, the Commission in the instant proceeding announced that it would encourage the specialization of carriers in the small shipment field, either through carriers which devote their attention exclusively to the transportation of small shipments or through the establishment by general freight carriers of separate divisions handling small shipments. The Commission's statement on these topics were strong in tone. They approached, but did not quite reach, the level of a general find-

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208. *Id.* at 79.

209. *Id.* at 28, 39, 127. Participant Jones Transfer Co. had called the Commission's attention, with regard to FAK rates, to a series of flat charges in effect on Michigan interstate shipments, of course. See note 153, *supra*, and accompanying text.

210. Restructuring Proceedings, *supra* note 1, at 128.

211. *Id.*

212. *Id.*

ing of need for new carriers in the small shipment field.<sup>213</sup> Yet, as the historical study herein showed, the Commission had, for over twenty years, encouraged the specialization of carriers in the small shipment area. Not only had UPS received a series of grants of authority over the vehement protests of numerous parties, but other small shipment specialists had been successful in obtaining authority to serve the shipping public in this area. Indeed, the Commission had been a sympathetic audience for shippers who wished to support new entrants in the small shipment area.

Thus, the mere support for small shipment specialists is not to be equated with the commencement of a new trend. However, the Commission's encouragement of specialization can be very significant if the words are followed by action on the part of the Commission. For example, the Commission expressed support for the concept that there was not only the need for specialization in the small shipment area, but the small shipment area itself could be subdivided into four further specialties. If the Commission, in applications for operating authority, recognizes the small shipment specialty and subspecialties, and adds or detracts from the protests of existing carriers, including general freight carriers, based on that recognition, then new entrants may actually be tempted to enter this field. As the Commission pointed out, it is not inherently unprofitable if it is treated as a specialty. Yet, it is submitted that when they were faced with the opposition of general freight carriers, potential entrants in the past may have been deterred from even attempting to enter the small shipment field. This stalwart opposition was by the same general freight carriers that stated that this traffic was unprofitable to them. At the same time, the Commission has encouraged the general freight carriers to set up separate divisions to handle small shipment traffic. Presumably, in this manner, the general freight carriers could establish the same specialized systems that have made the transportation of small shipments profitable for other concerns.

If new entrants are attracted into the field and general freight carriers are persuaded to establish separate divisions for the handling of small shipments, innovations with regard to operations in this field would necessarily follow, improving service and reducing prices. The test of the policy statement will come, however, when the Commission is faced with operating rights applications in the small shipment field. The policy statement must be translated into a working rule of application in operating rights proceedings.

The Commission addressed other service innovations, including such suggestions as pooling, transportation facilitation centers, and the permissi-

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213. In Ex Parte No. MC-120, Petition to Relax Entry on the Transportation of Small Shipments Weighing 500 Pounds or Less, the Commission has before it a proposal submitted by a passenger carrier, Trailways, Inc., to make a general finding of public convenience and necessity in the small shipment area. This is now pending before the Commission. 43 Fed. Reg. 37329 (1978).

bility of various levels of service. The Commission indicated that it was receptive to virtually any new ideas to improve service in this area. Legislation was suggested in the area of loss and damage claims, uniform size and weight restrictions on the highways, and pooling, in order to facilitate the remedies in these areas. In the entire service area, however, the most important of all developments is the authorization of new service and the encouragement of general freight carriers to establish separate divisions for the handling of small shipments. The operating efficiencies referred to by the Commission will only be utilized effectively to the extent that carriers do in fact specialize in small shipments—then, the various innovative devices cited by the parties will become meaningful and cost-saving to the motor carrier industry. Similarly, new technological developments for material handling in the transportation of small shipments can be expected to accompany the specialization.

In the rate area, the Commission warned initially, as it had in the past, that it was the duty of carriers to present rate proposals to the Commission. Yet, after making this general statement, the Commission proceeded to discuss specifically the proposals submitted by both carriers and shippers in the rate area, indicating specifically which areas were acceptable to it. This was exactly the leadership which had been requested by the MC-82 Bureaus, and it represents an important step in any solution of the pricing problems that have traditionally confronted small shipments. This lack of leadership, in the past, has slowed a solution to the small shipment problem substantially. The ICC's reluctance to establish any guidelines or guiding principles is perhaps understandable, it should be noted, in light of recent court actions which have specifically nullified attempts by the ICC to be aggressive in this area. Indeed, the courts have seemed only too ready to examine in meticulous detail, not matters of general policy, but minute and detailed economic procedures and judgments made by the Commission.

At the same time, the Commission, in matters such as its controversial platform study, delayed too long in commencing its search for a replacement after it became apparent that the initial platform study was inadequate in several respects. Although costing may not yet be a science, it is impermissible to shrug away costing deficiencies for art's sake.

The Commission, in *Ex Parte No. MC-98*, did provide some specific guidelines for the motor carrier industry in the area of small shipment tariffs. Specifically, it prescribed the publication of separate pickup rates apart from line-haul and delivery rates. It also supported aggregate tender rates. Moreover, it stated that it would not consider prepaid discounts to be discriminatory, if in fact they are based upon carrier cost savings. These developments, led by the publication of separate pickup charges and line-haul and delivery charges, should have an effect in reducing shippers' cost in

the transportation of small shipments as well as in encouraging carriers to transport their small shipments in a more efficient manner.

As the Commission, in the service area, supported certain legislation, the Commission, in the rates area, instituted two new rulemaking proceedings. The released rates proceeding, specifically related to the issue of released rates in small shipment tariffs, has the promise of allowing service to be provided at still lower cost while providing the shipping public with the alternative of moving their small shipments at full value.<sup>214</sup> The other investigation, that relating to the classification system, goes to the very core of the construct of a small shipment tariff. The Commission, in denying the FAK rate approach of Tariff 499, indicated its adherence to the National Motor Freight Classification once again. The Commission, it is submitted, did not give due weight to the systems of flat charges that are already in effect today, such as those cited by Jones Transfer. At the same time, the general investigation into the classification system, and the relative merits of the National Motor Freight Classification (as opposed to the Coordinated Freight Classification in use in New England) will provide needed hard data in this area. Also, an opportunity will be presented for parties to present ways in which the use of FAK rates would not discriminate against consistent shippers of lower-rated commodities. Moreover, the Commission's reluctance to eschew the National Motor Freight Classification on all small shipments is understandable in light of the court decision in *National Small Shipments Traffic Conference, Inc. v. United States*,<sup>215</sup> in which Judge Friendly redressed the Commission for ignoring, contrary to the dictates of the Act, classification principles.

## VI. CONCLUSION

*Ex Parte No. MC-98* is by no means a final solution to the small shipment problem.<sup>216</sup> It does seem, however, to be the most positive step to date in the struggle with this vexing, amorphous problem. It certainly represents, furthermore, a retreat from the narrow, reflexive reaction exhibited by both shippers and carriers in earlier proceedings.<sup>217</sup> The recommenda-

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214. The Commission contemplates, in the rate-making proceeding, the establishment of a two-tiered rate structure for small shipment tariffs, with the shipper having freedom to choose lower rates on goods moving at less than full value or higher rates on shipments transported at actual value.

215. 321 F.Supp. 500 (1970).

216. *Ex Parte No. MC-98* is not administratively final. Petitions for administrative review were filed by RCCC, ECMTA, Middle Atlantic Conference, The New England Motor Rate Bureau, and the Rocky Mountain Motor Tariff Bureau, Inc., all five of which are carrier groups.

217. This reflexive reaction against change was decried by Commissioner Arpaia (dissenting) when he stated that

[1]here is nothing in the act which permits us to condemn a rate merely because it departs from a tradition. Indeed, we should not be governed by the dead hand of the past, but

tions reached by the Commission in this proceeding are, to a very great degree, the result of the thought-provoking input of the various shipper, carrier, and governmental participants. If these recommendations are in fact utilized by the Commission in its day-to-day decision making, both rate and service problems (from the standpoint of shippers and carriers) should be decreased dramatically. This, perhaps, is the most important qualification of all, for much of what was said in *Ex Parte No. MC-98* with regard to both service and rates was merely a reiteration, for both the Commission's benefit and the benefit of the parties which appeared before it, of past principles, enunciated in a more positive and meaningful way.

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should permit the carriers subject to our regulation to initiate departures from the conventional to attain lawful ends. As a matter of fact, if it were otherwise, we would be in the position of the author of the rhyme:

"I do not like thee, Doctor Fell;  
The reason why, I cannot tell;  
But this I know, and know full well,  
I do not like thee, Doctor Fell."

Surcharge on Small Shipments Within Central States, 63 M.C.C. 157, 205 (1954). For many years, it is submitted, shippers and carriers alike were in the position of the author of the poem. The resulting frustration was best expressed in *Ex Parte No. MC-98* by Arthur W. Todd:

Once upon a time, when we were very little, there was a small boy (not this respondent) whose manners were impeccable and whose emotions were human who, when he was very angry, could think of no better expletive than "streetcar." Today, perhaps "streetcar" is the only expletive that has not been used by one party or another, with respect to "the small shipment problem."

Initial Statement of Arthur W. Todd, individual, at 1, *submitted in Restructuring Proceedings*, *supra* note 1.