SIZE AND WEIGHT COMMODITIES—JANUARY 1971

By Thomas E. James

With the exception of applications for new operating authority and rate proceedings, one of the principal areas of controversy which has repeatedly been before the Interstate Commerce Commission and the courts in recent years has been the question of what services may be provided and what products may be transported by a so-called "heavy hauler" or "size-and-weight" commodity carrier. What traffic may or may not be transported by heave haulers and the facts and circumstances which must exist in order for such carriers properly to transport any given item are far from resolved. The purpose of this presentation is to explore the background surrounding heavy hauling authorities and to examine the constructions which have heretofore been made.

With the advent of regulation, the Commission was authorized under Section 204(c) of Part II of the Interstate Commerce Act to establish just and reasonable classifications of motor carriers as the special nature of the services performed by such carriers required. In Ex Parte No. MC-10,[1] the Commission defined carriers of heavy machinery to include both common and contract carrier motor carriers engaged in the hauling of heavy machinery and equipment, including road machinery, structural steel, oil field rigs and oil field equipment and noted that these commodities were grouped together because of the equipment required and the nature of the services performed. The Commission observed that certain auxiliary or accessorial services were performed in the transportation of the involved commodities and that shipments of heavy machinery and similar equipment moved to, from and between unlimited origins and destinations within the territory served by such carriers, over irregular routes, in either direction, outbound or inbound, or in cross-haul movements. Various phraseology has been used in the issuance of heavy hauler operating rights. In recognition of the inconsistencies in the wording of its prior grants of heavy hauling authority, the Commission, in Ex Parte MC-45, again considered the services provided by heavy haulers and its recent decisions relative to the wording of grants of authority designed to authorize the performance of a complete heavy hauling and rigging service and found that the commodity description,

> "Commodities, the transportation of which because of size or weight requires the use of special equipment, and of related

1. Ex Parte No. MC-10, *Classification of Motor Carriers of Property*, 2 M.C.C. 703 (1937).

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> machinery parts and related contractor's materials and supplies when their transportation is incidental to the transportation . . . of commodities which by reason of size or weight require special equipment",

would, for the future, be a just and reasonable classification of the commodities which fall within the scope of service of the heavy haulers.[2] A review of the wording of heavy hauling authorities as to the services authorized thereunder will indicate that there are four critical words in the size and weight authorization. These are "commodities", "transportation", "requires", and "special equipment". Where appropriate, each of these will be mentioned hereinafter.

I. Interpretations Prior To The Moss Decision[3]

A. "Transportation" and the Twilight Zone

Consideration of heavy hauling authority also necessitates consideration of the operating authority of general commodity carriers. Generally, the operating authority of general commodity carriers authorizes the transportation of general commodities, except those requiring the use of special equipment. In 1948 in the *Gallagher* case,[4] the Commission pointed out the difficulty in wording a commodity description sufficient to confine the operations involved to those norrmally conducted by heavy haulers and riggers as distinguished from those conducted by common carriers of general commodities. *Gallagher* held that the term "transportation" as used in a certificate authorizing the transportation of "commodities the transportation of which, because of size or weight, requires the use of special equipment . . ." included the services of loading and unloading and that a carrier holding size and weight authority could transport a shipment which required special equipment for loading or unloading even though the shipment was transported on a flatbed trailer. Subsequently, in *Berk Contract Carrier Application*,[5] decided in 1949, it was held that a heavy hauler could transport a shipment which was transported on an ordinary flatbed trailer, if it was loaded or unloaded with special equipment, even though such loading and unloading was performed either by the consignee or

2. Ex Parte No. MC-45, *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209, 248-251 (1952).

3. *Moss Trucking Company, Inc., Investigation of Operations*, 103 M.C.C. 91 (1966).

4. *Gallagher Common Carrier Application*, 48 M.C.C. 413, 414-415 (1948).

5. *Berk Contract Carrier Application*, 62 M.C.C. 571 (1949).

consignor. Prior to the *Gallagher* case, the general commodity carriers had considered that the restrictions in their certificates against the use of special equipment ran solely to over-the-road equipment and not to the methods of loading and unloading of freight. The propriety of general commodity carriers transporting shipments which require special equipment for their loading and unloading was drawn in issue in 1951 in the *St. Johnsbury Trucking Co.* case[6] which recognized that there was an overlap or "twilight zone" which existed between the authorities of heavy haulers and general commodity carriers whose certificates contained the usual restrictions against the use of special equipment. In the *St. Johnsbury* case the Commission held that it did not intend to preclude the use of modern devices for the economical and expedient loading, unloading and handling of freight. The wording of the respective authorities of the general commodity carriers and heavy haulers was there explained as being intended to restrict each class of carrier from invading the field of service of the other, but not being intended to preclude either type of carrier from the transportation of specific commodities which might rightfully fit either type of service. In that respect, the *St. Johnsbury* case recognized that there is an overlap of commodities which may move either in heavy hauler service or general commodity service. In *National Automobile Transporters Assn. v. Rowe Transfer,*[7] decided in 1955, the Commission clarified the so-called "twilight zone" by holding that:

> "Where the commodity in question 'requires' special equipment or special services for loading or unloading, or both, and *only* ordinary vehicular equipment for the over-the-road portion of the transportation, such commodity (1) is within the authority of a heavy hauler irrespective of whether or not the heavy hauler is required to provide such loading and unloading equipment or service, and (2) is within the authority of a general-commodity carrier whose authority excepts 'commodities requiring special equipment' provided the loading or unloading or both which necessitates the special equipment is performed by the consignor or consignee, or both."

Subsequently, the question arose as to whether the "twilight zone" theory that applies between heavy hauler certificates, on the one hand, and, on the other, general commodity carrier certificates which are

6. *St. Johnsbury Trucking Co., Inc., Extension—Heavy Hauling,* 53 M.C.C. 277 (1951).
7. *National Automobile Transporters Assn. v. Rowe Transfer,* 64 M.C.C. 229, 240 (1955).

restricted against the handling of commodities which require special equipment, also applies between heavy hauler certificates, on the one hand, and, on the other, certificates which authorize the transportation of specific commodities and which contain a restriction against the handling of size and weight commodities. For example, carriers holding specific authority to transport commodities such as agricultural machinery with a restriction against the transportation of commodities requiring special equipment have asserted that under the "twilight zone" theory they may transport such agricultural machinery which can be transported by ordinary vehicular equipment but which requires special equipment to load or unload, or both, if such loading or unloading services, or both, as the case may be, are provided by the shipper or consignee. In *Daily Express, Inc., Extension—Concrete Forms and Rings from Boston, Mass.*,[8] Operating Rights Review Board No. 1 refused to extend the "twilight zone" concept to include specific commodity carrier certificates which are restricted against the transportation of commodities requiring special equipment. The basis of such holding was that heavy hauling restrictions in general commodity certificates relate to the equipment that the carrier may use because no one particular class of commodities is specified in such authorities to which the limiting "special equipment" phrase can be related, but that in the case of a carrier holding specific commodity authority there is a particular class of commodities to which the limiting "special equipment" phrase can be related. Operating Rights Review Board No. 1 then held that the effect of a restriction against the transportation of commodities requiring special equipment in a grant of operating authority served to preclude the holder thereof from handling any article which because of its size or weight requires the use of special equipment, regardless of whether the special equipment was provided by the carrier or by someone else. Subsequent to the *Daily Express* case, Review Board No. 2, in *Jenkins Truck Line, Inc., Extension — Monmouth, Illinois*,[9] disapproved the holding in the *Daily Express* case as it related to extending the "twilight zone" concept to apply in connection with specific commodity authorities which are restricted against the handling of special commodities and held that the rationale of *National Automobile Transporters Assn. v. Rowe Transfer, supra*, applied equally to the division of authority between haulers of specified commodities and

8. *Daily Express, Inc., Extension—Concrete Forms and Rings from Boston, Mass.*, MC-117574 (Sub 143) (Not printed) (Operating Rights Review Board No. 1, served April 27, 1967).

9. *Jenkins Truck Line, Inc., Extension—Monmouth, Illinois*, MC-61592 (Sub 70) (Not printed) (Operating Rights Review Board No. 2, served August 16, 1967).

heavy haulers. Petitions for leave to intervene and petitions for reconsideration were filed in the *Jenkins* case, *supra*, on behalf of numerous heavy haulers who asserted that the position of the *Daily Express* case relative to the extension of the "twilight zone" concept should be preserved, and the *Jenkins* case was then consolidated with the proceeding in *Herr's Motor Express, Inc., Extension—Wheeling Steel,*[10] for disposition by Division 1, which held in its decision that a "twilight zone" does exist between heavy hauler certificates and specific commodity certificates which are restricted against the transportation of commodities requiring special equipment. Petitions for a declaration of general transportation importance in the *Herr's Motor Express* case were denied. The effect of the decision in the *Jenkins* case is that a carrier which holds authority to transport specific commodities subject to a restriction against the transportation of size and weight commodities may transport an article requiring special equipment that falls within its specific commodity authority so long as the carrier involved is not required to supply special equipment to load or unload the shipment and does not use special equipment for its transportation.

B. Special Equipment

St. Johnsbury Trucking Co., Inc., Extension—Heavy Hauling, supra, summarizes prior decisions as to what constitutes "special equipment" as follows:

> "We come now to the term 'special equipment.' At the outset, let us say that there can be no question about the meaning of these words as used in the *Gallagher* case. There they mean special equipment necessary for the loading and unloading of the vehicle of the heavy hauler and are used as a means of *identifying the commodities which the heavy hauler may transport.* . . .
>
> "The term, 'special equipment,' has been interpreted to be 'vehicles designed to transport articles which, because of their unusual weight, size or bulk, were not susceptible to loading or unloading in ordinary van-type vehicles' but 'not of a particularly unusual design . . . provided with winches to assist in the loading and unloading operations or assembly,' and with 'sides for the accommodation of articles of extraordinary dimensions, such equipment . . . not ordinarily provided on the commonly known van-type unit,' *Davidson Transfer & Storage Co. Com. Car. Application,* 32

10. *Herr's Motor Express, Inc., Extension—Wheeling Steel,* 108 M.C.C. 626.

M.C.C. 777; 'vehicles . . . equipped with various types of loading devices for use in the handling of unusual articles,' *Belyea Extension of Operations—Heavy Machinery*, 24 M.C.C. 745; and in *Gallagher Common Carrier Application*, 48 M.C.C. 413, ordinary flat-bed vehicles were held to be not special equipment. In *Petroleum Carrier Corp. v. Black*, 51 M.C.C. 717, the term 'special equipment' was said to be 'unequivocal,' and in that case stress was placed upon 'type of service'—an important if not the principal determining factor in establishing the commodity scope of the operating authority . . . .

"In *Gallagher Common Carrier Application, supra*, hereinafter called the *Gallagher* case, what appears to be a fourth element or factor was discussed, and that is the requirement of special equipment for loading and unloading . . . .

". . . .

". . . At any event, the use of equipment such as winches and cranes for loading and unloading is unquestionably one of the services which comprise the complete holding out of the so-called 'heavy hauler' carrier. However, in the prior report in the instant proceeding we carried this element or factor one step further and, as heretofore noted, concluded that the special equipment exception prohibits the transportation of commodities which, by reason of size or weight, requires the use of cranes or other mechanical devices for loading or unloading. The effect of this conclusion was to make cranes or other loading devices 'special equipment' and it brings into issue the question of whether the use of such devices is a function exclusive to the 'heavy hauler' and not a part of any other type of service.

"It was not, however, until our determination of *Steel Transp. Co., Inc., Extension—Wisconsin*, 44 M.C.C. 835, decided February 3, 1945, that there was any intimation that the use of cranes, derricks, or other hoisting machinery for loading, unloading, or both, might constitute the use of *special equipment*. In appendix A to that report there is contained a list of iron and steel articles which generally require specialized handling . . . and in that report we pointed out that we had not previously defined the term 'special equipment,' insofar as the transportation of iron and steel is concerned, but that it comprises such equipment not generally used by general commodity carriers which 'do not utilize as ordinary equipment such devices as pole-trailers, special bulkheads, racks, dollies,

cradles, and other devices designed to enable long, rigid or semi-rigid articles to be transported around curves.' . . .

". . . Special equipment as it relates to vehicles includes winch-trucks and trailers, low-bed carry-alls, crane trucks and trailers, and any other vehicle including flat-bed vehicles, especially designed for the transportation of articles of exceptional size, shape, or weight, or which have attached as a part of the vehicle any type of mechanical loading device except the ordinary tai-gate lift, and the restriction in the authorities of general-commodity carriers against the use of special equipment relates to and includes such vehicles . . . ."

In its decision in Ex Parte MC-45, *Descriptions in Motor Carrier Certificates, supra*, the Commission considered the term "special equipment" and generally approved the holdings and discussions relative thereto in the *St. Johnsbury Trucking Co.* case, *supra*. In addition to its holding in the *Gallagher* case, *supra*, the Commission also held that flatbed trailers were not special equipment in *Dallas & Mavis Forwarding Co., Extension—Galion, Ohio.*[11] Neither permanent nor portable loading ramps are special equipment.[12] The observations of the Court in *Moss Trucking Company v. United States,*[13] illustrate some of the uncertainty concerning special equipment. In that proceeding the Court stated that the term " 'special equipment' is apparently an elastic phrase which changes solely with the progress made in the transportation industry." The Court further stated that it was "unable to determine with any degree of certainty whether forklift trucks are 'special equipment' " and observed that "perhaps size and capacity control the characterization . . . ."[14] The Commission has made clear its intention not to deny the use of modern devices for the economical and expedient loading, unloading and handling of freight to any class of carrier.[15] In its decision in the *Ace Doran* case[16] the Commission observed that in contrast to the limited interpretation

11. *Dallas & Mavis Forwarding Co., Ext.—Galion, Ohio*, 79 M.C.C. 285 (1959).

12. *United Transports, Inc. v. Gulf Southwestern Transp. Co.*, 81 M.C.C. 1, 7 (1959); Modified on other grounds, *United Transport v. Gulf Southwestern Transp. Co.*, 95 M.C.C. 443 (1964).

13. *Moss Trucking Company, Inc. v. United States*, ____ F. Supp. ____ (W.D. N.C., 1965).

14. *Moss Trucking Company, Inc. v. United States*, ____ F. Supp. ____ (W.D. N.C. 1965).

15. *St. Johnsbury Trucking Co., Inc., Extension—Heavy Hauling*, 53 M.C.C. 277, 298 (1951).

16. *Ace Doran Hauling & Rigging Co., Investigation of Operations*, 108 M.C.C. 717 (1969).

placed upon "special equipment" as it relates to over-the-road equipment, the term "special equipment" had been found to cover virtually every mechanized device employed in the loading and unloading process. This expression of the Court in the *Moss* case illustrates one of the problems inherent in the size and weight commodity description and that is that as technology changes and improves transportation equipment, the commonly understood meaning of special equipment tends to change with the availability and usage of new or more efficient freight handling or hauling equipment. The Commission, in deciding *Moss*[17] on rehearing, acknowledges that:

> "The obvious difficulty in this area of our regulation is how to provide for equipment which may have been considered 'special' at some point in the past, but is not generally considered so today, and similarly, how to regulate impartially the movement of commodities which formerly were thought to 'require' special equipment for their handling but today may be handled in ordinary common carrier service."

This facet of heavy hauling commodity authority has not worked to the advantage of the size and weight commodity carrier.

C. "Commodity" and "Required"

The terms "commodity" and "required", as used in heavy hauler certificates, are so closely related that they will be considered together. Initially, it must be said that special equipment must be required to transport a shipment before such shipment can be construed to be included in the operating authority of a heavy hauler. The Commission has held that the individual components of a shipment rather than the shipment as a whole must be considered in determining whether the commodity involved requires special equipment; that a carrier authorized to transport commodities requiring special equipment may not bring a load of non-size and weight commodities within its scope of operations by loading such commodities on a unit of special equipment; and that, insofar as size and weight authority is concerned, the term "required" cannot be ignored. *Jones Trucking Co., Extension—The Dakotas.*[18] "The fact that mechanical hoisting devices are convenient in putting the individual units high enough to obtain a maximum load is immaterial", since the Commission is "concerned only with the individual units in

17. *Moss Trucking Co., Inc., Investigation of Operations*, 103 M.C.C. 91, 105.
18. *Jones Trucking Co., Extension—The Dakotas*, 62 M.C.C. 539 (1954).

making a determination as to whether special equipment is required." *Hove Truck Line v. Eldon Miller.*[19] In its 1959 decision in *Dallas & Mavis Forwarding Co., Extension—Galion, Ohio, supra,* the Commission enunciated the proposition that a "last resort test" rule should be established whereby single-unit items weighing 15,000 pounds or more would be considered to be within the authority of heavy haulers regardless of whether such units or items could be loaded or unloaded under their own power and regardless of the type of vehicle used for the transportation service in those instances in which after applying all the usual tests, the authority of a heavy hauler to transport such a single-unit item remained in doubt. This so-called "last resort test" was thereafter affirmed by the Commission in *Dillner Transfer Co.—Investigation of Operations*[20] and similarly was affirmed by the Courts.[21] Thereafter, the Commission held, in *United Transports v. Gulf Southwestern Transp. Co.,*[22] that any item weighing over 15,000 pounds was presumed *prima facie,* not as a last resort, to be within the operating authority of a heavy hauler. In reversing the Commission's decision in the *United Transports v. Gulf Southwestern Transp. Co.* case, *supra,* the Court held that the test adopted by the Commission established a different test from that formerly applied by the Commission and resulted in an enlargement of the Gulf Southwestern authority in a manner not prescribed by law. The Court further stated that "if the words 'special equipment' as used in the certificate in question mean anything, and it observed that obviously they do, it is that Gulf Southwestern as a so-called heavy hauler is only authorized to transport commodities which *require* the use of special equipment . . . ."[23] (Emphasis added.) In light of the holding in *United Transports v. Gulf Southwestern,* the Commission abandoned the 15,000-pound test,[24] and the majority of heavy haulers applied for and received authority to transport self-propelled articles weighing 15,000 pounds or more when transported on trailers.[25]

Insofar as the "commodity" to which reference must be made to determine whether the transportation service is within the scope of a heavy hauler is concerned, Division 5 stated, in its decision in *Johnson Common*

19. *Hove Truck Line v. Eldon Miller, Inc.*, 63 M.C.C. 753 (1955).
20. *Dillner Transfer Co.—Investigation of Operations*, 79 M.C.C. 335 (1959).
21. *W. J. Dillner Transfer Co. v. I.C.C.*, 193 F. Supp. 823 (W.D. Pa., 1961); aff'd per curiam, 368 U.S. 6 (1961).
22. *United Transports v. Gulf Southwestern Transp. Co.*, 84 M.C.C. 565 (1961).
23. *United Transports v. United States*, 214 F.Supp. 34 (W.D. Okla., 1962).
24. *United Transports, Inc. v. Gulf Southwestern Transp. Co.*, 95 M.C.C. 443 (1964).
25. *Ashworth Transfer, Inc., Ext.—15,000-Pound Articles*, 103 M.C.C. 404 (1966).

Carrier Application,[26] that the test is "whether the commodity or commodities severally are such as to require the use of special equipment for loading and unloading or over-the-road transportation, or both." The decision in *Johnson* further holds that the permits and certificates issued by the Commission grant authority to transport commodities as distinguished from shipments and concludes that the individual commodity or commodities to be transported, as contrasted to a shipment in the aggregate, must be within the scope of a heavy hauler. An exception to the rule in the *Johnson* case was established in the instance of bundles or aggregated products in *Black—Investigation of Operations*.[27] Among the commodities involved in the investigation of the respondent's operations in the *Black* case were shipments of 100 sheets of sheet steel weighing 3,000 pounds and aggregated on a skid or pallet, described as Shipment No. 47; a shipment consisting of ten pallets of tin plate having a total weight of 29,734 pounds, referred to as Shipment No. 48; a shipment consisting of one skid of galvanized flat sheets of steel weighing 1,936 pounds, described as Shipment No. 87; and a shipment consisting of four bundles of flat aluminum sheets weighing 16,367 pounds, described as Shipment No. 88. Shipment No. 47 was automatically stacked on the pallets, banded by hand, loaded and unloaded by crane or heavy duty forklift, and this was the shipper's customary manner of handling and selling its products. The Bureau of Law admitted that Shipments Nos. 48, 87 and 88 were within Black's heavy hauling authority and that there was insufficient evidence to establish that Shipment No. 47 differed materially from the three previously mentioned shipments. The basis of the Bureau of Law's admission is stated in its brief as follows:

> "Aggregating such shipments would seem to be necessary to enable them to be handled commercially, particularly to avoid their being dented, bent, and otherwise damaged. In the case of this particular type of commodity we think the aggregated package should be considered *'the commodity itself'* within the meaning of the *Johnson* case, and within the respondent's authority to transport 'articles requiring special equipment.' " (Emphasis added.)

The decision in the *Black* case established an exception to the rule announced in the *Johnson* case, *supra*, in connection with bundled or aggregated commodities, as follows:

> "With respect to the bundles of sheet metal here involved, we think

26. *Johnson Common Carrier Application*, 61 M.C.C. 783 (1953).
27. *R. Q. Black—Investigation of Operations*, 64 M.C.C. 443 (1955).

bundling was required by the inherent nature of the commodity. Single sheets are unstable, subject to bending or other damage, and, having in mind their size, awkward or impossible to handle without bundling. In the case of sheet tinplate, at least, bundling would also seem to be required as protection against damage to the coated surface of the sheets, and the same is true, to a lesser extent, with respect to the rather soft aluminum sheets. Examination of the facts concerning this method of handling convinces us that the bundling is done, not merely for economy and efficiency, but because it is required by the inherent nature of the commodity. When bundled, the commodities are too heavy to handle without the use of special equipment, and we therefore conclude that these four shipments were within respondent's authority to transport 'articles requiring special equipment.' . . ."

Thereafter, in 1959, in *W. J. Dillner Transfer Co.—Investigation of Operations*,[28] the Commission made clear its intention to construe the *Black* exception within its strictest limits, stating that "only under unusual circumstances may aggregation or bundling result in a situation where such commodities may thereby be recognized as requiring special equipment." In addition, insofar as it relates to palletized or bundled commodities, the Commission held the *Black* decision to be a special exception to the long recognized general rule which looks at the commodity itself, which is not applicable when bundling is done for economy and efficiency, and the mere act of the shipper in tendering a particular size bundle or pallet was held not to be controlling. Insofar as it relates to bundled or palletized commodities, the *Dillner* case holds:

"[1] In bundling, aggregating or palletizing, it should be the general rule of construction (1) that the individual 'commodity itself' is the controlling consideration as respects a carrier's authority; (2) that the limited exception which the *Black* case, 64 M.C.C. 443, represents, where commodities are bundled for protection or as otherwise required by their 'inherent nature,' must be maintained within its strictest limits; (3) that the minimum bundle which is required by the 'inherent nature' of the commodity is the size or type of bundle which must be considered in any determination whether necessity exists for the use of special equipment; and (4) that in order reasonably to maintain these limits it shall be presumed, in the absence of a sound basis for concluding to the contrary, that the

28. *W. J. Dillner Transfer Co.—Investigation of Operations*, 79 M.C.C. 355 (1959).

commodities tendered to carrier, in bundles or aggregations, are within the general rule and not within the limited exception thereto;

"[2] Heavy haulers, insofar as bundled or aggregated commodities are concerned, may transport only those which fall within the narrowly excepted group as described . . . next above;

"[3] The usual type general-commodity carrier may transport bundled commodities within the excepted group set forth . . . above *only* when loaded or unloaded by the consignor or consignee in accordance with the doctrine of the *Rowe* case, but the general-commodity carrier may transport other types of bundled or aggregated commodities so long as they are transported on ordinary equipment . . . ."

The Commission's holdings in the *Dillner* case were affirmed by the courts on appeal.[29]

II. The Moss Case

In 1963, three proceedings were begun which were to result in the *Moss* case[30] which is one of the recent landmark decisions involving heavy hauling.

The Aetna Freight Lines Investigation[31]

In February of 1963 an investigation was instituted by the Commission into the operations of Aetna Freight Lines, Inc., of Warren, Ohio, to determine whether Aetna had been transporting various commodities, including steel plates, steel sheets, steel coils, steel bars and steel beams, beyond the scope of its operating authority. Aetna held authority to transport heavy machinery, contractor's equipment and steel articles fabricated beyond the primary stage and requiring specialized handling or rigging because of size or weight. The investigation concerned fifty-six representative shipments of steel articles, many of which consisted of a number of individual pieces which had been aggregated and shipped in or on skids, packages, lifts and bundles. All of the shipments were transported on flatbed trailers and were loaded by the consignor and

29. *W. J. Dillner Transfer Co. v. I.C.C.*, 193 F.Supp. 823 (W.D. Pa., 1961); aff'd per curiam, 368 U.S. 6 (1961).

30. *Moss Trucking Co.—Investigation of Operations*, 103 M.C.C. 91 (1966).

31. *Aetna Freight Lines, Inc.—Investigation of Operations*, 100 M.C.C. 88 (1965).

unloaded by the consignee through the use of cranes, except in a few instances in which the shipments were loaded or unloaded by lift trucks which were owned and operated either by the shipper or receiver, whichever was involved. Some of the shipments consisted of individual commodities and some consisted of aggregated commodities. Insofar as individual commodities were concerned, the shipments consisted of six shipments of steel forgings and one shipment of steel mill rolls, each ranging in weight from 450 to 3,007 pounds; two shipments of steel pipe on which the individual pieces of pipe in the respective shipments weighed 355 and 656 pounds each; shipments of coils of tinplate weighing over 8,000 pounds each; shipments of steel coils which ranged in weight from 11,950 pounds to 39,700 pounds each; shipments of steel plate and rolled sheet steel which ranged in weight from 1,071 to 8,530 pounds each; shipments of structural steel on which each piece weighed over 15,000 pounds and was over eighty feet long; shipments of steel beams which measured over fifty feet long and which varied in weight from 2,208 pounds to 10,572 pounds each; and shipments of steel beams which ranged from 671 to 5,888 pounds each. The aggregated commodities consisted of shipments of tinplate which, as aggregated, weighed from 1,576 pounds to 3,109 pounds per package or skid; a shipment of packaged sheet steel weighing 5,636 pounds and on which the individual sheets weighed 120 pounds and measured 48 inches by 100 inches; a shipment of two bundles of sheet steel weighing 7,980 pounds each, with each sheet involved weighing 257 pounds and measuring 60 by 144 inches, and two bundles of steel bars which weighed 9,485 pounds per bundle with each bar in the bundle measuring sixteen feet in length and weighing 231 pounds; a shipment of six bundles of steel sheets weighing 8,814 pounds with each sheet weighing approximately 756 pounds; a shipment of steel sheets in lifts of 8,288 pounds with each sheet weighing 881 pounds and measuring 72 by 140 inches; and a shipment of forty flat long steel bars which were bundled into bundles of 5,824 pounds each. Fifty-five of the described shipments of individual commodities and aggregated commodities, which were found to have been aggregated because of their inherent nature, required special equipment for their loading and unloading and were held to be within the scope of Aetna's operating authority. Of the fifty-six shipments involved, only one shipment consisting of sixteen bundles of steel bars on which each bar measured two inches square, ranged from eight feet to eight feet, nine inches in length and weighed approximately 113 pounds but which weighed 2,516 pounds per bundle, was found to have been transported outside the scope of Aetna's operating authority. A petition for reconsideration of the Commission's decision in the *Aetna*

case was filed by one of the intervening carriers and, on February 8, 1966, the Commission reopened the proceeding to deal with "the related heavyhauler problems".

The Aero Trucking Case

On February 21, 1963, Aero Trucking, Inc., of Oakdale, Pennsylvania, filed an application with the Commission seeking either a declaration by the Commission that its size and weight authority authorized it to transport aluminum billets and ingots, including those weighing from six to fity pounds each, when wrapped in bundles on pallets which had an average weight of 2,000 pounds each, or that its operating authority be extended to permit it to transport such commodities within the territorial scope of its existing authority. The hearing examiner concluded, in his report and recommended order, that Aero's existing size and weight authority authorized it to transport the involved commodities. By its Report of October 29, 1964, Operating Rights Review Board No. 2 dismissed the application as to ingots or billets weighing 1,000 pounds or more because their transportation was authorized by Aero's existing size and weight authority. As to ingots and billets weighing from six to fifty pounds, Review Board No. 2 found such commodities not to be within Aero's size and weight commodity authority, concluding that there was nothing inherent in the nature of such commodities so as to require palletization, and further found that no need existed for an extension of Aero's authority. Aero's petition for reconsideration was denied, and on April 22, 1964, Aero sought review of the Commission's decision in an action filed in the United States District Court for the Western District of Pennsylvania. In its decision, the Court concluded that the Commission's determination that the ingots and billets weighing from six to fifty pounds were without Aero's authority was not supported by substantial evidence and ordered that the Commission's order be set aside.[32] The following holdings of the Court in the *Aero* case are particularly pertinent:

> "In the present case we fail to find the evidence upon which the Commission relied in refusing to apply the *Black* exception to the commodities in question here. The evidence to support the *Black* rule is substantial: the inherent nature of the commodities which required aggregation and palletization here were the varying chemical compositions and alloys of the aluminum ingots involved,

32. *Aero Trucking, Inc. v. United States of America,* ___ F. Supp. ___ (W.D. Pa., 1966) (1966 Fed.Car.Cases 81,794).

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which required separation; the soft, fragile and easily abraded quality of individual ingots which required palletizing; the wrapping of the palletized packages to protect them from the corrosive atmosphere in the neighborhood of the shipper's plant; the refusal of customers to accept aluminum ingots and billets loose; and the inconvenience and expense of crating or packaging each individual ingot and billet separately in a form not acceptable to the customer.

"In arriving at its determination the Commission relies upon the possibility that these small aluminum ingots could be loaded manually. But there is no evidence in this record that they were ever so handled. . . . Applying the rule of *Dillner* to the instant case would in effect destroy the exception of the *Black* case which the Commission expressly recognized. . . .

"We feel that in adopting a standard which uses the possibility that the ingots could be individually and manually loaded, the Commission has gone beyond the bounds of reasonable practicality. . . .

"As recently as December 16, 1965, the Commission in *Aetna Freight Lines, Inc.—Investigation of Operation* . . . , Docket No. MC-C-4050, reported in 100 M.C.C. 88, 96, recognized the necessity of reasonableness in the application of the *Black* rule: . . .

"If the bare physical possibility that a commodity could be individually and manually loaded were to be adopted as the standard for determining the 'inherent nature' we see no room for any further application of the *Black* rule. We can see few, if any commodities, which are customarily offered to carriers bundled or palletized which would not be susceptible of being loaded individually if we disregard the economy, efficiency and practical necessity of bundling or palletizing. We must ignore the necessities of the shipper and the requirements and demands of the customers to reach such a result. To adopt such a standard in face of all the evidence to the contrary and based solely upon a conclusion that it is physically possible to handle these items individually, seems to us as reliance solely on a presumption, in face of uncontradicted evidence showing a sound basis for concluding to the contrary."

The Moss Complaint

On November 23, 1963, the Commission instituted an investigation into the operations of Moss Trucking Company, Inc., of Charlotte, North

Carolina, to determine whether Moss had been transporting commodities in interstate commerce beyond the scope of its operating authority. In its decision of May 19, 1965, Division 1 of the Commission concluded that Moss had been transporting crated aluminum tanks, wire mesh, steel beams, farm tractors and military vehicles beyond the scope of its heavy hauling authority.[33] The farm tractors involved weighed 3,000 pounds and were received as import shipments at Charleston, South Carolina, from the Port Authority warehouses. Such tractors were without fuel or batteries and, when loaded on flatbed trailers, were loaded from truckbed level warehouse facilities by manually pushing such tractors onto the trailer by from three to four men or, on some occasions, such tractors were pushed onto the transporting vehicle by a small tractor operated by the warehouse from which such tractors were loaded. When Moss used double-deck trailers, cranes were necessary to load tractors on the top level. Division 1 concluded that the tractors could have been manually loaded and that the use of cranes for loading did not establish that they were required. The military cargo vehicles involved in *Moss* weighed from 10,000 to 13,000 pounds each, were slightly over eight feet wide and were from eleven to thirteen feet high. Some of such vehicles were operable and others had their battery cables disconnected and possibly were without gasoline. The width of such trucks was such that when loaded on a trailer the tires of such vehicles would either overhang or be extremely close to the edge of the trailer. Such vehicles were loaded through the use of overhead cranes and, because of the safety aspect, the shipping installation had never attempted to load such vehicles by driving them onto a carrier's equipment. Division 1 concluded that the Commission's decision in *United Transport v. Gulf Southwestern Transp. Co.*,[34] which held that heavy hauling authority did not include authority to transport self-loading vehicles transported on regular flatbed equipment, was controlling and held that Moss' transportation of military cargo vehicles was not authorized. The crated aluminum tanks in *Moss* individually weighed 273 pounds and measured 224 inches by 30 inches by 30 inches when uncrated and weighed 616 pounds and measured 232 inches by 42 inches by 45 inches when crated. Such tanks were loaded from ground level at origin by forklift or crane and unloaded at destination by crane. The rolls of wire mesh involved weighed 788 pounds each and were loaded and unloaded by crane. Division 1 concluded that the use of cranes was not required but that cranes were used only for the shipper's convenience. Later, when the

33. *Moss Trucking Company, Inc., Investigation of Operations*, 100 M.C.C. 63.
34. *United Transport v. Gulf Southwestern Transp. Co.*, 95 M.C.C. 63.

Commission's decision was appealed, the Court concluded that the Commission had found this transportation improper because of the implied premise that Moss had failed to establish this to be the minimum bundles required by the inherent nature of the commodity. The steel beams transported by Moss moved in connection with the rolls of wire mesh and were approximately 25 feet long, 18 inches wide and weighed less than 200 pounds. Other beams were 32 feet in length, 12 inches wide, and weighed 277 pounds. These beams were bundled and were loaded and unloaded by overhead crane. Manual loading of such items was against the shipper's regulations. Division 1 concluded that crane loading of these beams was only for convenience and that special equipment was not required for their loading. Moss' petition for reconsideration was denied and on September 24, 1965, Moss sought review of the Commission's decision in the United States District Court for the Western District of North Carolina, Charlotte Division. On December 27, 1965, the Court sustained the Commission's order.[35] Though the Court sustained the Commission's order, it observed:

> "Moss strongly urges that the word 'requiring' in its certificate ought to be given a common sense interpretation with reference to economy, efficiency, and safety . . . . It is persuasively argued that such loading problems are no longer solved with manual labor but with fork trucks or cranes, and that it is arbitrary and capricious to interpret such a certificate without regard to the facts of life in the industry.
>
> "Such an argument, however appealing, is fallacious. The Commission here is not concerned with economy, efficiency, or even safety; but, instead, is concerned with dividing up, consistent with the public interest, the various activities and classifications of service that go to make up the whole transportation industry. What is obviously absurd with respect to efficiency may be quite sensible with respect to drawing a line between 'heavy haulers' and general carriers. Such is the case here. We share Moss' wish, as stated by a member of the Commission in a dissenting opinion, that the Commission may be able to frame its interpretations of operating authorities so that shippers and carriers will know where they stand and will not be drawn into unwitting violations. If it takes, as the dissenting member of the Commission said, 'a Philadelphia lawyer to determine when a commodity is within the scope of the authority

35. *Moss Trucking Company, Inc. v. United States*, ____ F.Supp. ____ (1965) (1966 Fed.Car.Cases 81,793).

> of a general commodity carrier or within that of a heavy hauler,' then it is indeed unfortunate. But the solution, to the extent possible, is within the provisions of the Commission rather than the courts. If the Commission's interpretation of 'requiring' is not 'right,' it is certainly not clearly erroneous."

Moss subsequently filed a petition for rehearing with the Court, relying principally upon the inconsistencies between the Commission's holdings in the *Aetna* case, *supra,* and the holdings in its decision involving Moss. On February 18, 1966, the Court opened its judgment and stayed further action pending the Commission's determination of the *Aetna* case.

The Moss Case on Reconsideration

In its report on reconsideration of the *Moss* case, *supra,* the Commission consolidated for disposition the *Moss* case, the *Aero* case, and the *Aetna* case. On reconsideration the Commission pointed out that the problem of interpreting the scope of the operating rights of heavy haulers was not a problem which could be isolated and confined to the operations of one class of motor carriers, but rather was one which bears directly upon two classes of motor carriers, the heavy haulers and the general commodity carriers, and, to a lesser degree, a third type of carrier, the so-called motor vehicle haulers. Thus, in *Moss* the Commission recognizes that the principal area of controversy involves the so-called "twilight zone". In recognition thereof, the Commission acknowledges that its interpretation of the phrase "requires the use of special equipment" is vital both to the heavy hauler and to the general commodity carrier. In considering the term "require", as used in heavy hauler certificates, the decision of the Commission in the *Moss* case follows the holding and construction given to such term by the Court in the *Aero* case, as follows:

> "The language of the court in the *Aero* proceeding demonstrates clearly that our construction of the meaning of the word 'requires' has been too narrow. As the court said, in utilizing a test of bare physical possibility, we have exceeded the bounds of reasonable practicability . . . . The court in *Aero,* while it did not discuss the specific meaning of the word 'require', criticized the Commission's failure to give consideration to prevalent shipping practices. The court, which also decided the *Dillner* court case, *supra,* has made it plain that with respect to aggregation we may not totally disregard economy, efficiency, and practical necessity. Certainly, to say that

the use of special equipment is 'required' does not limit the basis of that 'requirement' to physical impossibility of handling in any other manner. Nor do we think the 'inherent nature' test as applied to palletization represents an unmistakably clear standard.

". . . The court merely finds, in construing its own decision in the *Dillner* court case, that the Commission has not applied the criteria properly. It disapproves our stringent application of the *Black* exception so as to ignore the 'practical necessities' of the shippers and receivers.

"It seems to us that what the court in *Aero* is saying is that more latitude must be exercised in determining whether the use of special equipment is required. Industry practice, while not to be the determinative factor, must be taken into account. Not whether manual handling is *possible*, but whether it is 'reasonably practical' must assume a larger role in our determination . . . . The court's decision in *Aero* requires some modification of our views with respect to aggregation. To say that the inherent nature of the commodity 'requires' aggregation into pallets or bundles so large that special equipment is needed for handling cannot be determined from a test of bare physical possibility, but reasonable practicality must be considered . . . ."

In applying the more liberal construction of the term "require" in heavy hauling certificates, the Commission first concluded that the small aluminum ingots and billets involved in the *Aero* case were palletized into bundles of such a size as to require special equipment for three reasons, such reasons being (1) to segregate the commodities by chemical composition and palletization was the only practical method of doing so; (2) to guard the billets from abrasion; and (3) to protect the commodity from corrosion, the wrapping of the commodities in polyethylene bags was a necessity. The Commission therefore concluded that the inherent nature of the aluminum products in the *Aero* case necessitated their aggregation into pallets of such size as to require special equipment to load and unload, and, accordingly, such commodities were within Aero's existing authority.

Insofar as the *Aetna* proceeding was concerned, the Commission affirmed the conclusions of Division 1 in the prior report as to the fifty-five shipments there involved which were found to be within Aetna's existing size and weight authority. As to the remaining shipment of sixteen bundles of steel bars which were held to have been transported by Aetna in violation of its authority, the Commission reversed the prior report and

held that shipment also to be within Aetna's authorized scope of operations. In this respect, the Commission explained its altered position as follows:

> "The record establishes that the steel shipper concerned regularly tenders steel bars in bundled form and we are persuaded that its decision to do so constitutes more than a matter of mere convenience. In this regard and notwithstanding the fact that steel bars could conceivably be loaded one at a time, such handling obviously would be cumbersome, uneconomical, and primitive. Accordingly, we believe that a sound basis exists for placing the movement under the *Black* exception.
>
> "The same conclusion applies to the shipment of steel bars of 16 feet length and weighing 231 pounds. The division, however, premised its conclusions on the basis that the individual bars could not be handled manually . . . . The problem then arises as to how many men a carrier might reasonably be expected to utilize for manual loading and unloading. Once again, the problem of physical possibility versus reasonable practicality comes to the fore. Obviously, a sufficient number of sturdy individuals, as the court in *Moss* recognized, might be able to load a very heavy item, provided the shape of that item was such that the strength of all could be utilized. Such theoretical situations manifestly do not comport with the ideal of reasonable regulation, however. In our opinion, the clear implication of the court's opinion in the *Aero* case is that any Commission determination that a given commodity is susceptible of handling manually should be premised upon record evidence showing that the commodity, in fact, has been or as a practical matter could be handled in that way; *an abstract possibility of manual handling will not suffice.*"

In considering its prior decision in the *Moss* case, the Commission reaffirmed its prior decision that the farm tractors there involved were not included within Moss' heavy hauling authority, but reversed its prior decision as to military cargo vehicles, wire mesh, crated aluminum tanks and steel beams. In so doing, the Commission considered that special equipment was required to load the military cargo vehicles for reasons of safety and the *United Transport v. Gulf Southwestern* case, *supra*, was held not applicable because, contrary to the facts in *Moss*, the vehicles in the *United Transport* case were not loaded or unloaded with special equipment. In holding the 788-pound rolls of wire mesh to be within Moss' scope of operations, the Commission held that:

> "The theory that the minimum aggregation required by the inherent nature of the commodity is a realistic one when individual unit items are under consideration, but here we are dealing with the length of a reel of wire. To assert that the inherent nature of the wire in question did not require that it be placed in rolls of such size would be unwarranted intrusion into managerial prerogatives. A reel of wire is a single length of wire, not an aggregation of individual units, and, in our judgment, the *Dillner* criteria with respect to palletization are not applicable . . . ."

Insofar as crated aluminum tanks were concerned, the Commission, on rehearing, held that, even when reducing the weight of the tanks to 273 pounds, the record did not support the conclusion that the loading of such tanks from ground level could be accomplished manually. The Commission further concluded, on rehearing, that it would be unrealistic from a regulatory standpoint to premise its findings relative to steel beams measuring twenty-five and thirty-two feet in length and weighing approximately 200 pounds and 277 pounds upon a theoretical possibility that a sufficient number of men could manually load such beams.

While the *Moss* decision, strictly speaking, continues to require that, in order to bring a palletixed commodity within the orbit of heavy hauler authority, such palletization must be required by the inherent nature of the commodity, such decision is authority for the proposition that reasonable practicability is the standard for determining whether palletization or bundling is required.

The *Moss* case also limited the applicability of its liberalized construction of the word "required" in an asserted attempt to preclude an unwarranted intrusion by the heavy haulers into the traffic traditionally handled by general commodity carriers, as follows:

> "On the other hand, it has been contended from time to time in heavy-hauler cases that any time special equipment is utilized in loading and unloading, or for over-the-road movement, the transportation falls within the permissible range of heavy-hauling operations, regardless of whether the use of such equipment can be said in any sense to be 'required.' Such a construction goes too far in that direction, of course, not only because it would render the word 'require' virtually meaningless, but also because it would enable the shippers, solely at their discretion, to open up, through palletization or otherwise, a field of service to the heavy haulers which has never been a part of heavy-hauling services and which would constitute unwarranted invasion of traffic traditionally handled by general-commodity carriers."

III. Decisions Since Moss

Subsequent to *Moss*, Operating Rights Review Board No. 1 held, in *C & H Freightways, Extension—Jute Bagging*,[36] that 300-pound to 600-pound bales of jute bagging loaded with "squeeze lifts" were included within authority to transport size and weight commodities. In so finding the Board held that:

> "Since one sheet of jute bagging is light, it is possible that it could be loaded by hand, but such a procedure would be time consuming, expensive, and contrary to shipper practice. It is apparent then that the baling of a light and bulky commodity like jute is required by efficiency, economy, and reasonable practicality; it is not baled merely for shipper's convenience. In considering the size or weight of a minimum bundle we also must rely heavily on industrial practice. The number of singular items used to make a bundle, or here, the number of sheets of bagging used to make a bale, is ordinarily shipper's prerogative, determined by its particular business needs . . . .
>
> "Not only whether manual handling is possible, but whether it is reasonably practical must play a part in our determination. The record here shows that the bales have not, in fact, been manually loaded. Nor are we convinced that 300 to 600-pound jute bales can as a practical matter be manually loaded. There is no evidence on this record which would support a conclusion that loading could be accomplished by hand, and we decline to speculate on the theoretical possibility, a practice specifically condemned in the *Moss* case. Accordingly, we conclude that the mechanical hoisting equipment used by applicant is required to load the jute bales, and that such handling constitutes the required use of special equipment."

Insofar as fungible commodities are concerned, the Commission reached differing results in *Parkhill Truck Company—Petition for Interpretation*[37] and in *International Transport, Inc., Common Carrier Application*.[38] The *Parkhill* case involved the propriety of transporting 50-pound bags of granular polyethylene on pallets and 1,000-pound boxes of

36. *C & H Freightways Extension—Jute Bagging*, MC-119918 (Sub-No. 3) (Operating Rights Review Bd. No. 1, 1967, not printed) (1967 Fed.Car.Cases 36,080).

37. *Parkhill Truck Company—Petition for Interpretation*, MC-106497 (Sub-No. 4) (Operating Rights Review Bd. No. 1, 1967, not printed) (1967 Fed.Car.Cases 36,104).

38. *International Transport, Inc., Common Carrier Application*, MC-113855 (Sub-No. 143) (Operating Rights Review Board No. 3, 1967, not printed).

granular polyethylene, unpalletized. Granular polyethylene, being a fungible commodity, was held to be a commodity traditionally considered to be outside the scope of a heavy hauler's operation. In finding the transportation of such commodity to be outside the scope of heavy haulers, the Review Board found that:

> ". . . . The granular polyethylene is a fungible commodity and, though not shipped by Dow in bulk form, it would appear to be capable of being shipped in this manner if the situation warranted. Such commodities have traditionally been considered as being outside the specialized scope of the heavy hauler. We think this is a logical concept and we are unable to justify the transportation of this commodity under heavy-hauler authority, *regardless of the manner in which it is shipped.*
>
> ". . . . *In a recent decision, Moss Trucking Co., Inc., Investigation of Operation, 103 M.C.C. 91,* the Commission found that past interpretation of ordinary heavy-hauler authority had tended to place too rigid a construction upon the word 'requires' and that consideration must be given the practices of the shipping industry . . . .
>
> "Here, the considered bags and boxes of polyethylene are not palletized for protection, but merely for shipper's economy and convenience and because of the requirements of the Baton Rouge port facility, and the evidence establishes that bags of this commodity have been and are handled manually by certain of the protestants. We must conclude, therefore, that it is 'reasonably practical' to manually handle 50-pound bags of this commodity and that it is the practice, at least to some extent, for the shipper to handle and ship them without the use of pallets . . . .
>
> "The 1,000-pound boxes of polyethylene present a different problem, for it would not be 'reasonably practical' to manually load or unload these individual boxes. Nevertheless, there is no indication that the commodity cannot be packed in smaller boxes, the loading and unloading of which would not require the use of special equipment, nor is there any indication that it is the general practice in the industry to ship the commodity in 1,000-pound boxes."

In *International Transport, Inc., Common Carrier Application, supra,* Review Board No. 3 held that size and weight authority includes the right to transport composite mineral powder, a fungible commodity, as follows:

> ". . . . The supporting shipper's composite mineral powders are

comprised of a relatively minute particle of material other than nickel or cobalt completely surrounded by nickel or cobalt . . . .

"The supporting shipper's products frequently move in palletized shipments consisting of a number of drums or boxes of its products, and . . . such shipments are usually loaded and unloaded by mechanical equipment; . . . the net weight of the individual commodity moving in a drum or box is often 400 or 500 pounds, although greater or lesser weights of the commodity also move in drums or boxes; and . . . a drum or box holding 400 or 500 pounds of the commodity could conceivably be handled manually, but such handling would be, as stated in *Moss Trucking Co., Inc., Investigation of Operation*, 103 M.C.C. 91, outside the realm of practical reality . . . .

". . . . The transportation of a drum or box containing 400 or 500 pounds of shipper's products would be in the circumstances within the scope of applicant's pertinent 'heavy hauling' authority . . . ."

On June 24, 1967, a complaint was filed under the so-called self-help statute in the United States District Court for the Western District of Missouri seeking to enjoin International Transport, Inc., from transporting Class A and B explosives and related dangerous articles.[39] Under its size and weight commodity authority, defendant International had transported cannon ammunition in twenty-nine- to thirty-nine-pound aluminum tanks and 110-pound boxes in a palletized condition; 500-pound bombs palletized six to a pallet for a total weight per pallet of 3,000 pounds; and 750-pound bombs palletized two to a pallet for a total weight per pallet of 1,500 pounds. The involved munitions frequently had been loaded manually on an unpalletized unit basis and, for other than bombs, the Court found such manual loading to be practical. The Court found that munitions possessed no inherent characteristics which required their palletization; that palletization often was resorted to for purposes of economy and convenience in handling; that palletization was not required to identify or segregate the commodities; that palletization was not required for reasons of safety or to protect the commodity; that munitions, including bombs, were shipped both palletized and unpalletized; and that historically heavy haulers had not undertaken to haul explosives. The Court held that, under the *Moss* case, *supra*, it was clear that, with the exception of the described bombs, the transportation

39. *Tri-State Motor Transit Company, et al. v. International Transport, Inc.*, ___F.Supp. ___(D.C. Mo., 1967).

of the other munitions involved was beyond International's authority; that the decision as to the bombs was of the type Congress intended to be decided in the first instance by the Interstate Commerce Commission; and that it was unnecessary to rule on the broad question as to whether heavy haulers are entitled to haul explosives in all instances in which the size or weight of the explosive requires special handling or special equipment in loading, unloading or transportation, stating that such question preferably should be presented to the Interstate Commerce Commission. Thereafter, by order entered September 15, 1967, the Commission instituted an investigation into the operations of International Transport to determine whether the transportation by International of the previously described 500-pound and 750-pound bombs was beyond the scope of International's size and weight commodity authority. The initial decision of the Commission,[40] which found that International had exceeded the scope of its size and weight authority in transporting 500- and 750-pound bombs and which ordered International to cease and desist from the transportation of such bombs, was appealed by International and its supporting intervenors to the United States District Court for the Western District of Missouri, Southwestern Division. By Order of Remand filed March 18, 1970, the Court remanded the *International* case to the Commission for consideration of a Department of Transportation safety regulation bearing on the handling of explosives, consideration of which inadvertently had been overlooked.[41] The Court, in remanding such proceeding, also suggested that the Commission take additional evidence concerning the manual loading and unloading of 500- and 750-pound bombs during pertinent times and concerning whether such bombs could be coated or equipped with shipping bands so as to permit rolling. By Order dated November 3, 1970, the Commission reopened the proceedings for the receipt of oral evidence confined to the issues raised or suggested in the remand of the proceeding to the Commission. The matter was referred to an examiner for hearing, and the Examiner's Recommended Report and Order affirming the Commission's prior determination that the transportation of 500-pound and 750-pound bombs by International was beyond the scope of its size and weight authority was served on February 11, 1971. Exceptions to such Order may, of course, be filed, and the time for filing such exceptions has now been extended to March 22, 1971. In holding such transportation to be

40. *International Transport, Inc.—Investigation and Revocation of Certificates*, MC-C-5766, 108 M.C.C. 275.

41. *International Transport, Inc. v. United States, et al.*, Civil Action Nos. 2136 and 2141 (W.D. Mo.), and *Leonard Bros. Trucking Co., Inc. v. United States, et al.* (W.D. Mo.).

without the pale of size and weight authority, the Examiner concluded that the Department of Transportation safety regulation relative to loading or unloading of explosives by rolling[42] relates only to explosives which are packed in containers; that the palletization of these bombs could not be considered as the packaging of explosives in containers; that prior to 1966 and at the time of issuance of the heavy hauling certificates involved, 500-pound and 750-pound bombs were equipped with shipping bands and were actually rolled in loading and unloading; that such bombs that have been shipped since 1966 could be rolled in loading and unloading and consequently do not require special equipment; that the current type of 500- and 750-pound bombs have not been coated or provided with shipping bands; that except for the prevention of rust, scratching will not damage such bombs; and that there is no danger in rolling 500- and 750-pound bombs.

In *Hughes Transportation, Inc., Extension—Nuclear Materials,*[43] the transportation of partially decomposed enriched Uranium 235, spent nuclear fuel, which is a radio-active material that must be shipped in protective lead and steel casks to protect the public from exposure to radiation, was held to be within size and weight commodity authority when the basic individual units in which the liquid was shipped weighed 170 pounds but which, because of its radio-activity, was required to be shipped in 47,000-pound casks. In such instances, it was concluded that the commodity was inherently incapable of manual loading. On the other hand, the *Hughes* case held that the transportation of deuterium oxide or "heavy water", which was not sufficiently radioactive to result in bodily harm and was shipped in fifty-five gallon stainless steel drums enclosed in a wooden box, with each filled unit weighing 575 pounds, was not included within authority to transport size and weight commodities. The filled fifty-five-gallon drums were shipped six to a pallet and loaded onto trucks through the use of a six-ton forklift and in holding the transportation of the drums of deuterium oxide not to be included in heavy hauling authority, Division 1 observed:

> "On the other hand, it is our view that with respect to the deuterium oxide, the prior report reached a conclusion which is neither required by the *Moss* case, nor consistent with the *Dillner* decision. We agree that 575-pound consignments of any commodity might well fall within the province of heavy hauling. However, this begs the

42. 49 CFR 177.835(b).
43. *Hughes Transportation, Inc., Extension—Nuclear Materials,* 107 M.C.C. 207 (1968).

question. Heavy water can move in a pint can or in a container of any size for that matter.

"If the container were large enough, the movement thereof would assume the characteristics of bulk transportation as to which heavy haulers cannot intrude. See *Ashworth Transfer Co. Extension—Cement* [11 Federal Carriers Cases para. 33,319], 64 M.C.C. 99. With like force, if heavy haulers were permitted to transport the involved liquid commodity in 55-gallon drums, they also could transport petroleum products in 55-gallon drums and an endless number of other liquid commodities. Such transportation has traditionally been without the field of service of heavy haulers and is not within the authority of protestant. Were it otherwise, heavy-hauling authority would, in effect, be transformed into general-commodity rights. Thus as stated in the *Dillner* case at page 352,

" 'The foregoing is no more than a limited application of a long-standing principle that in the construction of heavy-hauler authority the commodity itself is the controlling consideration and not the act of palletizing, the method of packaging, or the type of container in which the commodity is shipped.'

"Moreover, the *Moss* decision clearly does not authorize incursions by heavy haulers into numerous specialized fields such as chemical and explosive transportation nor into the province of the general-commodity carriers."

In *Roy L. Jones, Inc., Extension—Iron and Steel,*[44] the heavy hauler applicants therein contended that on the basis of *Moss* they already held authority to transport 2,000-pound bundles of the iron and steel articles even though the evidence of the supporting shippers failed to give any consideration to the inherent nature of the commodities. The Division pointed out that the *Moss* case had to be read in light of the *Dillner* case to determine the permissible extent of heavy hauling operations and concluded that since there was no evidence that the involved iron and steel articles required bundling because of their inherent nature and since there was a lack of evidence to indicate that aggregation was required as a matter of practical reality the presumption in *Dillner* controlled. Accordingly, the transportation of such 2,000-pound bundles of iron and steel articles was held not to be included within the scope of the size and weight authority of the heavy hauler applicants.

44. *Roy L. Jones Extension—Iron and Steel,* MC-4964, 108 M.C.C. 424 (1969).

IV. The Ace Doran Case[45]

By Order entered on February 26, 1964, the Commission instituted an investigation into the operations of Ace Doran Hauling & Rigging Co. to determine if that carrier had operated beyond the scope of its heavy hauling operating rights in transporting various commodities, including earth-moving tractors, telescoping trailers, steel pallets and skids, apparatus cabinets, rails, steel blanks, conduit and wrought steel pipe, steel mine roof bolts, steel bars, structural steel angles, hot top slabs, steel tubing, roof joists, metal lath, steel roofing sheets, highway guard rails, channel iron and steel, corrugated culvert pipe, steel plate, metal grindings and tile roofing. By Order dated September 28, 1967, Division 1, acting as an appellate division, found that Ace Doran had exceeded the scope of its operating authority in transporting earth-moving tractors, telescoping trailers, roof bolts and tapered steel tubing. On the other hand, Division 1 concluded that under the *Moss* case, *supra*, the remaining commodities involved were within the scope of Ace Doran's heavy hauling authority.[46] The proceedings were thereafter opened for consideration and the Commission, in so doing, acknowledged that the controversy and problems there involved concerned the activities which lawfully can be conducted under heavy hauling operating rights and stated that *Doran* was being utilized as a convenient vehicle for reexamination of those issues with a view toward taking some overall corrective action. The Commission observed that the issues in *Doran* had implications that affect the scope of size and weight authorities generally and that there existed a pronounced uncertainty as to the intended effect of the *Moss* case on the competitive balance between the heavy haulers and the non-size and weight commodity carriers. In *Doran* the Commission observed that the "overall clarification of heavy-hauler authority which the *Moss* case was intended to achieve is far from a reality". The Commission then concluded that a satisfactory resolution of this problem depends upon a balanced consideration "not only of the *Moss* case taken in its entirety, but also of certain other case and historical precedents".

In discussing the historical background of heavy hauling authorities, *Doran* observes that the decisions prior to *Moss* show that there was little heavy hauler interest in objects which weigh less than 200 pounds. On the other hand, it is noted that items which have exceeded that figure significantly, except where circumstances permitted their loading and

45. *Ace Doran Hauling & Rigging Co., Investigation of Operations*, 105 M.C.C. 801.
46. *Ace Doran Hauling & Rigging Co., Investigation of Operations*, 105 M.C.C. 801.

unloading by non-mechanized procedures other than physical hoisting, have been treated as size and weight commodities. Insofar as controversies between size and weight and ordinary common carriers are concerned, *Doran* notes that until recently these conflicts have involved certain reasonable well-defined groups of commodities such as iron and steel articles, building and contractor's materials, motor vehicles, machinery and motor-like objects. It is observed that, generally, the Commission has found that heavy hauler rights do not authorize the carriage of dry fungibles and liquid bulk commodities when "they assume proportions only by reason of the container or conveyance in which they are placed". *Doran* acknowledges that the Commission has recognized a limited area of overlap between the commodities authorized to be transported by explosives carriers and by heavy haulers.

The Commission noted that it was appropriate to again set forth in their original form the basic tenets which must be followed in all determinations of whether articles tendered in aggregated form are within the scope of heavy hauler authorities. These are set forth in *Dillner, supra,* as follows:

> "In bundling, aggregating, or palletizing, it should be the general rule of construction (1) that the individual 'commodity itself' is the controlling consideration as respects a carrier's authority; (2) that the limited exception which the *Black* case, 64 M.C.C. 443, represents, where commodities are bundled for protection or as otherwise required by their 'inherent nature,' must be maintained within its strictest limits; (3) that the minimum bundle which is required by the 'inherent nature' of the commodity is the size or type of bundle which must be considered in any determination whether necessity exists for the use of special equipment; and (4) that in order reasonably to maintain these limits it shall be presumed, in the absence of a sound basis for concluding to the contrary, that commodities tendered to carrier, in bundles or aggregations, are within the general rule and not within the limited exception thereto. . . ."

In addition, irrespective of whether they are tendered individually or in aggregated form, the Commission adopted a presumption that commodities within the specialized operational spheres customarily excluded from the general commodity carrier certificates, such as Class A and B explosives, household goods, and bulk commodities, are presumed to be beyond the field of service of size and weight commodity carriers. Size and weight commodity carriers proposing to engage in the

transportation of such commodities are charged with the burden of developing a record which will support a valid conclusion to the contrary. *Doran* holds that heavy hauler operations in the involved fields of transportation represent exceptions to the general rule and, as such, are to be strictly construed.

In *Doran*, the Commission recognized that in addition to the basic principles stated in *Dillner* and in the presumption as to the exclusion from heavy hauler service of those commodities normally excluded from general commodity certificates, that additional guidelines were required to assure their proper and fair implementation. The need for workable tests to be used in determining the status under size and weight authority of all articles tendered for shipment was found to exist whether such articles were covered by a presumption or not. The Commission concluded that the necessary guidelines, in one form or another, had been enunciated in prior decisions relating to heavy hauling authority; that, with some variation as to specific details, the status under heavy hauling rights of aggregated and single-item shipments are susceptible to determination through consideration of the same factors; and that a balanced application of those factors, in light of the general rules, which include those in the *Dillner* case and the presumption against the inclusion in size and weight authorities of commodities normally excluded from general commodity authority, will assure the preservation of a healthy scheme of regulated motor carriage along these lines. The additional guidelines are (1) the basic characteristics, if any, of the commodity, which occasion the use of special equipment; (2) prevailing industry practice with regard to such commodity's handling; (3) the manner in which such commodity or analogous commodities have historically been shipped; and (4) the commodity's traditional sphere of carriage.

The "basic characteristics" of the commodity are stated to be the most important determinants of a commodity's requirement for special equipment and such concept encompasses, among other things, the size, weight, shape, or design of an individual unit, its chemical composition, its susceptibility to damage in loading, in unloading and in over-the-road movement, and the handling procedure it requires in the interest of public safety. The first point of industry is the size and weight of the object. In the case of single unit shipments this factor alone in many instances may be determinative. The other considerations assume significance principally in instances in which individual pieces are tendered for transportation in aggregated, bundled, or palletized forms. In such instances a determination must be made as to which, if any, intrinsic properties of the commodity require its movement in aggregated lots

rather than in individual units. However, once it has been established that aggregation is required for protection or segregation of the commodity, then efficiency and economy, together with reasonable practicality, become material to the subsequent determination of the minimum bundle which is necessary to meet such requirement.

The "prevailing industry practice" is stated not to be a new concept in determining the permissible limits of heavy hauling authority as it relates either to single units or aggregated shipments. The handling of a given product by the use of mechanical devices throughout the interested shipping community, on the surface, tends to indicate that such mechanical devices are required. Little weight is to be accorded to proof of the practices of one or a relatively limited number of shippers. The Commission will, however, in respect to prevailing industry practices, take notice of official determinations made in other proceedings. A conclusion that a commodity is included within size and weight authority based on present day shipping practices is unwarranted if the commodity involved is aggregated almost entirely on the basis of economy and efficiency and such commodity has in the past been handled satisfactorily by manual labor. A carrier should not expect to establish that a heavy hauler is entitled to transport a particular commodity based solely or primarily upon a showing that special equipment is employed as a matter of current industry practice. Conversely, a limited showing of industry practice will not defeat a heavy hauler's claim to transport particular commodities if the remaining concepts are sufficiently persuasive to constitute the commodity as being within the traditional heavy hauling field.

As to "historic methods of handling", a clear showing that a commodity, as a matter of industry practice, currently is being handled by mechanical means to the exclusion of hand labor operates in favor of the heavy hauler. However, consideration also must be given to historical shipping practices in the government of the commodity involved, or of analogous commodities. A showing of prior manual handling of the same or an analogous commodity will tend to show that the current handling by mechanical means is attributable primarily to reasons of economy or efficiency rather than to the commodity's characteristics. To the contrary, the industrywide use of mechanical handling devices both presently and in the past would tend to indicate that such mechanical handling is required. Similarly, a showing that hand labor, when utilized, resulted in an abnormal amount of damage to the lading also would tend to show that mechanical handling is required.

The "traditional sphere of carriage", or field of service, is the principal

consideration underlying the presumption that heavy hauling authorities do not authorize the transportation of commodities which customarily are excepted from certificates authorizing the transportation of general commodities. However, even as to commodities falling within the presumption, the Commission acknowledges that further examination must be made if the Commission correctly is to determine whether a sufficient basis exists for placing a given commodity outside the operation of such presumption. In considering the status of a commodity under heavy hauler authority, the Commission's position in *Doran* is that it must take into account the extent to which it or an analogous commodity has previously been regarded as being within a particular sphere of motor carriage. Resolution of the problem is said to involve two separate but related questions, which are:

> "(a) whether, and to what degree, the commodity under scrutiny is one which by tradition has been regarded as part of a transportation sphere essentially separate and distinct from heavy hauling; and (b) whether it or an analogous article has historically been considered an appropriate subject for heavy-hauler participation."

In this respect, the greater the similarity between the commodity involved and a commodity or commodities which have been established to be within the scope of heavy hauler authority, the more persuasive will be the heavy hauler's position. Also, the fact that, or degree to which, a commodity has not become established as being in a non-heavy hauler service is material to the question of the "traditional sphere of carriage".

Based upon its conclusions, the *Doran* case overrules *C & H Freightways, Extension—Jute Bagging, supra,* and *International Transport, Inc., Common Carrier Application, supra,* which respectively involved jute bagging and mineral powders, and any other proceeding inconsistent with *Doran*. In addition, *Doran* explains that the Commission's position in the *International Transport* bomb case, previously discussed, is, in part, based upon the presumption that commodities excluded from general commodity carrier certificates may not, in the absence of countervailing evidence, be transported by heavy haulers, as well as other factors.

In disposing of the shipments involved in the *Doran* case, the Commission carefully detailed the basis of its findings in respect to each type of shipment involved and explained the manner in which it had applied the general principles, presumptions and guidelines which it had previously set forth in its decision.

Earth-moving tractors weighing from 7,000 pounds to 10,000 pounds

which were driven to the loading area and which were loaded into vans by being driven, but on which the shipper preferred to use flatbed trailers when available, in which instance loading was performed by crane for safety reasons, were held not to be included within Doran's heavy hauling authority on the basis of actual shipper usage.

Pallets and skids weighing, respectively, 121 pounds and 167 pounds, which were banded at the production line into stacks twelve to fifteen feet high and thence moved by forklift truck to the loading point for loading on trailers by mechanized equipment were held not to be included within Doran's heavy hauling authority. The basis of the holding was that there was no reason of record indicating any necessity for such pallets and skids being shipped in aggregated form; that such practice was dictated almost entirely by the particular facilities of the shipper; that there was no evidence as to present or past handling of such commodities by other shippers; and there was no evidence or precedent to bring such commodities within the recognized orbit of heavy hauler service.

Apparatus cabinets weighing 95 to 100 pounds which are aggregated and mechanically loaded, not for protection but because the shipper in question had no ramp or dock facilities, were held not to be included within heavy hauling authority. The Commission considered that such cabinets are named as commodities specialized carriers of "store and office fixtures and new furniture" are authorized to transport in the *Descriptions* case, Ex Parte MC-45, *supra*, and that they also could be transported by household goods carriers under certain conditions. Such cabinets also were considered to bear scant resemblance to articles regarded either under relative decisions or historical tradition as being within the sphere of heavy hauling.

Steel rails measuring fifteen feet in length and weighing 150 pounds each which were always shipped by the interested manufacturer in bundles which were not capable of manual loading were found not to be included in heavy hauler authorities. The involved rails were not susceptible to damage from handling and, although two men could load such a rail, the layout of the particular shipper's plant was such as to render manual handling of each rail unsafe and cumbersome. No other evidence of industry shipping practices was introduced. Additionally, the Commission noted that the weight of the individual units, 150 pounds, fell within the weight range that historically has been regarded as non-heavy-hauler traffic.

Three shipments in *Doran* involved pipe, all of which was produced in lengths of twenty-one feet and threaded with a coupler susceptible to damage in loading and unloading. Units of pipe of less than two inches in

diameter were bundled into lots weighing from 154 to 215 pounds each, with such bundles being consolidated onto lifts for tender to the carrier. Larger diameter pipe was loaded in individual pieces by a crane. The pipe of two inches and over in diameter consisted of diameters of 2 inches, 2 ½ inches, 3 inches, 3 ½ inches, 4 inches and 5 inches which, respectively, weighed 74 pounds, 117 pounds, 154 pounds, 193 pounds, 220 pounds and 315 pounds. The 315-pound and 220-pound individual pieces of pipe were held to fall within the weight range regarded by tradition and precedent as being within the heavy hauler sphere. The Commission then concluded that the weights and lengths of the individual pieces of the remaining sizes of pipe did not fall within the recognized sphere of heavy hauling operations so as to justify their one piece movement under size and weight authority. Regarding the necessity for bundling such smaller diameter pipe, the Commission held that, in the absence of evidence to the contrary, it must give credence to the shipper's determination that aggregation of such pipe was necessary to protect the smaller diameter pipe from the possibility of damage to the pipe threads. The Commission observed, however, that aside from establishing the necessity for bundling, a heavy hauler bears the additional burden of establishing that the protection required can practicably be afforded only through a minimum bundle which is of such size and weight so as to render impractical the employment of manual labor. Here, there was no evidence of present and past industry practice, and the carrier failed to meet its burden of establishing that the bundles of smaller diameter pipes were of the minimum size necessary to afford the required protection of the commodity. Accordingly, except for 315-pound and 220-pound joints of pipe, the Commission held that Doran had exceeded the scope of its heavy hauling authority in transporting such pipe.

Shipments of conduit pipe having a uniform length of ten feet, varying in weight from eight to twenty-two pounds per unit, which were, as a matter of standard procedure, bundled and banded by the shipper into lifts of 1,000 to 1,200 pounds and thence loaded through the use of a crane, were held to have been transported beyond the scope of Doran's heavy hauling authority. This finding was based upon the record being silent as to the characteristics, if any, that necessitated that conduit pipe be handled in such manner. In the absence of such proof, the Commission concluded that the bundling, banding and loading procedure was employed only for reasons of economy and efficiency.

Wrought steel pipe which was not threaded, ranged up to thirty feet in length, averaged weighing 147 pounds per piece, and which was always crane-loaded by the shipper involved, who owned no dock facilities, was

held to be outside Doran's authority. The Division had found that the loading of such pipe by manual labor was unsafe. Nevertheless, the Commission found that there was no evidence that unthreaded steel pipe is handled mechanically to the exclusion of other methods on an industrywide basis and that no reference had been shown to precedent or tradition which would bring pipe or any other individual shipment of the weight here involved within the recognized area of heavy hauler operations.

Steel bars measuring 18 feet, 9 inches each and each weighing seventy-one pounds, which as a matter of standard procedure were shipped in palletized lots that could not be loaded or unloaded without the use of automated devices and which steel bars would have been susceptible to being warped or heated out of shape if handled on an individual unit basis, were held to be within heavy hauler authority. This conclusion was reached in the absence of proof of industry practice because the inherent properties of the bars when considered in connection with the practical realities of the matter and the absence of a background showing that such commodities have not been included within the sphere of operations of a non-size and weight commodity carrier are stated to be sufficient to establish the bars as size and weight commodities.

Hot top slabs weighing 105 pounds each were found to be within Doran's heavy hauling authority when aggregated into sets of four weighing 420 pounds. Such slabs are brittle items that are unusually subject to damage and if exposed to moisture will explode upon contact with molten metal. They must be covered by polyethylene bags while in transit; are manufactured to customer specifications in sets of four; must be separated according to design; and the delivery of such hot slabs in sets of four is required by the receivers. The Commission concluded that the basic characteristics of these commodities were such as clearly to necessitate their aggregation; that they were traditionally within the field of service of heavy haulers; and that practical realities and a need for segregation by design, call for their aggregation into sets of four, which totaled 420 pounds in weight.

Shipments of metal lath on which the necessity for shipping in bundled form was beyond dispute were found not to be included in size and weight commodity authorization. Even though tendered in bundles which required special equipment to load and unload, the load was broken by the consignee at destination into smaller lots and unloaded through hand labor. Shipments tendered to general commodity carriers were similarly broken and unloaded in smaller lots at destination. Accordingly, the Commission concluded that this method of unloading by the consignee

negated the existence of any requirement, either by virtue of its inherent nature or from reasonable practicality, that such lath be aggregated into lots of such size as to require mechanical handling.

Asbestos coated steel sheets which ranged in length from eight to twelve feet each and weighed from fifty-two to seventy-eight pounds were held not to be included in heavy hauling authority. Such sheets were susceptible to scarring or abrasion from individual handling and for this reason as well as to achieve greater economy, efficiency and expedition of movement, were shipped by the shipper involved in bundles of up to 100 sheets which weighed as much as 5,000 pounds. The Commission founded its decision on the fact that such sheets had, in the past, been loaded and unloaded to a significant degree as single units with manual labor and that there was no persuasive evidence that such method of loading was unsatisfactory; that neither tradition nor historic usage establish fifty-two- or seventy-eight-pound objects to be within heavy hauling authority; and that the available facts constituted the particular items as primarily being general commodity freight.

Highway guard rails which vary in weight from 92 to 240 pounds and from thirteen to sixteen feet in length, and posts, all of which are painted or galvanized in order to protect them from rust and corrosion with a protective coating that is susceptible to chipping or scratching, and which rails and posts are bundled into bundles which because of their aggregated weight are loaded by mechanical devices, were held to be within Doran's authority. The individual units in the bundles were separated one from the other by protective bands and neither of the two manufacturers involved had manually handled such items both because of their need for protection and also because their sharp edges rendered manual loading unsafe. Here, the Commission concluded that the bundling to guard the coating is required by the basic characteristics, its susceptibility to corrosion if not painted, of the article itself. The Commission further concluded that physical handling had been shown unsafe and that aggregation was required by the inherent nature of the product itself. Because of their size and weight, it was determined that it would be impractical to bundle such products into bundles capable of manual handling. Insofar as these commodities are concerned, there were no field of service factors involved.

As to two bundles of channel steel transported by Doran, the Commission affirmed that the transportation of individual iron and steel pieces weighing 240 pounds each and connecting parts fall within the province of size and weight operations recognized in earlier decisions and, therefore, that the transportation of such items was within Doran's heavy hauling authority. On the other hand, iron and steel objects averaging 114

pounds in weight were found to be well within the size range that precedent has shown manual handling to be reasonably practical and which tradition, as well as prior lack of heavy hauler interest, have placed beyond the permissible orbit of heavy hauling service. Further, there was no evidence of record to establish that handling of the 114-pound iron and steel objects was required for reasons bearing upon their composition.

Individual pieces of corrugated culvert pipe measuring ten feet long and weighing 36, 52, 104, 124 and 148 pounds, and individual pieces of corrugated culvert measuring 20 feet long and weighing 72 pounds on which possible damage by manual handling was minimal and which, in order to obtain a maximum payload, the shipper loaded five pieces at a time by the use of a crane, were held not to be within Doran's size and weight authority. The shipper regarded the employment of physical labor to load or unload culvert pipe as impractical because of the number of men it would be required to employ and because there was no characteristic of such culvert that would necessitate bundling for protection. The status of each pipe dimension was held to be dependent upon size and weight factors. On the other hand, pieces of culvert pipe which were ten feet long and weighed 240 pounds each were found to be within Doran's heavy hauler authority.

It is apparent that the *Ace Doran* decision is intended to be a landmark decision insofar as the interpretation of size and weight commodity authorities is concerned. Even though the Commission has been temporarily enjoined from enforcing the decision in *Doran*,[47] there is little doubt but that *Doran* represents the current views of the Commission and that the decision and guidelines therein currently are being used as the standard in determining the propriety of heavy hauling operations.

V. Decisions Subsequent to The Ace Doran Case

In November of 1969 the Commission followed the guidelines of the *Doran* case in deciding *Steel Haulers, Inc., Extension—Tulsa, Oklahoma.*[48] *Doran* also has been followed in several recent cases involving operating authority applications. In *Steel Haulers, supra,* authority was sought to transport iron and steel, iron and steel articles and such materials as are used or useful on highway construction projects. The

47. *Leonard Bros. Trucking Co., Inv. v. U. S., et al.*, Docket No. 69-646-CIV-WM (S.D. Fla., Miami Division).

48. *Steel Haulers, Inc., Extension—Tulsa, Oklahoma,* MC-119700 (Sub-No. 9), 110 M.C.CC.C. 612 (1969).

examiner recommended that the application be granted. Review Board No. 1 concluded that all of the commodities marketed by the supporting shippers required, by reason of their size or weight, movement in special equipment and denied the application. The applicant argues that under a proper construction of the heavy hauler operating authority decisions dealing with heavy-hauler authority, most of the involved traffic is not included within the scope of size and weight authority. The involved traffic consisted of three types of items. One was reinforcing bars which measured from twenty to eighty feet in length, from ½ to 2½ inches in diameter, and which customarily were shipped in 5,000-pound bundles which were loaded and unloaded by a crane, with the number of units per bundle being governed by the individual dimensions of the tendered bars. The second type of commodity was fence posts which were manufactured in five- and ten-foot lengths, with the five-foot long posts weighing 7.5 pounds each and the ten-foot long posts weighing fourteen pounds each. To prevent chipping of the paint, the shipper tendered the posts in 200-piece bundles weighing 1,500 pounds and 2,800 pounds which were loaded and unloaded by forklift trucks. The third type of traffic consisted of metal decking and siding which are relatively thin materials measuring three feet in width and from fifteen to thirty-five feet in length. Depending upon their ultimate use, decking or siding are marketed either in unpainted, gray enameled, or painted form. The painted items require extreme care in shipment, but the gray enameled and unpainted articles require nothing more than normal handling. Whenever possible the shipper aggregated decking for shipment in bundles of 2,000 pounds which, irrespective of susceptibility to damage, the shipper has found to be the most efficient method of tendering its traffic for transportation. On occasions, the size and nature of the shipment precluded aggregation and, in such cases, the order was prepared for shipment on a unit by unit basis. In applying the guidelines of the *Ace Doran* case, *supra*, Division 1 held that the commodities which were more than forty feet long, steel bars, compared in measurement to articles previously recognized by Commission decisions as not being susceptible to manual loading even if not aggregated and therefore they were properly within the scope of heavy hauling authority. For the individual units of steel bars which measured from twenty to forty feet in length, it was concluded that the length and diameter of such rods was such to suggest that they weighed less than 200 pounds which historically has been recognized as the weight range in which physical loading and unloading is possible and that there was no evidence that bundling was required because of the bars being susceptible to damage or deterioration. Accordingly, it was concluded that except as

to those bars which exceeded forty feet in length, the bars involved in the application might not be transported under size and weight authority. Transportation of the fence posts involved was held not to be proper under size and weight authority because, even though the necessity for their bundling had been established, there had been no showing that the minimum bundle necessary to protect the commodity required special handling. In addition, the record was silent as to consignee requirements on bundled shipments of posts and, in the absence of such data, the Commission declined to speculate that such fence posts could not as a practical matter be afforded the requisite protection by aggregation into bundles of less than 200 pounds, which weight of less than 200 pounds historically has been recognized as being reasonably capable of manual handling. The transportation of aggregated shipments of unpainted and gray enameled decking and siding was held not to be included within size and weight authority on the basis that such commodities require only ordinary handling; that the individual units are susceptible to manual handling; and that, in accordance with consignee specifications, such commodities periodically were handled with physical labor rather than by mechanical means. The transportation of aggregated shipments of painted decking and siding similarly was held not to be included within size and weight authority on the basis that the manufacturer's occasional preparation and tender of such commodities on a unit by unit basis vitiated any requirement that such commodities be loaded or unloaded by special equipment.

The significance and intended effect of the *Doran* case is further emphasized in the Commission's decision in *Equipment Transport, Inc., Extension—Heavy Hauling*[49] in which the Commission referred the applicant to *Doran* as detailing the permissible scope of heavy hauler operations as follows:

> "In the same general connection, applicant's attention is directed to the recent report on reconsideration in *Ace Doran Hauling & Rigging Co. Investigation*, 108 M.C.C. 717. As was there conceded, the permissible scope of heavy hauler operations generally has been the subject of many interpretive difficulties. Be that as it may, the *Doran* case extensively reviews this question with respect to both aggregated and single-unit shipments, and, based largely upon actual case precedents, sets forth clearly stated principles and guidelines for determining an article's status under size and weight

49. *Equipment Transport, Inc., Extension—Heavy Hauling*, MC-109430 (Sub-No. 11), 111 M.C.C. 74 (1970).

authority. The applicable tenets are summarized at page 757 in the cited proceeding, and applicant in its day-to-day implementation of the franchise awarded herein should be guided accordingly."

An additional facet of the *Dillner* and *Doran* cases is seen in the decision in *Vant Transfer, Inc., Common Carrier Application.*[50] In that proceeding Vant Transfer, Inc., sought authority to transport iron and steel articles on expandable and specialized equipment as a common carrier motor carrier. By Decision and Order dated December 5, 1969, Review Board No. 2 adopted the examiner's statement of facts and conclusions, and affirmed his finding that the commodities in issue fell within the scope of operations of a heavy hauler. In addition, the Review Board observed that in operating authority application proceedings, the burden generally rests upon the applicant to establish whether the commodities it seeks to transport are covered by the authority of existing carriers. The Review Board then concluded that because Vant had adduced no evidence as to whether the tender of the involved commodities in bundles which require mechanized handling is the industry practice, Vant had not met its burden of establishing the status of those commodities under the protestant's heavy hauler operating rights. Citing the *Dillner* case which is affirmed by *Doran*, Division 1, acting as an appellate division, concluded that the involved items, even though customarily handled by mechanized procedures, were reasonably capable of being loaded and unloaded by manual labor. For that reason and because such commodities were found to have no inherent requirements for shipment in bundled form, such items were found not to be size and weight commodities. In so holding, Division 1 made the following observation:

". . . . The review board found the lack of such proof to constitute a fatal deficiency in applicant's presentation. Under the *Dillner* presumption, however, it is the heavy hauler—not the conventional transporter of motor freight—which assumes the burden of establishing the status of an aggregated shipment under size-and-weight authority. In our view, therefore, the paucity of evidence bearing on this issue negates, rather than affirms, International's title to transport most of the items programmed for future production and shipment. . . "

International was a heavy hauler protestant in the *Vant* case. Based on the

50. *Vant Transfer, Inc., Common Carrier Application,* MC-133189, 112 M.C.C. 36 (1970).

Vant case, a heavy hauler protestant to an operating authority application bears the burden of establishing the supporting shipper's aggregated traffic to be size and weight commodities as a result of the presumptions set forth in *Dillner* and affirmed in *Doran*.

CONCLUSION

As a review of past decisions indicates, the Commission has not been consistent in its standards for determining the size and weight commodity status of articles moving in interstate commerce. The *Johnson* case which establishes the general rule that reference is to be made to the individual commodities in a shipment to determine their status as size and weight commodities, the *Black* case which establishes an exception to the general rule in the case of bundled or aggregated commodities; the *Dillner* case which establishes the criteria for applying the exception to the general rule established by the *Black* case; and the *Moss* case which requires a liberal application, based on reasonableness and practical necessity, of the *Black* exception and the *Dillner* criteria all remain effective decisions of the Commission to which reference properly is to be made in considering a commodity's status under size and weight commodity authority.

The *International Transport* bomb case, while not yet a final decision, is an important decision. Thus far, the Commission's decisions in that case have been based almost entirely on negative reasoning which appears designed to achieve the results that the transportation of the 500-pound and 750-pound bombs there involved are not within the scope of size and weight commodity authorities. Although such decisions to date attempt to pay lip service to *Moss* and other prior decisions of the Commission, it is obvious that the Commission's position in the *International* bomb case is based on the field of service doctrine which generally presumes that the transportation of explosives is not within the scope of operations of a heavy hauler. Despite the reasoning applied, I submit that there simply is no wording in a size and weight commodity certificate that serves to form the basis for a presumption that any commodity which because of its size or weight requires the use of special equipment is not included within a size and weight commodity carrier's authority regardless of the identity of the commodity involved.

Even though the Commission has been enjoined in its enforcement of its decision in the *Ace Doran* case, that case undoubtedly represents the current thinking of the Commission insofar as the interpretation of size and weight commodity certificates is concerned and currently is being followed by the Commission in its decisions involving operating authority

applications. It is not my purpose here to speculate on the future legal status of *Doran*. Clearly, *Doran* is indefinite in several respects, one of the most apparent of which is the fact that different results can be achieved under *Doran* depending upon the weight which one elects to give to the various heavy hauling characteristics and guidelines set forth therein. Even though *Doran* purports not to modify or overrule *Moss*, it is obvious that *Doran* clearly establishes more stringent tests of heavy hauling than does *Moss* and that *Doran* is intended to circumscribe and limit the *Moss* case. To the extent *Doran* conflicts with *Moss*, there is widespread belief that *Doran* cannot stand. The basis of this reasoning is, of course, the fact that *Moss* is decided, both by the Commission and by the courts, in consideration of the *Dillner* case and the fact that the *Moss* decision is in keeping with the unassailed decision of the United States District Court in the *Aero* case. For that matter, the opinion is widespread that any attempt by the Commission to limit or expressly overrule *Moss* would be futile and precluded by the Court decision in the *Aero* case.

Here, as in other dynamic areas of the law, no simple test exists for immediate, uniform and satisfactory application to all fact situations. The extreme numbers of commodities and variations in commodities which today, and will in the future, move in interstate commerce when coupled with the various factors involved and the weight which different parties assign to the various criteria indicate that there may never evolve a simple, clear-cut test to determine an item's status as a size and weight commodity. In the future, the determination of the permissible scope of heavy hauling operations will continue to be decided on a commodity-by-commodity and case-by-case approach in which the importance of well researched evidence and well informed counsel will continue to be of vital importance. The significance of these future proceedings upon the continued existence and effectiveness of the heavy hauling industry is obvious.