THE EVOLUTION OF REGULATORY POLICIES FOR TRANSPORT COORDINATION

BY PAUL J. TIERNEY*

The full development of new techniques, services and operations such as "piggyback" and containerization in the last decade, along with a more complete understanding of the critical role performed by transportation in the larger process of physical distribution,[1] has stimulated an increasing awareness of the potential promise of a coordinated transportation system. Despite its popularity, coordination as a term has no well-established definition in transportation usage. For purposes of this article, transport coordination means the assignment of each element of the total transportation service to the carrier or agency which can perform most economically and efficiently.[2] This growing awareness has also drawn attention to the impediments that frustrate the nation's ability to make the optimum use of each mode and to maximize the efficient use of the resources of the total transportation system.[3] Alluding to these problems, President Johnson, in his message[4] calling for the creation of the Department of Transportation, observed that:

> As a result, America today lacks a coordinated transportation system that permits travelers and goods to move conveniently and efficiently from one means of transportation to another, using the best characteristics of each.

Among the impediments to a coordinated national transportation system indicated in the President's message were the historical random growth of each mode; unbalanced and often inconsistent governmental promotional activities; and economic, technological, institutional and

---

*Commissioner, Interstate Commerce Commission, B.S., Georgetown College, and LL.B., Georgetown University Law School.

The author wishes to thank Mr. Richard E. Briggs and Mr. Robert L. Calhoun, both of the Commission's staff, for their assistance in the preparation of this article.

1.The literature in this field is extensive. For a useful collection of articles, see Hale C. Bartlett, *Readings in Physical Distribution* (Danville: Interstate Printers 1966).

2.See Charles A. Webb, "Panel Discussion, Coordination Among Modes of Transportation," 33 I.C.C. Pract. J. 27 (1965).

3.Merill J. Roberts et al., *Intermodal Freight Transportation Coordination: Problems and Potential* (Graduate School of Business, University of Pittsburgh 1967), p. 3.

4."Proposed Department of Transportation," House Doc. 399, 89th Cong. 2nd Sess. (1966), p. 3.

political "barriers to adaptation and change." The mere listing of these sources of difficulty is suggestive of the broad and complex nature of the subject matter of coordination.

The scope of this article is limited to an examination of the development of certain aspects of Federal regulatory policy toward coordinated transportation between independent carriers or transport agencies and the extent to which existing policy, as expressed in either statutory form or agency decisions, requires revision or restatement in order to be fully responsive to present and anticipated economic, technological and institutional changes. While, for the most part, the principal emphasis in the discussion is within the context of the statutes administered by the Interstate Commerce Commission and their effect on domestic surface carriers subject to its jurisdiction, the concluding section looks briefly into the issues involved in coordinating the services and facilities of ICC-regulated carriers with those subject to the jurisdiction of the Federal Maritime Commission and the Civil Aeronautics Board.[6]

Although the subject of coordination and its attendant problems are now attracting and receiving more concentrated attention, efforts to bring about some degree of concerted cooperative action among the carriers closely parallel the evolution of the transportation industry itself. Since present Federal regulatory policy itself is also the end product of this process, a brief summary[7] of the development of the present regulatory policy is useful to place the need for change in an appropriate setting.

As the industry has developed into its present configuration, efforts by the carriers and others to coordinate transportation services and facilities have proceeded along two distinct and essentially separate paths. The first, usually accomplished by outright merger or some other device of common control, involves the integration of the facilities, operations, or services under common management. The second involves accomplishing these same objectives through

5.*Op. cit. supra*, pp. 3-4.

6.See pp. *infra*.

7.A more detailed exposition of the applicable law, both as to Commission-regulated carriers and those regulated by other agencies, see Samuel P. Delisi, *Legal and Regulatory Aspects of Coordinated Transportation Service* (University of Pittsburgh 1966). This analysis was performed in conjunction with the "Roberts" study cited in footnote 3. An abbreviated version of this monograph also appeared in Delisi, "Coordinated Freight Transportation Service: Legal and Regulatory Aspects," 34 I.C.C. Pract. J. 379 (1967)—Part I, and 34 I.C.C. Pract. J. 536 (1967)—Part II.

cooperative agreements among independent carriers. Integrated coordination—intramodal consolidations and the related controversial area of "common ownership" of one mode by another—is not considered in this discussion[8] because it differs significantly from cooperative coordination with respect to legal, economic, and political policy considerations. For present purposes, it is sufficient to point out that, historically, public policy, in response to the desire for "enforced competition" to curb monopolistic abuses together with a strong reluctance to permit the concentration of economic power in transportation, has treated these two approaches to coordination in a sharply different fashion. In contrast to a liberal and permissive regulatory attitude toward coordination between individual independent carriers, integrated coordination is relatively difficult to accomplish, particularly with respect to intermodal ownership, which is hedged with many restrictions.

I. Development of Regulatory Policy

Prior to the inception of regulation by the Commission in 1887, Congress took the first steps toward the development of a national policy toward coordination with the enactment of a series of laws between 1862 and 1874 designed to secure the physical and economic connections of the then-developing railroads into a common system. The main purpose of some of these statutes was to facilitate the making of private agreements among the carriers.[9] But other acts, such

8.The literature on both subjects is extensive. Recent discussions of mergers include: *Rail Merger Legislation*, Hearings before the Subcommittee on Antitrust and Monopoly of the Committee of the Judiciary, United States Senate, 87th Cong. 2nd Sess. (1962); Staff Study Group of Senate Committee on Interstate and Foreign Commerce, *National Transportation Policy*, Sen. Rpt. No. 445, 87th Cong., 1st Sess. (1961)—commonly called the "Doyle Report"—pp. 229-72; Conant, *Railroad Mergers and Consolidations*, (University of California Press 1965). On the subject of common ownership, see *Doyle Report*, pp. 214-22; Byron Nupp, "Regulatory Standards in Common Ownership in Transportation," 34 I.C.C. Pract. J. 21 (1966); and Stanton P. Sender, "Review of Congressional Policy on Trucking Coordination," *Transportation Research Forum, Papers and Proceedings* (Oxford, Richard Cross Co. 1967) pp. 431-45.

9.For example, the Act of June 15, 1866, 14 Stat. 66, 45 U.S.C. § 84 (1964), authorized every railroad to carry freight and passengers over its own lines from any state to another state and to connect with other railroads "so as to form continuous lines for the transportation of the same to the place of destination." The purpose of this Act was to remove impediments to interstate commerce imposed by the states and prior Acts of Congress and to prevent such impediments from being created in the future rather than

as the Pacific Railroad Acts,[10] imposed a specific prohibition against discriminatory, preferential, or prejudicial practices by the railroads against connecting carriers.[11]

The policy expressed in these acts was made generally applicable to all railroads by the original Act to Regulate Commerce,[12] most specifically in what is now section 3(4) of the Interstate Commerce Act, dealing with discrimination in rates, practices and facilities between connecting carriers.[13] Very early in its history, the Commission noted that the Act was deficient in that it made no provision for requiring the establishment of through routes and joint rates or for the Commission to compel the establishment of such joint arrangements.[14] Subsequent amendments to the Act strengthening and expanding the jurisdiction of the Commission remedied these defects through the enactment of what are now sections 1(4) and 15(3) of the Act.[15] The general policy expressed in these three sections was summarized by the Commission in an early case as follows:[16]

> Our railroads are called upon [by these sections] to so unite themselves that they will constitute one national system; they

---

to interfere with private arrangements among the carriers. *Cf. Dubuque & S.C.R. Co.* v. *Richmond*, 19 Wall. 584 (1868).

10.Act of July 1, 1862, 12 Stat. 495; Act of July 2, 1864, 13 Stat. 362, 45 U.S.C. § 83 (1964).

11.Section 15 of the 1864 Act specifically prohibited the Union Pacific and other railroads subject to its provisions from engaging in "discrimination of any kind *in favor of* the road or business of any or either of said companies or *adverse* to the road or business of any or either of the others. Although the enactment of the Interstate Commerce Act to a large extent superseded these Acts, the District Court's decision in the so-called Ogden Gateway case indicates their continued viability. *Southern Pacific Co. and Union Pacific Co.* v. *United States*, 277 F. Supp. 671 (D. Neb.) (1967), affirming *Control of Central Pacific by the Southern Pacific*, 328 I.C.C. 345 (1966).

12.Act of February 4, 1887, 24 Stat. 379 (1887).

13.24 Stat. 380 (1887), as amended, 49 U.S.C. § 3(4). In an early case, the Commission summarized the purpose of this section.

> As a result of such discrimination [between connecting carriers], a shipper may be compelled to use a line that for good reasons may be less desirable and less beneficial to him than another competing line; and, as a result, a substantial monopoly of business may be established over one connecting line and serious loss inflicted on another. Either of these involves a public injury.

The New York & N. Ry. Co. v. *New York & N.E.R.R. Co.*, 4 I.C.C. 702, 720 (1891).

14.8th Annual Report of the Interstate Commerce Commission (1894), pp. 54-60.

15.34 Stat. 58 (1906), as amended, 49 U.S.C. § 1(4) (1964), and 34 Stat. 589 (1906), as amended, 49 U.S.C. § 15(3) (1964).

16.*Missouri & Illinois Coal Co.* v. *I.C.R. Co.*, 22 I.C.C. 39, 47 (1911).

> must establish through routes, keep these routes open and in operation, furnish the necessary facilities for transportation, make reasonable and proper rules of practice as between themselves and the shippers, and as between each other.

With the later enactment of section 20(11)[17] and the Esch Car Service Act,[18] the framework of regulatory legislation as to coordinated transportation service among railroads[19] was substantially completed by 1920.[20] Subsequently, a number of minor perfecting amendments and one major addition, section 5a of the Act,[21] were added.

With the development of the motor carrier and freight forwarding industries and the re-establishment of the inland water carrier industry, the regulation of these non-rail agencies was largely considered in the context of existing railroad regulation. Although a report of the Commission on the need for Federal regulation of motor carriers[22] and the two reports of the Federal Coordinator of Transportation on motor

17.34 Stat. 593 (1906), as amended, 49 U.S.C. § 20(11) (1964). Although essentially codifying the common law as to common carrier liability for loss and damage, this section, as subsequently amended, altered the common law that a carrier was not liable beyond its own lines, thus permitting a shipper to file claims against the originating or terminating carriers participating in the through coordinated movement. On the basis of this section and section 1(6), the Commission also prescribed the form and content for single-line and through bills of lading. *Cf. In re Bills of Lading*, 52 I.C.C. 671 (1919).

18.40 Stat. 101 (1917), as amended, 49 U.S.C. § 1(10)-1(17), as amended, P. L. 89-430 (1966). As pertinent to the scope of this article, one purpose of this Act was to augment the Commission's authority to remove delays and other impediments that tended to frustrate the effective interchange of traffic between connecting carriers and thus impaired the viability of established through routes. See 30th Annual Report of the Interstate Commerce Commission (1916), pp. 68-74.

19.These provisions, with certain exceptions, also covered oil pipeline carriers, express companies, and water carriers. Intramodal coordination involving these modes has not as yet involved any significant policy issues.

20.The Transportation Act of 1920, 41 Stat. 474 (1920) made few changes in the substantive law dealing with coordination as discussed herein, although the Commission was given postive authority to set divisions. The added general philosophy of this Act to promote and protect the development of the carriers added a new dimension, however, to the Commission's handling of issues involving coordination. See Phillip H. Locklin, *Economics of Transportation*, 5th Ed. Homewood, Richard D. Irwin Inc. (1960), pp. 225-38, for a summary of the 1920 Act.

21.62 Stat. 472, 49 U.S.C. § 56 (1964). See Carl Fulda, *Competition in the Regulated Industries*, (New York, Little-Brown 1961), pp. 288-94, for the background of section 5a. Also see 15th Annual Report of the Interstate Commerce Commission (1893), p. 16, for an early expression of need to permit such agreements to facilitate coordinated rail service.

22.*Coordination of Motor Transportation*, 182 I.C.C. 263 (1932).

carrier[23] and water carrier[24] transportation alluded to the desirability and the need for regulation of coordinated transportation of these modes, these recommendations were largely directed toward *intermodal* coordination rather than coordination between carriers of the same mode.[25]

Much of the impetus for regulation of intermodal coordination grew out of the economic characteristics of railroads and the effect of their operating practices on competing carriers. The state of the present law thus largely reflects a historical process of reaction against discrimination and other abuses by the then-dominant railroads against competing modes.

The development of legislative policy in this area began with a limited initial grant of jurisdiction to the Commission over joint rail-water traffic in the Act to Regulate Commerce.[26] As subsequently expanded by successive amendments to the Act, the Commission presently has much the same authority over coordinated rail-water service as over all-rail service,[27] with several important differences, most of which reflect a strong Congressional policy to equalize the ability of the water carriers to compete with the railroads.[28] As previously noted, the existing law simply left the establishment of joint arrangements for coordinated rail-motor or water-motor service to the carriers involved.

---

23. Federal Coordinator of Transportation, *Regulation of Transportation Agencies*, Senate Doc. No. 152, 73rd Cong, 2nd Sess. (1934), pp. 10-12.

24. *Id.* pp. 10-13. Also *Fourth Report of the Federal Coordinator of Transportation*, House Doc. No. 394, 74th Cong. 2nd Sess. (1936), and 50th Annual Report of the Interstate Commerce Commission (1937), p. 105.

25. Possibly because of the then-small size and limited range of motor carrier operations, all of the above-cited reports appeared to visualize the motor carrier (except motor buses) as a coordinative adjunct to existing rail service, the role of coordinated intramodal motor carrier service being treated very briefly. For the subsequent developments, see pp. *infra* and footnotes 33-37.

26. 24 Stat. 379 (1887), as amended, 49 U.S.C. § 1(1)(a) (1964), as pertinent, gives the Commission jurisdiction over the interstate transportation "...partly by railroad and partly by water when both are used under common control, management, or arrangement for a continuous carriage or shipment...[I]n so far as such transportation takes place within the United States." For discussion of the application of this section, see *In the Matter of Jurisdiction over Water Carriers*, 15 I.C.C. 205 (1912), and *United States* v. *Munson Steamship Lines*, 283 U.S. 43 (1931).

27. *Cf.* sections 1(4), 15(3), 15(4), and 907(d) of the Interstate Commerce Act, 49 U.S.C. § 1(4), 15(3), 15(4), and 907(d) (1964). Also see Delisi *op. cit*, *supra*, at footnote 7, pp. 18-19, for a summary of the case law developed under these provisions.

28. In particular, see sections 6(11)(a) and (b), 49 U.S.C. § 6(11)(a)(b) (1964) dealing with the Commission's power to compel physical connections between rail and water carrier operations and to establish proportional rates to and from ports; section 6(12), 49

A somewhat different situation controls in the case of freight forwarders, which were brought under regulation in 1942.[29] By the very nature of their operations, freight forwarders provide a coordinated service to the shipping public. Although recognized as common carriers[30] in dealing with their own customers, the forwarders are regarded as shippers[31] by other modes. Except to the extent permitted by joint arrangements with common carriers subject to other parts of the Act.[32]

Intramodal provisions for coordination were not totally absent from the laws expanding transportation regulation. The Coordinator's bill[33] to regulate motor carriers included a provision requiring motor carriers to establish "reasonable through routes" and "just and reasonable rates applicable thereto" on an intramodal basis similar to section 1(4). The resulting provisions in the Motor Carrier Act,[34] subsequently re-enacted in the Transportation Act of 1940,[35] retained this suggestion only as to

---

U.S.C. § 6(12) dealing with through water-rail arrangements to foreign countries; and section 307(a), 49 U.S.C. § 907(d) (1964) dealing with Commission establishment of differential rail-water through routes and rates.

29.Freight Forwarder Act of 1942, Part IV of the Interstate Commerce Act, 56 Stat. 301 *et. seq.* (1942), 49 U.S.C. § 1002 *et. seq.* (1964).

30.*Cf.* section 402(5), 49 U.S.C. § 1002(5) (1964). Also see *C.,M., St. P. & P.R. Co.* v. *United States*, 336 U.S. 465, 467-68 (1949).

31.*Interstate Commerce Commission* v. *D. L. & W.R.R.*, 220 U.S. 235 (1911). Ironically, this result was sought initially by the forwarders themselves since the question resolved in this case turned on whether a railroad could treat a forwarders traffic differently from other shippers. Here, the Court held that since a forwarder was, as to a railroad, a large shipper it could not be charged a different rate on the same volume of traffic.

32.Section 409(a), 49 U.S.C. § 1009(a)(1964). Prior to the advent of motor carrier regulation, the forwarders dealt with motor carriers on a contract basis. Following the imposition of motor carrier regulation, the forwarders and the motor carriers established a network of joint rates and through routes, subsequently declared unlawful in *Acme Fast Freight, Inc., Common Carrier Application*, 17 M.C.C. 549 (1939) *affm'd sub nom Acme Fast Freight, Inc.* v. *United States*, 30 F. Supp. 968 (S. Dist. N.Y. 1940) affirmed *per curiam* 309 U.S. 638 (1940). For an extensive discussion of these matters, see *Freight Forwarder—TOFC Contracts*, Hearings before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, House of Representatives, 90th Cong. 2nd Sess. (1968) on H.R. 10831 esp. pp. 3-11 (Comments of the Commission).

33.H.R. 5262, 74th Cong. 1st Sess. (1936). This was in accord with the reports of the Commission and the Coordinator that motor carriers be subject to the same provisions of law as railroads, except for the authority of the Commission to compel such arrangements. See 182 I.C.C. at p. 387—recommendation number 8.

34.49 Stat. 558 (1935).

35.54 Stat. 924 (1940), 49 U.S.C. § 316(a) (1964).

intramodal arrangements between motor common carriers of passengers.[36] By contrast, the 1940 Act, in providing for regulation of certain water carrier operations, imposed essentially the same intramodal requirements on these carriers in the establishment of interchange facilities, joint rates and through routes and other matters relating to coordination as had been imposed on the railroads.[37]

II. Regulatory Policy Toward Coordination

The relevant provisions of the Interstate Commerce Act dealing with surface transportation have evolved in an incremental fashion over the years in response to particular problems rather than in fulfillment of some preconceived design. Although the revolutionary changes in transportation in the last decade have prompted many proposals for amending the existing law, only a few such changes have in fact been forthcoming. The Commission has, therefore, been left the task of accommodating statutory language developed in another age to present-day transportation problems. Fortunately, the key provisions of the Act are, for the most part, sufficiently broad and general so as to give the Commission considerable latitude in applying them to new situations in light of the directive of the National Transportation Policy that the ultimate aim of the Act is "developing, *coordinating* and preserving a national transportation system."[38]

A considerable degree of progress toward intramodal coordination for water carriers and railroads has been achieved. As noted in the summary of the statutory law, matters involving through routes, joint rates, interchange of traffic, and through bills of lading were initially left to the carriers as a matter of private contract.[39] Following the imposition of regulation in this area, the Commission and the courts were at the outset called upon to resolve numerous controversies as to

---

36.54 Stat. 924 (1940), 49 U.S.C. § 316(c) (1964). A critical factor in this decision appears to have been a fear that the railroads would dominate the making of joint rates and through routes. See 79th Cong., Rec. 5655 (Remarks of Senator Wheeler).

37.Specifically, sections 305(b) and 305(d), 54 Stat. 934 (1940), 49 U.S.C. § 907(b) and 907(d), impose a duty on common carriers by water to establish reasonable through routes and rates and provide for the interchange of traffic while section 307(d), 54 Stat. 937 (1940), 49 U.S.C. § 907(d) authorizes the Commission to require the establishment of joint rates and through routes between common carriers by water.
and through routes between common carriers by water.

38.54 Stat. 899 (1940), 49 U.S.C. preface.

39.See pp. *supra* and footnotes 9 and 10.

scope and application of these provisions.[40] While particular controversies still arise, the systematic and elaborate body of decisions developed in earlier years continues to provide the carriers involved with a workable set of principles for coordinating rates, practices, and equipment interchange with a minimum of Commission involvement.

Two impediments, both statutory, serve to prevent the shipping public from obtaining the full benefits of intramodal coordination. The first, section 15(4) of the Act, limits the Commission's authority to require the establishment of all-rail through routes which have the effect of "short-hauling" one of the participating carriers.[41] Because of the inhibiting effect of this provision on intramodal coordination, the Commission has sought to have this provision deleted.[42] In this context, it is appropriate to note that the Commission has recognized the value and importance of joint rates and through routes both to the shipping public and competing carriers in railroad mergers. It has required the establishment of new all-rail joint rates and through routes and the

---

40.Some of the more important cases dealing with intramodal coordination include: *In the Matter of Through Rates and Through Routes*, 12 I.C.C. 163 (1907); *In the Matter of Jurisdiction over Water Carriers*, 15 I.C.C. 205 (1909); *In the Matter of Bills of Lading*, 52 I.C.C. 671 (1919), 64 I.C.C. 347 (1921), 66 I.C.C. 63, 687 (1922); *St. Louis S.W. Ry. Co.* v. *United States*, 245 U.S. 136 (1924); *United States* v. *Missouri Pacific R. Co.*, 278 U.S. 269 (1929) (limitations on Commission to establish all rail through routes under sections 15(3) and 15(4).) More recent cases construing the Commission's authority to compel the establishment of all-rail joint rates or through routes include *Thompson* v. *United States* 343 U.S. 549 (1951), *United States* v. *Great Northern Ry. Co.*, 343 U.S. 562 (1951). As to the relationship between this section and section 3(4), see *Akron, C. & Y.R. Routing or Overhead Traffic*, 300 I.C.C. 163 (1956). Also see Doyle Report, *op. cit. supra* at footnote 8, pp. 148-49 for critical appraisal of both the existing statutory law and the Commission's decisions.

41.49 U.S.C. § 15(4) (1964). The thrust of this provision is to prohibit the Commission from establishing an all-rail through route which has the effect of depriving one of the participating carriers or an intermediate carrier under its management or control from a haul "substantially less than the entire length of its route" *unless* the Commission finds that preserving this right would result in: (a) discrimination under section 3, (b) create an unreasonably long route, or (c) that "short hauling" is required "to provide adequate and more efficient or economic transportation."

42.As a result of the highly restrictive decision in *United States* v. *Missouri P. R. Co.*, *supra*, the Commission requested Congress to delete this section because of its adverse effect on rail coordination. Annual Report of the Interstate Commerce Commission (1929) p. 89. Although renewed in 1930, 1937, 1938 and in connection with the Transportation Act of 1940, except for the change summarized in footnote 41(c), *supra*, no changes were made. See H.R. 2016, 76th Cong. 3rd Sess. (1940), pp. 64-65 and *Thompson* v. *United States*, *supra*, at pp. 555-56. In the more recent context of joint intramodal motor carrier and intermodal rail-motor service, see *Through Routes and Joint Rates*, and *Revocation of Motor Carrier Operating Authority*. Hearing before the

opening of previously closed gateways as conditions to its approval of a number of large railroad mergers.[43] Since these conditions are imposed under section 5(2),[44] they can be, and are, imposed without being bound by the limitations of section 15(4),[45] and thus provide a valuable and powerful regulatory tool with which to facilitate coordination between merger applicants and other carriers.

The second problem area concerns the Commission's present lack of complete authority over coordinated rates and services provided by motor common carriers. Although motor carriers have established an extensive structure of joint rates, through routes and interchange arrangements since the inception of motor carrier regulation, these arrangements are purely voluntary and, therefore, subject to cancellation or change by the carriers. In the absence of a showing of discrimination against particular shippers or commodities, the Commission has held that it lacks jurisdiction to compel the establishment or re-establishment of such arrangements.[46] As the

---

Subcommittee on Surface Transportation of the Committee on Commerce, United States Senate, 90th Cong. 1st Sess. on S. 751, S. 753, and S. 1768 (1967), esp. pp. 147-50 which outline the Commission's objections to extending this principle as to motor carrier through routes.

43.For example in *Great Northern Pac. & B. Lines Merger*, 331 I.C.C. 228 (1967) reversing 328 I.C.C. 460 (1966), the Commission imposed such conditions to protect the competitive stance of the Milwaukee and the Northwestern railroads by, among other things, requiring the opening of a number of previously "closed gateways" and establishment of joint rates and through routes through a number of North Dakota and Montana gateways. 331 I.C.C. at pp. 279-83. In addition, by a grant of trackage rights over the Northern Pacific from Longview, Washington, to Portland, Oregon, to the Milwaukee road, the effect of the Commission's decision in the *Spokane Gateway* case (*Chicago M. St. P & P.R.* v. *Spokane P. & S. Ry. Co.*, 300 I.C.C. 453 (1957) was largely overcome. In that case, the Commission had, because of the strictures of section 15(4), declined to order the establishment of joint rates and through routes between the Northern Lines and the Milwaukee. More extensive and novel conditions of the same type were also imposed in the *Penn Central* merger (*Pennsylvania R. Co.—Merger—New York Central R. Co.*, 328 I.C.C. 475, 561-65 (1966)—Appendicies G, H, and I.)

44.49 U.S.C. § 5(2) (1964)—section 5(2)(b) authorizes the Commission to approve carrier mergers, "[S]ubject to such terms and conditions and such modifications as it shall find to be just and reasonable."

45.*Cf. Atlantic Coast Line R. Co.* v. *United States*, 284 U.S. 288, 295 (1932) approval of a lease under section 5(2) conditioned on lessee's agreement to establish a through route short hauling itself.

46.See *East South Joint Rates and Routes, Cancellation*, 44 M.C.C. 747 (1945). Recently, in No. 34815, *National Furniture Traffic Conference, Inc.* v. *Associated Truck Lines, Inc.*, designated as a proceeding involving issues of general transportation importance, the entire Commission is considering its prior holdings to this effect with a view to reappraising such in light of the provisions of the national transportation policy

shipping public, particularly the small shipper, has come to rely more heavily on motor carrier transportation, this lack of authority has created some serious problems. While no definitive solution to this and related small shipments problems has evolved, the Commission has proposed that a number of steps be taken, including elimination of the present lack of statutory authority over motor carrier joint rates and through routes.[47] Although opposed by the industry in the past, a modified version of the Commission's recommended legislation was supported by the motor common carriers in the 90th Congress.

In contrast to the relatively steady growth of intramodal coordination, the history of intermodal coordination has been marked by frustration and controversy because it involves cooperation between competing modes having dissimilar economic characteristics and a history of competitive rivalry with one another. To a large extent, both the statutory and case law relating to intermodal transportation has developed against a background of the contrasting size and geographical scope of operations of most railroads and competing water and motor carriers.

The Commission undertook the establishment of an extensive system of joint rail-water routes[48] pursuant to a Congressional mandate to foster and promote such coordination.[49] The most difficult aspect of this task has been the prescription of appropriate differentials between

---

designed for the purpose of developing, coordinating, and preserving a national transportation system by highway adequate to meet the needs of the commerce of the United States.

47.*Small Shipments Problem*, Report of the Ad Hoc Committee of the Interstate Commerce Commission, (Washington: Government Printing Office, 1967), p. 10. The legislation referred to is implemented in S. 751 and H.R. 6533, 90th Cong. 1st Sess. (1967). Hearings (*Through Routes and Joint Rates*, *supra* at footnote 42) have been held on the Senate bill. A compromise Committee Print supported by the motor carrier industry and the Commission was issued on December 19, 1967.

48.Although Congressional concern over the lack of joint rail-water coordination had been expressed as early as 1887, much of this concern was directed toward the abuses of the railroads toward the water carriers. Positive concern dates from the re-establishment of water transportation during and after World War I and the subsequent enactment of the Dennison Act, 45 Stat. 978 (1928), which directed the Commission to grant certificates of public convenience and necessity to inland water carriers and to establish joint rates and through routes between such carriers and the railroads with appropriate differentials between all-rail routes and rail-water routes. *Cf.* Delisi, *op. cit, supra* at footnote 7 at pp. 18-19.

49.A fairly comprehensive set of coordinated rail-barge routes were established under the Dennison Act until its repeal by the Transportation Act of 1940, 54 Stat. 950 (1940), 49 U.S.C. § 920(e) (1964). The 1940 Act preserved this structure until it was reviewed

all-rail routes and rail-water routes.[50] Although this process has continued, the end result has been the subject of much controversy.[51]

In case of coordinated intermodal transportation involving motor carriers, much of the development in the area of joint intermodal through routes and rates has proceeded without direct involvement of the Commission because of its limited powers to require such actions. The most notable exception has been in the fast-growing area of TOFC or "piggyback" transportation. The evolution of TOFC transportation and the Commission's policy toward it, which culminated in the comprehensive decision in Ex Parte 230,[52] has prompted considerable comment, and the details of this development need not be repeated here. But certain aspects of this decision should be mentioned because of their general relevance to the future role of conventional regulatory techniques in transportation coordination.

In its deliberations on Ex Parte 230, the Commission was presented with the problem of fashioning rules that would permit effective regulation of coordinated rail-motor service, provide both the carriers and shippers with reasonably clear standards for their conduct, and, at the same time, not cramping the growth of this new form of transportation at a critical stage in its development. The task was further complicated by the necessity of fitting the prescribed rules into

---

by the Commission and revised in *Rail and Barge Joint Rates*, 270 I.C.C. 591 (1948) affirmed *sub nom Alabama G.S.R. Co.* v. *United States*, 340 U.S. 216 (1951).

50. *Rail and Barge Joint Rates, supra.* Additional facts in later years which have been interwoven with the differential question include rail discrimination against connecting water carriers and the issue of rail-water proportionals to and from the ports. As to the connecting carrier question under section 3(4), see *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947). As to the struggle over proportionals, see *Chicago, R.I. & P.R. Co. v. United States*, 223 F. Supp. 381 (E. Dist. Mo. 1964) affirmed *per curiam* 380

51. In essence, the railroads have resisted efforts to compel to establish joint rail-barge rates and sought legislation to remove the differential provision for such rates from section 307(d) while the water carriers have felt that the railroads are attempting to limit them solely to carriage on the waterways (for the water carrier industry's position, see *The Chinese Wall*, Washington: The Common Carrier Conference of Domestic Water Carriers, undated); in addition, until recently there has existed a continuing dialogue between the Commission and the Supreme Court in this area with the Court reversing many Commission cases holding adversely to the water carriers. See Delisi, *op. cit, supra* at footnote 7, pp. 25-32 for a summary of the cases.

52. *Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders*, 322 U.S. 301 (1965) affirmed *sub nom, American Trucking Associations* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397 (1967). For an extensive discussion of this case, see Eugene D. Anderson, Paul C. Borghesani, and William A. Towle; "Ex Parte 230: The ICC 'Piggyback' Rulemaking Case," 35 I.C.C. Pract. J. 616 (1968). See also *Doyle Report, op. cit.* at footnote 8, pp. 652-76.

a statutory framework which for the most part antedated the development of large-scale piggyback operations.[53]

The principal question in this proceeding centered on the legality of the so-called "open tariff"[54] rules. In addition, a number of related issues such as shipment documentation, interchange and leasing of equipment, the status of exempt common carriers and freight forwarders, and tariff format were given consideration. While most of these related matters were essentially tangential to the main issues and were not contested in the ensuing litigation, they disclosed a number of problems which will require active consideration and resolution in the future.[55]

III. Coordination and the Role of Regulatory Policy

The same economic and technological forces that have advanced transportation coordination to its present state and made it attractive to carriers and shippers alike have also drawn the appropriate role of regulatory policy and its implementation into sharper focus. Although up to this point the scope of this article has been concerned with the regulation of carriers subject to the Interstate Commerce Act, in order to determine to what extent regulatory policy requires revision or restatement in order to be fully responsive to present and anticipated

53.The main issues in Ex Parte 230 turned on a construction of the antidiscrimination provisions of sections 2 and 3(1), 49 U.S.C. § 2 and 3(1) (1964) which in their original form were part of the 1887 Act to Regulate Commerce. Although originally construed to apply only to discriminatory practices by carriers against shippers, Ex Parte 230 was decided against a background in which discriminatory treatment of carriers by other carriers had received considerable attention, *e.g.*, *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612 (1945). Also see *Anderson et. al.*, *op. cit.*, at footnote 52, pp. 619-24 and 322 I.C.C. at pp. 326-30.

54.The effect of these rules taken together requires the railroads to make TOFC plans previously available only to shippers also available to motor carriers on the same terms. *Cf.* 322 I.C.C. at pp. 336-37; 49 C.F.R. § 500.2 and 500.3 (1967).

55.In particular, this proceeding and the Commission's earlier decision in *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 111 (1954), have brought the appropriate role of the freight forwarder into sharp focus since, by virtue of their "shipper" status, they are precluded from using either of the "joint intermodal" TOFC plans, Plan I or II. The forwarders in the ensuing litigation sought unsuccessfully to set aside the "open tariff" rules, *American Trucking* v. *A. T. & S.F. R. Co.*, *supra*, at pp. 420-22, and in a separate proceeding still pending in the District Court to set aside the Commission's approval of Plan I. *Lone Star Packing Car Company* v. *United States*, Civ. No. 4-355 (N. Dist Tex.). Legislation has also been sought, footnote 37, *supra*. By extension, the same question exists with regard to the future role of other transport intermediaries such as REA Express.

economic, technological and institutional changes, coordination must be placed in the wider setting of all transport carriers, including deep-sea and aviation transport regulation as administered by the Federal Maritime Commission and the Civil Aeronautics Board.

Recent developments among domestic land carriers have brought a considerable coalescence in the regulation of coordinated transport by the Commission despite the modal compartmentalization of the four parts of the Interstate Commerce Act. As the discussion in connection with Ex Parte 230 indicates, there still remain a number of difficulties in developing regulatory policies that will foster greater coordination. As transport coordination reaches across the lines of the Commission's jurisdiction and begins to include carriers subject to the jurisdiction of either of the two other agencies, these inconsistencies and disharmonies become more apparent, particularly in the rapidly growing area of international transportation. Although some degree of coordination has always existed between surface, ocean, and air carriers, the historical pattern of growth has been such so as to permit intermodal transportation to be viewed as a set of separate but interrelated steps rather than as a continuing seamless flow. Although this view has shaped and influenced a similarly segmented approach in the development of regulatory policy, the same economic and technological forces, in particular the all-modal container, that have made a shambles of the separation of modal operations, are also challenging and testing the once-tidy jurisdictional limits of each agency.

One basic area concerns the establishment of a network of interagency intermodal through routes, accompanied by the establishing of appropriate single-factor through rates, interchange patterns, and the like to make them viable. The development of such arrangements permits the user to ascertain his needs in terms of the transportation system as a whole rather than as a patchwork of arrangements with individual carriers. While identical considerations have influenced the development of statutory and regulatory policies for maritime and air carriers as previously described, with respect to domestic ICC-regulated surface carriers, at this point, there seems to be no pressing need to provide governmental authority to compel interagency intermodal joint arrangements. Rather, what seems to be called for at this time is the establishment of a regulatory framework that will permit the voluntary establishment of such joint arrangements by the carriers involved, provide for uniform tariffs and tariff filings, and provide for curbs against abuses. Certain portions of existing law, such as sections

1(1)(a)[56] and 216(c)[57] of the Interstate Commerce Act and section 1003 of the Federal Aviation Act,[58] already provide for the establishment of such arrangements between ICC-regulated carriers and carriers regulated by either FMC or CAB in domestic commerce, and perhaps foreign commerce as well.[59]

A needed addition to existing law is to provide for agency authority to approve agreements and conferences between carriers, thus immunizing them from the antitrust laws, subject to the jurisdiction of different agencies similar to that conferred by section 5a and the like provisions of the Shipping Act and the FAA Act.[60] While legislation has been introduced in this Congress to authorize interagency approval

56.49 U.S.C. § 1(1)(a) (1964). As relevant, this section confers jurisdiction over rail and certain rail-water transportation "...from or to any place in the United States to or from a foreign country but only insofar as such transportation takes place within the United States." This wording dates from the 1920 Act, 36 Stat. 544 (1920), the prior wording being "...from any place in the United States *to* an *adjacent* foreign country but only insofar as such transportation takes place within the United States." [Emphasis added]

57.49 U.S.C. § 316(c) (1964). Although the relevant jurisdictional sections of Parts II and III, sections 203(a)(11), 49 U.S.C. § 303(a)(11) (1964) and 302(i)(3), 49 U.S.C. 902(i)(3) (1964), seem to clearly contemplate through routes and joint rates between ICC-regulated carriers and water carriers regulated by either the Commission or the Federal Maritime Commission, at least on domestic commerce, the Commission held, in *Motor Carrier Operation in the State of Hawaii*, 84 M.C.C. 5, 31 (1960), that joint motor-water rates with an FMC-regulated carrier were not within its jurisdiction. The so-called "Rivers Bill," 76 Stat. 397 (1962), was enacted in 1962, amending section 216(c) to cure this situation as to joint motor-water rates and routes to Hawaii and Alaska.

58.49 U.S.C. § 1483 (1964). Although the purpose of this section is to encourage air-surface joint rates and through routes, few such tariffs have been filed, possibly because of the vagueness of the procedures contemplated. *Cf.* Whitney Gillilland, "CAB Coordination of Unlike Modes," Pub. Util. Fort., September 2, 1965, p. 23. The Commission and CAB have, however, developed dual regulations with respect to carriers operating under section 203(b)(a), 49 U.S.C. § 307(b)(a) (1964), which partially exempts motor carrier transportation incidental to air. See 14 C.F.R. § 222.1-222.3 (1964) (CAB); 49 C.F.R. § 1047.50 and 1047.45 (1968). Also see "Regulation of Air Freight Pickup," 76 Yale L. J. 405 (1966).

59.In the case of joint rail rates to and from Canada and the United States, for example, tariffs containing such rates have been filed with the Commission for many years and jurisdiction exercised over their lawfulness to the extent of an American carrier's participation in such rates. See *Canada Packers, Ltd.* v. *United States*, 385 U.S. 182 (1966). As to the jurisdiction of the Commission over joint arrangements between regulated and exempt carriers (which may or may not be analogous to a carrier regulated by another agency), see Ex Parte 230, 322 I.C.C. at pp. 352-54.

60. Section 5a of the Interstate Commerce Act, 49 U.S.C. § 5b (1964); section 412 of the Federal Aviation Act, 49 U.S.C. § 1382 (1964); and section 15 of the Shipping Act, 46 U.S.C. § 814 (1964).

of equipment interchange arrangements and related matters, it has not been actively considered.[61]

Closely related to the problem of establishing through single-factor routes, rates, and tariffs, is the challenge of the content of the tariffs themselves. Since the inception of regulation, both the agencies and the carriers have struggled to accomplish the worthy goal of tariff simplication in the interest of reducing the waste inherent in tariff complexity and to enable the carriers and shippers to determine the applicable charges with more certainty. For the most part, these efforts have been unsuccessful. The evolution of an essentially simple concept, such as the basic railroad class rate structure, into the complex and voluminous tariffs presently being filed results from intense competition between carriers and between competing users. In view of the great value placed on competition in transportation and in the economy generally, it makes little sense to approach this subject with a view toward a simplified and mathematically logical tariff structure that makes only a cursory allowance for this important variable. At the same time, if the several modes subject to the jurisdiction of the same or different agencies are to facilitate their services into a coordinated pattern, the traditionally disparate tariffs systems that have grown up will have to be rationalized. Where the separate tariffs requirements of the three regulatory agencies differ, some degree of integration must be achieved. To the extent that agency rules or practices permit or encourage such things as meaningless fragmentation in commodity classifications and needlessly complex rules and restrictions, they will require revision. Fortunately, much useful work in this area has been already accomplished and more is under way, stimulated by the development of the container and all-commodity container rates, streamlined carrier pricing policies, and the growing use of automatic data processing.[62] Against this background, the role of regulatory policy is one encouraging, facilitating and, where required, prodding, those involved to continue in this effort and insuring that its own procedures do not hinder this progress.

---

61. S. 3134 and H.R. 15934, 90th Cong. 2nd Sess. (1968). These bills purport to authorize the three regulatory agencies, through the medium of a joint ICC-CAB-FMC Board, to approve agreements for the interchange of equipment between carriers subject to the jurisdiction of more than one agency.

62.The literature is extensive and diverse. For a representative collection of articles on various aspects of this subject, see *Automation Break-through*, Papers from the Second National Conference on Tariff Computerization, Transportation Research Forum (Oxford: Richard B. Cross Co. 1965).

To these areas must be added the elimination of unneeded documentation, the development of at least the rudiments of a uniform bill of lading, and a critical examination of the separate and distinctly different legal doctrines that govern carrier liability for loss and damage.

Elimination of excessive documentation is largely outside the control of the regulatory process, since it involves requirements of general commercial law, inspection, and customs regulations and other legal requirements which are reinforced by the accretion of carrier and user practices that have evolved over the years.[63] The other two areas are interconnected because of the historical dialogue between users and carriers over clauses in bills of lading purporting to limit or preclude entirely claims for loss and damage. The operational and economic differences between carriers regulated by the three agencies has resulted in the development of three essentially distinct bodies of law for land, water, and air dealing with this subject.[64]

Recognition of these difficulties confronting coordination and efforts to alleviate them are reflected in current administrative and legislative action. The FMC has determined that tariffs containing through intermodal rates can be filed with it, even though all of the participating carriers are not subject to its jurisdiction.[65] A similar type of arrangement is apparently contemplated by a number of ICC-

63.As an example of the paperwork jungle in import-export traffic, the President's Message noted that as many as 43 separate forms may be needed for one export shipment. House Doc. 399, *op. cit.*, *supra*, at footnote 4, p. 12.

64.Section 20(11), 49 U.S.C. § 20(11), restricts the freedom of common carriers by land to limit their liability whereas the Harter Act, 27 Stat. 445 (1893), 46 U.S.C. § 190-196 (1964), and the Carriage of Goods by Sea Act, 49 Stat. 1207 (1936), 46 U.S.C. § 1300-1315 (1964), are far less stringent as to carrier liability. The situation with respect to air carrier liability is clouded by virtue of there being no statutory law or CAB regulations on the subject, leaving the law to develop through judical decisions construing the effect of exculpatory clauses in air bills of lading. For a discussion of the cases, see Allen J. O'Brien, "Damage Claims Against Air Carriers," 35 I.C.C. Pract. J. 652 (1968). For recent action by the carriers and CAB on air carrier claim rules and practices, see *Traffic World*, August 10, 1968, pp. 74-75.

65.FMC Docket No. 68-8, *Disposition of Container Marine Lines Through Intermodal Container Freight Tariffs Nos. 1 and 2*, FMC Nos. 10 and 11; ___FMC___, decided April 23, 1968, approving the filing of tariffs for through transportation from inland points in the United Kingdom and certain parts in the United States. A key condition in this decision is the requirement that the ocean carrier's portion of the through rate, subject to FMC jurisdiction, be broken out for ease in identification, thus eliminating the indivisible quality that characterizes a conventional joint rate. For a similar handling of such arrangements by the Commission, see Interstate Commerce Commission *Tariff Circular 20*, Rule 67 (Washington: Government Printing Office 1928), pp. 94-95.

regulated carriers.[66] The introduction of the Trade Simplification Act of 1968 in the present Congress,[67] at the request of the Department of Transportation, represents an effort to bring about a degree of harmony among the laws and policies administered by the three agencies in international through transportation without at the same time making any organizational changes in the agencies themselves through either a merger of the agencies or the establishment of a joint interagency board of the type proposed in the past.[68]

The Department's proposal incorporates many of the matters discussed previously to facilitate through transportation, the voluntary establishment of single-factor intermodal through routes and joint rates, uniform tariffs, and authority to develop a through bill of lading. Contemporaneously with this legislation, the Department has undertaken a cooperative effort with the three regulatory agencies, other interested Federal agencies, carriers, and users to identify and resolve technological, economic, documentation and regulatory impediments to facilitate coordination.

IV. CONCLUSION

Although the details of what revisions are required in either statutory law or administrative policies are debatable, it is reasonable to assume

66.*Cf.* Docket No. FF-96 (Sub-No. 2), *New England Forwarding Co., Inc.—Extension—Import-Export*, Hearing Examiner's report and recommended order granting applicant forwarder authority to engage in import-export trade affirmed by decision and order of the Commission, Division 1, May 17, 1968. Now pending final decision before the entire Commission.

67.H.R. 16023 and S. 3235, 90th Cong. 2nd Sess. (1968).

68.The most recent attempts to establish a statutory joint ICC-CAB-FMC Board stem from a recommendation made in President Kennedy's Transportation Message, House Doc. No. 384, 87 Cong. 2nd Sess. (1962), p. 7. H.R. 11584 and S. 3242, 87th Cong. 2nd Sess. (1962) and H.R. 4701 and S. 1062, 88th Cong. 1st Sess. (1963), were subsequently introduced to implement this recommendation which applied only to domestic transportation. In commenting on the 1963 bills, the three agencies jointly proposed an alternative bill providing for greater detail in the joint board's procedures. See *Transportation Act Amendments*, Hearings before the Subcommittee on Surface Transportation of the Committee on Commerce, United States Senate, 88th Cong. 1st Sess., on S. 1061 and S. 1062 (1963), pp. 26-27. For a later version, see H.R. 7793, 89th Cong. 1st Sess. (1965). Because of controversy over how this board would work, none of these bills ever progressed beyond the Committee stage; however, in the interim, the three agencies have developed closer informal working relationships on matters of mutual concern. On the question of merging the three regulatory agencies, see *Doyle Report, op. cit., supra*, at footnote 8, pp. 11, 107-10, and William H. Tucker, "Renovating the Decisional Process in an Independent Regulatory Commission," 35 I.C.C. Pract. J. 207, 217 (1068).

that such revision will not involve any substantial reduction in the level of regulation embodied in the present statutory scheme. Even the most earnest advocates of this position do not extend it to encompass matters involving coordination. Nor does there appear to be any necessity for major additions to the regulatory laws which fundamentally alter the basic approach and philosophy of the existing structure (as distinguished from some of the recommended legislation, such as the Trade Simplification Act or other laws described earlier, which essentially fill out and perfect this approach). Rather, what seems to be called for is a careful evaluation of the relevant law with a view toward either eliminating obsolete barriers erected in another age or filling gaps which impede coordination. A necessary corollary is a similar evaluation of the accumulation of the decisions and rulings of the Commission and other regulatory agencies in terms of the same objective. Consistent with this approach, the future development of regulatory policies of these should be guided by the sweeping language in the Supreme Court's opinion in affirming Ex Parte 230 that:

> Regulatory agencies do not establish rules of conduct forever; they are supposed, within the limits of the law and of fair and prudent administration to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.[69]

69. *American Trucking* v. *A. T. & S.F. R. Co.*, *supra*, at p. 416.