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LEGISLATION AND ADMINISTRATION

ADMINISTRATIVE LAW — ICC TO PASS ON MOTOR CARRIER USE OF PIGGY-BACKING — EXTENT OF “INITIAL MOVEMENT” AUTHORITY OF AUTOMOBILE HAULERS — By a petition dated June 27, 1960, the National Automobile Transporters Association, a corporation having present membership of fifty-seven common carriers and six contract carriers by motor vehicle engaged in the transportation of automobiles and related articles and purporting to speak on behalf of the automobile hauling industry, sought from the Interstate Commerce Commission a declaratory order¹ under the provisions of section 5(d) of the Administrative Procedure Act,² interpreting Administrative Ruling No. 75,³ promulgated by the Commission's Bureau of Motor Carriers. The concern is with the meaning of the term “initial authority,” as that term is used in Ruling No. 75, insofar as it relates to the extent of the authority granted to those engaging in “initial movement.”

More precisely, the petitioner was seeking a ruling as to whether a motor carrier holding initial authority to transport motor vehicles only from A to D may transport them to B, a non-service point intermediate to D, there load the trailer on a rail flat car, for handling in trailer-on-flat-car or “piggyback” service to C, another non-service point intermediate to D, where it would again take possession of the shipment and move it by truck to its ultimate destination, D, without first obtaining specific authority either to serve B or C or to operate from C to D.⁴

The matter was referred to an Examiner for hearing and the recommendation of an appropriate order. Following a hearing, in which the petitioner, NATA, certain automobile manufacturers, and a number of rail and motor carriers participated, several of whom intervened in opposition, and after the submission of briefs, the Hearing Examiner, on July 20, 1961, issued his recommended order denying the petitioner's requested interpretation.⁵ The matter is currently pending before the Interstate Commerce Commission, with a decision expected to be rendered in the latter part of 1961.

This proceeding involves a highly important question relating to the legality of motor carrier operations in the transportation of motor vehicles. The problem which confronts the motor carriers, the railroads, and the shippers of motor vehicles is nation-wide in scope. The proceeding grows out of confusion as to the rights of motor carriers to utilize trailer-on-flat-car service (TOFC) provided by railroads. The necessity for the issuance of a declaratory order was felt by the NATA:

to be demonstrated by reference to the pendency before the Commission of a number of proceedings, the disposition of which would require such interpretation and by the fact that in two of such cases two Commission Examiners faced with practically identical facts, had reached diametrically opposite conclusions, citing the same Commission precedent in support of their diametrically opposed views.⁶

In the final analysis, much of the national transportation policy may have to be scrutinized and perhaps changed.

The Supreme Court, in reviewing an ICC decision, once said: “The national transportation policy is the product of a long history of trial and error by Congress.”⁷

1 Docket No. MC-C 3024, September 30, 1960.

2 60 Stat. 240 (1946) 5 U.S.C. § 1005 (1958):

Prompt notice shall be given of the denial in whole or in part of any application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where a denial is self explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds.

3 FED. CARR. REP. ¶ 25075, at 26151 (July 15, 1938).

4 Report and Order of the Hearing Examiner, No. MC-C 3024, July 20, 1961.

5 *Ibid.*

6 Brief of the National Automobile Transporters Association in Docket No. MC-C 3024, October 24, 1960.

7 *MacLean v. United States*, 321 U.S. 67, 80 (1944).

The first step in the formulation of such a national policy was the passage of the Interstate Commerce Act of 1887.⁸ The purpose of the Act was the regulation of common carriers doing interstate business, which, for all practical purposes, were the railroads. The end in view was the control of these industries to bring about a more effective carrier coverage of the whole nation, while protecting the individual carriers from one another. The Act, while not perfect in this regard, was on the right track to a more efficient country-wide transportation system. However, with the advent of the twentieth century, a new carrier came upon the scene. During the 1920's, this new form, the motor vehicle, developed rapidly.

Yet, the Interstate Commerce Commission could correctly state in 1928 that interstate carriage of property by motor carrier was not significant enough to warrant legislation.⁹ But the depression of the 1930's changed this. It is estimated that thirty-one per cent of the nation's railroads were in receivership during this period.¹⁰ When the railroads' business fell off, the motor carriers moved into the field. The situation then existing was best described by a Senate Report of 1934:

Motor Carriers for hire penetrate everywhere and are engaged in intensive competition with each other, and with the railroads and water carriers. This competition has been carried to an extreme which tends to undermine the financial stability of the carriers and jeopardizes the maintenance of transportation facilities and service appropriate to the needs of commerce and required in the public interest. The competitive struggle is to a large extent unequal and unfair, inasmuch as the railroads are completely regulated. . . , and the interstate motor carriers are scarcely regulated at all.¹¹

The ICC had called for an answer in a ruling in 1932 that said: "Substantial and increasing rail-motor competition requires the proposed regulation in the public interest, since the unrestrained competition is an impossible situation."¹²

It was into this situation that the Motor Carrier Act (Interstate Commerce Act Part II) was enacted in 1935.¹³ This regulated the competition between the motor and rail carriers so as to foster the contributions each could make to the over-all national transportation system. To effectuate the development of both, the absorption of the new motor carrier industry by the established railroads was guarded against. The ICC was instructed by the framers of the Act:

to allow acquisition (by the railroads of motor carrier concerns) which will make for a coordinated and more economical service, and at the same time to protect the public against monopolization of highway carriage by the railroads.¹⁴

The rails did establish subsidiary motor carrier lines to connect the shipper with the rail yard, but as to the independent motor carriers, coordination and its consequent savings to shipper and public were dead letters. The rails refused to work harmoniously with the motor carriers, and the latter were, they thought, in no need of rail help. A 1938 ICC case pointed this out with a touch of humor:

The railway goes so far, indeed, as to suggest that if it contemplated retirement from the handling of merchandise traffic, it could do so more gracefully and at less expense than by entering into joint arrangements with the parallel competing truck lines, from which the railway is convinced "it could reasonably expect no bona fide coordination or cooperation."¹⁵

During this period, the motor carriers were taking an especially large share

8 24 Stat. 379 (1887), 49 U.S.C. § 1 (1958).

9 Motor Bus and Motor Truck Operations, 140 I. C. C. 685, 719 (1928).

10 DRAYTON, *Transportation under Two Masters* 67 (1946).

11 S. REP. No. 482, 74th CONG., 1st Sess. (1935).

12 Coordination of Motor Transportation, 182 I. C. C. 263, 379 (1932).

13 49 Stat. 543 (1935), 49 U.S.C. §§ 301-400 (1958).

14 79 CONG. REC. 5655 (1935) (remarks of Senator Wheeler). Senator Wheeler concluded: "We try . . . to take away any fear that might exist in the minds of some that the motor busses and trucks were going to be regulated in the interest of the railroads. I think such fears were absolutely unfounded."

15 Kansas City Southern Transit Co., Common Carrier Application, 10 M.C.C. 221, 235 (1938).

of the national market in "high-rate" goods, *i.e.*, goods shipped in quantities less than a carload and goods which would not stand a large amount of handling.¹⁶ One commentator has suggested the following reasons for these inroads by the trucking concerns:

In attempting to compete with the truckers, the railroads have been handicapped in two important respects: (1) by the loss of time in handling freight cars through large terminals, and (2) by the added cost to the consignor or consignee when either or both are located off-track in the handling of freight to and from the railroad freight house or team track service.¹⁷

It was further observed by this commentator that: "Piggybacking service provides a means of overcoming both handicaps."¹⁸ Piggybacking or trailer-on-flat-car service in its most fundamental form is the interchange of trailers, loaded or empty, between motor vehicles and rail flat cars.¹⁹ In all instances, motor vehicle traffic moving in TOFC service is moving in transport trailers normally utilized by motor carriers in highway service, but loaded on flat cars normally utilized in the provision of service by rail. In most instances the motor carrier highway service is involved in the origination of such traffic prior to the loading of the trailers on rail flat cars and some motor carrier highway service is involved in the subsequent delivery of the traffic after the trailers are unloaded from the rail flat cars. The latter operation is the only type involved in the present proceeding.

Interchange is not something new, having been used sparingly between rail and water in the middle of the last century.²⁰ However, for present purposes, piggybacking may be considered to have started with the Chicago and Great Western Railway in 1936. The railroad entered into an agreement with a common carrier by motor vehicle to transport the latter's trailers from the former's yards in Chicago to the Twin Cities, where the motor carrier would once more haul the trailers to the specific destinations in and around the Twin Cities. A petition to the Interstate Commerce Commission for authority to post a tariff, *i.e.*, a schedule of rates or charges, covering the rail segment of the combined transportation was submitted.²¹ Competing rail and motor carriers immediately posed objections as to the rates sought, which were well below the standard all-rail rates. The motor carriers objected that the Great Western would need a motor carrier authority to transport highway trailers. The Commission rejected the objectors' arguments and piggybacking became part of a legal transportation policy.

Since then, TOFC has become a growing source of revenue for the railroads. Approximately \$166,000,000 was realized through its use in 1959,²² and use of the service increased 115% in the two years following 1958.²³ From the Great Western, the furnishing of this service had spread to a total of sixty-one first-class railroads as of June, 1961.²⁴

The nation-wide changes in transportation from the first Interstate Commerce

16 See Williams, *Some Aspects of the Problem of Intercarrier Competition*, 11 VAND. L. REV. 971, 975-80 (1958), for an analysis of rail rate structure and motor carrier competition.

17 Fox, *Trailer-on-flat-car Rates*, 28 I.C.C. PRAC. J. 833-34 (1961).

18 *Id.* at 834.

19 SPECIAL STUDY GROUP ON TRANSPORTATION POLICIES IN THE UNITED STATES FOR THE SENATE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, 87TH CONG., 1ST SESS., REPORT ON TRANSPORTATION POLICY, PRELIMINARY DRAFT, 652 (Comm. Print. 1961).

20 From 1843 to 1857 sectionalized canal boats were transported on flat cars between Philadelphia and Columbia, Pennsylvania. In 1885 and thereafter for several years, the Long Island Railroad operated the so-called Farmer's Trains between Long Island points and the East River, carrying four loaded produce wagons per flat car with the teams riding along in specially constructed boxcars.

21 Trucks on Flat Cars between Chicago and Twin Cities, 216 I.C.C. 435 (1936).

22 Fox, *Trailer-on-flat-car Rates*, 28 I.C.C. PRAC. J. 835 (1961).

23 SPECIAL STUDY GROUP ON TRANSPORTATION POLICIES IN THE UNITED STATES FOR THE SENATE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, 87TH CONG., 1ST SESS., REPORT ON TRANSPORTATION POLICY, PRELIMINARY DRAFT, 652 (Comm. Print. 1961).

24 "Piggyback Routing Guide," *Distribution Age*, Oct. 1960, p. 99.

Act until today are particularly evident in automobile hauling. The business of hauling automobiles during the early years of that invention was the domain of the rails. With the expansion of motor carriers, their adaptability to transporting new automobiles was soon recognized. The merits of this system from a practical standpoint were pointed out in the *Andrew Clark — Extension of Authority* case, wherein it was said:

The dealers who testified herein expressed a preference for motor carrier transportation because it enables them to receive cars at their place of business completely assembled, lubricated, and ready to deliver. Cars shipped by rail must be unloaded by the dealers, which requires considerable labor. At many points, in particular the smaller towns, inadequate terminal facilities entail additional time and labor in unloading the cars. After unloading, cars transported by rail must be towed to the dealers' garages for oil, gasoline, and occasionally some servicing, such as installation of bumpers, wheels, and other parts.²⁵

The inherent advantages of motor carrier transportation of automobiles led to a rush of competing carriers to service Detroit and the other motor capitals of the Midwest. The resultant duplication of facilities was contrary to the policy of the Motor Carrier Act.

Under the so-called "grandfather clause" of the Act,²⁶ the number of authorities granted for interstate motor vehicle transportation was limited to the number of truckers in active business at a date one year prior to the enactment of the bill. But even at the critical date, the number of carriers in the automobile hauling industry was excessive, so that a further limitation was deemed necessary. The following year, the Interstate Commerce Commission grouped all property carriage into four categories, determined according to the service offered by the carrier.²⁷ By definition, automobile haulage would fall into groups C and D (irregular radial movements and irregular non-radial movements, respectively). In 1937, the ICC ruled that transportation of new cars was usually a C movement, *i.e.*, "over irregular routes from a fixed base point or points to points or places located within such radial area as shall have been fixed and authorized by the Interstate Commerce Commission."²⁸ The transportation of used and repossessed cars was defined as a D movement, *i.e.*, "generally territorial in scope and between unlimited points of origin and destination within designated boundaries."²⁹

That the distinction between the two types of movements depended on the fixed originating point or lack of it is seen clearly in a 1944 ICC decision:

²⁵ *Andrew Clark — Extension of Authority*, 16 M.C.C. 535, 537 (1939).

²⁶ 49 Stat. 551 §§ 206(a), 209(a) (1935); 49 U.S.C. §§ 306(a), 309(a) (1958). § 306(a) reads:

Except as otherwise provided in this section, and in section 310 of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interest or operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations. *Provided*, however, that subject to section 310 of this title, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935 on the route or routes within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation, and has so operated since that time, except in either instance as to interruption of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings.

²⁷ *Classification of Motor Carriers of Property in the Matter of the Classification of Brokers and Motor Carriers of Property*, 2 M.C.C. 703, 709-11 (1937).

²⁸ 49 C.F.R. § 165.1(c) (1937).

²⁹ *Howard Sober, Inc. Extension — California*, 52 M.C.C. 296, 301 (1950).

[The] authorities have carefully maintained the distinction between radial and non-radial service. To our knowledge, in no instance has radial authority been granted with the understanding that through service between points in the radial territory via a point in the base territory was permitted or authorized. The motor carrier industry has developed under the general understanding that certificates authorizing radial operations do not authorize the holder thereof to perform cross haul operations by transportation between points in the radial territory.³⁰

In 1938, the Commission handed down an administrative ruling defining the two types of authority in regard to the automobile hauling carriers.³¹ The terms used were initial and secondary authority, but they corresponded to the radial and non-radial movements that governed the entire area of motor carrier transportation. So, the Commission defined the two as follows:

The term "Initial movements" means transportation of *new motor vehicles* from a place of manufacture or assembly, specifically authorized to be served as a point of origin by the originating carrier's certificate, or permit, to any point or place upon the authorized route or within its defined territory for delivery to consignee or to a connecting carrier.

The term "Secondary movement" means transportation of motor vehicles, *except transportation of new motor vehicles from a place of manufacture or assembly*, by a carrier to, from, and between all points and places upon its authorized route or routes or within its authorized territory for delivery to consignee or connecting carriers. Such movements also include cross movements, back hauls, and movements to and from body and specialty plants upon the route or routes or within the authorized territory of the carrier.³²

This ruling governed the automobile hauling industry without question as to its meaning for almost twenty years. The "initial movement" carrier would perform the long haul from the manufacturer to the distributor or large dealers. The secondary authority holder would perform the final distribution, if any were needed, and transport used and repossessed cars. But at the end of the 1950's, the possibility of adapting TOFC to the automobile hauling business was fully appreciated for the first time. Since the cars were in themselves mobile, there was no difficulty in transporting them from highway to rail and back.³³ The rate savings of twenty-five per cent and more convinced shippers that they should request their carriers to enter into arrangements with the railroads for a trailer-on-flat-car service.

It must be noted here that the automobile manufacturers were using both common carriers and contract carriers by motor vehicle. A common carrier is a quasi-public agency that furnishes transportation to any and all members of the public who desire such service, while a contract carrier does not furnish transportation indiscriminately, but only to those with whom it sees fit to contract.³⁴ While both in the present instance are performing the same work, the common carriers are not under as strict a regulation as the contract carriers, nor are the contract carriers afforded all the privileges of the common carriers.³⁵

The agreements call for TOFC service to be utilized under various plans. In some instances, the traffic moves by motor common carriers and under rate schedules published by such common carriers, although en route the motor carrier utilizes the TOFC service offered by the railroad. Such substitution of TOFC service for a portion of the highway haul is provided for in the tariff. Thus, the motor carrier receives its publicized transportation charges from the shipper and remits to the participating rail carriers an unpublished division of the single factor motor carrier rate. This is Plan I. It is to be noted that under this plan the

30 G & M Motor Transfer Co., Common Carrier Application, 43 M.C.C. 497, 503-04 (1944). See also, Carraway, *Motor Carrier Operating Authorities*, 11 VAND. L. REV. 1029, 1043 (1958).

31 Administrative Ruling No. 75, FED. CARR. REP. ¶ 25075, at 26151 (July 15, 1938).

32 *Ibid.* (Emphasis added.)

33 Fox, *Trailer-on-flat-car Rates*, 28 I.C.C. PRAC. J. 836 (1961).

34 Mt. Tom Motor Lines v. McKesson & Robbins, 325 Mass. 45, 89 N.E.2d 3, 5-6, (1949).

35 Holmes Contract Carrier Application, 8 M.C.C. 391 (1938).

shipper does not share in the cost reduction effected by the substitution.

In other instances, the rail carriers publish ramp to ramp rates and the motor carriers transport traffic to and from the railroads at the motor carrier rates and the railroad transports the same traffic between its ramps at the rail rate. Thus, the railroad receives its published rate rather than an unpublished division of the motor carrier's single factor rate. This is Plan 3.

A third variation, known as Plan 5, occurs where the motor common carrier and the railroad publish *joint* rates covering motor carrier and TOFC service.

The physical aspects of the coordinated motor-rail-motor operations under the three plans do not differ materially, but there is considerable difference in the methods of billing, the identity of the shippers involved, and the imposition of liability for loss or damage to the cargo. The legal significance of the differences among these plans, as viewed by the parties on both sides and the Hearing Examiner, will be seen in subsequent discussion. These three plans are the only ones available for use within the confines of the "initial movement" limitation.

Typical of the agreements entered into by the automobile hauling industry is the service provided by the Dixie Transport Company and the Louisville and Nashville Railroad. Under this operation, Dixie would pick up the motor vehicles at the Studebaker-Packard factory in South Bend, Indiana, transport them to Cincinnati, Ohio, there load the trailers on flatcars of the L&N, from where the loaded cars would move to Atlanta, Georgia, where the loaded trailers would be removed from the flatcars and transported by Dixie to ultimate destinations in Florida and Georgia. Dixie's authority was both initial and secondary from South Bend to all points in Florida and Georgia.

Dixie, however, had brought a proceeding before a Hearing Examiner in which it voluntarily sought a certificate of public convenience and necessity for initial and secondary rights from the rail terminal points to the destinations served, apparently believing that some additional authority would be required.³⁶ Protesting competing carriers challenged the right of Dixie to transport the vehicles over an entirely different route than that authorized on Dixie's certificate. Secondly, they asserted that the railroad carriage segment of the transportation terminated the initial authority of Dixie. The plan used being a Plan I operation, the L&N was quick to point out that under this system, the rail service was merely substituted for Dixie's highway haul, and that Dixie actually remained the carrier for the entire trip; thus, the initial authority was not ended by the rail portion of the shipment.

The decision in this case, as well as the decision in another involving essentially the same question, was rendered in 1960.

In *Dixie Transport Company-Extension-Several States*,³⁷ the Examiner recommended a denial of the application on the ground that public convenience and necessity had not been established. During the course of the public hearing, it was developed that Dixie was already engaged in the provision of transportation service involving TOFC movement between rail terminal points intermediate to the point of automobile manufacturer and the ultimate consignee. The Examiner ruled that the TOFC service so employed was unlawful inasmuch as the motor carrier had no authority to serve Cincinnati nor to serve Atlanta from Cincinnati. In the other case, *Convoy Company Extension—Rail-for-Motor Service*,³⁸ the applicant was using TOFC service between California and Utah, holding only initial authority to serve these points. The Hearing Examiner wrote:

[I]t would appear that applicant, upon publication of appropriate tariff provisions for substitution of rail service, might lawfully conduct the proposed operations under its presently effective rights. The matter of

³⁶ Dixie Transport Company — Extension — Several States, MC — 88300 Sub. 24 (1960).

³⁷ *Ibid.*

³⁸ MC — 52858 Sub. 78 (1960).

*whether the proposed service lawfully may be performed under presently effective rights, of course, would depend on whether issuance of a bill of lading by applicant at the assembly plant covering transportation by motor vehicle to final destination would fix the identity of the shipment from the plant to final destination as an initial movement.*³⁹

Here, again, there was involved a Plan I operation and the Examiner evidently accepted the argument of the railroads entering in support of the petition that the rail portion of the transportation was not as a connecting carrier, but merely as a substitute for the motor carrier.

The decision in this case, as well as the *Dixie* decision, was pending before the Commission at the time the petition of the National Automobile Transporters Association was submitted.⁴⁰ Because of the conflicting opinions, the motor carriers refrained from further use of the piggyback services, unless they possessed the requisite secondary authority to serve the intermediate points. The whole question of further adaptation of piggybacking to automobile hauling was kept in abeyance pending the outcome of the petition.

In reality, what is desired by the petition is a redefinition of Administrative Ruling No. 75 as to the interpretation of the last phrase thereof, *viz.*, "or to a connecting carrier."⁴¹ If the railroad is a connecting carrier in TOFC arrangements, as understood by the term in the ruling, the initial authority of the motor carrier terminates at that point where the trailers are loaded onto the flatcars. Consequently, the motor carrier is violating his authority certificate inasmuch as he is performing initial movement only from point A to B, and not to D as the authority requires.

The Hearing Examiner's decision was a denial of the NATA petition. In so doing, the Examiner wrote:

Regardless of which of the so-called rail TOFC plans are [sic] described in Appendix B is used, the conclusion is inescapable that the motor and rail participants are, in fact, connecting carriers, and it is immaterial whether the vehicles move on joint through rates, or a combination of local rates. . . . In addition to requiring authority to serve the intermediate points at which the traffic is turned over to or received from the railroad, the motor carrier must have initial authority from the point of initial origin to the point of transfer to the rail carrier, and secondary movement authority from the point at which the traffic is received from the railroad to the point of ultimate destination.⁴²

There is no doubt that the forthcoming decision on the Hearing Examiner's recommended order will have far-reaching effects on the automobile haulers. The Commission is well aware of this, for in *Auto Convoy Co. Extension—Secondary Movements from Texas Points*,⁴³ the opinion noted the upcoming decision on the petition for the declaratory order in these words:

Until recently, authorized motor carriers transported the bulk of the traffic from assembly plants to final destinations in initial or combined initial-secondary movements. Much of the long haul traffic now moves by rail. Cut off from the over the road service for long distances, the established automobile transporters are forced to rely on traffic moving to points within relatively short distances of the assembly plants, or to the traffic which has been moved by rail for the major portion of its journey to a destination requiring only a short haul movement to the distributor. Most of the established carriers have a large investment in special equipment and plant facilities which are lying idle. Certainly, in the auto transport business, there needs to be a clarification of basic principles to serve as guidelines to those holding authorities no longer useful to shippers, and to

39 *Ibid.* (Emphasis added.)

40 MC-C 3024, Sept. 30, 1960.

41 Administrative Ruling No. 75, FED. CARR. REP. ¶ 25075, at 26151 (July 15, 1938).

42 National Automobile Transporters Association Petition for Declaratory Order, Order of the Hearing Examiner, MC-C 3024, July 20, 1961.

43 No. MC 108121, July 25, 1961.

those who may be induced to seek modifications of rights or even new grants.⁴⁴

The Commission, in deciding the petition, will have no precedents precisely on this point upon which to rely. But there are previous cases dealing with the problems of interchange between carriers, TOFC service, and the automobile hauling industry in general.

The landmark case on the practice of TOFC service is *Movement of Highway Trailers by Rail*,⁴⁵ better known as the "New Haven Questionnaire." The controversy arose over the use of TOFC service by the New Haven Railroad. Under an Examiner's disallowance of the service, the railroad ceased the arrangements in force and submitted twelve questions to the Commission regarding the legal relations, limitations, and obligations incident to the transportation of highway trailers on flatcars. The answers given by the Commission were a compendium of the earlier decisions dealing with TOFC service. The findings included holdings of previous decisions that "piggybacking" is rail and not motor transportation;⁴⁶ common carriers by motor vehicle may enter into joint rate agreements with railroads,⁴⁷ while private and contract carriers may not;⁴⁸ and that these rules do not apply when the prior motor transportation is within a "terminal area" solely.⁴⁹

The questions posed which immediately touch on the issues raised in the petition are as follows:

Question No. 7(a): As between a railroad and a motor common carrier whose loaded and empty trailers are moving in the railroad's trailer-on-flat-car service, is the relation that of connecting carriers where the arrangement is for substituted service?⁵⁰

The Commission answered with an unqualified "yes." What the Commission went on to say about the obligations of the two carriers necessarily follows such a construction of the relationship described:

Although the railroads are under no obligation to police the operations of the motor carriers with respect to their certificates, we believe that when they enter into joint rate agreements with such carriers they should satisfy themselves that the motor carriers have authority to operate with respect to the commodities *between the points* where the substituted service is performed.⁵¹

In regard to the use of the different plans of TOFC service offered by the railroads, it has been seen that joint rate agreements (Plan 5) were not questioned. Question No. 4 considered Plan 3 in the following words:

Under the conditions stated in question 3, (under provisions of tariffs duly published, but without holding any authority under Part II of the Act) may a railroad transport such trailers if the prior and/or subsequent highway movement is by a common carrier by motor vehicle?⁵²

The Commission answered the question in the negative, saying:

[I]f the railroad is on notice that the trailers tendered it in this manner are being operated in common carrier service subject to Part II of this Act, it should not thus knowingly join with the motor common carrier in a violation of the law.⁵³

Neither of these holdings was unexpected. They were merely a restatement of the law governing TOFC since the first case dealing with the subject came before the Commission in 1936. In this case, *Trucks on Flat Cars between Chicago and*

44 *Ibid.*

45 293 I.C.C. 93 (1954).

46 *Movement of Highway Trailers by Rail*, 292 I.C.C. 93, 103 (1954), answer to question No. 1.

47 *Id.* at 105, answer to question No. 5.

48 *Ibid.*

49 *Id.* at 103, answer to question No. 2.

50 *Id.* at 107.

51 *Ibid.* (Emphasis added.)

52 *Id.* at 103.

53 *Ibid.*

the *Twin Cities*,⁵⁴ the Commission allowed the Great Western Railway to conduct the TOFC service over the route that the participating motor carrier was certified to serve under an open tariff (Plan 3) on the theory that the motor carrier was still the carrier from beginning to end of the entire journey and that the carrier was acting as the "shipper" during the rail segment.

But this justification of Plan 3 service by use of the fiction that the carrier was carrier-throughout and shipper-part-way was found repugnant to the spirit of the Motor Carrier Act and consequently overturned in the *Substituted Freight Case*⁵⁵ three years later. In that case, mention was also made of Plan 1 operations in the following:

[W]here a common carrier by motor vehicle substantially abandons its over the road service between any points on its route, it runs the risk of having its certificates revoked in whole or in part. . . . The furnishing of the so-called substitute service without setting forth the service, the routes over which it is performed, and the parties performing same in lawfully filed tariffs is in contravention of sections 216-217 (Motor Carrier Act) and our regulations thereunder.⁵⁶

Thus, the Commission was equating Plan 1 with Plan 5 in the relationship of the two carriers.

On the same point of relationship, perhaps the clearest expression of the Commission's thinking was given in *Motor-Rail-Motor Traffic in the East and Midwest*.⁵⁷ There, the Great Western Railway again filed a tariff for proposed motor-rail-motor joint rates, using the corresponding rates of the motor carrier for highway transportation for the same distance (a Plan 1 operation). The Commission, in answering the objection that it is unlawful for the motor carrier to substitute a new route over rails, made the following comment:

This argument assumes that under the proposed arrangement the status of the respondent motor carrier with respect to the rail portion of the transportation would be that of shipper. Nothing in the evidence warrants this assumption. *The motor carriers status is that of a connecting carrier under a joint rate agreement which is specifically authorized by law. The novel way in which the traffic is handled does not affect the status of the participating carriers in that arrangement.*⁵⁸

In point of fact, the only decision that has shown a different viewpoint as to the relationship between the carriers is the *Gilbert Carrier Corp. Extension — Kearney, N.J.*⁵⁹ case, where the Commission ruled that "As the proposed service is a substitute for the all-motor service which the applicant is now authorized to perform, it cannot be considered as distinct and separate therefrom, but rather as complementary and non-severable."⁶⁰ Here, it must be noted that the controversy was not concerned with automobile hauling and the Commission did, in spite of this quotation, take it upon itself to grant a new authorization for the motor carrier to serve the rail yard, thus indicating that the old authority for the over-all transport would not cover the initial truck movement to the rail head in a city outside the area encompassed in the original authority.

The Commission, in the 1961 *Auto Convoy Co.* case referred to above accepts this conclusion as to the need of new authority to serve the rail head:

The contention of protestants at the hearing that, under initial authority to serve both origin and destination points, they could provide service by means of TOFC (trailer-on-flat-car) Plan 1, even though not authorized to serve either rail origin or destination point *finds no support in present Commission precedents.*⁶¹

54 216 I.C.C. 435 (1936).

55 232 I.C.C. 683 (1939).

56 *Id.* at 690-91.

57 219 I.C.C. 245 (1936).

58 *Id.* at 274. (Emphasis added.)

59 72 M.C.C. 204 (1957).

60 *Id.* at 206.

61 *Auto Convoy Co. Extension — Secondary Movements from Texas Points*, No. MC 108121, July 25, 1961. (Emphasis added.)

This twofold conclusion of the law as it stands today—that the status of the carriers engaging in TOFC together is that of connecting carriers and not that of shipper and agent, and that as connecting carriers, both must have authority to serve the point of interchange—does not necessarily defeat the position of the petitioner. The cases were not dealing with the question of initial and secondary authorities, and the petitioner contends that, because of this, the cases cited may be distinguished from the instant proceedings. Nor does the phrase “connecting carrier” have the same meaning today that it did when Administrative Ruling No. 75 was issued. As has been seen, the coordination of railroad and motor transportation facilities was virtually nonexistent before the arrival of TOFC. The petitioners seize upon this fact to argue that the subject of Administrative Ruling No. 75 was interchange between two motor carriers or two railroads, and not between railroads and motor carriers.⁶² This present arrangement of rail movement acting for motor movement was something unforeseen in 1938 and so must be decided upon new considerations, and not on the law as it describes conditions then existing.

There is certainly strength behind this argument and no one, not even the objectors to the petition, would deny that a great change has occurred in the past few years. But there were instances in the past where motor carriers hauling automobiles have interchanged cargo with another carrier, *e.g.*, cars have been shipped by boat from Michigan to Milwaukee and Duluth,⁶³ and the subsequent motor vehicle transportation was always required by the Commission to be under secondary authority. It may be said that this era of piggybacking is not so much a revolution as a development, astounding and unprecedented to be sure, but a development nonetheless of a practice already judged in terms of initial and secondary authority.

The petitioners contend that the purpose of Administrative Ruling No. 75 was to protect the initial authority holders and not to limit their field of operations.⁶⁴ This is shown clearly, they argue, in the quantity of proof demanded by the Commission in granting initial authorities, much more than was needed for the granting of a secondary authority. Secondary authority was never predicated on the fact that the secondary carriers would play an appreciable role in the transportation of new cars and so the procedures were made simpler.

While this may be true in regard to the conceptions of the original Commission, it is well known that at this time secondary carriers are carrying much of the new automobile traffic.⁶⁵ A denial of the petition would, of course, increase their business, but in no sense would it give the secondary carriers an entrance into a field where they have never been.

The petitioner argues that public interest demands the granting of the petition. Shippers of automobiles and railroads have for the most part joined the proceedings as intervenors in behalf of the petition. The shippers' interest is due to the fact that the motor carriers now making the initial movements have serviced them long and well and are experienced in the handling of their product. Another reason for the shippers' interest is the amount of procedural difficulties that will fall on them if the petition is denied. The brief of the Ford Motor Company brings this out:

62 Brief of National Automobile Transporters Association in No. MC-G 3024, October 24, 1960, p. 25.

63 Brief of Clark Transport Company, Intervenor in Opposition in MC-G 3024, October 24, 1960, p. 10.

64 Brief of National Automobile Transporters Association in No. MC-G 3024, October 24, 1960.

65 Frank Porterfield, of Convoy Company, an intervenor in opposition, testified at the oral hearing that \$22,000,000 has been derived by his company in secondary operations in the past thirteen years. Further, he testified that his concern has spent over \$1,000,000 in acquiring facilities to perform distribution of piggyback traffic.

Ford, in order to assure itself that it would have suitable motor carrier service to carry out the distribution of automobiles after completing the rail portion of TOFC services, has been obliged to communicate with the Commission on no less than 17 occasions in support of various motor carrier requests for temporary secondary authority or requests for the renewal of a secondary authority about to expire.⁶⁶

The railroads have joined in asking for the granting of the petition because of the immediate fuller use of TOFC service that would result. But all the railroads have expressed uneasiness over any extension of the petition to any other than a Plan 1 arrangement. Plan 3, they fear, may be illegal under the *New Haven* rulings, and Plan 5 has always concerned itself with connecting carriers. Thus, the railroads pay lip service to the theory that Administrative Ruling No. 75 was intended to prevent just that.

The petitioner's final argument is not based on law or new interpretations of older decisions. It rests firmly on logical grounds and perhaps is the best argument advanced for the granting of the requested order. The initial authority holders were always able to transport the automobiles from the manufacturing site to the distributor. Until approximately two years ago this was all done by highway transportation. Now, the argument runs, are they not doing the very same thing, even though substituting a rail shipment for part of the formerly all-highway journey? The change in mode of transportation is merely accomplishing the end which the initial authority holder was providing at all times since the distinction between initial and secondary authority was made. Nor are the secondary authority holders losing anything, as the initial movement was always as complete a service as the proposed TOFC service will be. The petitioner also brings out the fact that the selection of who will receive the cars at the rail unloading point will be in the hands of the shipper, and if the shipper feels that secondary carriers should perform the final lap of the journey, the granting of the petition will not hinder his choice.⁶⁷

In this question of whether the granting of the petition will cause a loss of traffic to the secondary authority holders, the secondary carriers take the position that it will. It appears that it would cause some loss where the secondary carrier is now operating as the receiver of the automobiles at the rail unloading point, but these situations are infrequent as compared with the majority of secondary carriers who concern themselves almost exclusively with used and repossessed cars. Perhaps it might be argued that the granting of the petition would allow the initial carriers to furnish complete service facilities at points far removed from their present facilities at or near the manufacturing site, and in so doing allow them to expand their business to small dealers, which at present they are not servicing, thus taking away the only business the majority of secondary carriers have in regard to new cars. The Commission will be faced with ascertaining all the facts in this matter to determine the validity of the petitioner's plea.

Besides this main issue at point in the petition, the entrance of intervenors both on behalf and in opposition to the petition have injected numerous related

⁶⁶ Brief of Ford Motor Company, intervenor in behalf of the petition in MC-C 3024, October 24, 1960, pp. 10-11.

⁶⁷ Brief of the National Automobile Transporters Association in MC-C 3024, October 24, 1960. While this argument is based on logic primarily, there are decisions that accept the position offered. The Commission has granted new authorities to established carriers where they are "following the business." So, in *Petroleum Transport Co. Extension — Umatilla*, 19 M.C.C. 637, 639 (1939), the Commission ruled: "In the circumstances, it is our opinion that we should view the issues herein as merely permitting the applicant to continue to perform the same service as it has heretofore." *Accord*, *Helms Express, Inc.*, 67 M.C.C. 183 (1956).

issues into the proceedings. Two especially seem to be worthy of mention here. General Motors, appearing in behalf of the petition, is unique in that it alone is dependent on contract carrier service for the distribution of its automobiles. Thus, General Motors has construed the petition as asking for permission for their contract carriers to make use of TOFC service. As has been seen, the granting of the petition in behalf of the common carriers would demand the overruling of many Commission precedents; in regard to contract carriers, the precedents are even more opposed.

In *Movement of Highway Trailers by Rail*,⁶⁸ the question of contract carrier participation in TOFC service was answered. The Commission determined:

[W]e are of the view that a contract carrier may not utilize trailer-on-flat-car service to obtain transportation within the scope of its [the contract carrier's] permit. For example, a contract carrier of specified commodities, authorized to perform such transportation from Portsmouth, N.H., to New York over a route through Boston, could not lawfully divert his vehicle at Boston to trailer-on-flat-car service between that point and New York.⁶⁹

The Commission was following the general thesis held in an earlier case, *Holmes Contract Carrier Application*.⁷⁰ There, upon a request by a contract carrier to authorize interchange movements with rail carriers, the Commission decided:

[A] contract carrier is under certain disabilities in its relations with common carriers. It may not engage in interchange with common carriers; interchange is appropriate between common carriers only. We see nothing to prevent a shipper from employing a contract carrier, apart from its contract of carriage, as its agent for the purpose of arranging for transportation by common carrier beyond points reached by the contract carrier, including payment of the charges for such transportation.⁷¹

One of the often-cited reasons for this prohibition on contract carriers is that the shipper has contracted with the carrier that it should perform the transportation for him and that to transfer the cargo to a common carrier for part of the distance would breach that contract.⁷² This argument could not stand up in the present case as General Motors *wants* the contract carrier to interchange. But the argument, it is submitted, is and was a subterfuge for the feeling, rightly held, that the purpose of the Motor Carrier Act was the protection of common carriers from the encroachments of contract carriers.⁷³

It would appear that any attempt of the intervenors to reopen this question of contract carrier participation in TOFC service will meet with the Commission's disapproval. On June 6, 1960, the NATA filed a petition for a reconsideration of the holdings in the *New Haven* case and the Commission denied the petition on the grounds that the law on the matter is settled and there is no reason for reopening the question.⁷⁴

Another related issue of special note which has been injected into this proceeding is the contention by NATA and the manufacturers of automobiles repre-

68 293 I.C.C. 93 (1954).

69 *Id.* at 103-04.

70 8 M.C.C. 391 (1938).

71 *Id.* at 392-93.

72 Iron and Steel Articles — Eastern Common Carriers, 305 I.C.C. 369, 374 (1959).

73 In *Gollock Application for Extension of Operations*, 1 M.C.C. 161, 165 (1936), this principle was alluded to on the extension of a contract carriers certificate of authority:

There is force in this protestant's view that common carriers, since they undertake to service the general public, should be protected against the contract carriers who take the cream of the traffic and thus make it difficult for the common carriers to continue their broader operations.

74 *Petition For Leave to Intervene in Movement of Highway Trailers by Rail for Reopening, for Oral Hearing, and for Reconsideration*, Docket No. 31375, March 1, 1960. Denied on June 8, 1960.

sented that all forms of TOFC are the same, and if one plan is allowed, all should be. As of the time the controversy began, all three plans were in use by different motor companies. The petitioner alleges that the only distinction between the plans is one of form, and the actual participation is identical.

It is this issue, seemingly put forward as a mere afterthought to the principal issue at hand, that has caused the intervention in the proceedings of the freight forwarders and at least one railroad.⁷⁵ For if the construction of TOFC plans advanced by the petitioner is accepted by the Commission, the conclusion would not be restricted to the automobile hauling field of transportation, but would be extended to all motor carrier companies.

At the present time, Plan 3 is restricted to the use of shippers, freight forwarders, and private carriers. This is so because of the very nature of the plan, *i.e.*, a proffering of all-rail service to a shipper or his agent in their vehicles. A common carrier cannot by law be the agent of the shipper, nor is a contract carrier an agent where it will deliver the goods and receive them back from the railroad, assuming full responsibility for the goods for the entire journey.⁷⁶ Allowance of Plan 3 service would, it is contended, constitute the carrier by motor vehicle as shipper and thus subject the railroad to accepting goods offered in this way, whether they agreed to the arrangement or not — because of their common carrier status.

Many railroads refuse to engage in Plan 1 service with motor common carriers because the plan leaves full responsibility and receipt of payment in the hands of the motor carrier, thus rendering the railroads liable to another carrier. The rails in general favor the use of Plan 5 TOFC service and that only in regard to motor common carriers. Any of the other plans, they feel, will violate section 216 of the Motor Carrier Act,⁷⁷ allowing them, at their discretion only, to enter into piggy-backing arrangements.

The Special Study Group on Transportation Policies in the United States recommends a more wide spread use of piggybacking.⁷⁸ They favor its extension along Plan 5 lines believing Plan 1 to be disadvantageous because of its unpublished division of charges, which circumvents the policy of open rates requirements for common carriers. Plan 3, they feel, should be limited to shippers, freight forwarders, and private carriers, and should be developed only to check the diversion of traffic to private carriers. This latter conclusion seems to have been accepted by the Commission in a case earlier this year.⁷⁹

75 The St. Louis-San Francisco Railroad intervened in its own behalf in the present proceedings. The "Frisco" was one of the original railroads offering TOFC service. In oral hearing on the petition, it declared itself as allowing service only under a Plan 5 arrangement.

76 Brief of the St. Louis-San Francisco Railroad Company, Inc., intervenor in No. MC-C 3024.

77 49 Stat. 558 §§ 216(c) (1935), 49 U.S.C. § 316(c) (1958), which reads:

Common carriers of property by motor vehicle may establish through rates and joint rates, charges, and classifications with other such carriers or with common carriers by rail, or express, or water. . . . In case of such joint rates, fares, or charges, it shall be the duty of the carriers thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of the participating carriers.

78 SPECIAL STUDY GROUP ON TRANSPORTATION POLICIES IN THE UNITED STATES FOR THE SENATE COMMITTEE ON INTERSTATE OR FOREIGN COMMERCE, 87TH CONG., 1ST. SESS., REPORT ON TRANSPORTATION POLICY, PRELIMINARY DRAFT, 668-78 (Comm. Print. 1961). Therein it was stated: "We recommend that Congress express its intention that rigid interpretation of the Act [Interstate Commerce Act] not operate to bar progress. We recommend that regulatory agency make full use of existing powers . . . to accomplish these objectives."

79 Eastern Central Motor Carrier Association, Inc. v. Baltimore and Ohio Railroad Co., No. MC — 32533, where, over the vigorous objections of the motor carriers, the Commission approved full scale use of Plan 3 TOFC service by freight forwarders because of the benefits accruing to shippers and the public.

While it may be advanced that the different plans of TOFC service may result in the same physical participation of motor and rail carriers, the law seems clear from the *Movement of Highway Trailers on Flat Cars* case⁸⁰ that Plan 3 is closed to the use of common carriers and contract carriers on pressing transportation policy grounds. Because of this and the fact that any such sweeping change of existing Commission law would require a hearing of all parties concerned, *viz.*, all the interests which partake in any form of TOFC service in any area of transportation, any decision on the matter of the petition will not include an affirmance of this position of the petitioner.

In concluding, it may be noted that the issues involved in the petition are many and complex. As to the incidental issues described, there is little chance that the Commission will reverse its prior decisions and grant the interpretation request. As to the central issue restricted to the area of automobile hauling, any forecast must be of a much less certain tone. The denial of the petition will slow down the full utilization of piggybacking in this area, a result most transportation analysts would condemn. However, the loss would not be of an appreciable nature and a denial would accord with the policies of the Commission in this area for the past twenty years. It is for these reasons that it would appear that the petition will be denied, and the Commission will do justice to the petitioners by granting them secondary authority for those movements now conducted on initial authority which follow the unloading of the trailers at the rail terminal point.

Charles J. Griffin

ARBITRATION AND AWARD—POWERS AND OBLIGATIONS OF COURTS AND ARBITRATORS IN INTERPRETING ARBITRATION CLAUSES OF COLLECTIVE BARGAINING AGREEMENTS. — The United States Court of Appeals for the Fourth Circuit has recently refused to enforce the award of a labor arbitrator on the grounds that he exceeded his submission authority and based his decision on inadmissible evidence. The dispute centered upon the discharge of an employee for allowing, as the Company termed it, “a cotton lap to run through a carding machine which he was supposed to be tending,” resulting in damage to the machine and a waste of production. The discharge came after two previous reprimands for the same offense and was based on “a long-standing policy in the ‘card room’ of discharge following two warnings.” After complying with the grievance procedure, the parties submitted the case to arbitration, which resulted in an award ordering suspension without pay for one week and thereafter reinstatement without loss of seniority rights and with back pay up to a maximum of ninety days. When the Company refused to abide by the award, the Union instituted this suit to compel compliance. The Court of Appeals affirmed the refusal of the lower court to enforce the award, holding that the arbitrator, under this particular contract, had no authority to investigate and pass upon the propriety of the “Company’s standards”; and that even if he did have such authority his award would fail, because it appeared to be based on another arbitration case with the same Company in which a different arbitrator reprimanded the Company for its training programs and excessive workloads. *Textile Workers Union of America, AFL-CIO, Local 1386 v. American Thread Company*, 291 F.2d 894 (4th Cir. 1961).

In *Textile Workers Union of America v. Lincoln Mills of Alabama*,¹ the Supreme Court of the United States delivered a mandate to the federal courts that they should apply the policy of our national labor laws in order to formulate a substantive law with respect to their jurisdiction and duties in interpreting arbitration clauses of collective bargaining agreements. On June 20, 1960, almost four years to the day after *Lincoln Mills*, the Supreme Court in a trio of cases de-

80 293 I.C.C. 93, 103-04 (1954), in answer to question No. 3.

1 353 U.S. 448 (1957).

terminated the nature of this substantive law.² The essence of this "Warrior trilogy," as these cases have come to be called, is that, according to our national labor policy, the question of the arbitrability of a dispute is exclusively for the courts to decide unless the parties have expressly contracted otherwise; that a decision on the merits is within the jurisdiction of the arbitrator and must be reserved for him; and that "An order to arbitrate the particular grievance [or to enforce the arbitration award] should not be denied unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."³ The reason for this extension of the latitude given the arbitrators is a recognition that collective bargaining agreements cannot be interpreted strictly as are commercial contracts, and a realization that the tools of the arbitrator are most suitable for such an interpretation.

The majority of the court in *Textile Workers Union of America v. American Thread Company*⁴ evidently realized the sweeping quality of the words of the Supreme Court in the *Warrior* trilogy, for an adequate and correct discussion of these cases is presented in the opinion.⁵ Also obvious from a reading of the opinion, though not actually spelled out therein, is a disapproval of the award of the arbitrator and of his conclusion as to the merits of the case. Desiring a ground upon which to refuse to enforce the award of the arbitrator because of his feeling of its patent injustice, and inoculated with judicial loyalty to the teachings of the United States Supreme Court, Circuit Judge Boreman was forced to scrutinize some of the provisions of the collective bargaining agreement strictly, and completely disregard others, so that it could be said with "positive assurance" that the dispute was not arbitrable.

This "judicial destruction" of the spirit of the collective bargaining agreement begins with a quote from Article III of the agreement — the Management Rights Section.⁶ To summarize the pertinent parts: The Company has the right of management, which includes the right to discipline or discharge for just cause; and any action by the Company under this section can be subjected to the grievance procedure, up to but not including arbitration, unless the agreement otherwise provides. Add to this section the fact that the discharged employee had violated a Company standard, and that Article IV, Section 1, defines "just cause" for discipline or discharge as including the "failure of an employee to properly perform his job in accordance with the Company standards,"⁷ and you have a "reasonable" argument that the type of penalty is up to the discretion of the Company and *positively* not arbitrable. This "reasonable" argument is a prime example of the reason courts have left the bulk of collective bargaining agreement interpretation to the arbitrator — a close scrutiny of a single contract provision, without a consideration of other provisions and of exterior factors, can often result in an absurd conclusion. An example based on other provisions of this collective bargaining agreement will illustrate this. Article IV, Section 1, also defines "just cause" for discipline or discharge as including a "violation of valid plant rules" and a "failure to obey instructions of supervisors";⁸ under Judge Boreman's interpretation of the agreement, an employee who reports to work two minutes late could be validly discharged.

2 *United Steelworkers of America v. American Manufacturing Company*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960). See also Davey, *The Supreme Court and Arbitration*, 36 NOTRE DAME LAWYER 138 (1961); Note, 36 NOTRE DAME LAWYER 63 (1960).

3 *United States Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574, 582-83 (1960). (Emphasis added.)

4 291 F.2d 894 (4th Cir. 1961).

5 *Id.* at 897.

6 *Ibid.*

7 291 F.2d at 898 (4th Cir. 1961).

8 *Ibid.*

The fallacies of this argument are adroitly pointed out by Chief Judge Sobeloff in a dissenting opinion. He attacks the opinion of the majority on this point from two angles. First, he points out the failure of the majority to differentiate between "just cause for discipline" and "just cause for discharge"; and secondly, he indicates that other contract provisions are pertinent and that if they are minor provisions and can be disregarded, this decision is for the arbitrator.⁹ Article IV, Section 2, of the bargaining agreement provides that all cases of discharge or discipline are subject to the grievance procedure, which contains arbitration as a last step, and Section 3 of that same Article assumes the possibility of arbitration in the case of discipline or discharge, for it limits the arbitrator's award of back pay to a period of ninety days.¹⁰

Whether Chief Judge Sobeloff succeeded in proving that this dispute is clearly arbitrable is debatable; but he did point out that there is a contradiction in the collective bargaining agreement, (or at the very least, an ambiguity), under the "positive assurance" doctrine of the *Warrior* trilogy is enough to get the case to the arbitrator for a decision on the merits.¹¹

As mentioned above, the majority also based their judgment on the arbitrator's reliance on inadmissible evidence, namely, another arbitrator's opinion in a case with the same Company. While there are some old cases holding that an award may be set aside for a manifest mistake of law or fact,¹² which includes the admission of improper evidence, the majority seem to hold that a mistake of law or fact, without corruption or fraud, will not vitiate the award.¹³ Moreover, as Chief Judge Sobeloff points out, since the United States Supreme Court stated in *United Steelworkers of America v. Enterprise Wheel and Car Corp.*,¹⁴ the third case in the *Warrior* trilogy, that "Arbitrators have no obligation to the court to give their reasons for an award,"¹⁵ it follows that these reasons cannot be reviewed by the courts.

Having thus established that the opinion of the majority is without support in the light of the *Warrior* trilogy, an interesting problem presents itself. Since the courts have exclusive jurisdiction to determine the arbitrability of a particular dispute;¹⁶ since they have to order arbitration of the merits unless there is "positive assurance" that the dispute is not arbitrable;¹⁷ and since they cannot review the reasons for an arbitrator's decision,¹⁸ is it possible for a dispute to be arbitrated,

9 Local 95, Office Employees International Union v. Nekoosa-Edwards Paper Company, 287 F.2d 452 (7th Cir. 1961). In response to the Company's claim that certain clauses were minor clauses and not pertinent, the court said at 456: "That argument merely points up a patent ambiguity which may be resolved only by interpretation of the agreement as a whole, . . . which is within the scope of the power expressly granted by the agreement to the arbitration board. . . ."

10 Textile Workers Union of America, Local 1386 v. American Thread Company, 291 F.2d 894, 904 (4th Cir. 1961).

11 United Steelworkers of America v. Warrior and Gulf Navigation Company, 363 U.S. 574, 582-83 (1960).

See Local 95, Office Employees International Union v. Nekoosa-Edwards Paper Company, 287 F.2d 452 (7th Cir. 1961); Maryland Telephone Union v. Chesapeake and Potomac Telephone Company, 187 F. Supp. 101 (D. Md. 1960); Textile Workers Union of America v. Cone Mills Corp., 188 F. Supp. 728 (M.D.N.C. 1960).

12 E.g., U.S. v. Farragut, 89 U.S. 406 (1874).

13 Western Oil Fields, Inc. v. Rathbun, 250 F.2d 69 (10th Cir. 1958); United Fuel Gas Company v. Columbia Fuel Corp., 165 F.2d 746 (4th Cir. 1948).

14 363 U.S. 593 (1960).

15 *Id.* at 598.

16 United Steelworkers of America v. American Manufacturing Company, 363 U.S. 564 (1960); United Steelworkers of America v. Warrior and Gulf Navigation Company, 363 U.S. 574 (1960); Local 201, International Union of Electrical, Radio and Machine Workers v. General Electric Company, 283 F.2d 147 (1st Cir. 1960).

17 United Steelworkers of America v. Warrior and Gulf Navigation Company, 363 U.S. 574, 582-83 (1960).

18 United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 598 (1960).

with the award being rendered and enforced, while the arbitrator actually lacks jurisdiction over the subject matter?

After many years of uncertainty and indecision, the federal courts were given an idea as to their role in interpreting arbitration clauses of collective bargaining agreements with the passage of Section 301(a) of the Labor Management Relations Act of 1947.¹⁹ Due to the generality of this clause, however, divergent views developed. One theory was that Section 301(a) was enacted only to give jurisdiction to the federal courts in cases involving labor contracts and that it did not give them any different or additional powers than a state court would have had if the action had been brought there.²⁰ Contrary to this was the view expressed in *Textile Workers Union of America v. American Thread Company*,²¹ and adopted by the majority of the courts, that Section 301(a) was a directive to the federal courts to develop a "federal common law" in connection with the rights of the parties to a collective bargaining agreement, and that it authorized such courts to give specific performance of arbitration clauses contained in these agreements.

The United States Supreme Court settled this conflict among the circuits in 1957 with its opinion in *Textile Workers Union of America v. Lincoln Mills of Alabama*.²² The Court adopted the view of Judge Wyzanski as expressed in the *American Thread* case; arbitration was ordered, and the federal courts were directed to fashion a federal common law from the policy of our national labor laws.

This directive was followed by numerous articles on the role of the federal courts in the interpretation of arbitration clauses in collective bargaining agreements. Undoubtedly the most influential was an address given by Professor Archibald Cox at the Annual Meeting of the National Academy of Arbitrators, and printed in the *Harvard Law Review*.²³ His article begins with an elaborate discussion of the characteristics of a collective bargaining agreement, including how it differs from an ordinary commercial contract, and how it "is the ultimate source of the rights [of the parties], but . . . does not provide the actual criteria of decision."²⁴ The latter part of the article contains Professor Cox's solution to the problem. He suggests that the conventional arbitration clause, a "wide-open" clause,²⁵ "reserves the right to a judicial determination upon whether the arbitrator has jurisdiction over the subject matter but that all other questions — procedural, jurisdictional or substantive — are solely within the power of the arbitrator to determine,"²⁶ and that "Since the true nature of a grievance often cannot be determined until there is a full hearing upon the facts, the reasonable course is to send all doubtful cases to arbitration, reserving the right to vacate any award which indisputably goes beyond the scope of the agreement."²⁷

Insofar as this solution gives to both the arbitrator and the courts the work

19 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958): "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

20 *Mercury Oil Refining Company v. Oil Workers International Union*, 187 F.2d 980 (10th Cir. 1951).

21 113 F. Supp. 137 (D. Mass. 1953).

22 353 U.S. 448 (1957).

23 72 HARV. L. REV. 1482 (1959).

24 *Id.* at 1493.

25 A "wide-open" arbitration clause is one calling for the arbitration of all disputes over the application or interpretation of the collective bargaining agreement. "Wide-open" arbitration clauses or reasonable facsimiles thereof can be found in the following cases: *United Steelworkers of America v. American Manufacturing Company*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574 (1960); *Retail Shoe and Textile Salesmen's Union, Local 410 v. Sears, Roebuck and Co.*, 185 F. Supp. 558 (N.D. Cal. 1960).

26 72 HARV. L. REV. 1482, 1511 (1959).

27 *Id.* at 1517.

for which they are best suited, it is feasible and practicable; but insofar as under it a grievance might come before the courts twice and the arbitrator once before the arbitrator's jurisdiction is definitely determined, it eliminates two of the advantages of arbitration — speed and minimum expense.

The United States Supreme Court, through the "positive assurance" doctrine,²⁸ adopted Professor Cox's idea of sending all doubtful cases to arbitration; in fact, the Court quoted his article in the opinion. But, evidently realizing the possibility of three hearings before a definite determination of the arbitrator's jurisdiction, the Supreme Court in the *Enterprise Wheel* case limited the investigatory powers of the courts after arbitration to the same knowledge that was available before the arbitration hearing and decision²⁹ — the wording of the contract in and of itself.³⁰ Thus, the Supreme Court has eliminated Professor Cox's idea of letting the courts review the arbitrator's award and consider the facts and conclusions expressed therein, in order to finally determine his jurisdiction. By such action, the Supreme Court has also eliminated the possibility in some cases of a final determination as to arbitrability. The courts have exclusive jurisdiction to determine the arbitrability of a particular grievance;³¹ they have to order arbitration unless they can positively say the dispute is not arbitrable;³² and under the *Enterprise Wheel* case, they have no more power in reviewing an award than they did at the time of the original action.³³ Therefore, in a case in which it cannot *positively* be said that the dispute is not arbitrable and in which the arbitrator does *actually* lack jurisdiction of the subject matter, the court must order arbitration, the arbitrator must decide the merits of the case, and the court must enforce the award. This is not only a serious departure from the intentions of the parties, but it is also contrary to most ideas of equity and justice.

In response to these teachings of the Supreme Court, the federal courts can take one of three types of action, all of which are unsatisfactory. First of all, they can ignore the *Warrior* trilogy and determine the arbitrator's jurisdiction as they see fit; this has not occurred as yet and due to the deep respect for the Supreme Court is not likely to take place. Secondly, and probably most reasonably, though not in accord with the law, they can follow the lead of Circuit Judge Boreman, as stated in the *American Thread* case,³⁴ in cases they want to keep from the arbitrator, *i.e.*, they can strictly construe certain provisions of the collective bargaining agreement, disregard others, and arrive at the conclusion that the particular dispute is *positively* not arbitrable. The third response of the courts would be to recognize the law as it is and abide by it; but, as shown above, this could possibly result in the enforcement of an arbitration award which the arbitrator was without jurisdiction to render.

In formulating a solution to this dilemma, it is important to keep separate the duties of the courts and the arbitrators and the reasons therefor. As has been

28 *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574, 582-83 (1960).

29 *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 598 (1960).

30 In *United Steelworkers of America v. American Manufacturing Company*, 363 U.S. 564 (1960) at 568 it is stated: "The court . . . is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." This statement, along with other statements in the *Warrior* trilogy, has been interpreted to mean that the court is without authority to examine contract proposals, negotiations or past practices. *Maryland Telephone Union v. Chesapeake and Potomac Telephone Union of Md.*, 187 F. Supp. 101 (D. Md. 1960). *Contra*, *Local 725, International Union of Operating Engineers v. Standard Oil Company of Indiana*, 186 F. Supp. 895 (D.N.D. 1960).

31 Cases cited note 16 *supra*.

32 *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574, 582-83 (1960).

33 *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 598 (1960).

34 291 F.2d 894 (4th Cir. 1961).

said, the courts are to determine arbitrability.³⁵ The principal reason for this authority is to enable the courts to maintain a check on the actions of arbitrators. The arbitrators, on the other hand, have been given complete control of weighing the merits of the case.³⁶ There are several reasons for this, but they all hinge upon the fact that, unlike the courts,³⁷ the arbitrators are not limited to the express provisions of the contract; they consider the "industrial common law — the practices of the industry and the shop,"³⁸ and also the contract proposals, negotiation meetings, etc., that were important in the formation of the collective bargaining agreement.³⁹

Based on these considerations, a proposed solution to the problem is to give the courts the right to determine arbitrability either when the dispute is clearly *not* arbitrable,⁴⁰ or when it clearly is arbitrable,⁴¹ and give them the authority to order the arbitrator to determine his own jurisdiction over the subject matter in all other cases. Such a solution is not beyond the power of the courts. As Justice Brennan stated in a concurring opinion in *United Steelworkers of America v. American Manufacturing Company*: "Since the arbitration clause itself is part of the agreement, it might be argued that a dispute as to the meaning of that clause is for the arbitrator."⁴²

In addition, such a solution would retain for the courts and the arbitrators the reasons for their participation in these matters; the courts would retain a check against unbridled arbitration, as they would have the final say as to whether the arbitrator exceeded his submission authority, and the arbitrator would be able to give full play to his skill in interpreting collective bargaining agreements and to his peculiar advantage of being able to investigate matters exterior to but connected with the collective bargaining agreement. Even more important than this, such a solution would preserve the goals of parties who insert arbitration clauses into their agreements; they would be guaranteed a fair decision, within a minimum amount of time, and with a minimum of expense.

Edward J. Fillenwarth, Jr.

³⁵ Cases cited note 16 *supra*.

³⁶ *American Brake Shoe Co. v. Local 149, UAW*, 285 F.2d 869 (4th Cir. 1961); *Howard v. United States Rubber Co.*, 190 F. Supp. 663 (D. Mass. 1961); *Textile Workers Union of America v. Cone Mills Corp.*, 188 F. Supp. 728 (M.D.N.C. 1960).

³⁷ Courts are limited to the contract itself. See cases cited notes 29 and 30 *supra*.

³⁸ *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574, 581-82 (1960).

³⁹ *Maryland Telephone Union v. Chesapeake and Potomac Telephone Company of Md.*, 187 F. Supp. 101 (D. Md. 1960).

⁴⁰ *E.g.*, *Local 791, International Union of Electrical, Radio and Machine Workers v. Magnavox Company*, 286 F.2d 466 (6th Cir. 1960). After rendering his decision the arbitrator ordered the Company to conduct an engineering survey of its assembly line; this was clearly outside his authority.

⁴¹ *E.g.*, *Retail Shoe and Textile Salesmen's Union, Local 410 v. Sears, Roebuck and Co.*, 185 F. Supp. 558 (N.D. Cal. 1960).

⁴² *United Steelworkers of America v. American Manufacturing Company*, 363 U.S. 564, 571 (1960).