# The Intermodal Movement of LCL Freight: The Problem Areas

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## I. INTRODUCTION

Two decades ago there burst upon the transportation scene the so-called "container revolution," said to be the most radical change in ocean transportation since the substitution of steam for sail. Instead of individual packages being loaded into a net or sling at the pier, hoisted aboard the vessel and then loaded into a hatch, the packages are loaded away from the pier into a container usually twenty or forty feet long, eight feet high and eight feet wide with a maximum load of 44,000 and 60,000 pounds respectively. The container is loaded into a cellular vessel, called a "container ship." Hundreds of millions of dollars have been expended for such ships, containers and terminal facilities. Because of the ability of the container ship to carry the "wonder boxes" both above and below deck, vessel capacity is increased dramatically. As a result, vessels may now be loaded in a fraction of the time formerly required.

The full container load (FCL) exporter, shipping from an inland point of

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origin, enjoys significant advantages in the movement of his merchandise because of containerization. The steamship lines cater to such an exporter by delivering empty containers to his plant for loading and subsequently moving them via an inland carrier to the port area. The steamship lines have shown no inclination to deal with the less than container load (LCL) exporter at inland points.[1]

The LCL shipper is left to his own devices in arranging for the movement of a shipment from an inland origin, through the port to the overseas destination. He must first retain the services of a local trucker to carry his package to the warehouse of a domestic forwarder or an ICC motor carrier. The package is consolidated with those of other LCL shippers, moved to the terminal of the forwarder or motor carrier at the port, broken out, and then carried by truck to the designated pier.

In the course of such handling, responsibility for loss or damage of the LCL package may rest with the inland trucker, the domestic forwarder or motor carrier, the trucker at the port of dispatch, the steamship line, or with the overseas transporter moving the shipment to the consignee's warehouse. Each of these carriers issues its own receipt or bill of lading for its portion of the transportation.

Because of separate transportation documentation, the LCL shipper experiences difficulty in pinpointing liability for loss or damage to his package. It is difficult, if not virtually impossible at times, to determine whether such loss or damage occured at the point of origin, during the inland haul to the port, while being transported to the pier, during the ocean voyage, at the port of unloading or while being transported to the final destination. In addition, each of those involved in the physical movement of the package operates under different liability limits. This results in higher costs for insuring goods during transit because of the underwriter's difficulty in recouping losses through its subrogation rights.

The LCL shipper has a problem in ascertaining the total transportation costs of moving his goods from the inland origin to the overseas consignee. A computation must be made of the local drayage cost, the freight charges for the haul to the port, the cartage fee from the port warehouse to the pier, the ocean freight charges, the forwarding fees, the port clearance costs at destination and the inland transportation charges to the consignee. Because of the liability question, the tremendous amount of paper work involved, and the problem of assembling the costs figures, many small manufacturers are discouraged from actively selling their products overseas.

It has been estimated that at least twenty-five percent and as much as

1. MARSHALL, IMPEDIMENTS TO OVERSEAS SHIPPING OF LESS-THAN-CONTAINER LOAD CARGOES 12 (Center for Marine Studies 1978) [hereinafter cited as IMPEDIMENTS].

fifty percent of the total U.S. ocean cargo moving on container vessels originates as LCL freight.[2] Since LCL freight comprises such an important segment of our foreign trade, an efficient thorough system of transportation for this type of freight is essential. A simplified movement would result in an increase in export sales by the smaller manufacturers of worthwhile products who have heretofore been reluctant to become involved in the intricacies of an overseas movement.

An obvious method of encouraging exports is to allow one person to take charge of the shipment at its origin, assume responsibility for loss or damage en route to the final destination by the issuance of a through bill of lading, and provide for a single-factor (one charge) rate for the entire movement. Such a person could be the non-vessel operating common carrier by water (NVO or NVOCC).

## II. Through Service

The Federal Maritime Commission (FMC), which has jurisdiction to regulate "common carriers by water in foreign commerce,"[3] has recognized the NVO to be a common carrier by water in our ocean commerce. Under FMC decisions, to be an ocean carrier a person need not own or operate the physical equipment by which the ocean transportation is affected. He is deemed to be a carrier subject to FMC jurisdiction if he (a) holds himself out as providing transportation for hire by water in foreign commerce, (b) assumes responsibility for, or has liability imposed by law, for the safe transportation of the shipment, and (c) arranges with underlying water carriers for the performance of such transportation in his own name.[4] The NVO concept has been codified by the FMC in its general rules.[5]

Assuming that an LCL exporter wishes to ship his product from Chicago to Frankfurt, Germany, and an NVO is permitted to offer, through service under a single factor rate, containerizing the LCL packages of various shippers in Chicago, the following substantial benefits accrue:

1. The LCL shipper receives single carrier responsibility and one charge for the entire movement from Chicago to Frankfurt.

2. Because of maximum space utilization concessions granted by some lines, known as "consolidation allowances," which are billed at a "freight-all-kinds" (FAK) rate, it is possible for the NVO to quote a through

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2. IMPEDIMENTS, *supra* note 1, at 37.

3. Shipping Act of 1916, § 1, 46 U.S.C. § 801 (1970).

4. Common Carriers by Water—Status of Express Companies, Etc., 6 Dec. Fed. Mar. Comm'n 245 (1961); Bernhard Ulmann Co. v. Porto Rican Express, 3 Dec. Fed. Mar. Comm'n 771 (1952); Puget Sound Tug & Barge v. Foss Launch & Tug Co., 7 Dec. Fed. Mar. Comm'n 43 (1962).

5. *See* FMC General Order 4, 46 C.F.R. § 510.21(d) (1979); FMC General Order 13, 46 C.F.R. § 536 (1979).

charge to the LCL shipper which is less than the combination of charges the exporter would ordinarily pay.

3. Time and money are saved by the elimination of inland documentation.[6]

4. The local trucking charge ordinarily expended by the LCL shipper to transport his package from the inland carrier's terminal in the port area to the pier is eliminated.

5. If the letter of credit so provides, the NVO bill of lading may permit the LCL shipper to receive payment in Chicago upon pick-up rather than when the shipment is loaded aboard ship, often a week later.

6. The risk to the LCL shipper of pilferage and shut-out at the pier is minimized.

Allowing the NVO to offer a through service to the LCL shipper from Chicago also confers the following significant benefits upon the steamship lines:

1. By consolidating the LCL packages at a Chicago warehouse, the NVO saves the steamship line the cost of doing this work at the pier at higher, deep-sea labor rates.

2. Inland consolidation by the NVO materially reduces the ever-present problems of congestion at the piers.

3. Issuance by the NVO of its own bill of lading to the LCL shipper relieves the line of responsibility for loss or damage and saves the line the cost of issuing individual bills of lading.

4. The NVO saves the underlying carrier the cost of processing and paying claims, the risk of non-payment of freight by the LCL shippers, and solicitation expenses.

## III. Problems with Overlapping Regulations

Despite these acknowledged benefits, an NVO which plans to offer through service from Chicago will run afoul of the Interstate Commerce Commission (ICC). This agency was established by Congress in 1887, under the Interstate Commerce Act (ICA) to regulate, among other things, rail and motor carrier, barge operators and Part IV freight forwarders.[7]

The term "freight forwarder" is defined in section 402(a) of Part IV of the ICA as any person (other than an ICC certificated rail, motor or water

6. The late G. Begnal, Jr., formerly Manager, Facilitation, General Electric Company, computed in 1971 that the elimination of documents for the inland haul would at that time save $17.24 per shipment. This figure would in all probability be more than doubled today. Impediments, *supra* note 1, at 31.

7. 49 U.S.C. § 1 (1970) (current version codified at 49 U.S.C. § 10501 (1978)). The Interstate Commerce Act has been recodified, but the orignal section references are used herein because they correspond to the references in the decisions.

carrier) who holds himself out to the general public as a common carrier to transport or provide transportation for compensation in interstate commerce, and who (a) assembles and consolidates, or provides for assembling and consolidating, shipments of such property, and who performs break-bulk and distributing operations with respect to such consolidated shipments; (b) assumes responsibility for the transportation of such property from the point of receipt to the point of destination; and (c) utilizes the services of an underlying ICC regulated carrier at any time during the transportation of the property.[8] No person may engage in services as a Part IV forwarder under the ICA without first obtaining a permit which the ICC may issue if it finds that the applicant is ready, able and willing to properly perform the proposed service and that it will be consistent with the public interest and the national transporation policy.[9]

The ICC maintains that NVOs which offer containerized LCL service from Chicago to the port of exit must obtain an authorization certificate from the ICC before engaging in Part IV forwarder services. According to the ICC, the LCL exporter is being offered a complete service from origin to destination without the necessity of intervention by the exporter or consignee at any point in the course of transportation subsequent to turning over the shipment. Thus, transportation responsibility is "presumed" and, consequently, the services bear all of the essential attributes of a Part IV forwarder and may not be performed without a forwarder permit.[10]

The NVO offering an inland consolidation service cannot avoid ICC jurisdiction by disavowing common carrier liability from Chicago to the port area.[11] Nor is it determinative that the break-bulk operation is not performed by the NVO in the United States. It is not necessary that all of the essential operations be performed within this country; it is enough that each is in fact performed.[12] Nor does it make any difference that the actual consolidation work in Chicago may be performed by someone other than the NVO. It is sufficient under the statute that the NVO "provides" for the service.[13] Thus, even though the NVO could offer a valuable and efficient

8. 49 U.S.C. § 1002(a)(5) (1970) (current version codified at 49 U.S.C. § 10102 (1978)). The domestic (or Part IV) forwarder is to be distinguished from the ocean freight forwarder regulated by the FMC under the Shipping Act of 1916, 46 U.S.C. § 801 (1970). The ocean forwarder is an agent to arrange the exportation, but does not assume responsibility as a carrier for the transportation. United States v. American Union Transp., Inc., 377 U.S. 437 (1946).

9. 49 U.S.C. § 1010(c) (1970) (current version codified at 49 U.S.C. §§ 10923, 10930 (1975)).

10. National Motor Freight Traffic Ass'n v. Vendors Consolidating, 326 I.C.C. 726 (1966); Hopke Freight Forwarder Application, 265 I.C.C. 726 (1950).

11. Universal Transcontinental Corp. Forwarder Application, 260 I.C.C. 521 (1945).

12. Household Goods Carriers' Bureau v. United States, 288 F. Supp. 641 (N.D. Cal.), *aff'd*, 393 U.S. 265 (1968).

13. 49 U.S.C. § 1002(a)(5) (1970) (current version codified at 49 U.S.C. § 10102 (1978)).

through service to the LCL exporter in Chicago, the ICC will consider its activity to be that of an unauthorized Part IV forwarder.

The FMC through rate rule[14] illustrates a more liberal approach to the participation of the NVO in an intermodal movement. The FMC has said, "[t]here is nothing in our statutes or regulations which prohibits NVOs from entering into through route and rate arrangements, and nothing has been advanced herein which required their exclusion from the provisions of our Through Rate and Through Route Rule."

Because of the conflict between the ICC and FMC concerning the ability of the NVO to offer through service from the interior, the LCL exporter in Chicago is placed at a distinct disadvantage when it competes with overseas exporters to sell in a third-country market. Unlike its American counterpart, the International Chamber of Commerce in Paris has, since 1973, recognized the "Combined Transport Operator" (CTO) as a person who can issue a Combined Transport (CT) Document providing for through transportation with single carrier responsibility even though the CTO does not operate the equipment. Because of the CTO, the European shipper of LCL merchandise has access to a transportation system with single-carrier responsibility, whereby his merchandise is moved from origin to destination in the most efficient fashion. On the other hand, the Chicago exporter, denied the services of the NVO by the ICC, must make separate arrangements for each mode of transportation, costing him the time and money which is spared his European competitor.

In an effort to settle the regulatory differences between the ICC and the FMC, the ICC initiated a rulemaking proceeding in 1969 to amend its tariff-filing rules.[15] The objective of the proceeding was to permit the filing of tariffs establishing joint rates for the transportation of goods in international commerce. The proceeding, Ex Parte No. 261, entitled, "Tariffs Containing Joint Rates and Through Routes for Transportation of Property between Points in the United States and Points in Foreign Countries,"[16] finally terminated in 1977, after the issuance of six separate reports.

In its first report,[17] the ICC abandoned its long-held view that it could only file joint rate tariffs for transportation from any place in the United States to an *adjacent* foreign country. It concluded that its jurisdiction restrictions with respect to tariffs to non-adjacent foreign countries was un-

14. FMC General Order 13, Amend. 4, 46 C.F.R. § 536 (1979).

15. Tariffs Containing Joint Rates and Through Routes for Transportation of Property between Points in the United States and Points in Foreign Countries, 34 Fed. Reg. 12,837 (1969).

16. *Id.*

17. *In re* Tariffs Containing Joint Rates & Through Routes for the Transp. of Property Between Points in the United States & Points in Foreign Countries, Ex Parte No. 261, 337 I.C.C. 625 (1970).

founded.[18] The ICC's expansive view formed the basis for its ultimate rule allowing joint rates between underlying ICC and FMC carriers.[19]

In 1976, the ICC promulgated a final rule which permits the ICC motor carrier, rail carrier and barge operator to enter into a through-route and joint-rate tariff with a vessel-operating common carrier by water which is regulated by the FMC.[20] In an attempt to meet the FMC's objections regarding possible ICC jurisdiction over the ocean leg, the ICC stated that when its procedures for suspending a rate were invoked, it would be limited to the division accruing to the domestic carrier and relevant governing tariff provisions.[21]

In 1975, the ICC instituted a rulemaking proceeding to consider the inclusion of both the Part IV forwarder and NVO in its joint-rate rule.[22] In 1977, however, the ICC issued its report denying participation in joint rates to both the Part IV forwarder and the NVO.[23]

With respect to the Part IV forwarder, the ICC concluded that there was no statutory authority to allow such forwarder to establish joint rates with ocean common carriers. Having thus concluded, the ICC did not reach the second issue of whether, as a matter of policy, the Part IV forwarder should be allowed to participate in international joint rates.

The ICC took a different approach with the NVO, excluding it from participation in joint rates on the following policy grounds:

1. Since the FMC places no restrictions on whom may become an NVO, the Part IV forwarder could become an NVO, establish joint rates with ICC regulated carriers and thus circumvent the long established rule against such joint rates.

2. Allowing an NVO to establish joint rates with an ICC carrier would enable the NVO to engage in Part IV forwarding in the U.S. without a certificate from the ICC, in competition with ICC regulated forwarders.

3. Because virtually anyone could become an NVO by filing a tariff with the FMC, there would be no way for the ICC to assure the shipping public that the NVO is able to properly perform the service.

4. There is a substantial danger of rebate and discrimination abuses

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18. *Id*. at 629.

19. *See* Ullman, *The ICC's Decision in Ex Parte 261—Its Residual Value*, 4 J. MAR. L. & COM. 455 (1973).

20. 355 I.C.C. 490 (1976). In Ex Parte No. 230 (Sub-No.5), 46 Fed. Reg. 14,348 (1981), the ICC has exempted from regulation trailer-on-flatcar (TOFC/COFC) transportation provided by a rail carrier as part of a continuous intermodal movement. Joint intermodal arrangements involving railroads and ocean carriers may still continue.

21. *Id*. at 491.

22. Ex Parte No. 261 (Sub-No. 1), Tariffs Containing Joint Rates & Through Routes—Freight Forwarders & Non-Vessel Operating Common Carriers by Water (NVO).

23. 355 I.C.C. 913 (1977).

if the NVO, considered a shipper by the ICC, is allowed to enter into joint rates with ICC regulated carriers.

5. Permitting NVO participation in joint rates, while excluding the Part IV forwarder, would result in a diversion of a significant amount of traffic, thus impairing the ability of the Part IV forwarder to perform its domestic services.

On appeal from the ICC decision, ocean forwarder[24] and NVO groups urged the U.S. Court of Appeals, D.C. Circuit, to reject the so-called "policy grounds" given by the ICC. In answer to the first reason given by the ICC, it was asserted that if a domestic forwarder chose to become an NVO by filing a tariff with the FMC, his participation in a joint rate would not be as a domestic forwarder but as an FMC carrier. In such a capacity, the domestic forwarder would not be circumventing the ICC's "rule" against a joint rate arrangement with an underlying ICC carrier in domestic transportation. In answer to the second reason, it was urged that the NVO moving goods from inland points would no more be an uncertificated freight forwarder than would the vessel operator who is allowed by the ICC to offer such a service. In response to the third ICC argument, that the NVO should be excluded because its participation would divert traffic from the domestic forwarder, the D.C. Circuit was advised of the United States Supreme Court doctrine that the public should not be deprived of a new and improved service because it may cause a loss of some traffic from other carriers.[25] The appellants also advised the court that the record before the ICC indicated that NVOs were rendering competent services from the port and that the ICC had no reason to believe that the same performance was not available inland. Concerning the fourth charge, which addressed the danger of rebating, appellants urged that the record before the ICC indicated no evidence of such conduct by the NVO, while rebating by vessel operators was rampant.

The D.C. Circuit affirmed the order of the ICC, which excluded the domestic forwarder and NVO from joint rate participation, in *New York Foreign Freight Forwarders & Brokers Association v. ICC*.[26] The reasoning of the court is questionable. In *Pennsylvania v. ICC*,[27] the D.C. Circuit held that the ICC was authorized to permit a joint rate arrangement between Part III water carriers (barge operators) and ocean carriers despite the absence

24. Ocean freight forwarders perform various services at the port to arrange for the exportation. Because they are experts in the movement of freight from inland origin to overseas destination, they seek the authority as NVOs to move goods as common carriers from inland points. *See* Ullman, *The Role of the American Ocean Freight Forwarder in Intermodal, Containerized Transportation*, 2 J. MAR. L. & COM. 625 (1971).

25. Schaffer Transp. Co. v. United States, 355 U.S. 83, 91 (1957).

26. 589 F.2d 696 (D.C. Cir. 1979).

27. 561 F.2d 278 (D.C. Cir. 1977).

of any statutory language indicating a congressional intent to allow such rates. Faced with the argument by the domestic forwarders that the lack of specific statutory authority should not militate against them any more than it did against the Part III water carriers, the Court concluded that:

> The underlying law that was left unchanged was one that recognized a discretionary role for the ICC in adjusting the "common law" of the Interstate Commerce Act to changes in economic realities. The rules that had evolved to prevent overreaching by the freight forwarders, viewed as shippers, were subject to reconsideration if this danger receded and the carrier quality of forwarders advanced.[28]

The court acknowledged that changing the rationale behind the ICC's exclusion of the Part IV forwarder from one involving a lack of statutory authority to one involving the exercise of discretion against such forwarder "might ordinarily require a remand to the Commission, for its Report is not cast in these terms."[29] The court concluded, however, that "the Commission believed that matters were such that it was not prepared to exercise its administrative discretion, preferring instead to await congressional guidance."[30] The Court went on to say that although the ICC denied joint rate authority to the forwarder because of the absence of express authority, its denial "also embodied a policy judgment against assertion of such authority in the face of deliberate congressional restraint."[31]

In effect, the Court substituted a policy ground for the legal one advanced by the ICC, without giving the agency the opportunity to consider the merits of such a policy determination. For a court to do so has been held incompatible with the orderly function of the process of judicial review.[32] If the grounds set forth by the agency are considered inadequate or improper, a court is powerless to affirm the adminstrative action.[33]

With respect to the fifth contention urged by the ICC, the Court concluded that the Commission acted within its discretion in requiring the same "rule of law" to be applied to the NVOs as had been applied to Part IV freight forwarders.[34] This conclusion is surprising in view of the fact that the Court recast the decision of the ICC with respect to the Part IV forwarder from a rule of law to one of adminstrative discretion. Nevertheless, the Court felt that "Congress left to the ICC a discretion to put the NVOs on the same basis as freight forwarders in terms of relations to domestic carriers."[35]

28. New York Foreign Freight Forwarders & Brokers Ass'n v. I.C.C., 589 F.2d at 703-04.
29. *Id*. at 704.
30. *Id*.
31. *Id*.
32. Burlington Truck Lines v. United States, 371 U.S. 156 (1962).
33. Securities & Exch. Comm'n v. United States, 332 U.S. 194, 196 (1947).
34. New York Foreign Freight Forwarders & Brokers Ass'n v. I.C.C., 589 F.2d at 704.
35. *Id*. at 705.

As matters now stand, underlying ICC carriers and vessel operators are permitted to enter into a joint rate arrangement for the through transportation of merchandise under a single bill of lading pursuant to a tariff filed with both the ICC and the FMC.[36] The tariff must include the names of all participating carriers, a description of the services to be performed by each such carrier, a statement of the joint rate and a clear statement of the division or charge to be received by the domestic carrier for its share of the revenue. In its own joint rate rule, the FMC requires a similar statement of the charge to be paid to the ocean carrier.[37]

Jurisdiction by two agencies over through movement is unsatisfactory. The agencies operate under two different regulatory schemes. Congress has authorized a dual rate system for ocean carriers.[38] Recently, the FMC has permitted its carriers to incorporate the inland haul under a dual rate.[39] The ICC, on the other hand, considers the dual rate system to constitute a destructive competitive practice in violation of the national transportation policy, and to be unjust and unreasonable under the ICA.[40] The ICC has preserved for itself the right to suspend the inland carrier's division of the joint rate, claiming that it does not intend to assert jurisdiction or otherwise engage in substantive regulation of the ocean portion of the rates pursuant to the ICA.[41] It would appear, however, that when the ICC suspends the domestic division, the joint rate necessarily becomes inoperative, and to that extent the ICC action impinges on the ocean haul.

If the exercise of jurisdiction by the two agencies is justified for any reason, it is for the protection of exporters against excessive joint rates. Nevertheless, the provisions of Ex Parte No. 261 for the filing of divisions creates insuperable difficulties for an exporter wishing to test the reasonableness of the charge. If the exporter's complaint is, for example, against the division of the joint rate paid to the motor carrier on the inland haul, the exporter becomes involved in a proceeding under the ICA regarding the

36. 49 C.F.R. § 1307.49 (1980).

37. FMC General Order 13, 46 C.F.R. § 536 (1979).

38. 46 U.S.C. § 813(a) (1970). Under such a system an exporter receives a lower rate if he commits himself to provide all or a fixed portion of his traffic to the ocean carrier. By Notice of Proposed Rulemaking on December 31, 1980, 45 FED. REG. 86,738 (1980) the ICC has reopened Ex Parte No. 261 (Sub-No. 1) proposing to allow the domestic forwarder to enter into a through route and joint rate with either a non-vessel or a vessel-operating common carrier by water. The proposed rule does not, however, suggest any change in 49 C.F.R. § 1307.49 (1980) which permits a motor common carrier to file a joint rate only with a vessel-operating common carrier by water.

39. Docket No. 76-11, Agreement Nos. DR-7 and 3103 DR-7 (I.C.C. Mimeo. Dec., Dec. 31, 1979).

40. *In re* Tariffs Containing Joint Rates & Through Routes for the Transp. of Property Between Points in the United States & Points in Foreign Countries, Ex Parte No. 261, 350 I.C.C. 361, 367 (1975).

41. 351 I.C.C. 490, 491 (1976).

"reasonableness" of the carrier's division.[42] If the exporter complains that the ocean division is too high, he has the heavy burden of demonstrating to the FMC that the rate is so unreasonably high as to be detrimental to the commerce of the United States.[43] Indeed, because he is not certain whether each or both of the divisions of the joint rate are too high, it may be necessary for the exporter to start proceedings before both agencies. Because of the time, effort and expense of seeking relief in such a situation, the exporter is, for all practical purposes, without a remedy.

In what areas may the domestic forwarder and NVO offer a through service to the LCL shipper, despite exclusion from joint rate participation? One such area was suggested by the ICC in its 1977 decision[44] excluding the domestic forwarder and the NVO from the joint rate rule. The agency pointed out that a Part IV forwarder could become an NVO by filing a tariff with the FMC, and that by combining the separate tariff rates of the ICC and FMC into a "combination rate," the domestic forwarder could offer a through service, the total charge being indicated in his tariff.[45]

There are currently some transportation entities which offer through service, but not without difficulty. If loss or damage occurs, a determination has to be made as to where this took place in order to ascertain whether the liability is that of a domestic forwarder during the inland haul or an ocean carrier during the sea voyage. Moreover, as the D.C. Circuit noted,[46] a joint through rate is generally lower then the sum of the purely local rates.[47] This means that the combination rates of the domestic forwarder-NVO service are more costly to the LCL shipper than a joint rate.

The NVO may be able to offer a through service from inland origin, although there is a danger that if it engages in unrestricted consolidation of the LCL shipments involved, it will be termed an unauthorized Part IV forwarder.[48] The NVO can move the container of a FCL shipper since no consolidation of LCL shipments is required, and, to a limited extent, the NVO may also consolidate LCL shipments from an inland point and have its container moved to the port by an underlying ICC motor carrier. The limited extent of allowable consolidation is suggested by *IML Sea Transit v. United States*,[49] in which a container, consolidated by an NVO, was picked up by a Part II motor carrier employed and paid by the steamship line. The ques-

42. *See* 49 U.S.C. § 210(a) (1976).

43. 46 U.S.C. § 817(b)(5) (1970).

44. Ex Parte No. 261 (Sub-No. 1) (1969).

45. Ex Parte No. 261 at 7-8 (I.C.C. Mimeo. Dec. 1977).

46. New York Foreign Freight Forwarders & Brokers Ass'n v. I.C.C., 589 F.2d 696 (D.C. Cir. 1979) (*aff'g* the ICC in Ex Parte No. 261 (Sub-No. 1)).

47. *Id.* at 698 n.3.

48. 49 U.S.C. § 1002(a)(5) (1970) (current version codified at 49 U.S.C. § 10102 (1978)).

49. 343 F. Supp. 32 (N.D. Cal.), *aff'd* 409 U.S. 1002, *rehearing denied*, 409 U.S. 1118 (1972).

tion was whether the NVO "utilized" the services of an ICC carrier, thus making its operations one of a domestic forwarder.

A three-judge court held in the negative, emphasizing that IML, as an NVO, did not itself employ the Part II motor carrier. The court concluded that as long as the vessel operator offered an all-water service pursuant to a tariff on file with the FMC, it could not be said that IML was operating as an unauthorized Part IV forwarder. But if the water carrier offered a service under a through route tariff on file with the ICC and FMC,[50] the question arises as to whether IML, receiving a through bill of lading from the ocean carrier, would then "utilize" a Part II motor carrier operating as a party under the through route tariff. This question was left open by the Court and remains undecided today. Thus, while an NVO may offer a limited inland consolidation service, even when an ICC carrier is involved, should the ICC carrier be part of a through route arrangement with a vessel operator, the risk exists that the NVO might be considered as an unauthorized Part IV forwarder.

Another means of through service has arisen as a result of the decision in *Japan Line, Ltd. v. United States*.[51] In that case a vessel operator offered a through service from Japanese ports to Chicago. The carrier accepted consolidated containers in Japan and issued an ocean bill of lading to Chicago. Under the supervision of the line, the containers were unloaded at Los Angeles and taken by railroad to Chicago, where the rail carrier arranged delivery to the ultimate consignee pursuant to the instructions of the line. The ICC held that the activities with respect to the inland haul to Chicago constituted an unauthorized Part IV forwarder service by the line.[52]

The ICC was reversed on appeal. The Court reasoned that since a Part IV forwarder was one who offered the services "for compensation," and since the steamship line paid the railroad the exact tariff rate for the inland haul, the line did not act as a Part IV forwarder because it did not arrange the haul "for compensation."

An NVO may be able to take advantage of *Japan Line*.[53] Under the FMC's General Order 13,[54] the NVO may file a tariff offering a through service from an inland origin point to an overseas destination. The NVO may assume transportation responsibility for the entire haul. If the NVO col-

50. Ex Parte No. 261 now permits the water carrier to offer a service under a through route tariff. Many steamship lines and ICC motor and rail carriers make such filings to offer FCL shippers a "minibridge" service—*e.g.* from New York by rail to the West Coast and then by water to a Far East port.

51. 393 F. Supp. 131 (N.D. Cal. 1975).

52. Compass Agencies, Inc., 344 I.C.C. 246 (1973).

53. 393 F. Supp. 131 (N.D. Cal. 1975).

54. 46 C.F.R. § 536 (1979).

lects the inland freight charge from the LCL shipper and then disburses that precise amount to the ICC carrier, the NVO's operations would appear to be lawful under the rationale of *Japan Line*[55] because it is not performing the domestic transportation "for compensation" under Part IV of the ICA.

Despite limited breakthroughs in through service operations, such as in *Japan Lines*,[56] the through service shipper is still regarded as a regulatory stepchild. The few court cases in favor of NVO through service have been encouraging, but without affirmative backing from the ICC, the NVO cannot be expected to make substantial investments in staff and facilities for through service expansion. Our adverse balance of payments[57] makes it essential the we overhaul our regulatory concepts in order to encourage the LCL manufacturer to export.

## IV. Conclusion

When the Interstate Commerce Act was passed in 1887, its primary purpose was to protect small shippers from discriminatory treatment by the railroads. Shippers today, however, may utilize the services of railroads, motor carriers, barge operators, airlines, private carriers and their own equipment. The need for the protection originally afforded by the ICA has long since disappeared.

Similarly, the original purpose of the 1916 Shipping Act was to confer anti-trust immunity upon steamship lines in return for equal treatment of shippers. Despite the tremendous changes in the nature of transportation resulting from the container revolution, the ICA and Shipping Act remain unchanged.

Since competition for the sale of goods overseas is more intense, it is time for the American shipper, particularly the smaller one, to have available the same efficient through service currently enjoyed by his foreign competitors. Regulatory schemes devised in the 19th century are no longer relevant to container transportation as we approach the 21st century. It seems clear, therefore, that the two statutes should be thoroughly overhauled at least with respect to intermodal transportation. Because of the variety of services currently available to the shipping public, it is questionable whether there is a need for the detailed regulation of a through movement. Indeed, it would not be an overly bold experiment to deregulate such transportation entirely and allow the marketplace to govern. Congress should act quickly to allow our LCL shippers the intermodal services of the NVO and domestic forwarder.

No longer can we afford the luxury of having two agencies regulate

55. 393 F. Supp. 131 (N.D. Cal. 1975).
56. *Id.*
57. In 1979 the deficit was $24.7 billion. J. Com., Jan. 1, 1980, at 1.

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surface transportation. It is time for the overlapping jurisdiction and the inter-agency squabbling of the ICC and FMC to be terminated. Our surface transportation, both land and sea, should be regulated by a single transportation agency.[58] Our balance of payment deficit, the declining value of our dollar and the stubborn problem of inflation mandate that one agency be given the responsibility to provide the most efficient transportation system possible.

58. In affirming the ICC's order in Ex Parte No. 261 (Sub-No. 1), the D.C. Circuit noted "the lack of a strong showing of interest on the part of the supposed beneficiaries of the proposed rates—the small shippers." New York Foreign Freight Forwarders & Brokers Ass'n, 589 F.2d at 704.