

CHALLENGES TO THE LEGALITY OF MINIBRIDGE TRANSPORTATION SYSTEMS

Advancing technology has had a profound effect on the maritime industry, producing such innovations as containerization, lighter aboard ship (LASH) and roll-on, roll-off (Ro-Ro) ship systems.¹ Ships utilizing this technology are larger and faster than conventional merchant ships and spend hours rather than days in-port transferring their cargo.² Port terminals have added expensive high-speed cranes, specially designed to handle containerized cargo, which permit the rapid on- and off-loading of the ships.³ This modern technology places a high premium on the close meshing of water, rail and motor carriers into a single "intermodal" transportation system. Such a system offers

1. The maritime industry has its own vocabulary, and this Note will of necessity use terminology which may not be familiar to the reader. As the terms are introduced, a working definition will be supplied. "Containerization" of cargo means prepackaging cargo into a rigid steel box, most often of dimensions approximately 20 x 8 x 8 feet or 40 x 8 x 8 feet, capable of being carried as a single unit over highway, rail or ocean transport. The Maritime Administration defines a container as

a new self-contained cargo carrying unit . . . normally of rectangular configuration, susceptible of mechanical handling, for shipping a number of smaller packages or bulk material, that confines and protects the contents from loss or damage and can be handled efficiently and economically as a unit by, and in interchange between, the different modes of transportation

46 C.F.R. § 255.2 (1977).

LASH systems include a lighter, or barge, of dimensions 61-1/2 x 31-1/2 x 14 feet with a cargo capacity of approximately 370 tons. The lighter can act as a self-contained unit and may be towed individually in inland waters. It is lifted aboard its "mother" ship for ocean transit. A variant of LASH is the SEABEE system which uses a larger capacity barge. See *Port Royal Marine v. United States*, 378 F. Supp. 345, 349 (S.D. Ga. 1974), *aff'd*, 420 U.S. 901 (1975), for a description of the LASH system.

Roll-on, roll-off (Ro-Ro) ship systems involve wheeled cargo which can be driven or rolled on and off the ship.

2. Modern containerhips can carry 1000 to 2000 containers at speeds in excess of 30 knots. See Crutcher, *The Ocean Bill of Lading—A Study in Fossilization*, 45 TUL. L. REV. 697, 720 (1971); Schmeltzer & Sheppard, *Container Feeder Systems*, 4 J. MAR. L. & COM. 215-216 (1973). For example, a new class of containerhip, the SL-7, displaces 51,000 tons when loaded, is 946 feet long and is capable of 33 knots. See Kopec, *Ships of U.S.-Flag Intermodal Fleet*, 101 U.S. NAVAL INST. PROCEEDINGS 213 (1975). The containerhip may enter port, transfer cargo and depart in one-quarter the time required for a conventional ship to handle the same amount of cargo. Crutcher, *supra*, at 721; Schmeltzer & Peavy, *Prospects and Problems of the Container Revolution*, 1 J. MAR. L. & COM. 203, 208 (1970).

3. See Crutcher, *supra* note 2, at 722; *Proposed Amendments to Shipping Act of 1916 to Provide for the Establishment of Single-Factor Rates: Hearings on H.R. 15465 Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 2d Sess. 57 (1972) (testimony of Karl-Heinz Sager, as quoted in statement of Manuel Diaz).

the shipper⁴ great savings in time, greater protection for his goods through fewer handlings and, in many cases, the promise of direct cost savings in transporting his goods to foreign markets.⁵

However, the new technology has also created several major problems. Chief among these is the question of which agency is to regulate intermodal transportation of goods from inland points to foreign destinations. Since such shipments involve overland and water carriers, they are subject to the jurisdiction of both the Interstate Commerce Commission (ICC) and the Federal Maritime Commission (FMC).⁶ For conventional transportation of break-bulk⁷ goods, the jurisdictional division between these agencies is marked by well-defined transshipment points, where goods change hands from motor or rail to ocean carriers. However, these traditional jurisdictional boundaries do not work as well in the context of intermodal transportation. Freight moving via a technologically innovative system is loaded only once at the shipper's plant or at an inland consolidation point.⁸ So packaged, the container moves as a single unit from an inland area to the port terminal. Since the cargo is, in effect, prepackaged, and travels in a single movement, there is no easily drawn jurisdictional line.⁹

4. Generally, a "shipper" is one who entrusts his goods to a "carrier" for transport to a desired destination.

5. See Schmelzter & Peavy, *supra* note 2, at 206-10, for a discussion of the advantages offered to the shipper by containerization.

6. See notes 19-22, 63-65 *infra* and accompanying text.

7. "Break-bulk" is descriptive terminology for cargo which, loaded as single discrete units aboard a carrier, produces a single load. When the cargo is transshipped from one carrier to another, the load is broken back into single units, then reloaded onboard the carrier for the next segment of the cargo's movement.

8. The inland consolidator may be a "freight forwarder," subject to ICC regulation, or a "non-vessel operating common carrier" (NVOCC), subject to FMC jurisdiction. Each performs similar services for the shipper by combining less than carload (LCL) cargo into full container loads and by arranging for transport of the cargo between the shipper and his buyer. The FMC requires registration of NVOCCs under 49 C.F.R. § 512.20 (1977) since they file tariffs and arrange for transport of goods to foreign destinations via ocean carrier. The ICC requires registration of freight forwarders for similar services in the domestic carriage of goods. Since these services are so similar and often overlap, they have occasioned many jurisdictional disputes between the ICC and the FMC. See, e.g., *CTI-Container Transp. Int'l, Freight Forwarder Application*, 341 I.C.C. 169 (1972) (ICC held that it has jurisdiction to require ICC permit of FMC-qualified NVOCCs limited to domestic freight forwarding activities of the NVOCC). *But see I.M.L. Sea Transit, Ltd. v. United States*, 343 F. Supp. 32 (N.D. Cal.), *aff'd*, 409 U.S. 1002 (1972) (court granted an injunction forbidding ICC from ordering an NVOCC to suspend its operations). In *CTI-Container*, the ICC addressed the *I.M.L. Sea Transit* decision and rejected the district court's interpretation of the nature of the activities engaged in by the NVOCC. 341 I.C.C. at 186 n.17.

9. *Sacramento-Yolo Port Dist., Petition for Declaratory Order*, 341 I.C.C. 105 (1972), illustrates the difficulty of dividing jurisdiction between the agencies where goods move via intermodal transport. In that case, the port engaged in the practice of transferring containerized cargo that had arrived in San Francisco from foreign ports via common ocean carriers to barges which then

Furthermore, the full benefits of technologically innovative transportation systems can be achieved only by fashioning equally innovative regulatory schemes. The intermodal carrier must be permitted to present a potential shipper with a "joint through rate" setting forth the full cost of transport of his goods from their point of origin to their destination. By simplifying the complex details regarding overland ICC-regulated rates, port terminal charges, and FMC-regulated ocean tariffs, such a rate structure allows the shipper to ship confidently under a single bill of lading and to look to a single carrier for liability for lost or damaged goods.¹⁰

carried the containers to the port of Sacramento, 79 miles inland. The port sought a declaratory order that ICC jurisdiction should not extend to this inland barge movement, since all of the cargo was moving from foreign ports to Sacramento under single port-to-port bills of lading naming Sacramento as the destination.

Under the Interstate Commerce Act, the ICC's jurisdiction extends to transportation of . . . property . . . wholly by water . . . from or to a place in the United States to or from a place outside the United States, . . . only insofar as such transportation . . . takes place from any place in the United States to any other place therein prior to transshipment at a place within the United States from movement to a place outside thereof

49 U.S.C. § 902(i)(3)(B) (1970).

Sacramento-Yolo Port District contended that the movement of containerized cargo via barge did not constitute "transshipment" under the statute. 341 I.C.C. at 107. Nonetheless, the ICC asserted jurisdiction over the inland barge portion of the through movement, finding that there was a sufficient "transshipment" anytime there was a transfer of lading of the cargo (*i.e.*, a change in the means of carriage). *Id.* at 110-11.

The limits of the jurisdiction of the two agencies were tested the following year in *Port Royal Marine Corp. v. United States*, 378 F. Supp. 345 (S.D. Ga. 1974), *aff'd*, 420 U.S. 901 (1975). In that case, LASH barges that had been transported from foreign ports by ocean carriers were discharged at a coastal port and towed by tugboat over domestic waterways to their destinations. Again, the entire through movement involved only one bill of lading, naming the inland port as the destination. As in *Sacramento-Yolo*, the ICC asserted jurisdiction based on the assumption that the unloading and towing of the barges constituted a "transshipment" within the meaning of the Interstate Commerce Act. However, the issue of jurisdiction caused such problems that a joint jurisdictional statement regarding LASH operations was issued by the FMC and the ICC:

[T]he transfer of cargoes from one barge to another barge of the same mother vessel, or another mother vessel of the same carrier or commonly controlled by it shall not be deemed to constitute transshipment. However, the towage of barges between the United States ports, when undertaken by other than the ocean carrier, is subject to the jurisdiction of the Interstate Commerce Commission.

Joint Jurisdictional Statement Issued by ICC, FMC on "Lash" Operations (May 12, 1972), *quoted in Sacramento-Yolo*, 341 I.C.C. at 112. This negotiated division of jurisdiction was affirmed in *Port Royal Marine*, in which the court found *Sacramento-Yolo* to be appropriate authority for ICC jurisdiction over the inland barge movement. 378 F. Supp. at 351. Indicative of the continuing controversy between the ICC and the FMC over the limits of their jurisdiction, the *Port Royal Marine* court took notice that in the ICC proceeding below the FMC had asserted that no transshipment occurred and that the ICC was thus without jurisdiction. *Id.* at 347 n.1. It was this controversy that the negotiated joint jurisdictional statement was designed to solve.

10. Here again, the use of maritime language must be explained. 46 C.F.R. § 536.16(a) (1977) offers the following definitions:

(l) Through route: An arrangement for the continuous carriage of goods between points of origin and destination, either or both of which lie beyond port terminal areas;

A carrier wishing to file a through rate that will provide a single cost to the shipper, including overland rate, terminal charges and the ocean rate, must file a tariff with both the ICC and the FMC. This tariff must include both the through rate and the underlying rates of the carriers regulated by each commission. Each underlying rate is then reviewed by the commission having jurisdiction over that portion of the intermodal movement under its own standards to determine the reasonableness of the rate.¹¹ Such coordination of FMC and ICC jurisdiction in establishing joint through rates permits greater participation in foreign trade by small or inland shippers who, prior to such coordina-

(2) Through rate: A rate expressed as a single number representing the charge to the shipper by a carrier or carriers holding out to provide transportation over a through route;

(3) Joint rate: A through rate in which two or more carriers participate by agreement for the offering of through transportation over a through route published in the same tariff

See Note, *Legal and Regulatory Aspects of the Container Revolution*, 57 GEO. L.J. 533, 537-38 (1969) (listing the possibility of lower prices and increased convenience to the shipper as major advantages of joint through rates); cf. *Matson Navigation Co.—Container Freight Tariffs*, 7 F.M.C. 480 (1963) (pick-up and delivery of containerized cargo by ocean carrier deemed "more efficient and less costly service" to shippers. *Id.* at 491. The ocean carrier is "charged with direction of and liability for the services performed." *Id.*).

11. The allowance of joint filings of a tariff with the ICC and the FMC, which permit the carrier to construct a through rate structure, is a recent development in regulatory law. Prior to 1970, each agency held that it lacked authority to receive joint filings that would allow a single-factor through rate to be developed. See text accompanying notes 23-27, 66 *infra*. See Note, *supra* note 10, at 539; cf. Note, *Coordination of Intermodal Transportation*, 69 COLUM. L. REV. 247, 262 & n.88 (1969) (establishment of through routes and joint rates between FMC- and ICC-regulated carriers said to be impossible under existing regulatory statutes).

FMC filing requirements for through routes are contained in 46 C.F.R. § 536.16(b) (1977):

Every common carrier by water in the foreign commerce of the United States . . . shall file with the Commission tariffs of any through rates, charges, rules, and regulations governing the through transportation of freight between ports or points in the United States and ports or points in a foreign country in which such carrier or conference participates. Such tariffs shall include the names of all participating carriers, the established through route, a description of the service to be performed by each participating carrier, and shall clearly indicate the division, rate, or charge that is to be collected by the water carrier subject to the Shipping Act, 1916, for its port-to-port portion of the through service, which division, rate, or charge shall be treated as a proportional rate subject to the provisions of the Shipping Act, 1916. Such tariffs will be filed and maintained in the manner provided in section 18(b) of the Shipping Act, 1916, and this part.

The tariff filed with the FMC thus must state the ocean portion of the through rate and include any inland rates filed with the ICC in arriving at the single-factor through rate. The FMC will limit its review of the rate to the port-to-port portion of the through rate, treating it as a proportional rate. See 46 C.F.R. § 536.15(d) (1977). A proportional rate means that the rate assessed is conditioned on a prior or subsequent movement of cargo. 46 C.F.R. § 536.1(f) (1977).

The ICC in *Ex Parte* 261, *In re* Tariffs Containing Joint Rates and Through Routes for the Transportation of Property Between Points in the United States and Points in Foreign Countries, 351 I.C.C. 490 (1976), *aff'd sub nom.* *Pennsylvania v. ICC*, 561 F.2d 278 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978), found jurisdiction to accept intermodal through rate tariffs that included the tariffs of FMC-regulated carriers for the ocean portion of the through route. While requiring that the ocean rates be stated, the ICC limited its substantive regulation to that portion of the route involving ICC-regulated carriers. 351 I.C.C. at 491.

tion, were deterred by the complexity of the international transportation of goods.

The development of cooperative regulatory mechanisms by which carriers may offer the advantages of intermodal transportation to shippers has resulted in the emergence of innovative carrier service techniques known as "minibridge" or "land-bridge" operations.¹² Generally, the ocean carrier will provide a container to one or more shippers who package it with their cargo. The shippers pay full price for the transport to the ocean carrier, who then "subcontracts" for motor or rail transport from the point of origin to the port for ocean transport. The ICC-regulated carrier's rate is paid out of the through rate paid by the shipper. Likewise, the port terminal charges, ocean transit, foreign delivery and any other charges may be included in the joint through rate charged to the shipper. Such a system benefits both the shipper, who enjoys simplified services, and the ocean carrier, who may take advantage of lower relative costs of transport by overland or ocean service to and from a particular area.

While holding great promise of opening foreign markets to the smaller inland shippers, evolving intermodal minibridge schemes have stirred intense opposition from port and labor interests. The large capital investment by carriers and ports occasioned by container technology has reduced the number of longshoremen jobs both by requiring fewer handlings of the cargo and by using mechanized loading techniques that require only a fraction of the conventionally needed personnel.¹³

12. In its simplest form, a minibridge replaces some portion of port-to-port carriage of intermodal freight with overland domestic carriage. This allows the shipper to take advantage of geographic and commercial conditions that favor a partial overland route as opposed to an all-water route. For example, a minibridge system from Japan to New York was described in Council of N. Atl. Shipping Ass'ns (hereinafter cited as *Far East*), No. 73-38 (F.M.C. Aug. 8, 1978) (Report and Order Adopting Initial Decision) (hereinafter cited as Final Decision):

[T]he agreed to division takes the form of a water rate and a flat rail rate per container, the rail carriage being from rail ramp at the West Coast port to rail ramp at New York. The Kobe shipper takes delivery of the water carrier's container, packs it, and delivers it to the water carrier's container yard. The water carrier collects the total freight from the shipper, moves the cargo to the West Coast port (*e.g.*, Long Beach), pays the Long Beach terminal and wharfage charges, transfers the cargo from the ship to the rail ramp, and pays the railroad the agreed rate for transcontinental transport. The consignee receives the container at the New York railhead. Outbound the operation is reversed. The shipper, of course, has the free choice between an all-water service or a minibridge service.

Final Decision, slip op. at 2 n.4. For a discussion of the *Far East* case, see text accompanying notes 74-81 *infra*.

Another example of minibridge operation is provided in *Texas v. Seatrain Int'l, S.A.*, 518 F.2d 175 (5th Cir. 1975). The minibridge operator shipped containerized cargo from the midwest and Texas by rail to Charleston, South Carolina, where it was transhipped for ocean transport to northern Europe. This system produced savings of time over the alternative all-water route. *Id.* at 177.

13. In the Initial Decision of the *Far East* case, No. 73-38 (F.M.C. July 1, 1977) (hereinafter

Ports, too, have found the technology a mixed blessing. Fewer port calls by ships and staging areas away from port terminal areas¹⁴ reduce the conventional wharfage and docking fees to be collected.¹⁵ More significantly, a carrier engaging in an intermodal or minibridge transport scheme prefers to conduct his operations from a single site at which he can centralize his capital investment. Consequently, cargo is diverted from other ports to the central location by overland transport, with the extra cost for the overland transport being absorbed into the cost charged the shipper for the entire movement to the cargo's foreign destination.¹⁶ The port from which the cargo is diverted is thus deprived of commerce both directly in fees charged to the carrier and indirectly in employment and business in the surrounding area.

In opposing the development of minibridge and land-bridge systems, port and labor interests have pursued two avenues of attack. First, they have challenged the jurisdiction of either the ICC or the FMC to accept the joint through rates that form the basis for such systems, since the decision to accept such joint through rates was made by the commissions without statutory expansion of their jurisdiction. Second, port interests have relied upon traditionally recognized causes of action available under the Shipping Act of 1916.¹⁷ The Act provides that when activities by an ocean carrier result in port discrimination and diversion of cargo "naturally tributary"¹⁸ to a port, the FMC may

cited as Initial Decision), evidence showed that membership in the International Longshoremen's Association for the Port of New York had fallen from 21,471 in 1966 to 11,746 in 1974. Initial Decision, slip op. at 12. This decline was primarily attributed to containerization of the maritime industry. *Id.* at 12-13. Labor agreements often require that packaging of containers within 50 miles of a port be accomplished by longshoremen. See Schmelzter & Peavy, *supra* note 2, at 237; *cf.* Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 264-65 (1968) (labor union's attempts to provide for longshoremen displaced by advanced technology was protested by a shipper).

14. Since containers may be packaged and stored away from terminal areas, "staging" (sorting and storing the containers) may occur at inland points. Not until actual loading need the container be brought to the port area. See Pacific Coast European Conference Rules 10 and 12, 14 F.M.C. 266, 270 (1971) (containerships require special loading facilities).

15. Schmelzter & Peavy, *supra* note 2, at 208, saw savings by the carrier in limiting the number of ships operating in fewer port calls and in limiting the number of hours in-port at each port visit. This advantage may be offset by the need to negotiate with the ports to obtain priority contracts for use of container berths.

16. See, e.g., Intermodal Serv. to Portland, Ore., 17 F.M.C. 106 (1973) (cargo moved overland from Portland to Seattle for ocean transport); Stockton Port Dist., 9 F.M.C. 12 (1965), *aff'd*, 369 F.2d 380 (9th Cir. 1966), *cert. denied*, 386 U.S. 1031 (1967) (carriers sought by rate equalization practices to avoid direct calls on Stockton, California). See generally Schmelzter & Sheppard, *supra* note 2 (carriers utilizing container systems will attempt to feed containers to a central location for foreign transport).

17. 46 U.S.C. §§ 801-842 (1970 & Supp. V 1975).

18. The concept of "naturally tributary" cargo has been derived from the FMC's interpretation of congressional purposes embodied in four acts: the Shipping Act of 1916, 46 U.S.C. §§ 801-

grant relief to the disadvantaged port. The FMC's continued adherence to these traditional concepts of port protection in reviewing the effects of minibridge operations could provide a strong challenge to their legality.

This Note will review the two lines of attack utilized by opponents to minibridge or land-bridge schemes, examining first the jurisdictional basis for coordination between the agencies and then the traditional causes of action available to the opponents under FMC administrative precedent. The Note will conclude that neither means of challenge is likely to succeed. Thus, minibridge schemes will provide shippers with more efficient access to foreign markets, promising savings of time and, in some cases, promising reduced costs of transport.

I. THE AUTHORITY TO COORDINATE JURISDICTION

In order to determine whether the ICC and the FMC have the power to coordinate jurisdiction in accepting joint through rates, it is first necessary to determine the statutory limits of each agency's jurisdiction. Once this has been done, the authorities can be examined to see if they lend support to coordination of jurisdiction by recognizing, perhaps implicitly, the authority of each agency to exercise jurisdiction over its own portion of a joint through route.

A. *ICC Jurisdiction.*

The ICC derives its authority from the Interstate Commerce Act.¹⁹ Under section 1(l) of the Act, the ICC is authorized to regulate transportation . . . partly by railroad and partly by water when both are used under . . . an arrangement for a continuous carriage or shipment . . . from or to any place in the United States to or from a foreign country but only insofar as such transportation takes place within the United States.²⁰

This section, in conjunction with language of the Act granting the ICC jurisdiction over motor carriers²¹ and domestic water carriers,²²

842 (1970 & Supp. V 1975); the Merchant Marine Act of 1920, 46 U.S.C. §§ 861-889 (1970 & Supp. V 1975); the Merchant Marine Act of 1936, 46 U.S.C. §§ 1101-1294 (1970 & Supp. V 1975); and the Intercoastal Shipping Act of 1933, 46 U.S.C. §§ 843-848 (1970 & Supp. V 1975). For the development of the naturally tributary concept, see text accompanying notes 91-114 *infra*.

19. 49 U.S.C. §§ 1-27, 301-327, 901-923, 1001-1022 (1970 & Supp. V 1975).

20. *Id.* § 1(l).

21. 49 U.S.C. § 316(c) (1970) provides:

Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water. . . . As used in this subsection the term "common carriers by water" includes water common carriers subject to the Shipping Act, 1916, as amended, or the Intercoastal Shipping Act of 1933, as amended (including persons who hold themselves out to transport goods by water but who do not

strongly supports an assertion of ICC authority over joint through routes and seems clearly to envision through routes from inland points of the United States to foreign destinations by rail, motor or water carriers. Prior to 1969, however, the ICC maintained that it lacked authority to accept filings of joint through rates for routes that included carriage aboard FMC-regulated ocean carriers. Its interpretation of the Interstate Commerce Act was based primarily on two early ICC decisions, *Cosmopolitan Shipping Co.*²³ and *Chamber of Commerce of New York*.²⁴

In *Cosmopolitan Shipping Co.*, decided in 1908, the ICC held that the Interstate Commerce Act did not grant the ICC authority to regulate ocean carriers participating with ICC-regulated carriers in a through route arrangement by which goods were transported from inland points of the United States to foreign destinations. Since at that time there were no statutory controls over ocean carriers' rates, the ICC found a potential for manipulation of the ocean portion of the through

own or operate vessels) engaged in the transportation of property in interstate or foreign commerce between Alaska or Hawaii on the one hand, and, on the other, the other States of the Union, and through routes and joint rates so established and all classifications, regulations, and practices in connection therewith shall be subject to the provisions of this chapter.

22. 49 U.S.C. § 905(b) (1970) provides in part:

It shall be the duty of common carriers by water to establish reasonable through routes with other such carriers and with common carriers by railroad, for the transportation of persons or property, and just and reasonable rates, fares, charges, and classifications applicable thereto, and to provide reasonable facilities for operating such through routes, and to make reasonable rules and regulations with respect to their operation and providing for reasonable compensation to those entitled thereto. Common carriers by water may establish reasonable through routes and rates, fares, charges, and classifications applicable thereto with common carriers by motor vehicle. Common carriers by water subject to this chapter may also establish reasonable through routes and joint rates, charges, and classifications with common carriers by water subject to the Shipping Act, 1916, as amended, or the Intercoastal Shipping Act, 1933, as amended (including persons who hold themselves out to transport goods but who do not own or operate vessels) engaged in the transportation of property in interstate or foreign commerce between Alaska or Hawaii on the one hand, and, on the other, the other States of the Union, and such through routes and joint rates, and all classifications, regulations, and practices established in connection therewith shall be subject to the provisions of this chapter.

The explicit authorization contained in sections 316(e) and 905(b) for the development of through routes between Alaska and Hawaii and the continental United States was the result of an amendment to the Act, Pub. L. No. 87-595, § 2, 76 Stat. 398 (1962), designed to streamline carriage between these geographically isolated states. The jurisdiction of the ICC to regulate ocean carriers otherwise regulated by the FMC over such through routes was confirmed in *Alaska S.S. Co. v. FMC*, 399 F.2d 623 (9th Cir. 1968), and *Sea-Land Serv., Inc. v. FMC*, 404 F.2d 824 (D.C. Cir. 1968). The explicit grant of jurisdiction grew out of congressional realization that lack of regulatory coordination unduly hindered transport of cargo from inland point to inland point when the transport was partially via ocean carriage. See Note, *Coordination of Intermodal Transportation*, *supra* note 11, at 263-68.

23. 13 I.C.C. 266 (1908). *Cosmopolitan* arose as a complaint against pooling arrangements by ocean carriers that offered through routes from inland points in the United States to foreign destinations.

24. 24 I.C.C. 55 (1912).

rate in order to attract traffic via the ICC carrier. Thus, a distinction was drawn between joint through routes under which goods moved exclusively via ICC-regulated carriers and through routes which included ocean carriage beyond direct ICC jurisdiction.²⁵ The ICC held that the former category of through rates was to be allowed, but that " 'joint rates' cannot be made between carriers subject to the Act and those not subject to the Act."²⁶ Four years later, in *Chamber of Commerce*, the ICC held that inland rail rates must be stated separately and independently from ocean rates in any tariff filing for goods traveling in a through movement from inland United States to foreign ports.²⁷

The *Cosmopolitan* holding was followed for over fifty years, until 1969. Even prior to 1969, however, several factors emerged which augured a reversal of the ICC's position on coordination with the FMC. First, the Shipping Act of 1916²⁸ brought greater stability to ocean rates through federal regulation of ocean carriers. Thus, the possibility of abuse of joint rates by manipulation of unregulated ocean portions of a through rate arrangement was lessened.²⁹ Second, the Transportation Act of 1920³⁰ amended section 1(1) of the Interstate Commerce Act, making the enabling language more capable of an interpretation allowing coordination between domestic and international carriers. Originally section 1(1) granted the ICC jurisdiction over transportation "from or to any place in the United States to or from an adjacent foreign country."³¹ The 1920 amendment deleted the word

25. 13 I.C.C. at 280.

26. *Id.*

27. 24 I.C.C. at 74. *Chamber of Commerce* arose when a group of merchants contested a railroad's rates for goods moving through New York destined for foreign transport because the rates were higher than charges for goods moving through other ports on the Atlantic. The ICC cited *Cosmopolitan* as authority for denying its power to accept joint through rates for routes that included international ocean carriage.

28. 46 U.S.C. §§ 801-842 (1970).

29. The Shipping Act required the filing of tariffs by ocean carriers setting out rates charged for transport and provided for review by the Shipping Board (now the FMC) of the rates for their reasonableness. *Id.* § 817.

30. Pub. L. No. 66-152, 41 Stat. 456 (1920).

31. Interstate Commerce Act, ch. 104, § 1, 24 Stat. 379 (1887). Section 1 of the Act as enacted in 1887 provided:

[T]he provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States . . . to any other State or Territory of the United States . . . or from any place in the United States to an *adjacent* foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an *adjacent* foreign country

“adjacent,” leaving the language “from or to any place in the United States to or from a foreign country.”³²

Finally, pressure to accommodate the emerging technology increased steadily through the 1960s,³³ manifesting itself most noticeably in ICC determinations regarding “piggybacking” or “trailer-on-flatcar” transport.³⁴ This intermodal system uses combinations of ICC-regulated rail and motor carriers in the transport of loaded trailers. Since the through route does not involve FMC regulation, there is no problem of coordinating agency jurisdictions.³⁵ However, two Supreme Court decisions in this area demonstrated the Court’s willingness to interpret the Interstate Commerce Act expansively in order to accommodate new transport systems.

In *American Trucking Associations v. Atchison, Topeka & Santa Fe Railway*,³⁶ railroads challenged an ICC ruling that would compel them to make their piggybacking system available to motor carriers under the same terms that applied to the railroads themselves. The Supreme Court found broad authority for the ICC to administer the provisions of the Interstate Commerce Act.³⁷ While the Act did not explicitly au-

(Emphasis added).

32. Transportation Act of 1920, Pub. L. No. 66-152, § 400, 41 Stat. 456 (codified at 49 U.S.C. § 1(1) (1970)).

33. See, e.g., *Ex parte 230*, Substituted Serv.—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Serv.), 322 I.C.C. 301 (1964), *set aside sub nom.* *Atchison, T. & S.F. Ry. v. United States*, 244 F. Supp. 955 (N.D. Ill. 1965), *rev’d sub nom.* *American Trucking Ass’n v. Atchison, T. & S.F. Ry.*, 387 U.S. 397 (1967) (reinstating ICC decision). In *Ex parte 230*, the ICC recognized the explosive growth of trailer-on-flatcar (TOFC) services. 322 I.C.C. at 305-07.

34. The ICC defines TOFC service as “the transportation on a rail car, in interstate or foreign commerce of (a) any freight-laden highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis)” 49 C.F.R. § 1090.1 (1977).

35. The Interstate Commerce Act explicitly grants jurisdiction to the ICC to receive through routes that involve rail, motor or water carriers subject to ICC regulation. 49 U.S.C. § 1(1) (1970) (rail and water through routes recognized); *id.* § 316(e) (motor carriers may establish through route and joint rates with rail and/or water carriers); *id.* § 905(b) (ICC-regulated domestic water carriers may establish through routes with rail and motor carriers).

36. 387 U.S. 397 (1967).

37. The *American Trucking* Court stated the issue as:

Does the Interstate Commerce Commission have authority to promulgate rules providing (1) that railroads which offer trailer-on-flatcar (TOFC or “piggyback”) service to the public under open-tariff publications must make such service available on the same terms to motor and water common and contract carriers, and (2) that motor and water carriers may, subject to certain conditions, utilize TOFC facilities in the performance of their authorized service?

Id. at 399-400.

Traditionally, the ICC’s position was that railroads had discretion to grant or to deny motor carriers access to TOFC service. *Id.* at 402 (citing *Ex parte 129*, Substituted Freight Serv., 232 I.C.C. 683 (1939)); see *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 105 (1954).

When the ICC reversed its position in *Ex parte 230*, holding that when TOFC service is

thorize the ICC to compel coordination of carriers, the Court said that “[t]he very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms. Congress has, in general, left the contents of these terms to be spelled out in particular cases by administrative and judicial action”³⁸

In *Canada Packers, Ltd. v. Atchison, Topeka & Santa Fe Railway*³⁹ the Supreme Court held that the ICC had authority under the Interstate Commerce Act to accept joint through rates of rail carriers for through routes which extended from the inland United States into Mexico and Canada.⁴⁰ The Court found ample authority to receive joint through rates for filing, but reserved judgment as to the legality of substantive review by the ICC of that portion of the joint through rate which lay beyond the domestic boundaries of the United States.⁴¹

offered by a rail carrier to the public it also must be made available to motor or water common carriers, 322 I.C.C. at 336-37, the railroads protested. A lower court held that it was beyond the scope of the ICC's statutory authority under the Interstate Commerce Act to compel railroads to furnish TOFC service to other carriers at equivalent rates. *Atchison, T. & S.F. Ry. v. United States*, 244 F. Supp. 955 (N.D. Ill. 1965). The district court stated three grounds for its decision. First, the Act did not forbid a rail carrier to refuse to carry trailers for a competing mode of transport. Second, the Act lacked specific reference to any grant of compulsory power to the ICC to enforce § 216(c), 49 U.S.C. § 316(c) (1970), which permitted *voluntary* through route coordination, and the structure of the Act in separately regulating rail, water and motor carriers indicated that the Act should not be used to require coordination. Third, notwithstanding the Commission's repudiation in *Ex parte* 230 of its traditional position, the court noted the Commission's long history of support for allowing railroads discretion to grant or to deny motor carriers access to TOFC service. 387 U.S. at 405.

The Supreme Court disagreed with the lower court's narrow construction of the Act. Citing *United States v. Pennsylvania R.R.*, 323 U.S. 612 (1945), the *American Trucking* Court held that the language of the Act granted sufficient authority to the ICC to allow it to require coordination of motor, rail and domestic carriers. 387 U.S. at 410. The Court read the substantive sections of the Act in coordination with the National Transportation Policy, which states a national policy to provide a completely integrated interstate regulatory system over motor, railroad and water carriers, 49 U.S.C. preceding § 1 (1970), and found broad authority in the ICC to require coordination by railroads. 387 U.S. at 412-13.

Once jurisdiction under the Act was established, the Court found that prior policy positions had no prohibitory effect on the ability of the ICC to alter policy to adjust to changed conditions. *Id.* at 415-16.

38. 387 U.S. at 409 (quoting *United States v. Pennsylvania R.R.*, 323 U.S. 612, 616 (1945)).

39. 385 U.S. 182 (1966) (per curiam).

40. *Id.* at 184.

41. In *Canada Packers*, a manufacturer engaged American railroads to deliver raw materials from the United States to Canada. The manufacturer was charged and paid according to a joint through rate. Later it attacked the rate charged as unreasonable and sought reparation. The ICC found the rates to be unreasonable and ordered the reparation. *Id.* at 182-83. On appeal to the district court, the ICC ruling was affirmed. However, the Seventh Circuit reversed, 343 F.2d 563 (7th Cir. 1965), holding that it was beyond the jurisdiction of the ICC to review that portion of the rates that took place in Canada, relying on 49 U.S.C. § 1(1) (1970), which states that the Interstate Commerce Act applies “only insofar as such transportation . . . takes place within the United States.” Thus, according to the circuit court, the ICC was without power to order reparations with respect to the Canadian portion of the goods' transport.

While neither *American Trucking Associations* nor *Canada Packers* dealt with coordination of rates with another agency, they reflected the broad power accorded the ICC to interpret and enforce the Interstate Commerce Act. Further, these cases clearly recognized within the Interstate Commerce Act the breadth to accommodate transportation innovations.

In 1968, a bill entitled the Trade Simplification Act⁴² was introduced before Congress. This bill sought to reverse the ICC position expressed in *Cosmopolitan* by explicitly authorizing the acceptance of joint through rates by the ICC and the FMC.⁴³ Further, it sought to coordinate the intermodal movement of goods in a through route by means of a single bill of lading acceptable to both commissions.⁴⁴ The bill did not pass. However, it triggered a change in ICC policy toward acceptance of joint through rates.

The ICC in 1969 instituted a rule-making proceeding, *Ex parte* 261,⁴⁵ in order to formulate rules for establishing joint through routes between the inland United States and foreign countries. In connection with this proceeding, the ICC issued five separate reports over its seven

The Supreme Court reversed the Seventh Circuit, finding precedent in *News Syndicate Co. v. New York Cent. R.R.*, 275 U.S. 179 (1927). The *News Syndicate* Court held that where a carrier providing transport within the United States enters into a joint through international rate covering transport in the United States and abroad, the ICC has jurisdiction to determine the reasonableness of the joint through rate and to order reparations if the rate is unreasonable. 275 U.S. at 187.

The Supreme Court in *Canada Packers* rejected an attempt to narrow the scope of ICC jurisdiction, which attempt, if successful, would have overruled its earlier broader interpretations of the limits of ICC jurisdiction, saying:

It is not shown, however, that the long-standing construction of the statute by both the Commission and this Court has produced any particularly unfortunate consequences and Congress, which could easily change the rule, has not yet seen fit to intervene. In these circumstances, we shall not disturb the construction previously given the statute by this Court

385 U.S. at 184.

42. S. 3235, 90th Cong., 2d Sess., 114 CONG. REC. 7825 (1968); H.R. 16023, 90th Cong., 2d Sess., 114 CONG. REC. 6796 (1968) (identical bills were introduced before both the Senate and House).

43. *Id.* § 4-5.

44. *Id.* § 9.

45. *Ex parte* 261, *In re* Tariffs Containing Joint Rates and Through Routes for the Transportation of Property Between Points in the United States and Points in Foreign Countries, 337 I.C.C. 625 (1970). The goal of the proceeding was

to facilitate the through transportation of freight by intermodal carriers between the United States and foreign countries. A shipper is benefited when he can make a contract with the originating carrier which covers a movement through to the destination at a total charge published in a single tariff. Moreover, the national transportation policy should be fostered and the free flow of commerce spurred by encouraging the establishment of more economical and integrated transportation services between the United States and foreign countries.

Id. at 627.

years of deliberation from 1969 to 1976.⁴⁶ In its final report, issued in 1976, the ICC agreed to accept for filing tariffs for joint through routes, adopting the view that the Interstate Commerce Act permits regulation of foreign commerce insofar as the transportation takes place within the United States.⁴⁷ However, the ICC limited the extent of its substantive regulation to the domestic carrier's portion of the through route,⁴⁸ stating:

[w]e do not intend to assert jurisdiction over or otherwise engage in substantive regulation of the ocean portion of the rates pursuant to the Interstate Commerce Act. To do so, we believe, would require us to interpret various provisions of the acts administered by the FMC which are within the expertise of that agency. Therefore, we wish to emphasize the fact that our jurisdiction will be invoked solely to accomplish substantive regulation of the domestic carrier's portion of

46. Each of the five separate decisions represents a stage in the evolution of ICC thinking on the acceptance of joint through rates between ICC and FMC carriers. In April 1969, the ICC advised Congress that the Interstate Commerce Act had vested the ICC with authority to accept tariffs containing joint rates and through tariffs published by ICC-regulated carriers and FMC-regulated ocean carriers. *Authorizing and Fostering Joint Rates for International Transportation of Property, Hearings on H.R. 12428 and H.R. 12429 Before the House Comm. on Merchant Marine and Fisheries*, 93d Cong., 2d Sess. 47 (1974). The ICC initiated *Ex Parte* 261 for the purpose of rule making to implement the altered stance of the ICC in agreeing to receive the joint through rates. The first rules, promulgated September 30, 1970, distinguished Cosmopolitan Shipping Co., 13 I.C.C. 266 (1908), which had formed the basis for the earlier refusal to accept the rates, *Ex parte* 261, 337 I.C.C. at 629, and issued general tariff rules. *Id.* at 649-52. Upon filing of petitions for reconsideration, the ICC suspended the effectiveness of these rules until it could give consideration to arguments for alteration put forward by the FMC and individual nonvessel operating common carriers by water. The FMC feared the rules would be too broad in application and would encroach on FMC jurisdiction. On June 28, 1972, the ICC decided not to promulgate the rules at that time, but reaffirmed its jurisdiction to accept filings of joint through tariffs. 341 I.C.C. 246, 247 (1972). In 1972, the ICC promulgated formal guidelines that permitted the creation of joint rates for qualified carriers, see *Hearings on H.R. 12428 and H.R. 12429, supra*, at 76, and reopened *Ex parte* 261 for promulgation of general rules governing the acceptance of joint rates. In 1975, the ICC adopted a broad interpretation of its powers to regulate carriers involved in intermodal operations. 350 I.C.C. 361 (1975). This was contested by the FMC, see note 48 *infra*, and was later changed as a result of the final decision issued under the *Ex parte* 261 investigation, 351 I.C.C. 490 (1976), which finalized tariff filing rules regarding filing of joint through tariffs.

47. 351 I.C.C. 490, 491 (1976). In a sense, the ICC simply adopted the construction of the Act imposed upon it by *Canada Packers*. See note 41 *supra*. Here, however, the special problem was that ocean carriers and their rates were already regulated by the FMC. Thus, unlike *Canada Packers*, the ICC would not exercise its jurisdiction in a vacuum, but had to coordinate with the FMC's jurisdiction.

48. This actually represents a compromise position. In one of its earlier reports, 350 I.C.C. 361 (1975), the ICC had held that it had authority to regulate the entire through route on file with the ICC, including the authority to suspend the joint rate in its entirety. This would have had the effect of suspending an ocean tariff on file with the FMC. The FMC challenged this action in *FMC v. ICC*, No. 75-1924, filed Sept. 19, 1975 (D.C. Cir. 1975), contending that the rules promulgated were beyond the ICC's jurisdiction. When the ICC released its final decision in *Ex parte* 261, 351 I.C.C. 490 (1976), this suit was dismissed on March 18, 1976, by consent of the FMC. See FED. MARITIME COMM'N, 15TH ANN. REP. 4, 54 (1976).

the through rate⁴⁹

Thus, the ICC renounced *Cosmopolitan* and found jurisdiction within the Interstate Commerce Act to receive filings of joint through rates for through routes encompassing movement of goods via both ICC-regulated carriers and the FMC-regulated ocean carriers. Furthermore, the ICC found authority to coordinate such routes with the FMC. As a matter of policy, however, each commission was to restrict its review of the joint through rate to that portion within its field of expertise.⁵⁰ This ruling opened the way for full establishment of minibridge and land-bridge intermodal schemes. Even prior to the ICC's final ruling, some minibridge systems had evolved despite the uncertainty of the protracted rule-making procedure.⁵¹

In *Pennsylvania v. ICC*,⁵² port interests challenged the ICC's ruling in *Ex parte 261* on two grounds. First, the challengers contended that the ICC lacked jurisdiction to accept joint through rates for filing. Second, they argued that if the ICC had jurisdiction, its decision to limit jurisdiction to the domestic portion of the through route was improper.⁵³ The Court of Appeals for the District of Columbia rejected both contentions, finding ample authority within the Interstate Commerce Act for ICC regulation of the domestic portion of joint through routes. The court found that the Transportation Act of 1920⁵⁴ established a statutory basis for accepting filing of joint through rates as of that date.⁵⁵ Continued adherence to the *Cosmopolitan* policy of refusing to accept such filings was characterized as "a self-imposed restriction on jurisdiction."⁵⁶ By finding authority for *Ex parte 261* within the Interstate Commerce Act, the court was able to characterize ICC forbearance as mere "policy." The court was thus able to dispose of

49. 351 I.C.C. at 491.

50. *Id.*

51. Even without a final report of *Ex parte 261*, many joint through rates were on file at the ICC under special permission granted in coordination with the FMC. See, e.g., *Ex parte 261*, 341 I.C.C. 246, 250-52 (1972) (listing of joint intermodal tariffs on file with the ICC under special permission).

52. 561 F.2d 278 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

53. 561 F.2d at 281.

54. Pub. L. No. 66-152, 41 Stat. 456 (1920) (codified at 49 U.S.C. § 1 (1970)).

55. 561 F.2d at 286-87.

56. *Id.* (quoting *Ex parte 261*, 337 I.C.C. 625, 629 (1970)). In fact, the D.C. Circuit stated that sections 303(a)(11) and 316(c) of the Interstate Commerce Act, 49 U.S.C. §§ 303(a)(11), 316(c), 317(a) (1970), when taken together,

represent an explicit conferral of jurisdiction on the ICC to accept for filing joint through rates established by motor and ocean carriers. Indeed, in light of this language, the Commission's prior policy of not accepting the joint rates appears to be the position most inconsistent with the plain statutory mandate, not the rules embodied in *Ex Parte No. 261*.

561 F.2d at 288.

the appeal, since the key factor in scrutinizing a change in policy of administration is that the change be "adequately explained and justified so that the parties upon whom the policy will have an impact understand the newly adopted position."⁵⁷ The court found that *Ex parte* 261 met the notice requirement and that changing transportation technology provided sufficient justification for the reversal of the ICC's long-standing policy.⁵⁸

The second challenge—that the ICC improperly limited its substantive regulation to domestic portions of the through route—was rejected on two grounds.⁵⁹ First, on purely statutory grounds, the Interstate Commerce Act limits the jurisdiction of the ICC to regulation "only insofar as such transportation takes place within the United States"⁶⁰ As observed in *Canada Packers*, while the ICC has jurisdiction to receive filings that include transport beyond its jurisdiction, the jurisdictional basis for substantive regulation over the rates charged by carriers is unclear.⁶¹ Second, the underlying rates for ocean transit that compose the through rate are subject to FMC regulatory authority, and as such are already regulated by that agency. By limiting the ICC's assertion of jurisdiction to the domestic portion of the joint through rate, *Ex parte* 261 was the appropriate accommodation of the two commissions' jurisdiction over the through route.⁶²

57. 561 F.2d at 291.

58. *Id.*

59. *Id.* at 291-92.

60. 49 U.S.C. § 1(2) (1970).

61. See text accompanying note 41 *supra*. In *Pennsylvania v. ICC*, the D.C. Circuit saw *Canada Packers* as being based upon an ICC tradition of reviewing the entire joint through rate for reasonableness. 561 F.2d at 287. The *Canada Packers* Court had expressed doubt as to whether substantive review of the entire joint through route—foreign portions as well as domestic portions of transport—would have been upheld as an original matter in the absence of years of contrary rulings undisturbed by Congress. 385 U.S. at 183. However, the authority to accept joint through rates for filing was not questioned in *Canada Packers*. Since *Ex parte* 261 upheld ICC jurisdiction to receive joint through rates for filing, but specifically limited substantive review of the rate's reasonableness to that portion of carriage which is via domestic ICC-regulated carriers, the question of ICC jurisdiction over the entire through route was not addressed.

62. The key distinction between *Canada Packers* and the issue of ICC jurisdiction presented by *Ex parte* 261 and its appeal is that in *Canada Packers* the ICC could choose to regulate the foreign portions of the through route without encroaching on any alternative regulatory mechanism provided by Congress. In contrast, in *Ex parte* 261 the ocean carriers were already subjected to FMC regulation of ocean rates under the Shipping Act of 1916. Thus, any definition of ICC jurisdiction to receive filings of joint through rates that include transport via FMC carriers in ocean transport must accommodate regulatory structures provided by Congress under the Shipping Act. In an earlier report of the *Ex parte* 261 proceeding, the ICC had asserted jurisdiction to review substantively the entire rate. 350 I.C.C. 361 (1975). See note 46 *supra*. When the FMC protested that such review was beyond the authority of the Interstate Commerce Act, the ICC reconsidered and reached a satisfactory accommodation between the Interstate Commerce Act

B. *FMC Jurisdiction.*

The authority for the FMC to receive joint through rates must come from the Shipping Act of 1916.⁶³ The Act grants the Commission jurisdiction over those common carriers by water that are engaged in the transportation of passengers or property between the United States or its territories or possessions and a foreign country.⁶⁴ To this end, the Act directs that common carriers by water in foreign commerce should file with the Commission tariffs showing all the rates and charges "for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established."⁶⁵

Traditionally, the FMC's position was that under the language of the Shipping Act it, like the ICC, lacked jurisdiction to accept filings of joint through rates for routes which included portions of carriage by ICC-regulated carriers.⁶⁶ However, in the 1960s the FMC also felt intense pressure to accept such joint through rates. As the world's maritime industry rapidly converted to intermodal containerized fleets, the strict noncooperation between the ICC and the FMC was perceived as an unnecessary and artificial restraint on transport systems that were tending to blend the various component systems into a single economically coordinated unit.

The pressure for change in policy was reflected in two FMC decisions, *Matson Navigation Co.—Container Freight Tariffs*,⁶⁷ decided in 1963, and *Disposition of Container Marine Lines Through Intermodal Container Freight Tariffs*,⁶⁸ decided in 1968. In *Matson* the FMC approved a single-factor rate published by an ocean carrier that included incidental pick-up and delivery charges as well as the ocean transit portion of the total movement of the cargo.⁶⁹ The pick-up and delivery charges were for the services of ICC-regulated motor carriers. However, since this portion of the movement was characterized as merely "incidental" to the ocean carriage, such charges could be included in

and the Shipping Act of 1916. 351 I.C.C. 490 (1976); see *Pennsylvania v. ICC*, 561 F.2d 278, 284-85 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

63. 46 U.S.C. §§ 801-842 (1970 & Supp. V 1975).

64. *Id.* § 801. To the extent that the Interstate Commerce Act regulates domestic water carriers, 49 U.S.C. § 832 (1970) establishes that the provisions of the Interstate Commerce Act shall prevail over Shipping Act jurisdiction.

65. 46 U.S.C. § 817(b)(1) (Supp. V 1975).

66. See, e.g., *Alaska S.S. Co. v. FMC*, 399 F.2d 623, 624 n.1 (9th Cir. 1968). See generally *Hearings*, *supra* note 3, at 14; Note, *Coordination of Intermodal Transportation*, *supra* note 11, at 261-64; Note, *supra* note 10, at 538-42.

67. 7 F.M.C. 480 (1963).

68. 11 F.M.C. 476 (1968).

69. 7 F.M.C. at 491.

the tariff filed with the FMC.⁷⁰ In *Disposition of Container Marine Lines*, the Commission held lawful a through rate that included the inland transport portion of goods being delivered to the United Kingdom so long as the charge for that portion was "broken out" or stated separately.⁷¹

These administrative decisions presaged a reversal in the FMC's interpretation of its authority under the Shipping Act. In 1969, the FMC stated that it would accept filings of joint through rates for routes including some ICC-regulated carriage. Then, in 1970, the FMC issued regulations by which such joint through rates could be filed.⁷² Although the FMC reversed its earlier position and asserted that it could review the joint through rates without further enabling legislation, the Commission continued to seek further legislative interpretation of its jurisdiction to receive such rates.⁷³

70. *Id.*; cf. *Swift & Co.*, 6 F.M.C. 215 (1961), *aff'd*, 306 F.2d 277 (D.C. Cir. 1962) (inland transport termed "incidental" to ocean transport; thus FMC had jurisdiction over entire route).

71. 11 F.M.C. at 492.

72. On April 21, 1970, the FMC amended its tariff-filing regulations to permit filings of through tariffs from inland points in the United States to foreign destinations. FED. MARITIME COMM'N, 11TH ANN. REP. 16 (1972). In 1971, two United States ocean carriers filed the first minibridge ocean tariffs. By 1976, the number of filings had grown to 170 independent intermodal tariffs and 11 conference tariffs. FED. MARITIME COMM'N, 15TH ANN. REP. 8 (1976).

73. In 1972, the FMC gave limited support to a bill amending the Shipping Act of 1916 to provide for single-factor rates under a through bill of lading for the transport of foreign and domestic offshore commerce of the United States. H.R. 15465, 92d Cong., 2d Sess., 118 CONG. REC. 20692 (1972). This bill would have placed regulation of cargo moving in intermodal transport under the control of a single body. However, the FMC objected to a provision prohibiting antitrust immunity to participating carriers in an intermodal transport scheme. *Hearings, supra* note 3, at 14.

The FMC supported two bills in the 93d Congress that would have consolidated regulatory authority for the control of intermodal systems. H.R. 12428 and H.R. 12429, 93d Cong., 2d Sess., 120 CONG. REC. 1488 (1974). These bills would have amended the Shipping Act of 1916 to provide authority for the FMC to regulate international ocean intermodal systems. In addition, H.R. 12429 would have provided an antitrust exemption for carriers in compliance with regulations promulgated for international through routes. See *Hearings, supra* note 46, at 15.

In the 94th Congress, the FMC supported H.R. 1080, 94th Cong., 1st Sess., 121 CONG. REC. H196 (1975), an identical bill to H.R. 12428, which had been introduced in the 93d Congress. This bill would have placed international ocean intermodal transport systems under FMC control. Additionally, it would have required the ICC, FMC and CAB to report to Congress on the need for further legislation and on conflicts between the agencies that might inhibit growth of intermodal transactions. *Hearings on H.R. 1080, Intermodal Transportation, Hearings Before House Comm. on Merchant Marine and Fisheries*, 94th Cong., 2d Sess. 163 (1976).

The ICC and the CAB have opposed further legislation defining the limits of their jurisdiction. Their opposition has centered around the implicit surrender of a portion of their jurisdiction as a result of the FMC's control over surface portions of the intermodal systems. See *Hearings on H.R. 1080, supra*, at 86. The two agencies felt that the interagency coordination that had resulted in the absence of legislation was sufficient to encourage growth of intermodal technology. *Id.* Justice Department opposition centered around concern that carriers operating either independently or in conferences establishing intermodal operations would be violative of antitrust laws. *Id.* 108.

The specific question whether the FMC has statutory authority to receive filings of joint through rates that include rates from carriers regulated by the ICC has not yet been brought before the courts. In *Council of North Atlantic Shipping Associations*⁷⁴ (hereinafter cited as *Far East*) East Coast port interests raised the lack of jurisdiction of the FMC to accept joint through rate filings.⁷⁵ In the Initial Decision, the administrative law judge rejected this challenge. Citing *Matson and Container Marine Lines* as authority, the judge determined that the FMC had jurisdiction for the acceptance of joint through rate filings.⁷⁶ Furthermore, the Initial Decision found an equitable basis for the FMC's acceptance of the rates. The regulations permitting such rates went into effect in 1970. Since the Commission had operated under those rules for some seven years at the time of the Initial Decision in 1977, the judge stated: "It is a little late in the day . . . to challenge the Commission's acceptance of intermodal (including minibridge) tariffs. The Commission's jurisdiction to accept minibridge tariffs is clear."⁷⁷

On appeal to the full Commission, the petitioners again raised lack of jurisdiction to accept joint through rates.⁷⁸ In affirming the Initial Decision, the FMC rejected this claim, citing *Pennsylvania v. ICC*.⁷⁹ The affirmance in that case of the ICC's authorization to receive joint through rates and to confine its jurisdiction to the land portion of the through movement was seen by the *Far East* court as "plainly premised upon the FMC exercising jurisdiction over the water portion of the joint rate just as the ICC regulates the land portion."⁸⁰ The *Far East* decision also cited other federal court decisions that "have assumed the

74. No. 73-38 (F.M.C. Aug. 8, 1978). The FMC adopted the Initial Decision by Administrative Law Judge John E. Cogrove (F.M.C. July 1, 1977).

75. Opening Brief of Complainants Council of North Atl. Shipping Ass'ns; The Int'l Longshoremen's Ass'n, AFL-CIO; and Del. River Port Auth. at 2. This case involved a land-bridge system that transported containerized goods cross-continent via rail and then to the Far East via ocean carrier.

76. Initial Decision, slip op. at 92.

77. *Id.*

78. In excepting to the Initial Decision, the complainants stated:

Prior to 1970, the Commission had always maintained that it could not accept for filing joint rates because it lacked statutory authority to do so. . . .

However, by 1970, the Commission decided to forego legislation and instead, through rule-making, promulgated regulations purportedly governing the "Filing of Through Rates and Through Routes". . . .

. . . Complainants contend that rule-making in 1970 cannot lawfully accomplish an objective which in 1968 and 1969 the Commission itself perceived would require legislation.

Exceptions to Initial Decision and Supporting Brief on Behalf of Council of North Atl. Shipping Ass'ns; The Int'l Longshoremen's Ass'n, AFL-CIO; and Del. River Port Auth. at 8-9 (footnotes omitted).

79. 561 F.2d 278 (D.C. Cir. 1977), cited in *Far East*, Final Decision, slip op. at 5.

80. Final Decision, slip op. at 6. (footnote omitted).

existence of FMC jurisdiction to accept joint tariffs for filing.”⁸¹

Such reasoning involves some degree of boot-strapping. In *Pennsylvania v. ICC*, the court was involved with interpretation of the Interstate Commerce Act, not of the Shipping Act. The language of the Shipping Act is not as expansive as that of the Interstate Commerce Act. Nonetheless, in *Far East* the FMC made an implicit assumption that it had jurisdiction under the Shipping Act and that it was merely reversing an administrative “policy,” just as the ICC had done in *Pennsylvania v. ICC*. Therefore, following this reasoning, the FMC’s only obligation was to explain and justify the change.

The Shipping Act in section 18(b)(1)⁸² provides for through routes only between United States *ports* and foreign countries. Thus, a strict reading of the Act might limit FMC authority to accept joint through rate filings solely to receiving ocean rates. To justify its acceptance of the joint through rates, the FMC must articulate more clearly the statutory basis for acceptance. Without this basis, the FMC cannot justify its action by relying upon earlier FMC administrative decisions, court decisions that did not address the issue, or decisions interpreting the Interstate Commerce Act.

However, two factors strongly suggest that the Shipping Act does provide adequate authority to allow filings of joint through rates with the FMC. First, the FMC only accepts the joint through rates *for filing*. The Commission does *not* exercise substantive regulation over the domestic portion of the through route. It limits its regulation to the ocean transit portion of the through rate, which is “broken out” or stated separately from the joint through rate.⁸³ In essence, the FMC exercises

81. *Id.* at 6 n.8 (citing *Texas v. Seatrain Int’l, S.A.*, 518 F.2d 175 (5th Cir. 1975), and *Pennsylvania v. FMC*, 392 F. Supp. 795 (D.D.C. 1975), as cases where the court implicitly recognized minibridge schemes built around joint through rate structures). In *Seatrain*, complaining ports sought a preliminary injunction against the operation of a Euro-Gulf minibridge that diverted cargo overland from the Gulf states to Atlantic ports for unloading. 518 F.2d at 177. In denying a preliminary injunction, however, the *Seatrain* court did not address the jurisdictional issue. Rather, it recognized the then ongoing FMC administrative determination. *Id.* at 178. Therefore, *Seatrain* is less than compelling as authority for the lawfulness of the minibridge tariffs.

Similarly, *Pennsylvania v. FMC* arose when certain port interests sought to preliminarily enjoin the operation of the Far East minibridge. The case was at that time before the FMC in administrative proceedings. As in *Seatrain*, the court considered only the grounds for a preliminary injunction and declined to address the merits of the case in recognition of the action pending before the FMC. 392 F. Supp. at 801.

82. 46 U.S.C. § 817(b)(1) (1970).

83. FMC requirements for filing joint through rates, are in part, as follows:

(1) tariffs naming single factor through intermodal rates shall show the through rate together with the division, rate or charge that is to be collected by water carrier subject to the Shipping Act of 1916, for its port-to-port portion of the through service, which division, rate or charge shall be treated as a proportional rate subject to the provisions of the Shipping Act of 1916. . . .

jurisdiction over the movement from port to port in accordance with section 18(b)(1) of the Shipping Act. Permitting a joint through rate that covers the total movement should not be ultra vires so long as the regulatory power granted the FMC is not exercised beyond the Act's limits.

This argument is bolstered by the view that the Shipping Act's delegation of authority to the FMC should be read broadly to allow responsiveness to technological innovation and changing conditions. *American Trucking Associations* and *Canada Packers*, although on their facts applicable only to the ICC, are relevant insofar as they read into the transportation acts Congress' intent that the FMC and the ICC be able to respond in innovative ways to altered technology.⁸⁴ A broad congressional intent to foster coordination and development of transportation resources is also evidenced in the Declaration of National Transportation Policy,⁸⁵ passed by Congress in 1940. In this Declaration, Congress established a national policy in favor of the development, coordination and preservation of a national transportation system by water, highway, rail and other means adequate to meet the commercial requirements of the United States.⁸⁶ Thus, despite the lack of explicit authority in the Shipping Act itself, the FMC should have the same expansive ability as the ICC to respond to technological changes.

Given the premise that the FMC should have broad authority under the Shipping Act, the reversal of the FMC's earlier position that it would not accept joint through rates which included ICC-regulated portions should be subjected to review similar to that undertaken by the court in *Pennsylvania v. ICC*. To this end, the change of policy

(2) When the through rate is to be constructed by combining the ocean rates with inland rates published in tariffs filed with the Interstate Commerce Commission . . . the ICC tariff . . . must be incorporated into the through intermodal tariff and filed with the Federal Maritime Commission.

46 C.F.R. § 536.15(d) (1977) (emphasis in original).

84. See, e.g., *United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474, 480-81 (1932):

The Shipping Act is a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate carriers by land. . . . In its general scope and purpose, as well as in its terms, that act closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect.

Once it is resolved that the Shipping Act and the Interstate Commerce Act should be similarly construed, *American Trucking Ass'ns* and *Canada Packers* may be relied upon in determining the breadth of the Shipping Act.

85. Act of Sept. 18, 1940, ch. 722, § 1, 54 Stat. 899 (codified at 49 U.S.C. preceding § 1 (1970)).

86. *Id.*

must be explained and justified.⁸⁷ The extended interval since the FMC's reversal of position in 1969, its promulgation of revised rules concerning filing of joint through rates in 1970 and the lengthy period of operation of these rules provided ample explanation to all parties. That the action was "justified" was shown in *Pennsylvania v. ICC*, in which changing transportation patterns and advancing technology were held to be adequate justification for a similar reversal of an ICC policy.⁸⁸ Further, the now-extended operation of the FMC rules makes it unlikely that, after the fact, the Commission will be found to have acted ultra vires.

The lack of specific enabling legislation to support the change of policy by the ICC and the FMC is not a critical failure that should preclude the commissions from adapting their policies in response to transport patterns or schemes. *Pennsylvania v. ICC* suggests two proper responses to changing commercial realities. One is to enact corrective legislation. The other, equally valid, is to change regulatory policy when such a policy change is within the agency's statutory authority.⁸⁹ Thus, under an expansive reading of the Shipping Act, the FMC should be found to have jurisdiction to accept filings of joint through rates.

In summary, recent developments make it clear that the ICC and the FMC will coordinate their jurisdiction to accept joint through tariffs. Furthermore, the courts will give an expansive interpretation to the enabling statutes of the agencies, thereby reducing the likelihood of successful challenge to their jurisdiction.

II. ATTACKING INTERMODAL SCHEMES VIA STATUTORY CAUSES OF ACTION BEFORE THE FMC

In addition to challenging the jurisdiction of either agency to accept joint through rates, opponents of minibridge and land-bridge schemes have sought relief under statutory causes of action before the FMC. These causes of action generally prohibit predatory practices by carriers that divert a port's cargo to other locations, thus protecting the port's trade and commerce.

There are a number of carrier practices that can result in diversion of cargo from a port. For example, the carrier can divert cargo by charging an unjustifiably low ocean rate from a single port if the rate has the effect of drawing cargo from other ports. The carrier can also

87. See *Pennsylvania v. ICC*, 561 F.2d 278, 291 (D.C. Cir. 1977), cert denied, 434 U.S. 1011 (1978). See text accompanying notes 57-58 *supra*.

88. 561 F.2d at 283.

89. *Id.* at 289.

engage in port equalization schemes by which the rate charged for ocean shipment from a particular port is lowered to that of a closer port, making the two equally attractive to the shipper. Equalization may be accomplished in three ways. The simplest method is for the carrier to pay the shipper the extra cost involved in the overland transport. Second, the carrier may use proportional rates in computing the cost to the shipper, deducting specified differentials from the ocean tariff for different areas in order to equalize the cost to the shipper. Third, the carrier may accept delivery of cargo at a port, then ship the goods overland to another port, absorbing any excess costs into the ocean rate.⁹⁰ Each variation has a similar result: the diversion of goods by making alternative ports as attractive to the shipper as the original port.

An equalization scheme is not unlawful in principle; it becomes unlawful only if it tends to divert from ports traffic that originates in areas "naturally tributary" to those ports.⁹¹ The concept of naturally tributary cargo is long lived in maritime law and was a source of litigation even prior to the development of intermodal transportation systems.⁹² It originated in sections 16 and 17 of the Shipping Act of 1916,⁹³ which prohibit discrimination against ports by carriers, and was

90. *See, e.g.*, *Sea-Land Servs., Inc.*, 9 F.M.C. 338, 345 (1966).

91. *Id.* at 346. *See* *Stockton Port Dist.*, 9 F.M.C. 12, 20-21 (1965), *aff'd*, 369 F.2d 380 (9th Cir. 1966), *cert. denied*, 386 U.S. 1031 (1967).

92. Actions based on a theory that carriers' practices discriminate against ports by diverting naturally tributary traffic arose shortly after the passage of the Shipping Act of 1916. In *Port Utils. Comm'n*, 1 Dec. U.S. Mar. Comm'n 61 (1925), the United States Shipping Board, predecessor to the FMC, held that differentials in rates between North Atlantic and South Atlantic ports were so disparate as to be detrimental to the commerce of the United States. The Board noted, in regard to grouping of ports by shipping conferences for the purposes of ratemaking, that "the board is not disposed to disturb port groupings which have prevailed for a considerable length of time and to which business has accustomed itself, except for very strong and compelling reasons." *Id.* at 67.

Again, in *Contract Routing Restrictions*, 2 Dec. U.S. Mar. Comm'n 220 (1939), the United States Maritime Commission stated as a policy: "We do not look with favor upon the attempt of carriers by artificial means to control the flow of traffic not naturally tributary to their lines." *Id.* at 226; *see, e.g.*, *Reduced Rates on Machinery and Tractors from United States Ports to Ports in Puerto Rico*, 9 F.M.C. 465, 476 (1966), *reaff'd*, 10 F.M.C. 248 (1967); *City of Portland, Ore.*, 4 F.M.B. 664, 679 (1955).

93. Section 16 of the Shipping Act of 1916, 46 U.S.C. § 815 (1970), prohibits

any common carrier by water or other person subject to this chapter, either acting alone or in conjunction with any other person, directly or indirectly . . . to make or give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic in any respect whatsoever, or to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever

Section 17 of the Act, 46 U.S.C. § 816 (1970), provides that "[n]o common carrier by water in foreign commerce shall . . . charge or collect any rate, fare or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as com-

strengthened by the general congressional perspective exhibited in section 8 of the Merchant Marine Act of 1920.⁹⁴ Section 8 expresses a congressional intent to "investigate territorial regions and zones tributary to such ports, taking into consideration the economics of transportation by rail, water and highway and the natural direction of the flow of commerce."⁹⁵ Additionally, section 205 of the Merchant Marine Act of 1936⁹⁶ has been construed by the FMC as an expression of congressional intent that cargo should not be diverted from ports by carriers acting alone or in concert.⁹⁷

These statutes have been amalgamated by the FMC into an administrative cause of action before the FMC. It is available to ports to protect themselves from carrier practices tending to divert naturally tributary cargo. The older decisions by the FMC suggest that this cause of action could be applied to block minibridge-type schemes that would have an effect of diverting cargo.⁹⁸ Recent FMC decisions, however, demonstrate a conscious reevaluation of the traditional FMC stance on cargo diversion in an effort to accommodate commercial and technological innovation. Earlier FMC decisions did not comprehensively set out the criteria to be used in applying the naturally tributary concept, but instead applied a case-by-case method, using microeconomic models in determining harm caused by the practice. More recent cases involving naturally tributary cargo in an intermodal context have required that the FMC reconsider the underpinnings of the naturally tributary concept to come to grips with the real economic trade-offs offered by intermodal schemes. An understanding of the concept requires a preliminary review of the traditional means of analysis, following which the evolution of the concept to accommodate in-

pared with their foreign competitors."

94. 46 U.S.C. §§ 861-889 (1970 & Supp. V 1975). While the Merchant Marine Act of 1920 places responsibility for its execution on the Secretary of Commerce and the Secretary of the Army, the FMC has seen the expression of congressional intent as imposing a duty on the FMC to consider the interests of ports in their review of carrier rates and charges, using as a standard the naturally tributary areas to a port described in the Merchant Marine Act of 1920. See, e.g., *Port of N.Y. Auth. v. FMC*, 429 F.2d 663, 670 (5th Cir. 1970), *cert. denied*, 401 U.S. 909 (1971) (section 8 is an expression of congressional policy and must be considered by the FMC in exercising its authority); *Stockton Port Dist.*, 9 F.M.C. 12, 29 (1965), *aff'd*, 369 F.2d 380 (9th Cir. 1966), *cert. denied*, 386 U.S. 1031 (1967).

95. 46 U.S.C. § 867 (1970).

96. *Id.* § 1115.

97. Section 205 provides that "it shall be unlawful for any common carrier by water, either directly or indirectly . . . to prevent or attempt to prevent any other such carrier from serving any port designed for the accommodation of ocean-going vessels . . ." *Id.* Like section 8 of the Merchant Marine Act of 1920, see note 94 *supra*, section 205 of the Merchant Marine Act of 1936 has served as an expression of congressional intent concerning diversion of freight. See, e.g., *Intermodal Serv. to Portland, Ore.*, 17 F.M.C. 106, 134-35 (1973).

98. See text accompanying notes 99-114 *infra*.

termodal and minibridge schemes will be analyzed.

A. Naturally Tributary Cargo.

In *Reduced Rates on Machinery and Tractors From United States Ports to Ports in Puerto Rico*,⁹⁹ several carriers serving the ocean route from Florida to Puerto Rico engaged in a round of rate reductions of the carriage of heavy machinery over that route. Each carrier had certain inherent advantages. One, a barge service, could offer the cheapest service; others could offer speedier delivery.¹⁰⁰ The FMC found that nine percent of the heavy machinery that normally would have passed through ports in the North Atlantic was attracted by the reduced rates overland to Florida for ocean shipment. The FMC determined this to be an unlawful diversion of cargo naturally tributary to North Atlantic ports.

The factual showing required of the complaining port to support a finding of unlawful diversion was not a rigorous one. The nine-percent diversion of machinery was sufficient to support the determination of unlawfulness without additional supporting data regarding total impact on the ports in terms of absolute amounts of cargo moving through the port.¹⁰¹

Furthermore, the FMC held that a port's right to naturally tributary cargo was "fundamental."¹⁰² Thus, access to the cause of action by one who is harmed by diversion is not dependent on the amount of cargo diverted. Any "significant" diversion of naturally tributary cargo triggers the cause of action.

In *Sea-Land Services, Inc.*¹⁰³ (hereinafter cited as *SACL*), the FMC held that a scheme by which a carrier accepted cargo at the port of Jacksonville, Florida, then shipped the cargo overland to Miami for ocean shipment (absorbing the overland cost differential between the ports) was an unlawful diversion of naturally tributary cargo.¹⁰⁴ According to the findings of fact, the diverted cargo originated in areas up to 360 miles away from Jacksonville. The goods were attracted to Jack-

99. 9 F.M.C. 465 (1966), *reaff'd*, 10 F.M.C. 248 (1967).

100. 9 F.M.C. at 466-69.

101. *Id.* at 468. The FMC derived the nine-percent figure by determining the amount of cargo that originated in areas where the rail rates were favorable to North Atlantic ports but was shipped overland to South Atlantic ports. No information on port activity overall was considered in the determination. "[T]he actual volume of a commodity in a trade or the relative amount of that volume transported by any particular carrier is irrelevant if area differentials not supported by transportation conditions have been shown to exist." *Id.* at 477.

102. *Id.* at 476.

103. 9 F.M.C. 338 (1966).

104. *Id.* at 347.

sonville by geography and "normal inland transit routes,"¹⁰⁵ making the cargo naturally tributary to Jacksonville, not to Miami. The FMC again interpreted the naturally tributary concept expansively, giving weight to time, distance and cost differences and to historic patterns of transport in determining the cargo to be naturally tributary to Jacksonville.¹⁰⁶

In *SACL*, the FMC rejected a "but for" test for determining whether cargo is naturally tributary to a port. Such a test would designate as naturally tributary cargo that would have passed through a port "but for" the diversion scheme operated by the carrier.¹⁰⁷ This mechanical test, with a low threshold for triggering the cause of action, was rejected in favor of a more extensive consideration of all the circumstances.¹⁰⁸

For example, in *Stockton Port District*,¹⁰⁹ the area naturally tributary to a port was held to be determined by an inquiry into several factors: the geographic location of the port, economic factors and historic patterns of transport. The FMC held that a mere mileage advantage—the fact that one port is closer to a shipper than another port—is not in itself proof that the cargo generated is naturally tributary to the closer port.¹¹⁰ If two or more ports exist in the same geographic area, and both may make a legitimate claim to the area served, then a carrier's employment of equalization tactics does not divert naturally tributary cargo and is not unlawful.¹¹¹ Further, the FMC held that the plaintiff must show substantial harm caused by the diversion scheme in order to state a claim.¹¹²

Once a port has made a substantial showing that a carrier is engag-

105. *Id.* at 346. The distance from Canton, Ga. to Jacksonville is 360 miles; from Jacksonville to Miami, 360 miles.

106. *Id.* at 348.

107. *Id.* at 350.

108. *Id.* at 346-47.

109. 9 F.M.C. 12 (1965), *aff'd*, 369 F.2d 380 (9th Cir. 1966), *cert. denied*, 386 U.S. 1031 (1967). In *Stockton*, the Pacific Westbound Conference adopted a rule that allowed carriers to limit their calls within the San Francisco Bay Area by equalizing overland delivery of cargo to central locations. Stockton claimed this practice was unlawfully diverting naturally tributary cargo from Stockton to San Francisco ports. 9 F.M.C. at 13.

110. 9 F.M.C. at 21-22.

111. *Id.* at 24. See *Intermodal Serv. to Portland, Ore.*, 17 F.M.C. 106, 126-27 (1973).

112. 9 F.M.C. 12, 29 (1965). This standard of showing substantial harm was imposed upon the complainant in *Intermodal Serv. to Portland, Ore.*, 17 F.M.C. 106 (1973), where the FMC found no evidence of a "drying up" of port terminal facilities as a result of the overland transport of container cargo from Portland to Seattle. *Id.* at 133. See note 125 *infra* and accompanying text.

The requirement of substantial harm as a prerequisite to a finding of unlawful diversion is in contrast to earlier FMC precedent. See, e.g., *Proportional Commodity Rates on Cigarettes and Tobacco*, 6 F.M.B. 48, 56 (1960) (substantial harm shown to port in spite of small amount of cargo actually diverted by diversion scheme).

ing in practices that cause diversion of naturally tributary cargo, precedent allows the carrier only one defense—that service at that port was inadequate to transship the diverted cargo.¹¹³ The carrier must show that the service was generally inadequate; merely showing that the port had a single inadequacy in any respect is not sufficient to carry the burden.¹¹⁴

The concept of naturally tributary cargo has traditionally centered around a model of a predatory carrier willfully engaging in activities designed to divert cargo. Thus, the remedy—an action by the aggrieved port—has been narrowly drawn to limit the issues before the FMC. Of necessity, the degree of harm required to be shown by the port is “substantial harm.” The carrier is barred from asserting a full range of defenses. However, once the model moves beyond this very limited, one carrier-one product-one port character into larger schemes that reflect fundamental changes in transportation patterns, it cannot provide sophisticated review reaching optimum decisions on their legality. Instead, there is a need for wider inquiry into the totality of circumstances, as is clearly shown by *Stockton Port District*.

B. Applying Naturally Tributary Concepts to Intermodal Transport Schemes.

The concept of port discrimination provides a basis for challenges to the institution of minibridge operations by joint rail-ocean carriers. Based on the expansive interpretation of the concept of naturally tributary cargo contained in *Reduced Rates to Puerto Rico* and *SACL*, ports would seem to have a strong argument that such schemes are unlawful. However, the application of the concept in the intermodal context requires close examination of the continuing viability of the concept of naturally tributary cargo as an affirmative bar to activities by carriers, including technologically innovative activities that have an effect of diverting cargo. In the cases that have brought the two concepts into direct conflict, the FMC has generally upheld the innovative system, limiting the scope of the protection offered the port interest.

113. See *SACL*, 9 F.M.C. 338, 344-45 (1966); *City of Portland, Ore.*, 5 F.M.B. 118 (1956) (equalization between ports justified on basis of inadequacy of steamship service to Portland); *Port Comm'n of Beaumont, Tex.*, 2 Dec. U.S. Mar. Comm'n 699, 702 (1943) (diversion of cargo justified because of special pier-handling requirements for Sea Train ships).

The language of section 205 of the Merchant Marine Act of 1936, see note 97 *supra*, suggests a possible origin of this limitation of defenses by the FMC. The Act makes it unlawful for a carrier to attempt to prevent any carrier from “serving any port designed for the accommodation of ocean going vessels.” 46 U.S.C. § 1115 (1970).

114. See *Stockton*, 9 F.M.C. at 33-34.

In *Investigation of Overland and OCP Rates and Absorptions*,¹¹⁵ West Coast carriers conducted an intermodal operation that reduced ocean rates to and from the Far East to account for the costs of overland rail transport. This allowed shippers in the Midwestern United States to ship to the Far East via the Pacific coast at a rate on par with Atlantic, Gulf and Great Lakes all-water routes. This activity was challenged on the ground that the rates unlawfully attracted naturally tributary cargo away from ports through which it traditionally moved. The FMC, and later the Fifth Circuit Court of Appeals, rejected the notion that an entire region could be naturally tributary to a range of ports or to a seaboard.¹¹⁶ While *Overland-OCP Rates* was concerned with movement of container traffic via rail-ocean carriers, the FMC's decision was heavily influenced by the long history of competitive activity by Pacific Coast carriers. They had engaged in rate reductions on their ocean tariffs in order to attract cargo from the mid-continental United States for over a century in competing with East Coast all-water routes to the Far East. Although improved technology made the competition more threatening to the Eastern ports, the long tradition of such competitive practices, predating any federal regulation of the shipping industry, served as adequate notice of the carrier's activities.¹¹⁷ Further, great weight was given to the increased competition brought about by the practice, presumably improving service to the shipper and the public.¹¹⁸ While recognizing limits to the concept of naturally tributary cargo and tacitly recognizing that innovations that tend to increase competition between areas may be judged by a more lenient standard, the strong reliance of *Overland-OCP Rates* on the traditional patterns of carrier activity makes it less than compelling precedent on the lawfulness of truly innovative intermodal schemes.

A second stage in the adjustment of the naturally tributary concept to technological innovation was reached in *Intermodal Service to Portland, Oregon*.¹¹⁹ In that case, the FMC found lawful a scheme by which loaded containers were sent overland from Portland to Seattle for ocean transportation to the Far East. First, the FMC held that

115. 12 F.M.C. 184 (1969), *aff'd sub nom.* Port of N.Y. Auth. v. FMC, 429 F.2d 663 (5th Cir. 1970), *cert. denied*, 401 U.S. 909 (1971).

116. 12 F.M.C. at 222-26; 429 F.2d at 670. The court would not hold as a matter of law that equalization practices were discriminatory simply because a port has a lower inland mileage advantage.

117. 12 F.M.C. at 207; 429 F.2d at 667.

118. 429 F.2d at 669. In the FMC opinion, competition was held to be "the basic distinguishing factor in the establishment of Overland/OCP rates. There is no contention that the level of Overland/OCP rates is so low as to be noncompensatory, detrimental to commerce, or otherwise unfair or unlawful." 12 F.M.C. at 206.

119. 17 F.M.C. 106 (1973).

land and Seattle served distinctly different geographic regions, so that under the *Stockton Port District* criterion the naturally tributary concept would apply.¹²⁰ On the basis of *Overland-OCP Rates*, however, the FMC held that neither port could claim as naturally tributary the cargo generated from inland areas geographically accessible to both and which historically had been shipped from both ports.¹²¹ The FMC made no distinction for containerized cargo moving in an intermodal transport scheme, holding that cargo does not cease to be naturally tributary simply because it moves in an innovative way.¹²² *Intermodal Service to Portland* also upheld FMC precedent by allowing the carrier to defend by proving inadequacy of the port to handle the cargo diverted.¹²³

Intermodal Service to Portland is best seen as a compromise decision, attempting to reconcile the development of alternative means of transport with traditional maritime concepts which protect port interests. The final remedy granted the FMC—that carriers wishing to serve Portland via indirect overland service must make a direct call on Portland at least on alternate sailings¹²⁴—represents a self-conscious balancing of the interests of the port, shipper, carrier and the public. Significantly, the lack of showing by Portland of any absolute loss because of the intermodal scheme in terms of declining revenue or slackened activity was given great weight by the FMC in holding the diversion lawful. In the absence of substantial loss in absolute terms of declining port activity, the FMC did not find the required injury to the port.¹²⁵ This adds immensely to the costs of a port wishing to challenge

120. *Id.* at 126.

121. Nor does cargo cease to be naturally tributary because of the direction in which it moves, either outbound or inbound. *Id.* at 127.

122. *Id.* at 130.

123. *Id.* at 128-131. However, the opinion in *Intermodal Service to Portland* expressed misgiving about so extending the inadequacy defense. It recognized that the carrier itself could make the service inadequate at a port simply by not calling there. See *City of Portland*, 4 F.M.B. 664, 675 (1955), for an example of inadequacy of steamship service being held adequate justification for diversion of cargo. In such a scheme, the carriers themselves could make service inadequate by not calling there.

124. 17 F.M.C. at 139.

125. *Id.* at 133. Compare this requirement of absolute harm with the requirement of *Reduced Rates to Puerto Rico* and *SACL*, in which the complaining port needed only to show that a substantial amount of cargo was being diverted in order to show the requisite injury.

One may trace the evolution of the increasingly tough threshold injury requirement to the *Intermodal Service to Portland* standard by reviewing the line of decisions beginning with *Proportional Commodity Rates on Cigarettes and Tobacco*, 6 F.M.B. 48, 56 (1960). In that case, in response to a contention by a defendant that the volume of cargo diverted by its practices was so small as to have no impact on the port, the FMB held that a significant portion of the volume of that cargo was diverted and that that was sufficient to trigger a cause of action for relief by the port. In *Reduced Rates to Puerto Rico* and *SACL*, the claimants were required to show, in dollar

an intermodal scheme and adversely affects its chances of successful attack on the scheme.

Intermodal Service to Portland left considerable haziness as to the legality of minibridge operations. In this uncertain climate, port interests sought injunctive relief in federal court to block minibridge operations while challenging their lawfulness before the FMC. Although this tactic had early success at the district court level,¹²⁶ two subsequent court of appeals decisions, *Delaware River Port Authority v. Transamerican Trailer Transport, Inc.*,¹²⁷ and *Texas v. Seatrain International*,¹²⁸ have strictly limited the availability of a preliminary injunction as means by which a port interest may block operation of a minibridge scheme. In each case, the FMC as intervenor said the likelihood of success before the FMC on the merits of the port discrimination claim was slight.¹²⁹

In *Seatrain*, the Fifth Circuit weighed the relative injury to the ports seeking to enjoin the minibridge and to the ports to whom the cargo was being transported overland by minibridge should the injunction be granted.¹³⁰ Finding that the injury to one port should the injunction be granted would be essentially the same as that suffered by

amounts, that the port had sustained *substantial* harm. Finally, in *Intermodal Service to Portland* the FMC hinted that the success of the port claimant's showing was dependent upon showing an *absolute* decline in port activity. Thus, *Intermodal Service to Portland* indicates that the port must carry a burden of showing a danger of a "drying up" of port business because of the challenged practice. 17 F.M.C. at 133.

The trend suggested by this line of cases is to require consideration of the diversion scheme's impact on the total volume served by the port. Although the earlier cases used a microeconomic model involving a single commodity, *Intermodal Service to Portland* indicates that the inquiry must be broader, focusing on the total impact on the port. Furthermore, the inquiry must include considerations of carrier efficiency and shipper convenience. See text accompanying notes 147-48 *infra*.

This broadening of the inquiry might well have a devastating effect on the potential challenger's costs in meeting the standards of proof required of a challenging port and on its chances of demonstrating adequate injury in an era of expanding trade volume.

126. See, e.g., *Delaware River Port Auth. v. United States Lines, Inc.*, 331 F. Supp. 441 (E.D. Pa. 1971), in which an injunction was granted to a longshoremen's association and the Port of Philadelphia on grounds of extensive injury to the city caused by the transport practices of a carrier. (Cargo was shipped overland from Philadelphia to Port Newark, N.J. for ocean shipment, and the overland costs were absorbed by the ocean shipper). But see *Pennsylvania v. FMC*, 392 F. Supp. 795 (D.D.C. 1975) (injunction denied for failure to exhaust administrative remedies).

127. 501 F.2d 917 (3d Cir. 1974). Philadelphia has been a leading opponent of minibridge schemes. Because it is located 13 to 16 hours from the open sea up the Delaware River, carriers have taken advantage of intermodal technology to divert cargo overland to other ports. See, e.g., *Delaware River Port Auth. v. United States Lines, Inc.*, 331 F. Supp. 441, 445 (E.D. Pa. 1971) (injunction sought to halt overland diversions of containers to Port Newark, N.J.).

128. 518 F.2d 175 (5th Cir. 1975).

129. *Id.* at 181 n.6; 501 F.2d at 920.

130. 518 F.2d at 179-80.

the other should the injunction be denied, the court considered the ultimate likelihood that the plaintiff ports would prevail on the merits. Accepting the intervenor FMC's judgment that the likelihood was low, the *Seatrain* court declined to enjoin the minibridge scheme.¹³¹ Thus, it is apparent that unless the port seeking an injunction against a minibridge scheme can carry the burden of showing promise of eventual success on the merits, injunctive relief is not likely to be available.

In *Overland-OCP Rates* and *Intermodal Service to Portland*, the FMC took initial steps to adapt the concept of naturally tributary cargo to intermodal transport schemes. However, these decisions did not squarely address the legality of the emerging minibridge and land-bridge schemes. *Overland-OCP Rates* relied heavily on historic patterns of carriage. *Intermodal Service to Portland* was a self-conscious balancing of the interests of two ports, and the remedy granted to Portland was tailored so as to apply only to the peculiar facts of the case. The formulation of general principles was thus deferred to future disputes.

C. *Revision of the Law of Port Discrimination—The Far East Case.*

The opportunity to formulate general principles of minibridge regulation arose in the *Far East* case.¹³² When the action was brought in 1973, the FMC indicated that it would serve as the means by which general guidelines for minibridge operations would be formulated.¹³³ Consequently, the case attracted the attention of ports, carriers, shippers and many intervenors.¹³⁴

Far East involved a challenge to the practice of moving containerized cargo via a coordinated rail-ocean movement across the continental United States to its destination in the Far East. Cargo moving from the Far East would terminate the ocean portion of its movement on the West Coast and would travel via rail across the United States. The Far East land-bridge would have the effect of diverting cargo that historically had moved via all-water routes from Atlantic and Gulf Coast ports to West Coast ports, where the cargo would be transshipped for the ocean movement to the Far East. The rates offered by the minibridge were set at levels competitive with those of the all-water

131. *Id.* at 180-81.

132. See text accompanying notes 74-81 *supra*.

133. Initial Decision, slip op. at 4.

134. *Id.* at 4-5. The initial suit was brought by complainants North Atlantic Shipping Associations; International Longshoremen's Association, AFL-CIO; and the Delaware River Ports Authority against fifteen ocean carriers engaging in minibridge activities. Joining the suit as a complainant was the Massachusetts Ports Authority. There were 37 intervening parties, representing Atlantic, Gulf and Pacific ports authorities, railroads, and shipping and labor organizations. *Id.* at 1-2.

route. Goods moving from the Far East to the eastern portion of the United States could also utilize the minibridge.¹³⁵

The Far East minibridge system was challenged before the FMC as violating sections 16, 17 and 18 of the Shipping Act and section 8 of the Merchant Marine Act of 1920 in that it caused substantial injury to Atlantic and Gulf Coast ports, labor organizations and maritime-related industries; illegally diverted naturally tributary cargo from Atlantic and Gulf Coast ports; and achieved this diversion through unlawful absorption practices and unreasonably low rates.¹³⁶

In its Initial Decision, the FMC rejected on three grounds the ports' contention that the minibridge operation unlawfully diverted naturally tributary cargo. First, the complainants failed to carry the burden of showing substantial harm.¹³⁷ Second, the concept of naturally tributary cargo was viewed narrowly.¹³⁸ Third, expanded defenses were held to be available to the carrier.¹³⁹

The complaining port interests introduced evidence showing that 1.6 percent of the total cargo that moved through the complaining ports and 4.6 percent of all containerized cargo was diverted by the minibridge operation.¹⁴⁰ When measured against the simultaneous growth in overall traffic and increased Euro-Cal minibridge operations, these losses were found to be insufficient to constitute substantial harm.¹⁴¹ Further, the decision criticized the statistics offered by the complainants, noting that the figures used to show diversion of cargo failed to take into account cargo that would not have passed through the ports in any event.¹⁴²

The Initial Decision adopted a narrowed definition of naturally tributary cargo. The opinion emphasized that the congressional intent

135. A European minibridge from the western portion of the country somewhat offset the flow of westward-bound minibridge cargo, but the net flow was strongly to Far Eastern destinations. *Id.* at 11. The Euro-Cal minibridge, moving containerized cargo eastward across the United States for a shipment from Atlantic ports to Europe, offset the impact of the freight moving west over the Far East minibridge from Atlantic ports. Additionally, the handling and transport of Far East-bound containers from Atlantic ports generated revenues for the originating locales that tended to offset the impact of the Far East minibridge. *Id.* at 36.

136. Opening Brief of Complainants at 1.

137. Initial Decision, slip op. at 36.

138. *Id.* at 72.

139. *Id.* at 73.

140. *Id.* at 36. The Initial Decision noted that only 35% of the total growth in Far East container traffic moved via the minibridge. *Id.* The Initial Decision also considered the impact of the minibridge on the various ports and found that the total volume of traffic had grown and was continuing to grow following the institution of the minibridge operation in these ports.

Some port facilities were operating at capacity, even with diversions of cargo. *Id.* at 36-42.

141. *Id.* at 36.

142. *Id.* at 35-36.

expressed in section 8 of the Merchant Marine Act of 1920¹⁴³ is only one of many policy aims that must be applied in accordance with other national goals.¹⁴⁴ Thus, the Initial Decision indicated that the FMC would balance port interests against carrier and shipper interests on a larger scale.¹⁴⁵

The Initial Decision adopted a two-step analysis. First, the FMC must determine whether there has been a diversion of naturally tributary cargo. The Initial Decision viewed the concept of naturally tributary cargo as constantly changing¹⁴⁶ and included the shipper's preferences as one of the factors to be considered in making the determination.¹⁴⁷ If the FMC determines that naturally tributary cargo has been diverted, then the second step is a consideration of the reasonableness of the diversion, taking into account the cost to the carrier of direct service, the competitive situation existing in the area and any other transportation factors that bear upon the carrier's ability to provide direct service.¹⁴⁸ In this respect, the Initial Decision directly contradicts the line of FMC precedent holding that the only defense a carrier may assert to a charge of diversion of naturally tributary cargo is that the complainant port's facility is inadequate to provide the service to the carrier.¹⁴⁹ Furthermore, the "but for" test for determining local cargo, specifically rejected by the FMC in earlier cases, is resurrected by the Initial Decision and promoted as a proper test for determining whether or not cargo claimed to be local is in fact naturally tributary to the port claiming unlawful diversion.¹⁵⁰ In sum, the Initial Decision of the *Far East* case strongly endorsed innovation in the maritime shipping industry to accommodate improved technology.

The Initial Decision was appealed to the full Commission by port interests on the ground that the Initial Decision did not properly formulate the scope of protection for naturally tributary cargo.¹⁵¹ In af-

143. See note 94 *supra* and text accompanying note 95 *supra*.

144. Initial Decision, slip op. at 64-65.

145. *Id.* at 72.

146. *Id.*

147. *Id.* The other factors listed in the Initial Decision were generally adopted by the full Commission. Final Decision, slip op. at 7-8. See text accompanying note 153 *infra*. *Cf.* Intermodal Serv. to Portland, Ore., 17 F.M.C. 106, 126-28 (1973) (geographic, commercial and economic considerations are relevant in determining whether cargo is "naturally tributary"). The Initial Decision included as one of the factors the relevant inland transportation rates. Initial Decision, slip op. at 72. The consideration of transportation alternatives available to accommodate the shipper in a certain area adds a variable to the determination of naturally tributary cargo that allows the carrier greater freedom in offering innovative service to the shipper.

148. *Id.*

149. See text accompanying notes 113-14 *supra*.

150. Initial Decision, slip op. at 79 n.88. See text accompanying notes 107-08 *supra*.

151. Exceptions to Initial Decision and Supporting Brief, *supra* note 78, at 17-20. The com-

firming, the FMC stated that it viewed the Initial Decision as establishing two general principles to guide deliberation on the lawfulness of minibridge-type operations. First, certain cargo may be tributary to a port, but any "naturally tributary zone" around a port is constantly changing, varying with time and with the nature of the commodity shipped.¹⁵² To determine whether the cargo is naturally tributary, four factors are to be considered: the flow of traffic through the port prior to the conduct questioned, relevant inland transport rates, natural or geographic transport patterns, and shippers' needs and cargo characteristics.¹⁵³

The second general principle is that, should the cargo be found to be naturally tributary to a port, a carrier or port may not *unreasonably* divert that cargo. Thus, the Commission adopted the Initial Decision's two-step analysis. First, the cargo must be proven to be naturally tributary; then the unreasonableness of the diversionary practice must be shown. The *Far East* case identified five factors to be considered in determining the reasonableness of the practice: the quantity and quality of cargo being diverted; the cost to the carrier providing direct service to the port; operational difficulties or other transport factors; competitive conditions existing at the time; and the fairness of the methods employed by the diversionary scheme.¹⁵⁴

The *Far East* case promulgated principles that greatly widened the scope of the inquiry into allegations of cargo diversion. The inquiry as formulated provides for consideration of all factors relevant to the challenged practice which, in turn, enable the Commission and the courts to undertake a broader balancing of the equities of ports, shippers, carriers and consumers.

Implicit in the *Far East* decision is the rejection of earlier precedent such as *SACL* and *Reduced Rates to Puerto Rico* insofar as they articulated notions of naturally tributary cargo. Interestingly, the *Far East* case stated that its guidelines would be applied to all future proceedings in which discrimination or diversion is alleged. Thus, the FMC will make no distinction in principle among intermodal cases, innovation cases and cases presenting more traditional microeconomic problems of port discrimination.

It is clear from *Far East* that the protected area that may be

plainants asserted that the Initial Decision had placed "impossible" burdens on the complaining ports by requiring an extensive inquiry into patterns of trade in order to define naturally tributary cargo. *Id.* at 17.

152. Final Decision, slip op. at 7.

153. *Id.* at 7-8.

154. *Id.* at 8.

claimed by a port as local or naturally tributary will be narrowed. Furthermore, the burden upon a challenger of a diversion scheme is increased. The challenger must now first meet the burden of proof that cargo is tributary and then must prove that its diversion is unreasonable. Such a requirement greatly widens the scope of the proceeding and decreases the likelihood that the challenge will be successful. While the widened scope of inquiry into all relevant factors provides the FMC with a more realistic model by which to decide these questions, the increased difficulty of a challenge will act to some degree as a deterrent to potential litigants.

Clearly, as the development of intermodal transport continues, past patterns of trade and the decisions concerning past practices are of limited value in testing the lawfulness of these innovative systems. The traditional concept of naturally tributary areas has been revised to remain a useful means of protecting port interests. Rather than being viewed as a concept to be invoked as a protective fence around an area, it must be seen as an element of a community of interests including those of the shipper, carrier and the consuming public, all of which must be considered in determining the impact of the innovation on the entire community. As such, the inquiry must be broadly based, taking into account all relevant evidence useful in obtaining an equitable resolution of conflicting interests between the parties. Used in this way, the naturally tributary concept may provide a focus for an inquiry into the total impact of the challenged intermodal system.

III. CONCLUSION

The traditional view of both the ICC and the FMC that they lacked authority to coordinate their jurisdiction has given way to a new willingness to coordinate in order to permit the creation of minibridge and land-bridge systems. This coordination has been accomplished without an expansion of either agency's statutory jurisdiction. Instead, the language of the present jurisdictional statutes has been broadly construed by the agencies and the courts to permit this innovative response to changing transport technology. Thus, disadvantaged port interests are unlikely to be able to challenge successfully the minibridge or land-bridge schemes on the grounds that the agencies lack the power to coordinate their jurisdiction.

In like manner, the FMC has redefined its cause of action designed to protect naturally tributary cargo. By seeking to balance the interests of shipper, carrier, port and consumer, the FMC has deflated "naturally tributary cargo" to that which is merely "local" to the port. At the same time, the inquiry has been broadened to include a consideration

of all relevant factors. As a result, the litigant seeking to defeat a technologically innovative system through a cargo-diversion challenge must bear a heavier burden of proof, and the factual inquiry will operate on a much broadened scale. Such a balanced inquiry promises greater efficiency to the shipper and consumer and threatens the challenger with a lessened likelihood of success as well as greater costs of proof.

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