

COMMERCIAL CARRIAGE AND MILITARY TRAFFIC*

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Since the military traffic is the largest singly-controlled traffic volume in the United States, and since it is vital to national defense, its interests are, in a sense, the interests of all. However, this fact only comes home to all, we know, when things go badly. Today, of course, it is the responsibility of the planners and traffic managers to insure that things do not go badly in the event of some future emergency.

Evaluation of this responsibility can well begin with the simple question: Is the country ready, transportationwise, for national emergency and war? In the answer to this question, it must be recognized that defense industry and others move a great deal of traffic vital to national defense under other than direct military proprietorship or sponsorship. This article, however, seeks to deal primarily with the actual military traffic aspect of national defense.

The essence of movement is dynamics; military traffic is no exception. The massive potential inherent in millions of shipments, millions of tons, and millions of passengers is not a passive lump of substance to "pick up, paint, or salute." Any experienced traffic manager worth his salt knows that traffic management becomes a definite ingredient of the traffic itself; similarly, management is an ingredient of traffic management. For this reason, the writer has tried to draw some brief typical sketches of both the mechanics and the principles of military traffic management, and to discuss some of the legal and technical matters peculiar to government transportation. The writer has also made so bold as to philosophize on one or two of the national transportation problems which seem to have an effect on transportation as a whole, and so inevitably on national defense.

I

THE MILITARY ROLE OF COMMERCIAL TRANSPORTATION

The Trojan horse and Hannibal's elephants are well-known classical examples of military transportation. Today—and perhaps then—they might be called "organic transportation"—that is, they were part of the organizations they were moving. At least, they would surely fall in the category of "military-owned," for we know from Homer that Agamemnon's soldiers built the Trojan horse, and almost certainly Hannibal's elephants were not hired to him for some carrier's profit.

*The views expressed herein are those of the author and do not necessarily reflect the views of the Department of Defense.

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This military ownership is a common attribute of battlefield transportation today, just as in Hannibal's time. In the case of our country, however, this does not hold true for the home front—the United States proper—the sometime “Zone of the Interior.” The activities of the Military Traffic Management Agency are confined to the continental United States, excluding Alaska; and this article will be similarly limited. In this area, commercial transportation—transportation for hire—reigns supreme in military usage, as will be seen clearly in a later section.

This reliance on commercial transportation for military traffic not only is rooted in traditional practice, but enjoys the matchless rationale of common sense. Moreover, it has worked well when properly controlled, although it does offer certain challenges to the military traffic manager that so-called “private carriage” by military-owned vehicles would not offer.

On still another hand, our reliance on commercial transportation in the United States permits us to escape the particular type of attack which falls the lot of the Military Air Transport Service and the Military Sea Transportation Service because of the extent to which they are obliged to employ aircraft and ships owned by the Government. The problems facing those organizations in operating overseas are obviously quite different in some respects from those of the MTMA.

During World War I, war-supporting transportation did bog down, but survived to do the job. Substantially all transportation was by rail, and lack of control caused the trouble. The details are sordid and unpleasant: cars backed up from New York to Pittsburgh; turn-around time reached fantastic lengths; expeditors crawled under cars in jammed railroad yards to search for precious critical cargo. Operation of the railroads by the federal government marked an era to which no responsible party has shown any desire to return. Controls aimed at keeping ports and transportation systems fluid were imposed—too little and too late, but useful enough to help clear up the difficulty and providing many lessons.

Performance in World War II was a different story; a far greater potential for calamity was present, but the lessons were well remembered. Determination and alertness to the dangers of transportation congestion and chaos caused incisive measures to be taken fairly early. The War Department devised controls of its own military portbound traffic and imposed them about the time the Lend-Lease Act¹ was enacted, almost a year before the country was at war. That Act generated large amounts of military-type traffic and thereby provided valuable experience in keeping facilities fluid. The Office of Defense Transportation approached with outstanding vigor and success the problem of maintaining an effective, well-utilized transportation system in the United States. Measures substantially similar to those of World War II solved the acute problems presented by the Korean conflict.

Responsibility for the commercial transportation aspects of national defense in the United States is widely vested; the principal focal points, of course, are the Interstate Commerce Commission, the Federal Aviation Agency, and the Office of Civil

¹ 55 Stat. 31 (1941), 22 U.S.C. §§ 411-13 (1952).

and Defense Mobilization. The ICC and the FAA regulate and promote transportation under specific statutes and administer, respectively, the Interstate Commerce Act² and the Federal Aviation Act of 1958.³ The OC&DM, as its name implies, has much broader functions than those two principal regulatory bodies. This article does not undertake to discuss specifically the functions of the three agencies named, nor of the several other federal agencies whose activities impinge on commercial transportation for military traffic.

Actions which affect the national defense effectiveness of American commercial transportation are taken in literally thousands of quarters: by states, counties, municipalities; by the Congress and a number of federal agencies; by hundreds of supply and service industries; by technologists, scientists, and researchers; by shippers, carriers, receivers, and travelers; by economists, lawyers, and other crafts and professions; and so on, almost ad infinitum. In short, the whole of the country, knowingly or not, is furthering or hindering—or perhaps changing—national transportation policy.⁴

Originally, federal regulation of transportation in the United States was designed to protect users from abuses which had accompanied the early power and philosophy of railroads. In the last several decades, statutory regulation has increasingly accentuated the preservation and health of the transportation industry itself. Doubtless this evolution stems from the fact that transportation has become increasingly vital in our national life. It has become more vital, apparently, because the individual has become more dependent on American mass production and less self-sufficient. Every technological advance that contributes to our standard of living automatically calls for more transportation; or, expressed differently, the average American has developed an absolute requirement for so many thousand ton-miles of freight transportation a year, including a fraction of all the transportation used by industry and commerce. Similarly, he requires passenger transportation, but this requirement varies more from person to person.

² 24 Stat. 379 (1887), as amended, 49 U.S.C. §§ 1-1185 (1952).

³ 72 Stat. 737, 49 U.S.C.A. §§ 1301-542 (Supp. 1958).

⁴ One congressional statement of the National Transportation Policy is in these terms: "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; —all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." Note preceding 49 U.S.C. §§ 1, 301, 901, and 1001 (1952). Compare the declaration of policy in the Federal Aviation Act of 1958, 72 Stat. 740, 49 U.S.C.A. § 1302 (Supp. 1958). It should be borne in mind that "national defense," of which these policy statements speak, is a far broader term than "military traffic." The former includes a great deal of public and industrial use of transport beyond the use by the four military services.

Congress has recognized that national defense and all else will fall if our transportation industry falls and, therefore, has increasingly developed the "fostering" theme. States and, to some extent, other political subdivisions regulate carriers in a variety of ways and degrees, much state regulation being patterned after federal regulation. Summed up in simplest terms, the commercial transportation industry with which military traffic managers deal, and upon which they are committed to rely, is regulated with firmness and in considerable detail. The regulation applies to economics, to safety, and to the right to operate. This regulated industry is vital to national defense and, more specifically, to military traffic.

The distinction between the government as a regulator of transportation and as a user of transportation seems broad, deep, and plain. Of course, this dual role creates some peculiar problems and pitfalls for the government traffic manager—the least of which is that of treading the often-narrow line whereon he may properly protect the interests of the taxpayer, adhere to procurement laws, and remain in statesmanlike comity with the regulative policies and agencies of the government. This difficulty may become more evident in succeeding sections of this article.

II

MANAGEMENT OF MILITARY TRAFFIC

A. The Managerial Establishment

Before the establishment of the MTMA, each of the four military services—Army, Navy, Air Force, and Marine Corps—managed its own traffic. That this traffic was of significant magnitude is indicated by the fact that direct annual payments by the military services to commercial carriers in the United States amounted to more than \$500,000,000 for moving about 24,000,000 tons of freight, and to more than \$100,000,000 for transportation of some 4,500,000 passengers. This does not include additional transportation costs, not susceptible of ready calculation, which are borne by the military services but are not paid directly by them to carriers. Such costs are incurred in purchasing f.o.b. destination, in reimbursable-cost contracts, in travel allowances, and in certain other ways.

The movements of passengers and shipments of property which incur this \$500,000,000 in charges are dispatched by more than 1,000 military activities and thousands of civilian contractors. The quantitative predominance of the Army traffic and other factors caused the Secretary of Defense to designate the Secretary of the Army as single manager for traffic management.⁵ The Department of Defense

⁵ DOD Directive 5160.14, 21 Fed. Reg. 4355 (1956). The purposes of this assignment were stated to be:

"1. To provide the most effective and economical freight and passenger transportation service for the Armed Services from commercial transportation companies (including rail, highway, air, inland waterway, coastwise and intercoastal carriers) operating between points within the United States (reference to coastwise and intercoastal commercial transportation is not intended to affect those responsibilities for ocean carrier functions assigned to MSTTS, but has reference to the traffic management authority necessary to determine the proper mode of shipment).

"2. To eliminate duplication and overlapping of effort between and among military departments.

"3. To apply to the functions of traffic management within the Department of Defense the basic

directive specified that the MTMA would be established to carry out the single-manager operational responsibilities.⁶

The establishment of the MTMA became a significant accomplishment in the execution of the Secretary of Defense's responsibility under the National Security Act of 1947⁷ to "take appropriate steps to eliminate unnecessary duplication or overlapping in the fields of . . . transportation." In terms of offices performing military traffic management, this reform meant that the number of field establishments engaged in this activity was reduced from sixteen to six, and the number of headquarters from five to one.⁸ Manpower has been reduced by about one third; the MTMA is jointly staffed with military personnel of the Army, Navy, Air Force, and Marine Corps, and with civilian employees who, predominantly, were formerly employed by the four military services in their field and headquarters traffic-management offices. Some key positions are occupied by military officer personnel and some by civilians in an established staffing pattern; the ratio of military to civilian personnel is about one to eleven.

B. Principles of Management

The MTMA is charged with three kinds of functions:⁹ (a) management, (b) cost, and (c) service. While there has long been considerable public understanding of the cost and service functions of a traffic manager, only in recent years has knowledge spread about the role of the traffic manager in management decisions of industry; the same is generally true of government traffic management. The traffic manager's ability to do a full job has benefited, no doubt, from intensified competition which has caused industrial management to explore deeper its own potential to improve operational efficiency, serve customers better, and make profits.

Helpful in increasing efficiency have been the excellent publicity and analyses of traffic management which have been sponsored nationally by certain carriers and by such publications as *Dun's Review* and *Modern Industry*, which has published the result of a series of surveys of several hundred industries with respect to traffic man-

pattern of all organizations performing a multiple-service support mission, as prescribed in DOD Directive 5160.12.

"4. To assure under all conditions, efficiency and economy within the Department of Defense in the procurement, use, cost and control of commercial transportation services required by military agencies for the movement of freight and passengers between points within the United States.

"5. To effectively develop plans to assure efficient use and control of commercial transportation resources utilized by the military within the United States in support of types of military missions.

"6. To assure adequate practical training for military personnel to fit them for traffic management assignments at posts, camps and stations within the United States, and in overseas areas."

⁶ *Ibid.*

⁷ 61 Stat. 500, 5 U.S.C. § 171 (1952).

⁸ The Army had four Zone Transportation Offices; the Navy, five Navy Central Freight Control Offices; the Air Force, four District Traffic Offices; and the Marine Corps, a Freight Control Office. Each had one traffic management headquarters in Washington, and the Air Force had the equivalent of a traffic-management headquarters at Headquarters, Air Materiel Command, Dayton, Ohio. Today, the Military Traffic Management Agency has Regional Traffic Offices at Pittsburgh (with branch at Brooklyn), Atlanta, St. Louis, Dallas, and Oakland, California.

⁹ Note 5 *supra*.

agement, together with significant individual experiences and approaches.¹⁰ In general, these surveys show that industry's use of traffic management, while improving, is as much a model for weakness as for strength. The MTMA is trying to profit as much as possible from the experience of industry in traffic management, as well as from its own experience.¹¹

Primarily, military traffic management is carried out by providing service and management to and through the more than 1,000 shipping activities of the four military services. The MTMA originates no military traffic except its own house-keeping travel of insignificant volume. Stated in highly simplified form, its traffic management is exercised through: (1) regulations (and enforcement thereof); (2) guidance; (3) servicing or control for individual movements or patterns; (4) negotiations and litigation; and (5) coordination with logistical systems. The structure of the MTMA and its allocation of functions can be briefly outlined as follows:

1. Traffic-management operations performed at base or depot level without reference to MTMA region:

- Arrange passenger transportation for individuals and groups of not over fourteen.
- Route shipments under 10,000 pounds via surface freight (in certain cases, the local transportation officer may select from several prescribed carriers).
- Route express and air shipments under 1,000 pounds.
- Arrange shipment of household goods (regardless of weight).

¹⁰ Blake, *Traffic Management: Gold Mine in Transit*, Dun's Review & Modern Industry, March 1955, p. 59; *Better Transportation: Pathway to Profits*, *id.*, June 1957, p. 65; Kenny & Heyel, *Goods on the Move: New Horizons in Transportation*, *id.*, June 1958, p. 63; *Integrating Your Transportation for Profit*, *id.*, June 1959, p. 60.

¹¹ The Executive Director of the Military Traffic Management Agency, Major General I. Sewell Morris, has appointed an advisory panel to assist him in providing optimum traffic management for the Department of Defense in peace and war. This panel represents a wealth of broad and varied transportation experience, comprising the following members:

Walter F. Carey, President, Automobile Carriers, Inc. Past Vice President and General Manager of the Motor Car Transport Company; organized and became President of Commercial Carriers, Inc., in 1934; served as consultant to the Transportation Corps during World War II; was elected First Vice-President of the American Trucking Associations in 1952, President in 1953, Chairman of the Board in 1954; elected President of the National Defense Transportation Association in 1959.

William Thomas Faircy, Retired, Chairman of the Board, Association of American Railroads. Engaged in legal practice for various railroads, advancing to Vice-President and General Counsel of the Chicago & Northwestern Railroad; became President of the Association of American Railroads in 1947.

Morris Forgash, President, United States Freight Company since 1941. Joined Universal Carloading & Distributing Company in 1916; became General Manager in 1929; was appointed Traffic Assistant to the President of the U. S. Freight Company and its subsidiaries in 1931.

John Monroe Johnson, Executive Assistant, Atlantic Coast Line Railroad since 1956. Served as Colonel, U. S. Army, World War I; Assistant Secretary of Commerce, 1935-40; Member, ICC, 1940-56, and served as Chairman in 1950, 1953-54; was appointed Director, Office of Defense Transportation in 1944.

Edmund C. R. Lasher, President, North American Car Corporation. Transportation Officer of the Eighth U. S. Army in Korea in 1950-51; Commandant, Transportation School, Fort Eustis, Virginia, 1951-54; Assistant Chief of Transportation (Traffic), 1954-56; first Executive Director for Traffic Management, MTMA, 1956-58; retired as Major General, United States Army, Jan. 31, 1958.

Stuart Guy Tipton, President, Air Transport Association since 1955. Engaged as an attorney in the office of the General Counsel of the Treasury Department, 1935-38; was with the CAA, 1938-40; served as Assistant General Counsel, CAB, 1940-43; was General Counsel of the Air Transport Association 1944-55.

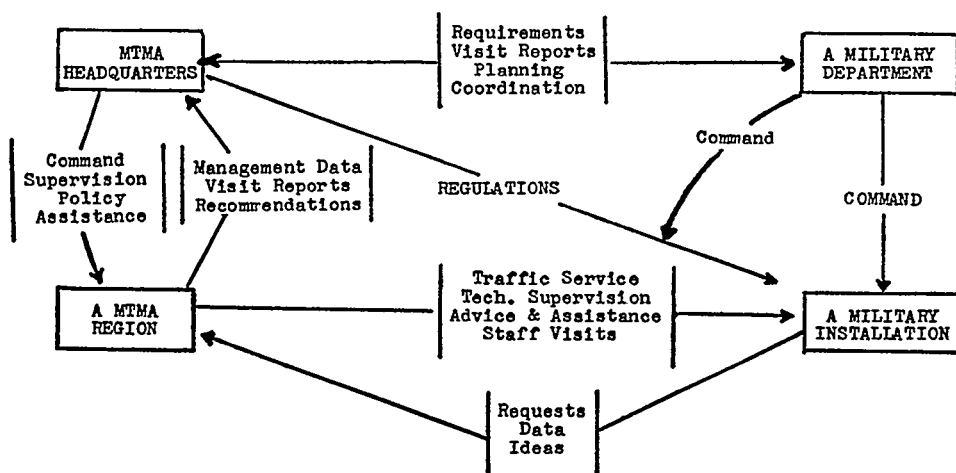
- In emergency, ship any quantity of freight or passengers, and report later.
- Routing of Air Force bulk liquids delegated to Air Force District Petroleum Offices.
- Routing of perishable subsistence delegated to the Military Subsistence Supply Agency.
2. Principal traffic-management activities carried out by MTMA regions:
- Routing of shipments of 10,000 pounds and over.¹²
 - Control of export traffic.
 - Expediting important shipments, including clearance of oversize/overweight items.
 - Arranging air and express movements (1000 pounds and over).
 - Quotation of freight rates for procurement.
 - Review of bills of lading.
 - Assistance to Installation Transportation Officers.
 - Management of tank cars and other Department of Defense rail equipment in interchange service (Central Traffic Region only).
3. Principal traffic-management activities managed at MTMA headquarters:
- Arrangement of group passenger movements (15 or more).
 - Negotiation of Joint Military Passenger Agreements.
 - Analysis and negotiation of freight rates, classification ratings and transit arrangements.
 - Freight classification guide system.
 - Household goods program.
 - Insuring transportability of missiles and other special items.
 - Loss and damage prevention program.
 - Development of improved methods and new techniques.
 - Liaison with military departments.
 - Support to regions in carrying out their traffic-management responsibilities.

The rudimentary chart shown below will suffice to indicate the rough outlines of operational military traffic management, omitting many staff and advisory aspects. This shows the relationship among four principal elements: military installations, MTMA regional offices, MTMA headquarters, and military departmental headquarters.

The most important principles in military traffic management are responsiveness to military requirements and optimum effectiveness in peace, emergency, or war—to wit, readiness. Certain phases of readiness will be discussed in a later section on Mobilization Considerations. Another outstanding principle of military traffic man-

¹² Cut-off at the 10,000-lb. level enables the MTMA to manage directly on a shipment-by-shipment basis about 71% of the freight dollars and 94% of the freight tonnage, while dealing with only about 18% of the shipments. By judicious use of repetitive route orders and other devices, the latter is further reduced to the equivalent of about 9% in terms of workload.

MILITARY TRAFFIC MANAGEMENT



agement in the United States is the use of commercial carriers.¹³ Ancillary to this principle is the policy that "the economic resources of the Department of Defense inherent in its large procurement of commercial transportation will not be employed in such a manner as will adversely affect the economic well-being of the commercial transportation industry."¹⁴

In the selection of modes of transportation and individual carriers for military movements, three general considerations prevail, in the following order: (1) service (responsive to the military need), (2) cost, and (3) equitable distribution.¹⁵ The least costly means of transportation shall be selected that will meet military requirements and be consistent with the objectives of governing procurement regulations and with the transportation policies expressed by Congress, contingent upon carrier ability to provide safe, adequate, and efficient transportation. However, if a prior factual determination has been made that expedited delivery will result in greater over-all economies through a reduction of in-transit or stored supplies, a more costly means of transportation may be employed if necessary to carry out the expedited delivery. "In view of the military's reliance during periods of mobilization or war on all modes of transportation, preferential consideration in the routine procurement of transportation will not be accorded one mode of transportation as against another."¹⁶

It is often urged upon the Department of Defense that cost considerations should be waived, not simply in favor of service which properly meets the military require-

¹³ The Department of Defense policy on this point is: Commercial transportation service will be employed for the movement of personnel or things when such service is available or readily obtainable and satisfactorily capable of meeting military requirements. DOD Directive 4500.9, General Transportation and Traffic Management Policies, Jan. 6, 1956.

¹⁴ *Ibid.*

¹⁵ DOD Instruction 4525.3, Routing of Domestic Freight Traffic, Feb. 2, 1956.

¹⁶ DOD Directive 4500.9, General Transportation and Traffic Management Policies, Jan. 6, 1956.

ments, but so as to "recognize and preserve the inherent advantages" of the mode of transportation being advocated. This advocacy presses the National Transportation Policy, which employs the quoted phrase,¹⁷ as an impelling reason for such preference. One factor frequently overlooked in making this argument is that cost of operation, and, therefore, the ability to make competitive rates, is itself one measure of inherent advantages.

The Comptroller General has stated that the National Transportation Policy is a guide for the ICC and not for implementation or enforcement by government procurement or transportation officers.¹⁸ The Supreme Court has characterized the Policy as the "Commission's guide to the public interest."¹⁹ But, even though the primary purpose of the National Transportation Policy is to serve as a guide to the regulatory bodies in administering transportation laws, this declaration by Congress also serves to give the parties directly concerned an insight into the congressional intent which underlies those laws. In this connection, it is the policy of the Department of Defense to procure transportation services in such a manner as not to contravene the National Transportation Policy.²⁰

C. Procurement of Transportation

The basic law underlying purchasing by the military services is the Armed Services Procurement Act,²¹ upon which, in turn, the Armed Services Procurement Regulations²² are based. In general, the Act and the Regulations provide for cost competition, even when the formal advertising method of procurement is not used. A specialized treatment of government transportation procurement appeared in a statute predecessor to the Act,²³ and it is referred to in a proviso of section 321(a), part two, title three of the Transportation Act of 1940, in these words:²⁴

Provided further, that section 5 of Title 41 shall not hereafter be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed.

Expressed in brief, the situation today is that transportation for the military services need not be advertised for procurement, but may be so advertised if circumstances warrant, and that, when transportation is bought on the open market, cost and competition are for consideration.

The United States Government uses two principal forms of procurement instruments for buying transportation from commercial carriers: Standard Form 1103,

¹⁷ See the National Transportation Policy, as quoted in note 4 *supra*.

¹⁸ Comp. Gen. unpublished decision No. B-102080, April 13, 1951.

¹⁹ *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944); *ICC v. Parker*, 326 U.S. 60 (1945).

²⁰ DOD Directive 4500.9, General Transportation and Traffic Management Policies, Jan. 6, 1956: ". . . the Department of Defense will be guided by and pursue policies which will not contravene the National Transportation Policy. . . ."

²¹ 62 Stat. 21 (1948), 41 U.S.C. § 151 (1952); 70A Stat. 127 (1956), 10 U.S.C. §§ 2301-14 (Supp. V, 1958).

²² 32 C.F.R. §§ 1.100-1.609 (1955).

²³ 12 Stat. 220, as amended, 41 U.S.C. § 5 (1952).

²⁴ 54 Stat. 954, 49 U.S.C. § 65(a) (1952).

Government Bill of Lading; and Standard Form 1169, Transportation Request. A series of associated standard forms are used for continuation sheets, vouchers (bills to the government disbursing officers), and related purposes. The government bill of lading is used for transportation of property; the transportation request, to procure tickets for passenger travel. These standard forms are Government-wide and are prescribed by the Comptroller General of the United States.²⁵

D. Control Over Expenditures

The Comptroller General directs and controls the General Accounting Office, whose general function is to assure the propriety of government expenditures. Both are independent of the executive branch of the Government, and were created by and report to Congress. As already noted, the Comptroller General prescribes certain standard forms for transportation; and he also promulgates basic regulations for the use of these forms.²⁶ For the armed services, these regulations are expanded and implemented by Military Traffic Management Regulations, which are prepared by the MTMA and issued over the command lines of the four military services. The GAO performs a postpayment audit of payments for transportation and makes any settlements and adjustments necessary.²⁷

Before 1940, the preaudit of carriers' bills had been a fairly general government practice; but with the increased movement of freight and passengers which preceded World War II, preaudit backlogs occurred. In order to get their money faster, the carriers sought and obtained the enactment of title three, part two, section 322 of the

²⁵ The government bill of lading serves several purposes for which industrial shippers often prepare other papers besides the commercial bill of lading upon which they ship property. The original of the government bill of lading is sent from the consignor, who has obtained the originating carrier's receipt upon the form, to the consignee, who completes a receipt incorporated in the document and turns it over to the delivering carrier. The delivering carrier uses the original bill of lading to support his charge, which he bills to the disbursing officer named on the bill of lading. The government transportation request is a punch-card form that is surrendered to the carrier's agent when the tickets are procured. The carrier bills his charges to the disbursing officer named on the transportation request. Within the United States, it has long been the rule that the Government does not prepay transportation charges paid directly to commercial carriers. This stems from a time-honored statute which provides, in pertinent part, that:

"No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment." 60 Stat. 809 (1946), 31 U.S.C. § 529 (1952). This prohibition against government prepayment of the charges has not prevented the use of the transportation request procedure for buying tickets, which constitute a redeemable entitlement to transportation rather than transportation itself. Also, this statute has not prevented the prepayment of packages in the United States mail.

²⁶ "The Comptroller General shall prescribe the forms, systems, and procedure . . . for the administrative examination of . . . claims against the United States." 42 Stat. 25 (1921), 31 U.S.C. § 49 (1952).

²⁷ 42 Stat. 24 (1921), 31 U.S.C. § 71 (1952). "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

Transportation Act of 1940.²⁸ There has been some controversy over whether that section will permit a rate audit of bills before payment if such audit is *not* performed by the GAO; but this has proved only of academic interest, because the practical effect of section 322—coupled with a certain enabling provision of the Certifying and Disbursing Officers Relief Act enacted in 1941²⁹—has been the discontinuance of rate preaudits on government transportation bills.

These developments, plus the huge wartime volume of transportation bills (for instance, as high as 12,000,000 shipments for the armed forces in one year), led ultimately to an investigation by a congressional committee in the Eightieth Congress³⁰ and to improvements in the audit system. The extent to which the carriers may have taken undue advantage of the liberality of section 322 has been, of course, conjectural and controversial. In appraising the question of payment of carriers' bills before an audit has been made, it should be recalled that any recoupments of overpayments to the carriers must be accomplished within certain time limits if they are to be available to the department to which they were originally appropriated, either for re-obligation or re-expenditure.

The MTMA, in close cooperation with military disbursement offices and the GAO, has installed certain systems and procedures termed a "management audit," wherein is employed the electronic file computer in MTMA headquarters to disclose significant discrepancies between the advance calculation of cost for a freight shipment and the amount actually paid to the carriers. This management audit makes a second use of freight rates which have been ascertained in MTMA regional offices when the shipment is routed, and it helps to reconcile the rating and routing activities in shipping with the GAO's postpayment rate work. Quite apart from the moneys returned for use, this procedure offers valuable dividends in "preventive management," which the MTMA is exploiting intensively.

²⁸ The portion of this section here pertinent reads as follows:

"Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor prior to audit or settlement by the General Accounting Office, but the right is reserved to the United States Government to deduct the amount of any overcharges by any such carrier from any amount subsequently found to be due such carrier. The term 'overcharges' shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Interstate Commerce Commission and the Civil Aeronautics Board and charges in excess of those applicable thereto under rates, fares, and charges established pursuant to section 22 of the Interstate Commerce Act. . . ." 54 Stat. 955 (1940), as amended, 72 Stat. 860, 49 U.S.C.A. § 66 (Supp. 1958). The remainder of the section deals with statutes of limitations.

²⁹ "Provided further, That the Comptroller General shall relieve such certifying officer or employee of liability for an overpayment for transportation services made to any common carrier covered by title III, part II, section 322, of the Transportation Act of 1940, approved September 18, 1940, whenever he finds that the overpayment occurred solely because the administrative examination made prior to payment of the transportation bill did not include a verification of transportation rates, freight classifications, or land-grant deductions." 55 Stat. 875, 31 U.S.C. § 82c (1952).

³⁰ *Hearings Before the Procurement and Buildings Subcommittee of the House Committee on Expenditures in the Executive Departments, on General Accounting Office Audit of Wartime Freight Vouchers*, 80th Cong., 2d Sess. pt. 7 (1948).

E. Overcharges

As originally enacted in the Transportation Act of 1940, section 322 provided for deduction of "overpayment to" instead of "overcharges by" a carrier.³¹ The latter phraseology was substituted in 1958³²—a change significant in two ways. First, but less important, "overpayment" includes purely mathematical and clerical errors made by the Government in paying; the substituted language appears to refer to the acts of carriers. Undoubtedly, Congress did not intend to negate the rather sacred, if not constitutional, right to correct ones' own arithmetic by set-off, particularly if one happens to be the sovereign. Secondly, "overpayment" can be construed as the excess over the lawful rate, but "overcharge," as defined in the statute,³³ means the excess only above the applicable rate in a tariff or in a pertinent special tender. Tariff rates are sometimes unlawfully high, and in this situation, the change of wording would take on significance.

In certain types of cases, not only the ICC, but anyone, has measures available to determine when a tariff is unlawfully high. For instance, a railroad rate which exceeds the aggregate of intermediate rates via the same route violates section four, part one of the Interstate Commerce Act, unless certain special relief has been obtained from the ICC.³⁴ Part two of the Act, the Motor Carrier Act,³⁵ does not contain an aggregate-of-intermediates clause for motor carriers; but the ICC ruled³⁶ that a through motor rate which exceeded the aggregate of intermediate rates was prima facie unreasonable—therefore, unlawful—under section 216 of the Act.³⁷

Railroads frequently refund to commercial shippers the amounts of overpayments above lawful rates in such cases, most of which are inadvertent, through the "voluntary reparations procedure."³⁸ Under this procedure, the carrier acknowledges the unlawfulness and asks the Commission's permission to make the refund. Part two of the Act does not provide for reparations against motor carriers; and, in the past, shippers have succeeded in recovering the excess paid above lawful rates by suing under the principle of the *Bell Potato Chip* case.³⁹ It was feared that the change of "overpayment" to "overcharge" in section 322⁴⁰ might force the Govern-

³¹ 54 Stat. 955, 49 U.S.C. § 66 (1952).

³² 72 Stat. 860, 49 U.S.C.A. § 66 (Supp. 1958).

³³ *Ibid.*

³⁴ 54 Stat. 904 (1940), 49 U.S.C. § 4 (1952).

³⁵ 49 Stat. 543 (1935), as amended, 54 Stat. 919 (1940), 49 U.S.C. § 301 (1952).

³⁶ For pertinent ICC decisions, see *Kingan & Co. v. Olson Transp. Co.*, 32 M.C.C. 10 (1942); *Victory Granite Co. v. Central Truck Lines*, 44 M.C.C. 320 (1945); *D. E. Bolman Mercantile Co. v. Sante Fe Trail Transp. Co.*, 38 M.C.C. 561 (1948).

³⁷ § 216(b) of the Interstate Commerce Act provides: "It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce." 54 Stat. 924 (1940), 49 U.S.C. § 316(b) (1952).

³⁸ 49 C.F.R. § 1.25 (Cum. Pocket Supp. 1958).

³⁹ *Bell Potato Chip Co. v. Rogers*, 156 Ore. 75, 66 P.2d 287 (1937).

⁴⁰ Discussed in text at note 31 *supra*.

ment in the future to file thousands of suits against motor carriers to recover such excesses, even where there might be no substantive controversy about the unlawfulness of the rate.

The situation was made even more awkward by a 1959 decision of the Supreme Court, *TIME. v. United States*,⁴¹ refusing judicial relief as to past unreasonable charges by motor carriers if such charges were made pursuant to a filed tariff. The Court held by a five-to-four vote that, in enacting the Motor Carrier Act, Congress did not intend to provide shippers with any right of reparation; thus, the principle of the *Bell Potato Chip* case is overturned and shippers are denied recovery even through the courts. The adverse effects of this decision upon the shipping public and the difference of result that it produces as between rail and motor carriage will certainly result in efforts to specify by legislation that reparations may be obtained under part two of the Interstate Commerce Act.⁴² If such efforts prove successful, then the wording of section 322 may produce the numerous suits by the Government against motor carriers which were foreseen prior to the *TIME.* case.

Perhaps a better understanding of the military traffic manager's task can be obtained by a further analysis of the *TIME.* case. Military installations are seldom located at the points of origin and destination used for commodity rates—these points usually being the more populous industrial or commercial centers. Sometimes a military movement is of a type which permits the rate or route technician to make a combination of rates into and out of one of those centers the sum of which will be lower than the through rate would be for the movement from its origin to its destination. This through rate, as already indicated, is, by virtue of the location of military installation, often one of the relatively high class rates which blanket the country. If the rates combined by the technician are motor-carrier rates, he will no longer be able to reap any benefits from the combination, since the Supreme Court's ruling prevents recovery of the difference between the through rate and the aggregate of intermediate rates. The inability to obtain this saving may, in turn, lead him to route the movement by other than motor carrier. If the shipment must, for some reason, move by motor carrier, even though this method costs more, then the Government simply must pay the higher cost, unless it can succeed in negotiating a fair reduction.

As this article is being written, the MTMA, employing in part the experience of the GAO, is screening the country for such situations where motor-carrier through rates may exceed the sum of the parts. A series of negotiations can be expected to ensue with a view toward correcting the awkward situation that has been described.

⁴¹ 359 U.S. 464 (1959).

⁴² Late in the first session of the Eighty-sixth Congress, Representative Oren Harris, Chairman of the House Committee on Interstate and Foreign Commerce, introduced H.R. 8031 (a Bill to Amend §§ 204a and 406a of the Interstate Commerce Act in Order to Provide Civil Liability for Violations of Such Act by Common Carriers by Motor Vehicle and Freight Forwarders, 86th Cong., 1st Sess. (1959)), the purpose of which is to provide for damages under pts. II and IV of the Interstate Commerce Act, which relate to motor carriers and freight forwarders, respectively. This bill, if it became law, would remedy the situation described in the text and would also extend to freight forwarders the right to sue for reparations.

Even with the screening, unexpected examples of this difficulty are almost sure to occur, as unprecedented movements arise or as the dynamic rate situation fluctuates so as to cause aggregate of intermediate rates to fall below through rates. In passing, it should be remarked that much of this complexity and effort would be avoided if the MTMA were able to persuade the carriers to apply to outlying military installations the same rates that apply to nearby populous or industrial centers.

The aggregate-of-intermediate-rates example is, of course, only one of several types of situations in which it may be found that unlawful motor rates have been paid or, conversely, where their payment must be prevented by traffic managers if other requirements permit. The volume of military traffic is so great that any such situation may involve a very substantial sum of money; indeed, for military traffic managers, the volume involved is sometimes so great that the problems created thereby seem not only different in degree, but even different in kind from those faced by industry's traffic managers.

F. Resolving Conflicts with Military Necessity

A few states have at various times enacted laws which, if applied to military traffic, might conflict with military necessity. For instance, a law that limits the length of passenger trains to fourteen cars could interfere with the integrity of an organizational troop movement by rail, as well as cause delay in the execution of the movement. A law concerning mixed passenger and freight trains which requires that passenger cars be placed ahead of freight cars could make it impossible to get heat and hot water to the troops in such a train. In 1941, the Judge Advocate General of the Army took the unequivocal position that such state laws do not apply to federal troop trains.⁴³

Obvious principles of interpretation, such as that of avoiding problems of possible unconstitutionality, would support a construction of a state law so it would not conflict with military necessity. If, however, such an interpretation were not adopted, the federal war powers would seem to give authority to move the federal traffic without hindrance from state laws. If a federal statute that was phrased for general applicability but did not name the federal government came in conflict with military necessity in the movement of traffic, these circumstances would point toward applying the principle of construction that the sovereign is not restricted by statute unless named.

G. Some Special Aspects of Military Traffic

As Congress, the courts, and regulatory bodies have long recognized, military traffic differs from the usual commercial and industrial traffic in several substantial

⁴³ See second endorsement, dated May 8, 1941, and addressed to the Adjutant General, War Department, by The Judge Advocate General of the Army. File 531.7, Office JAGA. An interesting recent case relevant to the relationship between state laws and the needs of military traffic is *Pub. Util. Comm'n of California v. United States*, 141 F. Supp. 168 (N.D. Cal. 1956), *aff'd*, 355 U.S. 534 (1958), discussed in the text at note 56 *infra*. The Supreme Court has also held that a state statute limiting the length of freight trains moving in interstate commerce is unconstitutional. *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945).

respects. For instance, many of the items shipped by the military are never, or seldom, found in commercial traffic. This holds true even though in some cases it is possible to find a commercial-traffic item of the same name, for it will have significantly different transportation characteristics. For instance, military vehicles may be far more rugged and constitute heavier revenue loads than vehicles used by the public. The general level of packing for military shipping is much better than the commercial level, one reason for this being the prospect of ocean shipping and rough handling under battle conditions. Military installations are often located away from the large industrial centers and, therefore, are frequently not covered by the commodity rates which have been obtained over the years by industrial-traffic interests to fit the established pattern of commercial traffic. In many instances, military traffic must be moved on short notice, with no published commodity rates to cover that particular type of movement; or it must go over routes and between points where very little or no commercial traffic moves. Military traffic must be responsive to military needs and requires considerable flexibility in rate adjustments, establishment of routes, and authorization of special packing, bracing, or other accessorial services, including on-the-spot rules to meet military requirements.

The flexibility is provided, in the case of surface transportation in the United States, by section twenty-two of the Interstate Commerce Act, the basic portion of which, so far as it concerns government traffic, reads:⁴⁴

That nothing in this part shall prevent the carriage, storage or handling of property free or at reduced rates for the United States, State, or municipal governments . . . or the transportation of persons for the United States Government free or at reduced rates. . . .

The language of the original Act to regulate commerce, which became law in 1887,⁴⁵ agrees substantially with the current language above quoted.

The Commission, in its Sixth Annual Report to Congress in 1892, stated:⁴⁶

In prescribing a general rule of equal charges for like service under similar conditions, Congress nevertheless foresaw the wisdom of continuing certain practices of carriers by which, as the case may be, the interests of the general public, the Government, humanity, religion, and of the carriers themselves were being subserved, and excepted such practices from the prohibition of the law by enacting the twenty-second section.

Congress continued to recognize the difference in government and commercial practice by expanding section twenty-two to include motor carriers, water carriers, and freight forwarders when it enacted parts two,⁴⁷ three,⁴⁸ and four⁴⁹ in 1935, 1940,

⁴⁴ 72 Stat. 1264, 49 U.S.C.A. § 22 (Supp. 1958). Another paragraph, discussed *infra* note 66, deals with procedures and antitrust immunity. An indication of the purpose of this special provision for the United States Government is furnished by the following excerpt from § 9 of H.R. 3547, introduced in Congress on Feb. 26, 1878: "Provided, further, that nothing contained in this Act shall prevent the United States from making contracts, or enjoying those already made, for facilities and rates of transportation more advantageous than those accorded to the general public under the provisions of this Act. . . ."

⁴⁵ 24 Stat. 387, 49 U.S.C. § 22 (1952).

⁴⁶ ICC SIXTH ANN. REP. 26 (1892).

⁴⁷ 49 Stat. 543 (1935), 49 U.S.C. § 301 *et seq.* (1952).

⁴⁸ 54 Stat. 929 (1940), 49 U.S.C. § 901 *et seq.* (1952).

⁴⁹ 56 Stat. 284 (1942), 49 U.S.C. § 1001 *et seq.* (1952).

and 1942, respectively. As late as June 6, 1957, the Senate Committee on Interstate and Foreign Commerce stated.⁵⁰

Your committee is of the opinion that Government with its numerous complicated operations and emergency situations needs more flexible and speedier means of obtaining rate adjustments than are offered by either rate bureaus or litigation before the Interstate Commerce Commission. . . . The patterns of Government traffic, the location of Government installations for the assembly, storage, and use of goods and supplies, and the exigencies of various agencies, especially those related to national defense, appear to require needs so different from the needs of commercial users of transportation and related services as to justify different treatment in the establishment of adequate and proper rates. Section 22 now allows these unusual needs to be met.

Recognition of the need for special flexibility in rate arrangements for government traffic has not been limited entirely to surface traffic. While the Federal Aviation Act does not contain specific provisions similar to section twenty-two of the Interstate Commerce Act, it does give the Civil Aeronautics Board broad administrative powers.⁵¹ The Board has provided special exemptions under those powers and has relieved the carriers from certain provisions of the Act and of the CAB's economic regulations when they are transporting military traffic.⁵²

The history of one such exemption can be recorded here briefly. Rates in air charter tariffs are based on mileage, frequently with a higher rate for "live" (loaded) mileage than for "ferry" mileage, the latter being the distance required to bring the plane to and from the points of its charter usage. Many charter flights have been engaged for military traffic, predominantly from supplementary air lines. In making advance calculations of cost, the government has been obliged to rely upon carriers' statements of ferry mileage, since it cannot determine whither and whence the planes have to be ferried. Awards were made accordingly until Associated Air Transport, Inc., relying upon the sanctity of the tariff, sued for an accumulation of higher charges that, according to its view, had accrued when the number of actual miles flown was more than the advance calculations. A federal district court ruled on August 12, 1959 that, where a contract or charter with the military conflicts with a tariff, the tariff provisions must prevail.⁵³ This case is pending on appeal.

Obviously, that decision presented a practical impasse, since government awards of charters cannot be made on such a conjectural basis, with no control over price, even when a supposedly maximum price has been negotiated. Because of the problem presented by the *Associated Air Transport* litigation, an order of the CAB has granted to the carriers named therein an exemption from the provisions of section 403 of the Federal Aviation Act and from the Board's own tariff regulations to the extent that the actual ferry mileage flown exceeds such mileage as is shown in the

⁵⁰ Senate Comm. on Interstate and Foreign Commerce, *Providing for Submission by Common Carriers to Interstate Commerce Commission of Quotations Made to the United States Government Under Section 22 of the Interstate Commerce Act*, S. REP. NO. 410, 85th Cong., 1st Sess. 4 (1957).

⁵¹ 72 Stat. 743, 771, 49 U.S.C.A. §§ 1324(a), 1386(b) (Supp. 1958).

⁵² 14 C.F.R. § 294.3 (1957); Application of Supplemental Air Carrier Conference for Exemption, No. 9862 *et al.*, Order No. 13158, CAB, Nov. 14, 1958.

⁵³ *Associated Air Transport v. United States*, Civil No. 6817-M, S.D. Fla., Aug. 12, 1959.

contract with, or bid to, the military.⁵⁴ This exemption is, of course, not retroactive and, therefore, will not directly affect the *Associated Air Transport* case. It should also be noted that in seeming recognition of the special considerations that surround military traffic, the CAB has long accepted special tariffs which support annual agreements between the military services (including the Coast Guard) and each of (today) three air-carrier associations.

A number of state laws regulating intrastate transportation contain provisions equivalent to section twenty-two of the Interstate Commerce Act; but in the states without such provisions, the issue has been raised from time to time of the state's authority to prevent or regulate the granting of reduced rates to the United States Government by carriers whose rates fall under state regulation. In *United States v. Pub. Util. Comm'n of California*,⁵⁵ the district court rejected in strong language the proposition that the California Public Utilities Commission could interfere in this matter. The Supreme Court sustained the lower court and declared the state law invalid and of no effect in its effort to grant such power to the Commission to prevent or regulate the granting of reduced rates to the United States.⁵⁶ Significantly, the opinion quotes from the legislative history of the Armed Services Procurement Act,⁵⁷ among other things that,⁵⁸

⁵⁴ Application of Supplemental Air Carrier Conference for Exemption, No. 9862, *et al.*, Order No. E-13158, CAB, Nov. 14, 1958.

⁵⁵ 141 F. Supp. 168 (N.D. Cal. 1956), *aff'd*, 355 U.S. 534 (1958).

⁵⁶ The regulations promulgated by the armed services for military traffic were discussed by the Court, and it was concluded that a conflict between state and federal requirements existed and that under the supremacy clause, U.S. CONST. art. 6, cl. 2, the federal standards must prevail. The majority commented:

"The seriousness of the impact of California's regulation on the action of federal procurement officials is dramatically shown by this record.

"It is the practice of the Government not only to negotiate separate rates which vary from the class or 'paper rate' but also to negotiate a 'freight all kinds' rate which will cover hundreds of diverse items for the supply of a division of the Army or for a vessel that are needed at one place at one particular time. There is no provision in the California Code or the regulations for the making of such shipments. The findings are that if the Code is applied here, this type of arrangement would be abolished:

"This would make it necessary for the shipping officers to classify the hundreds and thousands of different items used in military operations, to segregate such items in accordance with published tariff and classifications, to rearrange the boxing and crating of such items in order to meet the classifications and requirements of commercial traffic and fill out voluminous documents. This additional process could cause delays as high as thirteen hours in the shipments of one truckload or carload. In many situations a delay of this sort would seriously hamper or disrupt the military mission for which the shipment was made."

"Moreover, no rates exist for much of the military traffic, which means that, unless the United States can negotiate rates for each shipment, the shipments will be delayed for Commission action unless shipped under the established rates which are higher than negotiated rates.

"General Edmond C. R. Lasher of the United States Army, who was Assistant Chief of Transportation, testified at the trial:

"... for us to make these arrangements at the Washington level with the various states, let us say 48 states, with 48 varieties of method to follow, we would find ourselves in an administrative morass out of which we would never fight our way, we would never win the war." *United States v. Pub. Util. Comm'n of California*, 355 U.S. 534, 544-46 (1958).

⁵⁷ Discussed in the text at note 21 *supra*.

⁵⁸ 355 U.S. 541 n. 3 (1958).

The primary purpose of the bill is to permit the War and Navy Departments to award contracts by negotiation when the national defense or sound business judgment dictates the use of negotiation. . . .

Clearly the Supreme Court was aware that military traffic presents some special problems and that the military traffic manager should not be handcuffed in dealing therewith.

Special provisions applicable for government traffic are used as judiciously as possible by the MTMA, every effort being exerted towards fair and open dealings. All requests for rate adjustments are placed on file in a "public room," where interested parties may review them. Accepted reduced-rate tenders are also well publicized throughout the country. In addition, Congress in 1957 enacted Public Law 85-246,⁵⁹ one of whose provisions requires the filing of copies of special "section twenty-two tenders" with the ICC at the same time they are filed with the interested government agency. The enactment of this law was supported by the Department of Defense.

Under this statute, the ICC is not given any special authority, such as suspension, with respect to these tenders. However, section twenty-two rates are, and always have been, subject to certain important remedies for injured parties. The Supreme Court affirmed in the *Tennessee* case⁶⁰ that the Commission has authority to remove undue discrimination, preference, and prejudice, even though they arise from section twenty-two rates. That decision also holds that a reduction may be granted the Government under that section without necessarily creating prejudice. The reason therefor is simple: Briefly, the pertinent provisions of the Interstate Commerce Act are aimed at unfair competition; the Government, not being a part of this competition, can benefit from a reduced rate without hurting other parties.⁶¹

The standards used by the MTMA in seeking lower rates for military traffic are approximately the same as—and perhaps better than, in some cases—those used by reputable industrial traffic managers in seeking the publication of commodity rates on their commodities or patterns of movement. In fact, MTMA negotiators do not specify to the carriers how a reduction, if granted, is to be published;⁶² and the carriers usually employ a special tender rather than tariff publication because it is simple, inexpensive, and more flexible.

A great many standard factors go into determinations of the propriety of a freight rate, although these factors do not have standard weights. Traffic managers, including MTMA traffic managers, cite these various factors, such as commodity characteristics (density, value, loss-and-damage experience, packing, and so forth), loads

⁵⁹ 71 Stat. 564 (1957), 49 U.S.C. § 22 (Supp. V, 1958).

⁶⁰ *Nashville, Chattanooga & St. Louis Ry. v. Tennessee*, 262 U.S. 318 (1923).

⁶¹ "The grant of a lower rate . . . to a government . . . may benefit the government without subjecting to prejudice any person, locality, or class of traffic." *Id.* at 323.

⁶² In instances where carriers have the option of providing rates in some manner other than by the usual tariff publication, the military departments will not prescribe which of the authorized methods will be used. DOD Instruction 4520.3, Transportation Freight Rate Negotiation and Litigation (Domestic), Feb. 2, 1956.

per vehicle, volumes and frequency, vehicle-mile and ton-mile revenue, analogies, and comparisons with established rate-measuring criteria. It is probably not too serious an oversimplification to say that usually the most impelling of all these factors is vehicle-mile revenue. Because of heavy loading and other factors, section twenty-two vehicle-mile revenue on military traffic is far higher than on commodity-rate traffic for industry generally.

Freight rates are of two general kinds: class rates and commodity rates. The former blanket the country and are the "retail catalogue" prices for all the odds and ends of freight service that may be ordered. Industrial shippers who have any considerable volume in any regular pattern approach the carriers and try to persuade them to establish commodity rates to cover their movements; or perhaps the carriers volunteer the rates as a competitive action; or, in some cases, these rates are forced in through action with or by the regulatory bodies.

Because of its unusual pattern with respect to geography, commodity, and directional flow, military traffic is peculiarly vulnerable to the application of class rates. A recent MTMA empirical study conducted with the most careful and objective standards showed that over eighty-six per cent of Department of Defense carload and truckload traffic would have moved under class rates in the absence of section twenty-two. It is widely known in traffic circles that only a small portion of general public traffic moves on class rates, but only occasionally do studies published by the ICC deal with this particular feature. A nation-wide analysis in 1942 showed only 4.1 per cent of total tons (in carloads) moving under class rates.⁶³ For the Mountain-Pacific territory, a study in 1952 of total interstate carload tonnage and revenue, intraterritorial and interterritorial, showed class rates at about one per cent, both ton-
age-wise and dollarwise.⁶⁴ Figures for 1953 showed five per cent of carload dollars as being at class rates.⁶⁵

Contrast with these small proportions the finding that the proportion of military traffic which actually moves under class rates is of the order of seventeen per cent. This is after section twenty-two has had its effect—a circumstance which reveals vividly the vulnerability of military traffic to class rates. This vulnerability is not widely understood; yet, to this writer, it is (or should be) the crux of the perennial arguments that revolve around section twenty-two.

The Reed-Bulwinkle bill, which became section 5a of the Interstate Commerce Act,⁶⁶ protected the long-standing practice of conference rate-making by common carriers by immunizing such practices from the antitrust laws, provided that the ICC has approved an agreement of certain substance filed by the carriers concerned. Ever since the enactment of this law, there had been a widespread understanding among the ICC, other government agencies, and the carriers that this immunity extended to special government rates as well as to other rates made by carriers⁶⁷

⁶³ Class Rate Investigation, 1939, 262 I.C.C. 447, 479 (1945).

⁶⁴ Class Rates Mountain Pacific Territory, 296 I.C.C. 555, 614 (1955).

⁶⁵ ICC Monthly Comment on Transportation Statistics, March 1955, p. 10.

⁶⁶ 62 Stat. 472 (1948), 49 U.S.C. § 5b (1952).

conferences. This understanding was upset in 1957 by an opinion of the District Court for the District of Columbia;⁶⁷ and this ultimately led to the precautionary amendment of section 5a by Public Law 85-246, of which the Chairman of the sponsoring House Committee said:⁶⁸

The purpose of the amendment is to make it definitely clear that the Congress intended then and it intends now that the application of 5a of the Interstate Commerce Act shall apply to the Government on Section 22 rates, as well as commercial shipments and all other shipments.

III

MOBILIZATION CONSIDERATIONS

Obviously mobilization considerations are a delicate subject; this article does not disclose any figures or concepts which have not previously been placed in records available to the public. It is obvious, too, that, as war science has progressed, calculations of the "adequacy" of the American transportation plant have had to become less and less finite.⁶⁹ For example, is the transportation system "adequate" for the needs of the country if, say, from fifty to one hundred of the most attractive targets in the United States have been struck by fusion bombs? In what time frame should adequacy be measured? In what season should its adequacy be gauged—the flood season for our big rivers; the blizzard season for the blizzard states; the striking season for railroad labor, teamsters, or longshoremen; or, perhaps, combinations of these?

Clearly the range of possibilities against which mobilization and war plans must be measured is many times wider than in either of the World Wars. Developments in rocketry and atomic-powered vehicles are only glamorous leaders in advances which have increased the range from total annihilation on the one hand to the smallest "brush fire" incident on the other. The difficulties of forecasting transportation requirements were touched upon in a statement by Major General S. R. Browning, then Deputy Chief of Transportation of the Army, in hearings before a congressional committee considering problems of the railroads:⁷⁰

Under ideal conditions, requirements' determination is one of the most difficult of deliberative and speculative tasks, requiring forecasting of the military, the political, and the economic situation of the future. Some economist has said that reliable detailed prophecy of the shape of international and national force of even 5 or 10 years from now is beyond human capacity. At best, requirements' determination is based on strong probabilities of a few simple developments which are subject to great uncertainties as to times, places, number of military and civilian populations, new weapons and instrumentalities, and other conjectural circumstances. Critics of the military services' failure to produce adequate and reliable requirements are not familiar with the immensity of the task of war planning and requirements' determination and they fail to see the inability to anticipate

⁶⁷ Aircoach Transport Ass'n, *Atchison, Topeka & Sante Fe Ry.*, 154 F. Supp. 106 (D.D.C. 1957).

⁶⁸ 104 CONG. REC. 11815 (1958).

⁶⁹ Compare the National Transportation Policy, as quoted in note 4 *supra*.

⁷⁰ *Hearings Before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce on Problems of the Railroads*, 85th Cong., 2d Sess. 1807 (1958).

with any finality the nature of military tasks of war, the limitations imposed by budgets on requirements, and the uncontrollable variables inherent in the tasks.

On March 19, 1956, the ICC instituted on its own initiative an investigation and inquiry styled Railroad Passenger Train Deficit.⁷¹ All rail common carriers conducting passenger service, subject to the jurisdiction of the ICC, were made respondents in the proceeding. State regulatory commissions and the general public, including railroad passengers and shippers and receivers of railroad freight, whose freight rates are now bearing a portion of the passenger deficit, were invited to become parties to the proceeding.⁷² A cooperating committee of state commissioners, composed of Alan S. Boyd of Florida, Harold K. Davis of New Hampshire, and Ewald W. Lund of Minnesota, sat with the examiners at hearings which extended intermittently from June 18, 1957 to June 23, 1958.⁷³ The examiner's proposed report in this case, popularly known as the "Hosmer Report," set the transportation fraternity and much of the public by the heels with such conclusions as this:⁷⁴

If railroad passenger-miles (other than commutation) continue to decline at the average rate of reduction between 1947 and 1957, the parlor and sleeping-car service will have disappeared by 1965 and coach service by 1970. It is of course possible that some development may stop the decline and stabilize the traffic at some level lower than that of the present time, but no such development is now in sight.

This report contained a section entitled "National Defense." The Judge Advocate General of the Army, representing Department of Defense interests, and with the concurrence of the MTMA, filed certain exceptions to several statements and conclusions in that section and asked that the section be changed to read as follows:⁷⁵

The National Defense. This aspect is the most critical of all those to be considered and one as to which the evidence, other than as to the needs of the military services themselves, is most deficient. The problem is accentuated by the following observations in the report of the Senate Committee:

"The subcommittee believes, however that the railroads should retain a certain amount of passenger service, whether profitable or not, as part of the railroads' obligation to serve the public and to provide for the national defense. This subject of declining railroad passenger service is recommended for further study."

This raises the question: What is the certain amount of passenger service which must be retained in the public interest, particularly from the standpoint of national defense, and how much unprofitability resulting from that service can the railroads—or perhaps more accurately, the freight shippers—be fairly required to bear? The record in this proceeding furnished no help toward an answer, but it is clear that the rail passenger equipment has approached a point where further reductions may greatly impair the national defense. Much further intensive study probably by the Congress will be necessary.

⁷¹ Docket No. 31954.

⁷² *Ibid.*

⁷³ Railroad Passenger Train Deficit, No. 31954, Examiner's Proposed Report, ICC, Sept. 18, 1958, p. 2.

⁷⁴ *Id.* at 70-71.

⁷⁵ Exceptions filed Dec. 31, 1958, pp. 13-18.

The Department of Defense presented as a witness a Navy captain serving as Director of Policy and Plans for the Military Traffic Management Agency. His statement, although based upon later information and related solely to the passenger deficit problem, was to the same general effect as one before the Senate Committee on March 27, 1958, by the Deputy Chief of Transportation. The latter statement may properly be noticed here, as the respondents request.

Both of these statements stress the military importance of transportation with particular emphasis on the value of the railroads and their service during World War II and express concern over the decline of the rail transportation plant. The statement of the Director of Policy and Plans, Military Traffic Management Agency, presented additional material to that presented to the Senate, in that he included later information and information as to predicted needs under different mobilization situations.

The military witnesses mentioned the obvious difficulty of forecasting future needs. It is stated that the Department of Defense has developed some requirements for railway equipment under war conditions . . . based on classified war plans which cannot be discussed in open sessions. However, it is possible to disclose that using World War II criteria, for passenger movements it was estimated that the mobilization requirements of the military departments would be 1,047 coaches and 5,684 sleeping cars in the sixth month of mobilization. Presuming a short mobilization period and a smaller military manpower build-up than was the case in World War II, which is a completely different type of mobilization than the one mentioned above, in the first month there would be a requirement for 3,545 sleeping cars and 712 coaches with a gradual decline in the requirement in the following six months. The railroads had 14,000 coaches in 1956, and therefore should be able, in the near future, at least, to supply the necessary coaches. In that year, however, they had only 4,504 sleeping cars, since from 1952 to 1956 the number had been going down at the rate of 400 per year.

Accordingly, faced with the possibility that it might not have enough sleeping cars to accommodate its military personnel on some future M-day, the Department of Defense has stockpiled 1,222 used Pullman cars on its own storage tracks "as mobilization reserve" and it plans to add 300 more.

The defense witnesses agree that "the railroads must possess sufficient capacity to meet an immediate surge of passenger traffic in the event of emergencies" and further that

"The Department of Defense fully supports the objectives of this proceeding and of Congressional inquiries into this serious problem, and therefore, will continue to cooperate in any feasible way designed to strengthen the potential of our railroads as a measure of national defense."

In conclusion, they point out that "the complex problems of economic adjustment of the passenger deficit, which is now being considered, are largely outside the purview of the Department of Defense" and are the "primary responsibility of management together with the legislative and regulatory bodies that are in the best position to evaluate and pass upon them."

Some other matters connected with the relations between the Department of Defense and the railroads may be noticed. It is stated that in peacetime the Department must avoid preference of one mode of transportation as against another "in the routine procurement of transportation." Therefore, in the fiscal year 1957, 30.5 per cent of its passengers traveled by rail, 25.8 per cent by air, and 43.7 per cent by bus, and the respective percentages of the total charges paid were 36.1, 58.0, and 5.9. Also in peacetime "next to meeting the logistics requirements of the military services, cost is the dominant factor."

Bearing on the relation between railroad passenger service and the national defense is some testimony before the Senate Committee on March 27, 1958, by Major General Edmund C. R. Lasher, retired, former executive director of Military Traffic Management Agency. The following quotation therefrom with emphasis supplied is highly significant:⁷⁶

"Another point I would like to bring to your attention has to do with the movement of passengers. In time of war, the hundreds of millions of passenger-miles required to recruit, organize, and train a military force is staggering. *The potential that we had for passenger movement at the beginning of the World War II is no longer present on the railroads.*"

"Now we can say that more people are traveling today than traveled in 1941, that is true, and we ask: But how are they traveling? They are traveling by Genet's buses, they are traveling by air, they are traveling by private automobile. But what happens when and if we go into a mobilization emergency? Some 375 of the biggest and largest and best airplanes on the airlines today are earmarked for reserve air force fleet operations under so-called CRAF Plan, civil reserve air fleet. Those are aircraft capable of over-ocean travel, but they are also the aircraft which are carrying the bulk of the people today. *So when we get into this emergency, where are we going to carry all these people, not only the military, but the added civilian requirements that go on top of it. I don't know.* Some say put them in boxcars. This soldier sometimes expects a little more, but what of our box car situation? The situation on class A boxcars is not too good today either and in time of war those are the cars we use for the movement of ammunition. *I don't know how we are going to move troops if we should have an emergency tomorrow.* We do not have the capacity. The army has done considerable in setting aside a reserve of passenger cars and is trying to do more. *But the situation on the railroads, the carrier on which we will have to depend, is serious in my opinion.*"

.....

"I believe, further, that all present modes must be placed on equal footing so far as the promotional role of the Government is concerned. In the promotional role I put everything which is not regulatory, including the subject of subsidization and so forth which have come up at least this morning in your questioning."

These statements directly or impliedly suggest the following questions: (1) Is there in the foreseeable future a possibility of some emergency of a military nature which might produce a volume of traffic, military and civilian, such as that which occurred in 1941-45? (2) Do the experts in the field of military transportation generally agree with statements which have been made by individuals of recognized competence in this field to the effect that the railroads do not now have the capacity for such a volume of travel? (3) Are the facilities for highway and air transportation adequate to carry the load satisfactorily without substantial help from the railroads? (4) Are the present promotional policies of the Government in respect of transportation, including subsidization, well adapted to the need of the national defense?

These questions, as before indicated, are promotional in nature and not regulatory.

The evidence of record in this proceeding is more than sufficient to establish that there is not now available sufficient passenger sleeping car equipment to meet the foreseeable military requirement for that type of equipment, but there is nothing in the record to show the other national defense needs and the needs of the civilian economy in the time

⁷⁶ *Hearings, supra* note 70, at 1802-03. [Editor's footnote.]

of national emergency. However, it appears that there has been a decline in the supply of sleeping car equipment so that the ability of the railroads to meet the military requirement alone has already been impaired. It is, therefore, vitally necessary that this deterioration of the situation be stopped, especially when it is considered that the military services, without even considering the question of the other defense needs, have foreseeable use under mobilization situations for the entire supply of sleeping car equipment.

The foregoing passage, although not adopted by the Commission, constitutes a fair summary of the national defense aspects of the Commission's investigation and inquiry as viewed by the military traffic manager, in so far as pertinent evidence was received. It should be noted, however, that evidence of defense needs other than those of the military services was "deficient."

The MTMA has been striving to produce a more definitive picture of military transportation passenger and freight requirements in the United States, together with industrially-authenticated estimates of carrier capabilities in the several modes. This is done in cooperation with the Joint Chiefs of Staff, the military services, and carrier industry representatives, and it involves the following basic actions: (1) categories and criteria are established by modes of transportation and kinds of equipment required; (2) the military services furnish the MTMA their requirements, as based upon current war plans approved by the Joint Chiefs of Staff; (3) industrial groups representing respective modes of transportation are asked for, and furnish, estimates of capabilities for a given future time frame; (4) numerous adjustments are made in order to reconcile formats usefully, among the various interests involved; and (5) the products of these efforts are authenticated by the carriers as to capabilities and by the military services as to requirements.

At this writing, unfortunately, these efforts cannot take into account the additional and undoubtedly enormous requirements of the civilian populace and of defense-supporting industry. Even so, the process described, which is being employed for the first time in so comprehensive a fashion, is producing a far more definitive and useful view of military transportation needs versus carrier capabilities than was previously available. The specific results, of course, are Secret. The Kilday Subcommittee⁷⁷ has inquired extensively in this field, and the Executive Director of

⁷⁷ Subcommittee on Adequacy of Transportation in Event of Emergency of the House Committee on Armed Services.

[As this article goes to press, the report of the Kilday Subcommittee, together with the transcript (unclassified version) of its ten days of hearings on this subject, has been released. Circumstances do not permit extensive revision to convey numerous highly important findings, recommendations, and expressions of the subcommittee. The following extractions—which are, indeed, miniscule—will afford some feeling of the sense of the committee's report:

On military transportation requirements: ". . . It can be stated that, from the data secured in these sessions, the requirements of the DOD, developed by the services in support of the approved plans, is considerably less than prior forecasts and appears to be within reasonable limits of the commercial carriers' capability, without a serious disruption of essential civilian activity. The current DOD requirements differ from those stated previously by the DOD to various congressional committees and Government agencies, interested in this problem. The marked differences between the past and today stem primarily from current concepts which provide for changes in force structures and from refined methods of calculation.

"In furtherance of its planning, the DOD has in being today the machinery necessary to initiate instantaneously the permitting and routing of DOD traffic under any conditions of emergency.

"No determinations of the adequacy of domestic transportation systems can be calculated based upon

the MTMA, Major General I. Sewell Morris, testified at some length before that subcommittee in executive session on July 23, 1959.

Any thoughtful student of transportation will recognize that the following questions are necessarily among the many which any transportation mobilization planner must take into consideration: What kinds of emergencies should be visualized? What war concepts are involved? What are the more significant trends in capabilities? (For example, the in-service Pullman sleeper fleet has declined from 4220 on February 1, 1957, through 3722 on March 1, 1959, to 2862 on September 1, 1959.) Are discernible trends controllable or subject to countermeasures? What feasible opportunities are available to traffic management in adjusting the use of modes or types of equipment to meet the stresses of imbalance?

Under authority of the Defense Production Act of 1950,⁷⁸ as amended, the ICC has prepared twelve transportation mobilization orders to become effective upon a presidential proclamation of a state of civil defense emergency or upon adoption of a congressional resolution. These twelve orders—embracing domestic transportation, storage, port facilities, and other related matters—have been transferred to the OC&DM, which now has responsibility for such planning.

The Interstate Commerce Act, in sections 1(15)-(17), 3(4), and 15(10),⁷⁹ provides the ICC with very broad emergency powers relating to car service, including the authority to suspend rules and practices, require the common use of terminals and tracks, and direct preference and priority in the handling, routing, and distribution of traffic in time of emergency. In the event of war or threatened war, and upon certification by the President as to national defense and security, certain traffic will have preference and priority in transportation, and the Commission shall so direct. During World War II, the ICC was granted authority to exercise comparable power over motor carriers to the extent necessary to facilitate prosecution

military requirements alone. There must be a consolidation of the military with essential civilian requirements, including those of the war supporting industries."

On DOD traffic procurement policies: "The policy of the Department of Defense of procuring the lowest cost mode of transportation commensurate with the service requirement and of not according preferential consideration to one mode of transportation as against another in the routine procurement of transportation services, is in accord with a reasonable interpretation of the Armed Services Procurement Act and in consonance with the national transportation policy.

"In view thereof, and in light of the transportation requirements of the DOD as computed within certain hypothetical cases, it is not believed that this policy should be changed and no change is being recommended."

On a national traffic control system: "There was demonstrated in these hearings an obvious urgent need for a National Traffic Control System, in being, staffed by officials in Government and in the transportation industry, who will work together and be ready to operate in time of emergency on a national and regional level. The Military Traffic Management Agency advised that it has the machinery for such an organization in the realm of its responsibility and that it has been tested. The OC&DM has such a plan in its executive reserve but this plan, on a national and regional level, has not been fully implemented or tested. It is the recommendation of this committee that a National Traffic Control System be established on a civilian level, that it be implemented on a permanent basis by the OC&DM, tested and in a position to be augmented by its executive reserve plan in event of an emergency."]

⁷⁸ 64 Stat. 798, 50 U.S.C. App. §§ 2061-66 (1952).

⁷⁹ 66 Stat. 277, 49 U.S.C. § 1(15)-(17) (1952); 63 Stat. 485 (1949), 49 U.S.C. § 3(4) (1952); 54 Stat. 911 (1940), 49 U.S.C. § 15(10) (1952).

of the war.⁸⁰ Section 6(8) of the Interstate Commerce Act⁸¹ provides that in time of war or threatened war, the carriers are to use every possible means to facilitate and expedite military traffic, and that in time of peace, shipments consigned to the United States are to be delivered as promptly as possible notwithstanding embargoes.

In time of war, the President, through the Secretary of the Army or the Secretary of the Air Force, is authorized to take possession of any transportation system to transport military traffic, or for other purposes related to the emergency.⁸² So far as necessary, he may use the system to the exclusion of other traffic.

IV

PROMISING RECENT DEVELOPMENTS

Some recent developments bid fair to strengthen the transportation industry for all purposes, including national defense. In the legislative field, the Eighty-fifth Congress enacted several laws aimed at strengthening the transportation system. Thus, contract carriers by motor vehicle were redefined in an effort to curb encroachment in the common carriage field by contract carriage.⁸³ The federal transportation tax on the transportation of property was repealed.⁸⁴

By the Transportation Act of 1958,⁸⁵ the Interstate Commerce Act was amended: (1) to provide that the Government may guarantee loans to carriers for the purpose of aiding railroad financing; (2) to provide stronger authority for the ICC in dealing with intrastate rates which unduly and adversely affect interstate commerce; (3) to give the Commission new authority over the discontinuance of, or change in, train service; (4) to declare that rates of one mode shall not be held up to a particular level to protect the traffic of any other mode; (5) to redefine the exemptions from regulation for haulers of agricultural products; and (6) to specify that private motor carriage cannot be conducted for business purposes unless within the scope and in furtherance of the operator's primary business enterprise other than transportation.⁸⁶ The Federal Aviation Act of 1958 created the Federal Aviation Agency, with its Administrator, and a reconstituted CAB.

⁸⁰ 56 Stat. 176 (1942) (expired Dec. 31, 1944).

⁸¹ "In time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given, over all other traffic, for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. And in time of peace shipments consigned to agents of the United States for its use shall be delivered by the carriers as promptly as possible and without regard to any embargo that may have been declared, and no such embargo shall apply to shipments so consigned." 63 Stat. 486 (1949), 49 U.S.C. § 6(8) (1952). It is interesting to compare the wording of this section with the language of the statutes referred to in note 79 *supra*.

⁸² 70A Stat. 266 (1956), 10 U.S.C.A. § 4742 (Supp. 1958); 70A Stat. 587 (1956), 10 U.S.C.A. § 9742 (Supp. 1958).

⁸³ 72 Stat. 573, 49 U.S.C.A. § 303 (Supp. 1958).

⁸⁴ Int. Rev. Code of 1954, § 4272, repealed by 72 Stat. 260 (1958).

⁸⁵ 72 Stat. 568, 49 U.S.C.A. §§ 1231-40 (Supp. 1958).

⁸⁶ Of course, it has already been emphasized that the military services abstain from private carriage—that is, military vehicles are not used for military traffic. The Transportation Act of 1958 does not affect the legal situation *vis à vis* military private carriage.

This group of laws was enacted in the enlightened interest of a more robust transportation system for the country, as including, as the National Transportation Policy says,⁸⁷ the needs of commerce, the postal service, and national defense. Some of the new statutory provisions are not universally popular and appear to be directed at restoring balances, perhaps in small measure. The simple but significant point probably is that Congress, after rather long and careful study, seems to have concluded that balance needs to be restored.

Probably even more important than legislative improvements are technological advances in recent years. Many of these, such as the strides in improving the speed and lift of aircraft, have been so widely publicized that they need no repetition. Aircraft which take off and land vertically—helicopters and others—are coming into their own and, presumably, will be followed by commercially-feasible vehicles which take off and land vertically but employ the equivalent of conventional fixed-wing principles for forward movement. But these once-fanciful concepts are becoming unsophisticated alongside the prospect of missile and space-vehicle transportation. It is unfortunate that most of us, the public, take scientific advances so complacently. Indeed, many persons would hardly be dumbfounded for long, if at all, at an announcement that transportation of things would give way to transmission and transmutation-reproduction of matter at a distance through electronic reconstruction and arrangement of atoms and molecules. A relatively down-to-earth vehicle recently publicized is one that glides within feet or inches of land or water surfaces, its forward motion being cushioned by a layer of artificially produced compressed air—much as an ice skate glides on a film of water without touching the ice itself. However, some of the more prosaic transportation improvements are, perhaps, appreciated most within a somewhat limited fraternity.

In the movement of freight, doubtless the greatest need for technological advance has been in transfer of shipments from mode to mode. The writer suspects that, statistically, ancient methods still predominate. For instance, the piece-by-piece handling of freight is the same system used on the dhows on the Nile thousands of years ago. Now a number of developments are reforming this picture; among these are the use of pallets (not very new, but expanding and improving), "overcontainers,"⁸⁸ transferable vehicle bodies, roll-on-roll-off vessels, auto-railers, and "piggyback." Of special significance is piggyback, which holds promise of solving the vexing problem of destructive competition between trucks and rails. If existing complex circumstances will admit of arriving at the point where long-distance truck freight is piggybacked by rail because the trucker can benefit by using the railroad, there is a bright prospect of the first real breakthrough on this problem.

One of the several piggyback plans—the one under which the shipper or freight forwarder owns the flat cars and the trailers which the railroad hauls for flat rates—

⁸⁷ See note 4 *supra*.

⁸⁸ The Army and Air Force alone now own about 60,000 "CONEX" overcontainers of dimensions which are described as compatible with the standard sizes proposed by the National Defense Transportation Association Special Subcommittee.

has special national defense significance. Such a trend could cause far more diversified ownership of equipment, thus spreading wider the financing of transportation facilities and removing some of the need to ask for government help.

Yet piggyback may not ultimately continue to be "trailer-on-flat-car"; operational, economic, and competitive dynamics may cause it to give way to trailer bodies on flat cars. "This little piggy" may go to market and leave the "bogie" (undercarriage) at home. Physically, either a trailer or a trailer body is simply one more form of overcontainer. The ICC has ruled, in general effect, that a piggyback trailer is a container rather than an operational motor vehicle, at least in the context of their being furnished by forwarders.⁸⁹ This decision by the Commission is at least a milestone in a monumental struggle that has shaped up between railroads and forwarders on the one hand, and truckers on the other. As could have been expected, the advent of piggyback has led to considerable jockeying for economic and legal position. The railroads and forwarders appear to have the advantage just now, with the truckers girding their loins for more combat over the issues of (1) railroads hauling, without trucker sponsorship, traffic in which truckers have acquired "vested interests"; and (2) forwarders handling truckload quantities. It does not seem too optimistic to believe at this stage that the upshot of this struggle will be the one best for the country.

In containerization, the most significant recent development is a concerted move to standardize sizes. In September 1959, the National Defense Transportation Association released a report of a special subcommittee on this subject,⁹⁰ a group chaired by Morris Forgash⁹¹ and comprising comprehensive industrial and military membership. The importance of this step, described by the subcommittee as "only a beginning but a real start increasingly overdue," is hard to overemphasize. As stated by Commissioner Arpaia of the ICC, "If standardization is put off too long, ultimate change-over may become expensive."⁹²

Piggyback, containerization, and the several other "non-break-bulk" systems which speed the interchange of freight mean that the country can get more out of its transportation plant than before. That, obviously, is good for national defense.

Of course, management and manipulative techniques are as definite a part of the transportation plant as physical technology. Generally, the two phases seem to go hand in hand—that is, progressive management induces technological advances. Certainly one bright new tool stands out—automatic data-processing. It is characteristic of this glamorous, poorly-understood phenomenon that it carries risks of premature decisions by management; here is one area where the old-time, bold autocrat can get himself into deep trouble as easily as he can come out a hero. But for

⁸⁹ Forwarder Volume Commodity Rates Between Chicago and New York, I & S No. 6993, ICC, Sept. 4, 1959.

⁹⁰ The report recommends that container sizes be standardized compatibly with the dimensions 8 feet wide by 8 feet high, with modular lengths based on two principal lengths, 20 feet and 40 feet.

⁹¹ See note 11 *supra*.

⁹² Speech to Central Arkansas Traffic and Transportation Club, March 10, 1959; letter to NDTA, Sept. 17, 1959.

proper applications, certainly it, too, stretches our national plant; and that, too, is good for the national defense.⁹³

V

ROOM FOR IMPROVEMENT

How well does transportation in the United States respond to demands for improved technology. Here is a place for some sour notes! The desirable, healthy pattern is for technology and design to follow consumer demand. If people want smaller, economical cars, they get them—after a while. This responsiveness varies greatly from industry to industry, of course, with progress often being stifled by vested, reactionary interests—as, for instance, in some areas in the building trades, where codes are sometimes used to hold back progress.

Transportation is too vital to our national welfare to have its progress thus stifled. But that is happening to a deplorable extent. Shippers, carriers, regulators, and politicians are all contributing to the lag between consumer need and technological response. In the first place, shipper needs are not generally being expressed forcefully enough—although many of the writer's carrier friends will disagree with this assertion.

Take the matter of the complexity of transportation pricing. Seventy-two years after regulation of railroads began, the total structure of rates, rules, and regulations for surface transportation in the United States is a sheer, monstrous, smothering mountain of worms. Everyone favors simplification until his ox starts getting gored. The very word "simplification" has become somewhat odious in transportation circles, because all simplification efforts thus far have not seriously deterred the advance of net complexity. One effect of this massive mess is to help drive shippers away from common carriage toward private carriage, a trend which most transportation statesmen agree is deleterious. Another effect has been to thwart the proper advance of containerization. Efforts to popularize overcontainers extend back at least thirty years. They were needed in commerce about as much then as now; in fact, during the touchy inventory situation of the 1930's, they might have been even more valuable than now, in certain ways. But the complexities of rating freight by commodity helped to discourage their use.

The younger, perhaps more aggressive, air transportation industry has profited by the experience of others and, thus far, has kept its rate structure fairly simple, basing it primarily upon cost of service rather than value of service. What it will look like after seventy-two years of opportunity to become more complex, no one knows.

⁹³ It may be worthy of mention that the MTMA, which has installed and is using a Univac File Computer, is clasping automatic data-processing to its bosom as rapidly and as realistically as it knows how. Also, of significance are some of the swiftly developing improvements in the communications field; there the MTMA has partially abandoned a small-scale test of facsimile document transmission in favor of other experiments which feature the early capture of digital traffic data for automatic treatment. All these efforts are in keeping with a long-range plan.

From its inception, the trucking industry has leaned more toward cost-of-service pricing than its older brother, the railroads. The railroads are taking it up more aggressively in recent years and indicate their intentions of proceeding vigorously under certain revised rate-making authority provided in the Transportation Act of 1958. Beyond a doubt, the trend toward cost-of-service rate-making will be tempered wisely by legal and moral requirements for justice to shippers, but this does not deny the health of the trend. Carriers are also finding that valuable rate experimentation and research can be conducted on government traffic, under authority of section twenty-two of the Interstate Commerce Act,⁹⁴ avoiding some normal frustrations.

One example of archaic complexity: Freight rates are based on short-line railroad distance. Usually, except for the shortest distances, these are academic routes made up of bits and pieces of lines of various railroads, and although theoretically trains can operate over these routes, in most cases they never do. The total calculation of such routes in the United States is so monstrous that it demands electronic computers, and even then is a big, difficult job. If direct air distances became the standard, they could be measured with a piece of string, and the system would be one step nearer automation. Would such a system really be less just to shippers than the old one?

Many years after uniform class-rate reform was undertaken, the railroad and trucking industries each has two principal freight classifications. In time, each will drop one of these, but there will then still be two "uniform" freight classifications. The truckers patterned their classification on that of the railroads, so the differences are not tremendous. Even if the two industries do not get together on the level of freight ratings themselves, the rail and motor classifications, which are somewhat like catalogues, could be made uniform in language and numerical coding. This, too, would be fairly easy, but a big step forward.

Recently, this writer had occasion to reread much of the leading 1912 ICC decision on railway express rates.⁹⁵ There the Commission said, in effect, that after exhaustive investigation, it found the existing system not only unjust, but so horribly complex that not even the numerous express companies understood it fully. In short, it was impossible! With masterful incisiveness, the Commission swept away the old rate and documenting system and prescribed a new one. The new system was almost incredibly simple, and it survives to this day not only in its essence, but in most of its particulars. In thirty years in traffic management, this writer has never heard of any shipper who was ruined by its simplicity.

It is remarkable how much of the description of complexity in that 1912 decision could be lifted practically verbatim and applied today to the freight rate and documentation situation. The most reliable forecasters predict massive growth and radical economic and social displacements in the United States within the next ten

⁹⁴ See the discussion in the text at note 44 *supra*.

⁹⁵ *In re Express Rates, Practices, and Revenues*, 24 I.C.C. 381 (1912).

years; in view of this coming shake-up, would not this be a good time for massive reforms to reduce transportation complexity?

VI

SUMMARY

The military services are the largest user of passenger and freight transportation in the country. Military traffic takes on some of the color of its management, which steadfastly strives to be fair and efficient, and has organized for control, economy, and most of all for readiness. Military traffic management relies completely on commercial carriers, except for the most extreme of emergencies, and employs principles widely accepted as sound industrial traffic management.

The military traffic manager lives mostly in a goldfish bowl and deals with a number of laws somewhat peculiar to his calling. Some of these involve constitutional issues, some deal with government procurement, and some revolve around the complexities of transportation regulation. Opposition to so-called government rate "reductions" largely ignores how peculiarly vulnerable military traffic is to high, catch-all class rates, which are somewhat like the well-known "list" prices.

Adequacy of the national transportation system for defense is a national problem, and not merely a parochial military one. On appropriate occasions, the Department of Defense has furnished Congress and the public with the best information and forecasts it had available at the time; but the evolution of war concepts and the progress of the forecasting art require constant re-evaluation in this field. Current military planning efforts undertake to incorporate carrier estimates of their own capabilities; but, of course, some results of these efforts are classified Secret. Material on mobilization considerations that has been released in connection with certain congressional and ICC hearings indicates that the prospect for adequate American passenger transportation in an emergency is not so good; for freight, it is much better. A grave deficiency is the lack of a national traffic control system ready to control *all* traffic instantly in an emergency, as the MTMA is ready to do for military traffic.

The rate and tariff system for surface freight is monstrously complex, tends to stifle technology, and should be reformed. The attention given in recent years to improvements in legislation, technology, and management is bearing some fruit. In particular, modal interchange of freight is being rapidly improved. Some of these improvements, especially piggyback and standard containerization, hold great hope for the future of American transportation.