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PIGGYBACK PLANS

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INTRODUCTION

Speaking in the vernacular of the transportation industry, the word piggyback imports basically an integration of transportation media. As a general concept, it involves the movement of freight loaded in the vehicles of one transportation medium which are, in turn, carried aboard the vehicles of another such medium. The term piggyback is more specifically associated with the railroads' transportation of motor vehicle trailers carried on railroad flatcars, and is commonly referred to as trailer-on-flatcar service (TOFC). This form of integration may be contrasted with its nautical counterpart, fishyback, whereby railroad cars or truck trailers are carried aboard ship, and with birdieback, the aero-integration of transportation systems.[1]

Although piggyback is by no means novel to our times, its definite origin remains an historical question mark.[2] For purposes of giving it a crude beginning, one may allude, with some certainty, to the transportation of sectionalized canal boats on flatcars, as part of a Philadelphia to Pittsburgh rail-water service from 1843 to 1857. The year 1885 marks another significant date in the development of piggyback, for in January of that year, the Long Island Railroad began operating its so-called "farmer's trains," connecting points on Long Island and the East River. The trains carried four loaded produce

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1 These general concepts were discussed in a speech, Traffic Impact of Piggyback, by Interstate Commerce Commissioner Arpaia on March 10, 1959; excerpts of this speech appear in 26 ICC Prac. J. 1018 (1959).

2 See the address, A Look at Piggyback Transportation, delivered by ICC Chairman Hutchison before the Railroad Transportation Institute, N.Y., Nov. 21, 1957.

wagons per flatcar with teams riding in specially prepared boxcars.[3] Probably the most vivid application of piggyback service during these pioneer days was the transportation of circus wagons aboard railroad flatcars.[4] This remains a familiar sight today.

Trailer-on-flatcar service, as we think of it today, was not inaugurated until 1926. It was instituted by the Chicago, North Shore and Milwaukee Railway as a means of competing more effectively with water and highway carriers between Chicago and Milwaukee. The operation consisted of picking up less-than-carload[5] shipments at the shipper's door, in trailers provided by or operated for the railroad. The trailers were then loaded aboard flatcars, transported at railroad rates and on railroad bills of lading, and ultimately delivered to the store door of the consignee.[6] In 1932 the North Shore expanded its operations in this area by inaugurating service for over-the-road[7] motor carriers at an attractive rate. Similar service was adopted by the Chicago and Alton (now the Gulf, Mobile and Ohio) in the same year, but was terminated a year later as an unprofitable venture.[8] The Chicago and Great Western established piggyback service in 1936, and in 1937 the transportation of trailers between Chicago and Galesbury, Illinois was begun by the Chicago, Burlington and Quincy as part of its trucking operations conducted by the Burlington Transportation Company. This service is still in existence today. Also in the year 1937, the New York, New Haven and Hartford began its piggyback service between New York and Boston, Springfield and Providence. Adoption by the Rock Island Line and the Denver and Rio Grande Western followed in 1938.[9]

Despite this fairly rapid and extensive adoption of piggyback in

[3] Movement of Highway Trailers by Rail, 293 I.C.C. 93, 94 (1954).

[4] John G. Shott, Piggyback and the Future of Railroad Transportation, Pub. Aff. Inst., Washington, D.C. (1960).

[5] This term has no technical significance; it is simply used to describe shipments that take up less space than an entire single vehicle of carriage.

[6] Supra note 3, at 95.

[7] Over-the-road service (also called line-haul service) is a phrase which defies definition with any degree of exactness, but for the neophyte in the area of transportation, it may be said to refer to carriage which is outside the terminal area. The latter phrase presents much the same definitional problems. One author, while recognizing this difficulty, has defined the phrase, relative to its use in this article, as follows:

> The Motor Carrier Act does not define the term "terminal area," and neither does it have any definite generally accepted meaning which can be applied in any particular case. In a general way, the term, as applied to rail carriers, suggests that area adjacent to a carrier's station within which bona fide transfer, collection or delivery services as distinguished from line-haul services, are performed either free or for a charge.

Kahn, Principles of Motor Carrier Regulation 20 (1958).

[8] Ry. Age, Nov. 4, 1950.

[9] Shott, supra note 4.

its very early years, it has been only within the past decade that the concept has fully matured into a major factor in freight transportation.[10] A number of reasons could be assigned to explain this "adolescent gap" in the growth of piggyback. At least one of these was the regulatory problem, both local and national, inherent in any attempt to integrate diverse and adverse transportation systems. Another equally significant reason was the necessity of gearing this concept to a large and diversified industrial complex, without which the present day demand for piggyback service could not be sustained. Whatever the obstacles may have been, an honest evaluation of the competing interests to be served not only obviates a detailed discussion of them, but indicates the overriding advantages which make the piggyback concept so mutually beneficial to these interests.[11] The patent attraction of piggyback is, of course, the integration of the motor carrier's flexibility[12] with those advantages inherent in railroad operations. This was aptly recognized as early as 1926 by the Electric Railway Journal when commenting on the Chicago, North Shore and Milwaukee's TOFC service:

> The great saving of time and expense in handling shipments make this new equipment an outstanding contribution to the development of freight transportation. The trailers eliminate all extra handling of shipments, being loaded at the point of departure and unloaded at their destination. The trailers will be hauled by motor truck to a central loading station, where they will be mounted on flatcars. Deliveries of the trailers will be made in similar manner to all parts of the cities embraced in this new type of service.[13]

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[10] For an excellent discussion of these recent developments and the expectations in this area, see John G. Shott, Progress in Piggyback and Containerization, Pub. Aff. Inst., Washington, D.C. (1961). See also 74th Annual Report of the ICC 78-79 (1960).

[11] See the address by L. K. Sillcox before the Canadian Railway Club on April 13, 1959, wherein he enumerated the material contributions which piggyback rates should make to the financial welfare of the railroads by:

(1) commanding profitable traffic which cannot be attracted in any other known manner;

(2) making possible the gradual elimination of vastly costly time-consuming utterly wasteful terminal services;

(3) arresting the further inroads of external competition on high class traffic and enable the railways to give a complete and scheduled service such as the shipping public now demands; and

(4) providing a flexible coordinated service in the public interest.

[12] Ibid.

Highway transportation possesses flexibility to a degree which can never be matched by conventional railway methods and this more flexible, as well as complete, service has many attractions to the shipping public.

[13] 68 Elec. Ry. J. 892 (1926).

Perhaps the most important single development in this field to date is the recent decision in *Eastern Cent. Motor Carriers Ass'n, Inc. v. Baltimore & O. R.R.*[14] This decision not only eliminated various legal barriers but, in effect, placed the ICC stamp of approval on the five basic piggyback plans of operation.[15]

The Five Basic Plans

The present Plan IV is arbitrary in its design.[16] Plans I, II and V basically constitute the three types of transportation available under Parts I and II of the Interstate Commerce Act[17] when these two parts are truly coordinated. Plan I is a substituted rail for motor service. Plan V covers the situation where a motor-rail or rail-motor joint rate is used. Under Plan II, the railroad furnishes the entire service, utilizing its so-called "terminal exemption"[18] for pickup and delivery services, and possibly using its motor carrier service for a portion of the rail haul. It is only under Plans III and IV that a variation from strict coordination between motor and rail is encountered. While both depend upon through routing, they contemplate only the offering of a rail service.

[14] I.C.C. Docket No. 32533, decided June 19, 1961; hereinafter referred to by docket number only.

[15] There is no theoretical reason why there are only five basic plans. There certainly can be more such plans and in all probability there soon will be. Quite recently, a protest was voiced that a proposed plan should be designated Plan II ½. (See Traffic World, Dec. 2, 1961.) It should also be noted that in Docket No. 32533, there were additional plans proposed that did not fit within the framework of the five plans given formal approval by the Commission.

[16] While Plans I, II, III and V can be traced through the discussion that follows, Plan IV cannot be. Morris Forgash of the United States Freight Company, speaking before the National Petroleum Association on April 15, 1959, stated that he did not know how Plan IV had evolved; this author also has been unable to trace its exact evolution.

[17] The Interstate Commerce Act is divided into four parts:

Part I, 24 Stat. 379 (1887), as amended, 49 U.S.C. §§ 1-27 (1958), governs rail carriage; Part II, 49 Stat. 543 (1935), as amended, 49 U.S.C. §§ 301-27 (1958), popularly known as the Motor Carrier Act, regulates that area of transportation; Part III, 54 Stat. 929 (1940), as amended, 49 U.S.C. §§ 901-23 (1958), governs water carriers; and Part IV, 56 Stat. 284 (1942), as amended, 49 U.S.C. §§ 1001-22 (1958), encompasses freight forwarders.

It should be noted here that, for purposes of clarification, the sections of the act have been numbered to correspond with the part in which they are found. Thus, sections 1 to 199 appear in Part I, sections in the 200 series in Part II, etc.

[18] Section 202(c), 49 Stat. 543, as amended, 49 U.S.C. § 302(c) (1958), states that the provisions of Part II shall not apply:

> . . . to transportation by motor vehicle by a carrier by railroad subject to [Part I] . . . incidental to transportation or service subject to [Part I] in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to [Part I] when performed by such carrier by railroad . . . .

Plan I

Under this plan, motor vehicle traffic moves from point of origin to destination under a single bill of lading issued by a single motor carrier, and under a single factor rate published in a motor carrier tariff, which provides for substitution of rail for motor transportation for a portion of the haul. This substituted service is performed at the option of the motor carrier for all or a portion of the haul between rail terminals. The railroad's only function is to move the loaded trailers on flatcars between rail heads. The motor carrier receives its published transportation charge from the shipper and remits to the participating rail carrier an unpublished division of the single factor, motor carrier rate. As an alternative, the railroad rate might consist of a flat charge per trailer. Since, as above indicated, the traffic moves on motor carrier billing, the rail service, as such, is not held out to the public.

Plan II

Plan II involves a complete service offered by the railroad, which provides the trailers and flatcars; the transportation, loading and unloading of the same; plus a door-to-door service for shippers and consignees within the terminal areas where the railroad has stations and provides conventional rail service. The usual practice under Plan II is for the railroad to place its own trailers in convenient locations for loading by the shipper, and then to move the trailers by tractor to ramps for loading on flatcars. The entire service is under railroad tariffs, on a single bill of lading, with rates generally geared to motor common carrier rates. While this is the normally offered Plan II service, it may also be possible for the railroad to utilize its own motor carriers in a line-haul capacity, under a substituted service arrangement.

Plan III

Under Plan III, the railroad's function is simply to load the trailers onto its flatcars at the terminal, transport the trailers on flatcars, and unload them at the destination terminal. The shipper provides the trailers, which it either owns or leases, and performs all delivery services at both rail terminals. For purposes of piggyback, the controlling carriage is on the flatcar, *i.e.*, railroad billing at railroad rates. The additional services, including the loading and unloading of the trailers, are reflected in such tariffs.

Plan IV

Plan IV service is almost identical with that of Plan III. The only difference is that the shipper provides the flatcar, which must be fitted with the necessary tie-down devices, subject to railroad approval.

Plan V

Plan V consists of transportation in combined motor and rail movements under joint, through motor-rail rates, with established divisions of revenue between the participating carriers. Both carriers perform line-haul movements. Under this plan, the initial movement from point of manufacture or assembly may be by either rail or motor service of the participating carriers. Thus, the rates may cover motor-rail-motor; rail-motor-rail; rail-motor; or motor-rail. The railroad performs ramp-to-ramp piggyback service between points that are definitely specified in the routing provisions of the applicable tariffs. Some tariffs may have proportional application, under which the transported vehicles must move, by unspecified means, beyond the termination point of the joint rate in order to enjoy such a rate.

The Law and Its Problems

For two dissimilar forms of transportation to be integrated into a unitized system, the law governing the participating systems must also be integrated. Piggyback, involving as it does rail *and* motor carriage in a combined effort, is precisely an integration of two unlike forms of transportation into a single fabric. However, under Parts I and II of the Interstate Commerce Act, rail and motor carriage are separately treated. The effect of this dichotomy is the creation of a number of regulatory problems which become increasingly complex in direct proportion to the number of piggyback plans developed, and the degree of variation in the existing plans. The interrelation of all of these factors also makes categorization of the subject matter difficult, if not impossible. Thus, for a better understanding of the problem areas to be discussed herein, the chameleon-like character of the plans themselves, the overlapping of subject matter, and the consequent impracticability of sharply delineating the various issues, should be kept in mind. It should also become apparent during the discussion which follows that a significant application of coalescent thought has yet to be made in most of these problem areas. One result of this failure is that the entire concept of piggyback is in more of a state of upheaval than is ordinarily the case under the usual conception of administrative regulation, in which there is an essentially dynamic character, unfettered by the absoluteness of an unchanging approach

to the problems before it. A second result is that the need becomes even more acute for some exploration of the problems in this vital area of transportation, and the theories underlying those problems. As a practical matter, this article will deal mostly with the existing piggyback plans by fitting them into the framework of presently existing principles. No attempt will be made to anticipate all the ramifications of the field, nor will all the mechanical and/or technical aspects[19] of the five plans be discussed. The element of competition is likewise beyond the scope of this article, but, though not a subject for discussion, it should nonetheless be recognized as one of the major determinants in deciding whether or not to propose a particular plan. Illustrative of the role which competition may play is the *Nat'l Auto. Transp'rs Ass'n Petition for Declaratory Order*.[20] In that case, the Association sought a ruling which, if favorable, would have allowed them to interchange with railroads under Plans I, III and V at points which the motor carriers were not authorized to serve, although they were authorized to serve the route from origin to destination. The competitive undertone is apparent in the hearing examiner's conclusion:

> Actually, what has happened is that motor carriers specializing in the transportation of new motor vehicles have lost a substantial amount of business to the railroads as a result of the establishment by the latter of lower rates for the movement of the traffic. In an attempt to salvage some of their portion of the business, the motor carriers are here seeking blanket authority to institute new services, totally different from those previously performed, and without regard to the long-established services of other carriers or the need for the new service sought to be instituted.[21]

The entire field of piggyback can perhaps best be understood when approached initially from the railroad's point of view. This is especially so because, when looked at in one sense, the basic legal

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[19] For additional information on such points, see the Code of Rules Governing the Interchange of, Repairs to, and Settlement for, Trailers and Containers Used in Trailer-on-Flatcar (TOFC) Service, published by the Association of American Railroads, effective Jan. 1, 1961.

Another facet of the legal complex not to be discussed is the cost-rate structure, which was an early obstacle to piggyback's development. The continuing significance of this issue was aptly illustrated in the Rail-Trailer publication, Trailers-on-Flat-Cars (I.C.C. Cat. No. HE-2313. RI). A question and answer exchange therein leaves little doubt that rail and motor's mutual apprehension over their rate structures is still a major factor to be considered.

[20] M.C.C.—3024, July 20, 1961.

[21] Id. at 8.

conflicts arose as a result of Part II of the Interstate Commerce Act, which altered the status of railroad owned motor carriers, as well as the relationship of the railroad to motor carriage itself. Prior to the passage of this legislation in 1935, the Interstate Commerce Commission exercised jurisdiction only over motor carriers operated by and/or for railroads in conjunction with terminal services.[22] The Motor Carrier Act did not purport to alter such jurisdiction.[23] However, it did nothing to alleviate the difficulty of distinguishing between a line-haul service, now regulated under Part II, and a terminal service, specifically exempt from Part II and thus still regulated under Part I.[24] The pickup and delivery services offered at both terminals are examples of the "202(c) exemption"[25] under the second piggyback plan. That plan contemplates that these services will be within the terminal areas and thus subject to Part I. The exemption is applicable to carload as well as less-than-carload shipments. The latter also pertains to a motor carrier's use of terminal areas.[26]

One of the major areas of conflict, already alluded to, arose because of the nature of the Motor Carrier Act itself. Cast in the form of a separate statute, the act made no attempt to distinguish railroad owned motor carriers from motor carriers generally, during a period of increased railroad activity in this field. This legislative duality was succinctly described in a 1939 Senate hearing:

> While railroads, motor carriers, and water carriers are all engaged in transportation, they function, operate and do business in general in very different ways, and any sound system of regulation must recognize, and be adjusted to, these differences. When the Motor Carrier Act—1935—Part II of the Interstate Commerce Act—was proposed, the plan of interlarding the new regulation with the old regulation of Part I was considered and rejected. The danger of tampering with the provisions of Part I which had undergone so

[22] See, e.g., Tariffs Embracing Motor-Truck or Wagon Transfer Services, 91 I.C.C. 539, 547 (1924), wherein the Commission stated that it had "no jurisdiction over the line-haul rates of motor-truck companies operated as an extension of the lines of rail or water carriers."

[23] Part II contains provisions in section 202(c), 49 Stat. 543 (1935), as amended, 49 U.S.C. § 302(c) (1958), and in section 203(14), 49 Stat. 544 (1935), as amended, 49 U.S.C. § 303(14) (1958), which exclude from regulation transportation by motor vehicle of a railroad, which transportation is subject to Part I.

[24] In Tariffs Embracing Motor-Truck or Wagon Transfer Services, supra note 22, the Commission expressed concern over the fact that "in many cases it is difficult to distinguish between a line-haul service and a terminal service." This difficulty persists today. See also Coordination of Motor Transp., 182 I.C.C. 263, 367-68 (1932).

[25] Supra note 18.

[26] See Movement of Highway Trailers by Rail, 293 I.C.C. 93, 102-03 (1954).

> much litigation and court interpretation was realized, and it also seemed desirable that the motor carriers should have a statute of their own which would define their duties and responsibilities and the jurisdiction of the Commission over them. . . .[27]

In the light of this legislative duality, Section 206 (Part II) of the Interstate Commerce Act[28] should be considered. This section, in effect, requires that all motor carriers subject to the provisions of Part II must obtain a certificate of convenience and necessity. Since the railroads were already engaged in line-haul motor carriage when Part II became law, a jurisdictional problem was created as to whether Parts I or II should govern when this line-haul motor service was substituted for rail service. This conflict prompted the Commission, on its own motion, to investigate the lawfulness of railroad tariff rules and practices in this area in the *Substituted Freight Service* case.[29] Both the substitution of motor for rail service and rail for motor service were considered. The ICC decided that neither the motor carrier nor the rail carrier could substitute the other mode of carriage for line-haul movements until the certificate requirements of both Parts I and II were satisfied. This same construction was also applied to the tariff provisions.

Compliance with the certification requirements was not the only major holding. Also of great significance was the finding that substituted service, where it consists of a combination of line-haul movements by rail or motor, is to be treated as a "joint service," despite what other name it may have been called.[30] Further, the Commission realized that the entire problem was not before it:

> It may also be that, after this service is brought into conformity with the tariff and certificate provisions of the act, mixed questions of law and fact will arise whether the practices in connection therewith are reasonable, nondiscriminatory, or otherwise lawful. . . .[31]

In defining these outer limits, *i.e.*, that the practices be reasonable,

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[27] Testimony of Commissioner Joseph B. Eastman, Senate Hearings on Transportation Act of 1939, April 3-14, 1939, p. 787.

[28] 49 Stat. 551 (1935), as amended, 49 U.S.C. § 306 (1958).

[29] 232 I.C.C. 683 (1939).

[30] Id. at 686. An argument can be made as to the accuracy of the phrase "joint service" if it means joint rate, and if it applied before passage of Part II of the act. See, e.g., Cary v. Eureka Springs Ry., 7 I.C.C. 286 (1897); Wylie v. Northern Pac. Ry., 11 I.C.C. 145 (1905); Cosmopolitan Shipping Co. v. Hamburg-American Packing Co., 13 I.C.C. 266 (1908).

[31] Substituted Freight Service, supra note 29, at 686.

nondiscriminatory and lawful, the ICC was reinforcing a problematical approach begun three years earlier in a case involving the Great Western Railroad Company.[32] In that instance, the railroad had begun operating under a joint rate arrangement whereby trailers were loaded aboard railroad flatcars and transported via rail over the rail portion of the joint route. In effect, this service was tantamount to the presently approved Plan V. During the hearing, the Commission examined the adequacy of the contemplated division and the lawfulness of the proposed rate under Part I, section 1[33] and Part II, section 216(c);[34] the possible discriminatory effects under Part I, sections 2[35] and 3[36] and Part II, section 216(d);[37] and the "section 4[38] (Part I) problem." The results were strikingly similar to those reached in the *Substituted Freight Service* case, for throughout the discussion and comparison of the Parts I and II provisions, there was no statement as to how, if at all, they were interrelated. As a result, the rail and motor provisions were considered and ruled upon as separate requirements. It is unfortunate that the Commission sidestepped this problem of legislative duality because it would have obviated the conflict in the *Substituted Freight Service* case. The jurisdictional issue was certainly before it since Part I, section 4 has no counterpart under the Motor Carrier Act (Part II), and the parties to the proceeding earnestly pressed this point upon the Commission, due in part at least to the fact that section 4 is quite famous within this area of the law, possessing a vibrant history of case law and amendments. Very briefly, the section 4 problem (commonly referred to as such) is aimed at the discrimination which arises when a railroad charges more for hauling a shorter distance than for a like haul of a longer distance over the same route. In resolving this problem the Commission stated:

> While section 4 does not apply to the charges of motor common carriers, when such a carrier joins in a through route and joint rates with a railroad it becomes a participant with the railroad in a movement which is subject to that section. Motor common carriers are not required to join with rail carriers in such routes and rates but, having voluntarily entered into such a joint arrangement, the motor carrier assumes obligations similar to those of the participating rail

[32] Motor-Rail-Motor Traffic in East and Midwest, 219 I.C.C. 245 (1936).
[33] 24 Stat. 379 (1887), as amended, 49 U.S.C. § 1 (1958).
[34] 49 Stat. 558 (1935), as amended, 49 U.S.C. § 316(c) (1958).
[35] 24 Stat. 379 (1887), as amended, 49 U.S.C. § 2 (1958).
[36] 24 Stat. 380 (1887), as amended, 49 U.S.C. § 3 (1958).
[37] 49 Stat. 558 (1935), as amended, 49 U.S.C. § 316(d) (1958).
[38] 24 Stat. 380 (1887), as amended, 49 U.S.C. § 4 (1958).

> carrier in observance of the provisions of section 4. In the instances last described and which protestants claim would be in violation of section 4, it is apparent that the departures are due to the circuity of respondents' routes and the fact that the rates are made the same as the highway rates. We have frequently authorized relief to circuitous all-rail routes to meet the motor-competitive rates of direct rail routes from and to the same points. We are of the opinion that similar relief is justified here.[39]

However this decision may have satisfied the case at hand, like the *Substituted Freight Service* case, it certainly failed to promulgate any basic policy of the Commission's jurisdiction over joint rates, that is, whether Part I, II or a combination of both apply. It is difficult to ascertain what, if any, effect these basic unanswered questions have had on the development of Plan V (the joint rate as it is usually thought of).[40] The fact remains, however, that Plan V has not as yet been widely adopted.[41]

Closely associated with the problems of legislative duality are those which arise in connection with the certification of railroad owned motor carriers. Although all interstate carriers must obtain an ICC certificate of convenience and necessity in order to initiate or continue operations, Part II, section 206,[42] requiring such certification, does not distinguish railroad owned motor carriers from motor carriers generally. In seeking certification under this section, the railroads, which were already engaged in extensive motor carrier operations

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[39] Supra note 32, at 272.

There is some thinking that the section 4 problem is avoided since joint rates which exceed the aggregate of intermediate rates are prima facie unreasonable under Part II of the act. See Kingan & Co. v. Olson Transp. Co., 32 M.C.C. 10 (1942); Victory Granite Co. v. Central Truck Lines, Inc., 44 M.C.C. 320 (1945).

[40] By way of explanation, since a joint rate is a single factor rate, the compensation of each carrier is arrived at by dividing the rate between them. This is referred to in the act as a "division." Forgetting Commissioner Eastman's statement (see text accompanying note 27 supra) for just a moment, Part I, section 15(6), 24 Stat. 284 (1887), as amended, 49 U.S.C. § 15(6) (1958), should be compared with Part II, section 216(f), 49 Stat. 558 (1935), as amended, 49 U.S.C. § 316(f) (1958). Although space limitations prevent the full text from being set out here, a reading of the two sections will indicate the significant differences in the language employed therein. This author's extensive research into case law, legislative history, ICC studies and coordinator's work papers, has been unable to turn up any reason for this difference in language. It has been said that "no determination has been made as yet of how far the Commission may go in applying the 'standards' of part I to the issues which arise under part II." (Practices of Motor Carriers of Property in the Division of Revenue on Joint Hauls, Statement 451, p. 265.) This is an accurate summation of the presently existing dilemma.

[41] 74th Annual Report of the ICC 80 (1960).

[42] Supra note 28, and text following same.

when the Motor Carrier Act became law, have been met with policy considerations often working to their disadvantage. This is so because the ICC and the courts have come to the conclusion that Congress has expressed a strong policy against railroad incursions into the motor carrier field. A general expression of this policy is said to be found in the National Transportation Policy[43] which commands recognition and preservation of the inherent advantages of all modes of transportation. More particularly, the congressional attitude is said to be reflected in Part I, Section 5(2)(b) of the Interstate Commerce Act[44] which contains a proviso specifically applicable to railroad acquisitions of a motor carrier:

> . . . *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith . . . is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.[45]

The Commission has concluded that the National Transportation Policy requires that these section 5 standards be followed as a general rule in all other situations. Thus, these standards must be satisfied by the successful (railroad) applicant for a certificate of convenience and necessity under Part II, section 206.[46]

To reflect this policy of opposition to railroad incursions into the field of motor carrier service, the ICC has developed five conditions, which are written into certificates issued to railroad owned motor carriers. These are commonly referred to, in the collective sense, as the auxiliary or supplemental conditions, this general label being derived from the first condition. Very briefly, the conditions are as follows:

1. The character of the service is limited to that which is auxiliary to or supplemental of the rail service of the railroad. A good example is the substituted service discussed earlier.[47]

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[43] Preamble to Part I of the Interstate Commerce Act.

[44] 24 Stat. 380 (1887), as amended, 49 U.S.C. § 5(2)(b) (1958).

[45] Ibid.

[46] See Kansas City So. Transp. Co., Com. Car. Application, 10 M.C.C. 221 (1938); United States v. Rock Island Transit Co., 340 U.S. 419 (1951).

[47] For an excellent discussion of the reasons for the insertion of this condition, see Kansas City So. Transp. Co., supra note 46.

2. The authorized service is restricted to points that are stations on the rail lines of the railroad.

3. Transportation of shipments by motor vehicle between so-called key points is generally prohibited. These key points are named in the certificate itself and are occasionally subject to revision.

4. All contractual arrangements between the carrier and the railroad must be reported to the ICC and be subject to revision as found necessary, in order that such arrangements will be fair and equitable to the parties.[48]

5. The Commission generally reserves the right to make such further changes or modifications in the conditions of the certificate as may be necessary to insure that the motor carrier service is auxiliary to or supplemental of the rail service.

In order to be relieved from the imposition of any of the above conditions, the applicant has the burden of showing that the public interest will be promoted thereby.[49]

In the recently decided Docket No. 32533,[50] which dealt mainly with Plans III and IV, the ICC made the following observation with respect to other services:

> *Other services.* Several railroads . . . have performed for freight forwarders the loading and unloading of lading into and out of trailers moved in plan III and plan IV service. Several [other] railroads . . . have leased either directly or indirectly through subsidiaries trailers or flexi vans on a trip lease basis to shippers including freight forwarders and shipper associations. In addition, some railroads . . . either directly or indirectly through subsidiaries, perform the cartage of trailers between the shippers' places of business and the railroads' ramp locations. The railroads have found that the utilization of their trailers in plan III service through trip lease arrangements has had the effect of reducing their empty trailer miles, as it enables the "interweaving" of plan II and plan III trailer utilization. The reduction results principally because the railroads, including their subsidiaries, generally lease only their surplus trailers, and . . . only to

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[48] Ibid.

[49] See American Trucking Ass'n v. United States, 364 U.S. 1 (1960). For instances where conditions have been relieved upon a proper showing, see American Trucking Ass'n v. United States, 355 U.S. 141 (1957); H. C. Gabler, Inc. Extension-Cement from Mo. and Pa. Counties, I.C.C. Docket No. MC-27817 (Sub. 35), decided August 1, 1961.

[50] Eastern Cent. Motor Carriers Ass'n, Inc. v. Baltimore & O. R.R., I.C.C. Docket No. 32533, decided June 19, 1961.

> shippers desiring to make use of the trailers to destinations at which the [railroad] wants them.[51]

The Commission did not decide the legality of these proposed "additional services." Instead, it stated:

> While potential unjust discrimination, in certain circumstances, might be found the potentiality is inherent in the nature of the tariff publication, and may not rest alone on speculation. In other words, we cannot find that plans III and IV, openly published and available without collateral qualification to all shippers at the same location are unjustly discriminatory because the opportunity exists for the carriers, outside of the tariffs, to engage in criminal rebating.[52]

The major significance of the above decision is that the Commission did not specifically condemn the offering of the additional services.

In the prior case of *Black Diamond Transp. Co.*,[53] ICC Division 1 ruled upon a variation in a proposed Plan II service. It seems that the applicant trucking company was a wholly owned subsidiary of the Lehigh Valley Railroad (Lehigh). The trucking company sought motor carrier authority to move between various piggyback loading facilities in order to provide, in effect, for a central terminal loading facility for these trailers, instead of requiring the railroad to utilize various scattered terminals. The variation in the case consisted of the fact that the applicant agreed to the insertion of the above-noted conditions in its certificate since, as it claimed, all that was being offered was a substituted service over points in the line already served by the railroad. The American Trucking Association (ATA) objected, claiming that, even if the five conditions were imposed in the certificate, they would not afford sufficient protection to existing carriers. The ICC rejected this argument and concluded:

> Authority to provide such a service, as noted, allows a railroad to transport rail traffic by truck, and allows the public to enjoy the benefits of improved rail service through the use of trucks instead of trains as a means of fulfilling the railroad's undertaking to transport. There is no showing here that the piggyback service which the Lehigh wishes to institute would be a substitute for service that it is now providing. It is not rendering piggyback service at the considered

[51] Id. at 14-15.

[52] Id. at 57.

[53] Black Diamond Transp. Co. Extension—Wilkes Barre, Pa. Area, 84 M.C.C. 205 (1960).

> points nor is piggyback service something that a rail carrier is obligated to render. In addition, the Lehigh has not shown that it is transporting to these points traffic by rail of a type which would be susceptible to handling in piggyback service and which could be more economically and efficiently handled in that way than it is at present. The Lehigh's suggestion that operating economics could be effected through use of applicant's proposed service relates solely to a projected piggyback movement. Granted that if the Lehigh instituted piggyback service, it could do so more economically through use of a single, centrally located loading ramp than it could through the construction of loading facilities at each station, however, there is still no showing that through use of applicant's services existing rail service will be improved. We conclude that the application should be denied.[54]

It should be noted that here too the decision was in no way contrary to the theory of the proposed service.

The above discussion indicates only some of the problems which may arise in conjunction with a railroad's operation of its own motor carrier, along with piggyback service. The importance of understanding the reasons for and the limits of certificates of railroad owned motor carriers is simply that, as illustrated in Docket No. 32533, various railroads have proposed modifications to the five plans by utilizing their own motor carriers. Furthermore, as indicated by the Commission's holding in the *Black Diamond* case, it seems to be theoretically possible under Plan II for a railroad to perform a portion of the rail leg of a piggyback service by wholly owned motor carrier. If the dicta in the *Substituted Freight Service* case means that substituted motor for rail is really joint service, meaning joint rate,[55] and if the *Black Diamond* case had been decided favorably to the applicant, then the railroad would have been engaged in joint service with its wholly owned carrier, combined with the terminal area service. The situation might be even more involved in instances where a railroad's motor carrier is authorized, under section 206, to perform so-called "peddle service."[56]

Returning to the problem of joint rates as such, Part II, Section

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[54] Id. at 214-15.

[55] See Substituted Freight Service, 232 I.C.C. 683, 688 (1939).

[56] This is the phrase used to describe a truck run with more than one delivery en route. See American Trucking Ass'n v. United States, 355 U.S. 141 (1957).

216(c) of the Interstate Commerce Act[57] pertains specifically to rail-motor joint rates. This section provides in part:

> Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad . . . and common carriers of passenger by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad. . . .

This section should be compared with section 1(4) of Part I,[58] which provides as follows:

> It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares and charges, and classifications applicable thereto. . . . It shall be the duty of every common carrier establishing through routes to provide reasonable rules and regulations with respect to the operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Patent differences between the two are that the latter section applies only to carriers subject to Part I, but is mandatory, while the former section applies to both motor carriers and railroads, but is permissive. These distinctions were clearly illustrated in *Ringsby Truck Lines, Inc. v. Atchison, T. & S. F. Ry.*[59] In that case, a truck line sued a railroad alleging that the latter had violated section 1(4) by refusing to establish reasonable rates and charges, provide reasonable facilities and make reasonable rules and regulations for the transportation of loaded and empty semi-trailers. It was contemplated that the motor carrier would perform a portion of the trip over the road and arrange for the rail carrier to perform the remainder. The Commission stated:

> The arrangement desired to be maintained by complainant [motor carrier] is for a joint motor-carrier and rail-carrier service for shippers. There is, however, no provision

57 49 Stat. 558 (1935), as amended, 49 U.S.C. § 316(c) (1958).
58 24 Stat. 379 (1887), as amended, 49 U.S.C. § 1(4) (1958).
59 263 I.C.C. 139 (1954).

> in section 1 of part I of the act for establishment by rail carriers of joint rates with motor carriers; section 216 of part II authorizes common carriers by motor vehicle to enter into joint rates with common carriers by rail, but establishment of such rates is not a requirement of any provision of that part of the act.[60]

An important extension of this "permissiveness" took place in the case of *Movement of Highway Trailers by Rail*,[61] where the Commission was faced with the delicate problem of whether a railroad, engaged in TOFC service under joint rate arrangements with some motor common carriers, could refuse to establish such arrangements with other motor common carriers, equally eligible under the law to participate in such arrangements. Relying on section 216(c), the Commission answered in the affirmative and stated:

> While it [section 216(c)] provides that motor carriers may enter into such rates with rail . . . carriers, it does not require their establishment; and the provisions of section 3(4) of the act, prohibiting discrimination as between connecting carriers, has no application to carriers subject to part II of the act.[62]

Perhaps the most comprehensive handling of the legislative duality problem to date occurred in this same case of *Movement of Highway Trailers by Rail*. The Commission issued a declaratory order resolving twelve of twenty questions submitted for review. Of major significance was the affirmative finding that a railroad may transport its own freight (*i.e.*, freight tendered it by shippers for movement by rail, on railroad bills of lading, at railroad rates) in its own trailers on flatcars, subject only to Part I. The legal ramification of this finding is that TOFC service is not motor vehicle transportation, but strictly transportation by rail involving no motor carriage, line-haul movement. Thus, the transporting vehicle is the flatcar, a component part of the train; the trailer serves only as a container; and the way

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[60] Id. at 141.

[61] 293 I.C.C. 93 (1954).

[62] Id. at 105. Section 3(4) of the act, 24 Stat. 380 (1887), as amended, 49 U.S.C. § 3(4) (1958), is similar in scope and effect to section 1(4) and provides:

> All carriers subject to the provisions of this chapter shall . . . afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for receiving, forwarding, and delivery of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines in the distribution of traffic that is not specifically routed by the shipper.

being traversed is a private railroad right-of-way, not a public highway.[63]

A correlative problem dealt with in this case was the prior or subsequent highway movement incident to a piggyback or TOFC service. The question was asked whether a railroad, under provisions of tariffs duly filed and published, may transport freight-laden trailers on flatcars, without authority under Part II, when the trailers have had a prior or subsequent highway movement (a) by private carrier, or (b) by contract carrier. The Commission answered part (a) in the affirmative, but considered the situation somewhat different as far as contract carriers were concerned. It held that "a contract carrier may not utilize trailer-on-flatcar service to obtain transportation within the scope of its (the contract carrier's) permit."[64] The Commission reasoned that a contract carrier performs a service for its portion under a contract which contemplates the rendition of motor service. Thus, to substitute TOFC movement in lieu of over-the-road service would constitute a breach of this contract. The substitution of one medium of transportation for another also constitutes a breach of the bill of lading contract with the shipper unless the shipper is appraised of such optional substitution of service by an appropriate tariff provision. Furthermore, a contract carrier is under an additional disability in its relations with common carriers, since it may not engage in interchange with common carriers—interchange being appropriate only as between common carriers.[65] However, the Commission did recognize that there is a distinction between transportation within the territorial scope of the contract carrier's permit and that beyond the scope of said permit: ". . . a contract carrier may, as agent for the shipper, arrange for such transportation beyond the territorial limits of its permit."[66]

Some Statutory Risks Involved

With reference to the aforementioned variations of Plans III and IV, tendered by certain of the railroad parties to Docket No. 32533,[67] the ICC in that proceeding referred generally to the opportunity for rebating, and more specifically, to the Elkins Act.[68] Although a detailed discussion of the Elkins Act[69] is unnecessary here, it should be noted that it applies to:

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[63] Supra note 61, at 97-101.
[64] Id. at 104.
[65] Id. at 109.
[66] Id. at 104.
[67] Supra note 15.
[68] Supra note 50, at 57.
[69] 32 Stat. 847 (1903), as amended, 49 U.S.C. §§ 41-43 (1958).

> Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates . . . .[70]

It is also interesting to note how broadly the act has been construed by the courts. The following statement is illustrative of its construction:

> The purpose of the Interstate Commerce Act and the Elkins Act was to outlaw every subterfuge, plan, scheme, or device formulated by or participated in by any person or corporation to give rebates, concessions, advantages, and discriminations to shippers in respect to interstate transportation by carriers subject to the Elkins Act and the statutes were designed to strike down every device without exception no matter how ingenious or labyrinthian, by which these objections are sought to be accomplished. These statutes are intended to strike through all forms, pretenses, and subterfuges to reach and eradicate the forbidden evil.[71]

Several of the railroads in Docket No. 32533 offered Plan II and Plan III service. Also, as indicated,[72] some were (and are) tendering additional services to be performed by the railroad's motor carriers along with Plan III service. Some of the tendered service is very similar to that under Plan II, except that the trailers are leased to the shippers. Without pretending to exhaust any and all the various ramifications that might arise under Parts I and/or II of the Interstate Commerce Act—for example, the effect of the service on other modes of transportation under the mandate of the National Transportation Policy—as a rule of thumb, one should always check whether or not the tariffs reflect all the services offered, as provided in Sections 6(7)[73] and 217(b)[74] of the Interstate Commerce Act.

The following statements accurately reflect ICC thinking on sections 6(7) and 217(b), and disclose that they are liberally interpreted. The former section was discussed in *Baltimore & O. R.R. v. United States*, where the Court stated:

> It is immaterial that the shipper pays fair value or the market price for the extra privilege he enjoys. Section 6(7) of the Act forbids the carrier to receive less than the published rates

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[70] 32 Stat. 847 (1903), as amended, 49 U.S.C. § 41(1) (1958).
[71] United States v. Union Pac. R.R., 173 F. Supp. 397, 412 (S.D. Iowa 1959).
[72] Supra note 15.
[73] 24 Stat. 380 (1887), as amended, 49 U.S.C. § 6(7) (1958).
[74] 49 Stat. 560 (1939), as amended, 49 U.S.C. § 317(b) (1958).

> for transportation or to remit "by any device any portion of the rates." When services, not necessary for transportation, are furnished below cost in an effort to acquire rail transportation, as was done here, this provision is violated.[75]

Section 217(b) was clarified in *ICC v. North Pier Terminal Co.*[76] There the court stated:

> Sec. 217(a) requires a "[filing] with the Commission . . . [of] tariffs *showing all the rates . . . for . . . all services.*" True, it might be said the section comprehends *charges* by, instead of payments by, the carriers. So we go on to sec. 217(b) which provides that the carrier shall not receive a "less or different compensation for transportation . . . between the points enumerated in such tariff than the rates . . . specified in the tariffs . . . and no such carrier shall *refund or remit in any manner or by any device,* directly or indirectly, or through any agent, or broker, or otherwise, any portion of the rates . . . ." When Congress in the language just quoted went to such great lengths to cover all conceivable situations which a carrier's ingenuity in solving situations might devise, we can not construe such language to require the rebate or refund to be the one making the original payment—the shipper. Probably such rebate is usually in fact made to the shipper. Here it was not. If Congress had intended to limit proscribed rebates to shipper, it could easily have so stated. Instead, it seemed bent on travelling in the other direction—away from narrowing restricted or condemned rebates.[77]

Conclusion

The logical conclusion to the above analysis of these legal conflicts is that, although the approval of the five basic plans affords a solid legal foundation upon which the piggyback concept may build, any modification or variation in the existing and formally approved plans will almost certainly be accompanied by litigation. Some voices of protest have already been referred to, as has the fact that the ICC must, in the near future, come to grips with the additional services tendered by various railroads in Docket No. 32533. An awareness of the basic principles and legal conflicts discussed herein should result not only in a greater appreciation of the formidable obstacles which the Commission faces in resolving these conflicts, but also in a deeper understanding of the ultimate solution itself.

[75] 305 U.S. 507, 523-24 (1939).
[76] 164 F.2d 640 (7th Cir. 1947).
[77] Id. at 643. (Emphasis supplied by the court.)