Catholic University Law Review

Volume 18 | Issue 3 Article 8

1969

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The maritime shipping industry is undergoing a revolution. The coming of age of containerized ocean shipping is having a profound effect in the United States and throughout the world. Millions of dollars are being spent on building huge container vessels and installing new equipment in ocean ports in order to take advantage of this less expensive and more efficient method of shipping. The largest part of shipping expense stems from cargo handling, not the actual storage or transportation.[1] Since this is exactly the expense the container reduces, it is indeed a welcome technological advancement. But as with most technological advancements, the container has also created difficult problems. This article will concentrate on some of the most critical legal and practical problems the container presents to persons affected by United States international trade.

The container is a large rectangular box which rests on the chassis of a truck. The length usually approximates thirty-five feet and the width seven feet, with the height varying from four to eight feet. Usually, the container is sent empty to a shipper, loaded at his factory or warehouse, driven to the dock, lifted off the chassis onto the ship, sailed across the ocean, placed on a waiting truck chassis and delivered to the buyer. Another method of use is for a shipper to send his freight to a container consolidation terminal where other shippers have sent their freight. There, freight bound for the same destination is packed in a container, put on a truck and sent to the dock. A third method is for the shipper to send his freight to the dock where dock workers consolidate the container and ship it. These methods substantially lower transportation costs by eliminating much of the labor previously needed. It is in the attempts to take advantage of the potential lower costs that problems are encountered.

One of the main reasons for the development of containerization is the "door-to-door" concept in which a shipper is charged a single rate for the movement of his freight from its point of origin in the United States to its final destination in a foreign country, and vice versa. This intermodal movement involves both land and sea transportation charges above and beyond those previously affected by ocean carriers generally, and shipping conferences[2] in particular. This procedure raises several questions: (1) Can conference members quote tariffs containing inland rates without violating conference agreements? (2) Will the ocean carrier be able to quote a single rate for point-to-point service or will he have to quote a series of component rates regulated by different federal regulatory agencies, as is presently required? (3) Can

1. May, *The Status of Federal Maritime Commission Shipping Regulation Under Principles of International Law,* 54 GEO. L.J. 794, 851 n.216 (1966).

2. Most international ocean shipping arrangements are established by conferences. This entails carriers getting together and making arrangements to minimize or eliminate competition. Because of the many factors affecting international shipping, Section 15 of the Shipping Act of 1916, *as amended,* 46 U.S.C. § 814 (1964), exempted agreements approved by the FMC from antitrust provisions. For detailed discussion on conferences see Comment, *Ocean Shipping Conferences and the Federal Maritime Commission,* 53 CORNELL L. REV. 1070 (1968).

the United States regulate that part of the carriage which occurs within a foreign country?

With respect to the first question, the Federal Maritime Commission (FMC) has made a determination.[3] Container Marine Lines (CML) filed freight tariffs which included provision for port-to-port service plus inland transportation in the United Kingdom.[4] Many of the conferences of which CML is a member objected ,arguing that to the extent CML is engaged in providing transportation between the United States and foreign ports within the scope of conference agreements, it must charge the rates set forth in conference tariffs. Container Marine Lines maintained that its tariffs were not contradictory to those of the conference because they involved a service not covered by conference agreements. The Commission held that so long as CML charged rates for port-to-port service, it must charge the conference rates for that service. But as conference agreements now stand, they cover *only* rates from port to port, and CML's sea and land transportation service is outside the scope of these agreements. The Commission also said that conferences "cannot impede additional transportation service becoming available to shippers, whether offered by an outsider or one of their own members, especially when it involves an advancement in the state of the art."[5] The solution to the conference's problem is that it will have to redraft all its agreements to bring this activity within the scope of the conference. In this direction FMC said, "[w]e do not mean to imply that the conferences could not obtain our approval to extend their operations inland. In fact we assume that the conferences have the expertise to develop modern shipper services in the interest of improving transportation systems."[6]

The answer to the second question rests in proposed legislation. Under present law, there is no express authority for a carrier to quote a single point-to-point rate which includes inland transportation in the United States. The regulatory agencies will not accept tariffs filed by carriers which incorporate rates for modes of transportation not under their jurisdiction; absent express authorization, these agencies believe they have no right to accept such tariffs. An export shipper has to contact carriers in each mode of transportation to find out what his total cost will be. The present procedure of shipping goods is time consuming, costly and confusing. The estimated documentation cost of a typical export shipment today is $163.00.[7] This includes preparing a separate bill of lading for each mode of transportation used. Confusion arises from the different limits on liability and different methods of computing charges used by carriers. A process is needed by which one carrier can offer a shipper a simple rate covering all the elements of through transportation. This need has long been recognized, and while

3. Disposition of Container Marine Lines Through Intermodal Container Freight Tariffs Nos. 1 and 2, FMC Nos. 10 and 11, No. 68-8 (FMC, April 23, 1968) [Hereinafter cited FMC Disposition No. 68-8].

4. By quoting such a tariff they were able to offer a cheaper rate for the ocean portion than the conference had established.

5. FMC Disposition No. 68-8, *supra* note 3, at 8.

6. *Id.* at 18.

7. *Hearings on S. 3235 Before Senate Comm. on Commerce,* 90th Cong., 2d Sess., ser. 90-78, at 57 (1968) [hereinafter cited as *1968 Hearings*].

the regulatory agencies have tried to work out solutions, no real action was taken until March 27, 1968, when at the request of the Department of Transportation, Senator Magnuson introduced the Trade Simplification Bill of 1968.[8] Section 4 of the bill specifically provides that common carriers in different modes of transportation may enter into agreements among themselves to establish joint rates for the transportation of goods between the United States and foreign countries. Each carrier would file the joint-rate tariff with its respective agency, which would still have to approve the rate charged by one of its carriers. Once the rates have been approved, they would be given antitrust protection. During Senate hearings on the bill, it received the endorsement of the various regulatory agencies and departments of government affected by it.[9] The Department of Transportation report expressed the general feeling of the participants in the hearings by saying:

> The so-called "container revolution" was brought about by the development of new transportation technology and hardware, particularly the container and the equipment necessary to guarantee an efficient transfer of the container between different modes of transport. Nevertheless, the old transportation environment and indeed the old impediments to transportation still remain. This bill . . . is designed to eliminate those transportation impediments . . . so that the full opportunities which container technology offers can be exploited.[10]

The bill remained in committee until the end of the Ninetieth Congress. Legislation of this type—enabling the ocean shipper to quote a joint-rate tariff—is conspicuously necessary, and there is little doubt that some legislative action, whether on this bill or another, will be forthcoming in the near future. Legislation is a must if maximum cost savings from containerization is to be realized.

As to the third question of whether the United States can regulate freight carriers in foreign countries, the simple answer is no. Section 21 of the Shipping Act[11] authorizes the FMC to require ocean carriers subject to the act to furnish any "account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier . . . ." Its jurisdiction has been interpreted to include water carriers doing business with the United States and domiciled in a foreign country.[12] It is doubtful, however, that this jurisdiction could be extended to regulate inland carriers. Control of rates could be established through treaties of friendship, commerce and navigation, which are commonly executed between nations today.[13] Provision has been made in Section 9 of the Trade Simplification Bill for foreign carriers to participate in the joint rates even though they are not subject to regulation by American agencies.[14] With joint cooperation on the part of shipping conferences, regulatory

8. S. 3235, 90th Cong., 2d Sess. (1968).
9. *1968 Hearings, supra* note 7.
10. *Id.* at 26.
11. Shipping Act of 1916, § 21, *as amended,* 46 U.S.C. § 820 (1964).
12. FMC v. De Smedt, 366 F.2d 464 (2d Cir.), *cert. denied,* 385 U.S. 974 (1966).
13. May, *supra* note 1, at 844.
14. S. 3235, 90th Cong., 2d Sess. § 9 (1968).

agencies, Congress and foreign governments, the door-to-door concept can become a workable reality paving the way to maximum utilization of containers.

Port Equalization

The advent of containerization has caused a problem for many of the comparatively smaller United States ports. Shipowners no longer wish to have their vessels move up and down the coastline picking up freight along the way. The new container vessels are extremely expensive and costly to operate and the owners want to reduce the time ships spend waiting in a series of ports accumulating a load for an ocean voyage. As a result, rate equalization practices are becoming more pervasive throughout the industry, causing great concern to the affected ports. Equalization is the absorption by the carrier of the difference between the shippers' cost of delivery to his nearest port and the cost of delivery to a requested port. For example, carriers have shippers on the East Coast send their freight to New York rather than to ports which would have been the shippers' normal ports, thus causing loss in business to these ports.

To counter such action by the carriers, complaints were filed with the FMC by the Massachusetts Port Authority[15] and the Delaware River Port Authority,[16] charging discrimination in violation of Section 16 of the Shipping Act.[17] The complaints were a reaction to equalization procedures set out in new tariffs filed by several conferences. Section 16 provides in part that "[i]t shall be unlawful for any common carrier by water . . . [t]o make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."[18] After the filing of the complaints, the conferences withdrew the objectionable tariffs.[19]

Had litigation arisen on the issue at this time, however, the outcome may not have been certain. In *Pacific Far East Line, Inc. v. United States*,[20] it was held that an equalization rate would be discriminatory in violation of Section 16 if it was used to eliminate a port where adequate service is available. The conferences could have successfully argued that adequate facilities are not available at the Massachusetts and Delaware ports, but this will not be true in the near future. The fact remains, however, that even if adequate facilities are available at all ports it will still be uneconomical for these huge container ships to stop at various ports and pick up cargo.

In *Sea-Land Services, Inc. v. Atlantic & Caribbean Line, Inc.*,[21] the defendant ran a container service and argued for port equalization because of the economics (he was losing money by failing to equalize) and lost. He was calling at Jacksonville and

15. Massachusetts Port Auth. v. Container Marine Lines, No. 68-45 (FMC, Nov. 21, 1968).
16. Delaware River Port Auth. v. Container Marine Lines, No. 68-46 (FMC, Nov. 25, 1968).
17. Shipping Act of 1916, § 16, *as amended*, 46 U.S.C. § 815 (1964).
18. *Ibid.*
19. Behind-the-scenes negotiating was in process at the time of this writing.
20. 246 F.2d 711 (D.C. Cir. 1957).
21. 9 F.M.C. 338 (1966).

Miami, Florida and then sailing on to Puerto Rico. He discontinued his service to Jacksonville and absorbed the cost of the shippers' sending their freight to Miami. The FMC held:

> [The defendant diverted] from the port of Jacksonville traffic which is naturally tributary to Jacksonville and not tributary to the port of Miami, and which would normally flow through the port of Jacksonville. The diversion of this traffic is not justified by inadequacy of direct-call service at the port of Jacksonville . . . . Thus, the diversion of traffic unduly prefers the port of Miami and is unjustly prejudicial to the port of Jacksonville, in violation of section sixteen First of the Shipping Act, 1916.[22]

This language would seem to be a major stumbling block to the case of carriers when the various ports have adequate facilities, but with the huge investment carriers have in containerization today, the economics of the situation will inevitably yield a flexible rule. Language similar to that used in cases to justify equalization will probably be employed, to the effect that "the public interest is much larger than the needs or desires in [a single port] area. The equalization under consideration here reflects an *overall economic* good, tangible benefit to the public at large, and an important transportation justification."[23] (Emphasis added.) The smaller ports may be used to handle the overflow from the larger, more accessible ports; to serve smaller container ships as feeders to the main ports; and to handle the non-container traffic. It seems inevitable, however, that the spiralling success of the container will lead to the complete failure and closing of some ports. As is often the case, progress is unkind.

Longshoremen and the Container

Just as the need for smaller ports is being eliminated, so is the need for longshoremen. The main issue in the recent International Longshoreman Association (ILA) strike was containerization. As noted earlier, great savings are achieved by reducing the number of times cargo is handled. This reduction in handling threatens the jobs of longshoremen. The conventional method of getting cargo on board a ship has been for the shipper to send his freight to the port terminal where it was unloaded; then, when the carrier was ready, the goods were moved to the pier, loaded, and secured on the ship in a safe manner to prevent damage during the voyage. All of this activity took time and men, but with the use of containers and container consolidation stations located outside port terminals, much of the ILA time and labor is eliminated. The big advantage of the consolidation stations is that non-ILA labor, which is considerably cheaper, is used. It is important for the union to build up man-hours worked because employer contributions to welfare, sick, pension and vacation plans are based on man-hours.

The three-year contract agreement reached in the Port of New York has a container

22. *Id.* at 347.

23. Stockton Port Dist. v. Pacific Westbound Conf., 9 F.M.C. 12, 28 (1965). Equalization was allowed because the goods were found to be tributary to more than one port.

clause which is a model for all other ports, and goes a long way towards solving this problem. It provides that ILA labor shall have the right to strip and reload all containers of shipments generated within fifty miles of a port and consolidated by non-ILA labor.[24] The union here has attempted to solve the problem by featherbedding of a type allowed by the Taft-Hartley Act, which provides: "[i]t shall be an unfair labor practice for a labor organization or its agents . . . to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed."[25] This provision has been narrowly construed by the courts. If the work is actually done, there can be no conflict with the statute, regardless of whether the employer wants or needs the work, and regardless of how unrelated the work result may be to the employer's business.[26]

This container clause is satisfactory for New York but not for most of the smaller ports. Ports such as New York, which are large, centrally located and easily accessible, are going to have all the work for longshoremen that they can handle. Ports which do not have the physical advantage of places like New York would like to retain some economic advantage to entice container carriers to call on them. These ports would prefer a five or ten mile limit reflected in the container clause to enable them to take advantage of the cheaper labor to lower carrier costs. Such an agreement, or one containing lower wages, lower guaranteed annual hours or lower employer contributions to employee benefit plans, probably would be acceptable to the ports. But the ILA locals were holding out for agreements like the one reached in New York. Even when a settlement was reached with a particular local, it refused to ratify the settlement and resume work until all locals had settled. This unified position had overtones of an unfair labor practice (failure to bargain in good faith) and was not maintained.[27] Various locals returned to work, the settlements varying as to guaranteed hours, salary and employer contributions to benefit plans; but most contained the fifty mile container limit. The fact that the government could have ordered resumption of work if the strike appeared to be detrimental to national interests[28] was no doubt also in the minds of labor negotiators. No matter what type of settlements were ultimately made, the negotiating will begin again in three years with containerization even more firmly entrenched.[29] ILA president Thomas Gleason has taken a tough position and will have

24. Journal of Commerce, January 29, 1969, at 1, col. 1.

25. Labor Management Relations Act of 1947, § 8(b)(6), 29 U.S.C. § 158(b)(6) (1964).

26. American Newspaper Publishers Ass'n v. NLRB, 345 U.S. 100 (1953); *accord,* NLRB v. Gamble Enterprises, Inc., 345 U.S. 117 (1953).

27. To the extent that it is an unfair labor practice to require all ports to settle before any work is resumed at any port *see* International Longshoremen's Ass'n v. NLRB, 277 F.2d 681 (D.C. Cir. 1960); Douds v. International Longshoremen's Ass'n, 241 F.2d 278 (2d Cir. 1957).

28. *See* United States v. International Longshoremen's Ass'n, 246 F. Supp. 849 (S.D.N.Y. 1964).

29. By 1970, 80 to 85 percent of the cargo will be moving in intermodal containers. *Hearings on S. 3235, supra* note 7, at 26.

to continue to do so in the future to preserve the jobs and incomes of the union membership.[30]

The necessary adjustments in the present methods of international trade operation will be made to accommodate this new system. It is unfortunate that the loss of jobs and property is the price often paid for progress. But the gain in the form of cheaper, safer and faster transportation of goods more than offsets these losses, and demands the use of containers in the future.

30. "Port labor is determined not to be boxed in by the container . . . . The ILA . . . intends to see to it that, containers or no containers, the traditional work of the dock worker shall not be taken from him. And, furthermore, that he will have employment in all new work categories which substitute for his traditional functions." Address by Thomas Gleason, Baltimore Symposium on International Shipping, 1968, in CONTAINER NEWS, Dec. 1968, at 14.

United Medical Laboratories and Public Concern: A Judicial Mandate for Unlimited Extension of the Actual Malice Standard

Five years ago in *New York Times Co. v. Sullivan*[1] the Supreme Court determined the extent to which the first amendment limits a state's power to award damages in a libel action brought by a public official against critics of his official conduct. The Court held that public officials can recover only if "the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[2]

The decision brought praise from civil libertarians, while skeptics cautioned that the holding would bring chaos and unpredictability to common law libel standards. One constitutional expert, Professor Harry Kalven, reasoned: "[The Court] may regard the [*New York Times*] opinion as covering simply one pocket of cases, those dealing with libel of public officials, and not destructive of the earlier notions that are inconsistent only with the larger reading of the Court's action. But the invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art, seems to me to be overwhelming."[3] Professor

1. 376 U.S. 254 (1964).
2. *Id.* at 279-80.
3. Kalven, *The New York Times Case: A Note On "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 221. Even if the "invitation to follow a dialectic progression" from "public official" to related areas was not followed, the extent of the "public official" class was shown to be practically unlimited in Rosenblatt v. Baer, 383 U.S. 75 (1966). There the Court felt the status of public official would apply even to a ski lodge superintendent employed by the state.