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CARRIERS

INTERSTATE COMMERCE: RECENT APPLICATIONS OF THE "GRANDFATHER CLAUSE" OF THE FEDERAL MOTOR CARRIER ACT

Under the Federal Motor Carrier Act of 1935,¹ to engage in interstate motor transportation, common carriers² must obtain from the Interstate Commerce Commission a certificate of public convenience and necessity, and contract carriers³ a permit. The "Grandfather Clause" of the Act provides in general that a carrier, or its predecessor in interest, "in bona fide operation"⁴ as a common carrier by motor vehicle on June 1, 1935.⁵ or as a

¹49 STAT. 543-567 (1935), Interstate Commerce Act, Part II, §§ 201-228, 49 U. S. C. §§ 301-327 (1940). The Act, passed August 9, 1935, as amended by the Transportation Act of 1940 [54 STAT. 919-929 (1940)], applies "to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation." *Id.* at § 202, § 302.

All of the provisions of the Act are to be administered and enforced with a view to carrying out the National Transportation Policy declared therein: "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." 49 U. S. C. notes preceding §§ 1, 301, 901, and 1001 (1940).

For the practical background and legislative history of the Act, see George, *The Federal Motor Carrier Act of 1935* (1936) 21 CORNELL L. Q. 249. See also George, *Authorization of Contract Motor Carriers by the Interstate Commerce Commission* (1941) 26 CORNELL L. Q. 621; George and Boldt, *Certification of Motor Common Carriers by the Interstate Commerce Commission* (1941) 17 JOURNAL OF LAND AND PUBLIC UTILITY ECONOMICS 82. See Note (1943) 43 COL. L. REV. 207.

²"The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to chapter 1 of this title. . . ." *Id.* at § 203(a) (14), § 303(a) (14).

³"The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation." *Id.* at § 203(a) (15), § 303(a) (15). "The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle." *Id.* at § 203(a) (16), § 303(a) (16). See Wagner, *Common, Contract and Private Motor Carriers Defined and Distinguished* (1941) 9 I. C. C. PRACT. J. 119, 124, 131.

⁴"Bona fide operation" requires:

(1) That there be actual operation and not only an ability to serve coupled with a holding out. *Loving v. United States*, 32 F. Supp. 464 (D. C. W. D. Okla. 1940), *aff'd with-*

contract carrier on July 1, 1935,⁶ "over the route or routes or within the territory for which the application is made" and which has so operated since that time, except "as to interruptions of service over which the applicant or its predecessor in interest had no control,"⁷ shall be entitled as of right to a certificate or permit.⁸

Chief among the problems arising in connection with recent applications of the "Grandfather Clause" have been:

(1) Does the "Grandfather Clause" recognize multiple rights to certificates or permits based on a single integrated transportation service, or on dual operations by one or more carriers on and after the statutory dates?

(2) Is an interruption of service caused by insolvency excusable as an interruption over which the carrier has no control?

(3) What limitations may the Commission properly impose upon the scope of authorization in the certificate or permit as to routes or territory covered, classes of commodities carried, or classes of shippers served?

I

On the question of multiple rights, the general approach of the Interstate Commerce Commission has been to treat alike both the common carrier and the contract carrier. Perhaps this has been accentuated by the fact that applicants usually request either a certificate or a permit in the alternative.

out opinion, 310 U. S. 609, 60 Sup. Ct. 898 (1940). "Actual and substantial, rather than potential service, is essential under the law." The fact that the carrier entered into a written contract on the statutory date to carry, but did not begin actual transportation thereunder until eight months later did not satisfy the requirement of "bona fide operation." *Noble v. United States*, 45 F. Supp. 793, 800 (D. C. D. Minn. 1942).

(2) That the operation be in good faith. *Compare McDonald v. Thompson*, 305 U. S. 263, 59 Sup. Ct. 176 (1938) (operation on public highways in defiance of state law is not bona fide) *with Alton Railroad Co. v. United States*, 315 U. S. 15, 24, 62 Sup. Ct. 432, 437-438 (1942) (operation may be in good faith though to some extent state laws be violated, provided it is not predominantly evasive). Unnecessary deviation through an adjoining state for the purpose of evading regulation by the state in which both termini were located was held not to be bona fide interstate motor carriage. *Eastern Carrier Corporation v. United States*, 31 F. Supp. 232, 235-237 (D. C. M. D. Pa. 1939). *See also Eichholz v. Public Service Commission of Missouri*, 306 U. S. 268, 59 Sup. Ct. 532 (1939).

⁵Interstate Commerce Act § 206(a), 49 U. S. C. § 306(a) (1940).

⁶*Id.* at § 209(a), § 309(a).

⁷Notes 4 and 5 *supra*. If engaged in furnishing seasonal service only, the applicant must have been "in bona fide operation on" June 1, or July 1, 1935, respectively, "during the season ordinarily covered by its operations" and have "so operated since that time. . . ." *Ibid.* *See United States v. Maher*, 307 U. S. 148, 59 Sup. Ct. 768 (1939), holding that where bona fide irregular route operations were discontinued after the statutory date and a regular route substituted, the requisite continuity of service was broken and the application for a "grandfather" certificate was properly rejected by the Commission. *See part II infra*.

⁸A common carrier seeking a certificate of public convenience and necessity on the basis of "grandfather" status thus need not show that "public convenience and necessity" will be served by its operations. Similarly, a contract carrier with "grandfather" rights is entitled to a permit without having to prove that the proposed operation will be "consistent with the public interest and the national transportation policy." Pending the determination of applications, operations may be lawfully continued. Interstate Commerce

The problem of multiple rights has arisen in three types of carrier operations: (a) Dual operations by a single carrier; (b) Integrated service or dual operations by affiliated carriers; and (c) Integrated service or dual operations by unaffiliated carriers.

(a) The Act expressly provided against the grant of both a common carrier certificate and a contract carrier permit to the same carrier "for the transportation of property by motor vehicle over the same route or within the same territory, unless for good cause shown the Commission shall find that such certificate and permit may be held consistently with the public interest and with the policy declared" in the Act.⁹

(b) This qualified prohibition was extended by the Transportation Act of 1940¹⁰ to cover dual operations by affiliated motor carriers, that is, by carriers between whom there is an interrelation of control arising from the scheme of business organization. The amendment was upheld in *Ziffrin, Inc. v. United States*,¹¹ sustaining the Commission's¹² denial of a certificate or permit under the "Grandfather Clause" to an applicant on the ground that it was owned, controlled, and managed in a common interest with another trucking concern to which a common carrier certificate had previously been granted.

(c) The amendment also covered dual operations by unaffiliated carriers where there was inter-control arising otherwise than by the scheme of business organization, as, for example, by contract or lease.

Frequently, two or more unaffiliated carriers cooperate in furnishing an integrated transportation service. This may take the form either of a simple freight-forwarding service¹³ or of actual participation in the movement of the goods.

A freight-forwarder, unless it owns or completely controls the motor vehicle, has been held not to be a motor carrier within the definition of the fed-

Act §§ 206(a) and (b), 207(a), 49 U. S. C. §§ 306(a) and (b), 307(a) (1940).

A similar "grandfather clause" in a state motor carrier act was sustained under the Fourteenth Amendment in *Stanley v. Public Utilities Commission*, 295 U. S. 76, 55 Sup. Ct. 628 (1935). Cf. *Mayflower Farms v. Ten Eyck*, 297 U. S. 266, 56 Sup. Ct. 457 (1936) (minimum price preference to milk-dealers in business on certain date held a denial of equal protection of the laws to new dealers).

⁹49 STAT. 554, c. 498 (1935), now Interstate Commerce Act § 210, 49 U. S. C. § 310 (1940). A motor carrier may operate as both a common and contract carrier pending the Commission's determination of applications for both a certificate and a permit. *Thomas v. National Delivery Ass'n, Inc.*, 24 F. Supp. 171 (D. C. W. D. Pa. 1937).

¹⁰54 STAT. 919, 923, c. 722, tit. I, §§ 16, 21(a) (1940), now Interstate Commerce Act § 210, 49 U. S. C. § 310 (1940). The amendment covers dual operations where the applicant controls, is controlled by, or is under common control with, a carrier who already has a certificate or permit covering the same route or territory.

¹¹U. S. —, 63 Sup. Ct. 465 (1943).

¹²*Ziffrin, Inc.*, 28 M. C. C. 683 (1941).

¹³For a definition of "freight forwarder," see Interstate Commerce Act [Part IV, Freight Forwarders Act] § 402(5), 49 U. S. C. A. § 1002(5) (Supp. 1942).

A forwarding agent, of course, is not a common carrier, but a freight forwarder who assumes the responsibility for the entire transportation from the point of receipt to destination is a common carrier although he employs other common carriers as such for the actual carriage of the goods. *Kettenhoffen v. Glove Transfer & Storage Co.*, 70 Wash. 645, 127 Pac. 295 (1912).

eral¹⁴ or similar state¹⁵ statutes, because it is not engaged in actual transportation over the highways.

The problem of multiple rights under the "Grandfather Clause," where two or more unaffiliated carriers were cooperating in rendering an integrated service on the statutory dates, has been more difficult.

In *United States v. N. E. Rosenblum Lines, Inc.*,¹⁶ the Supreme Court affirmed the denial of an application for either a contract permit or a common carrier certificate under the "Grandfather Clause," where the applicants were helping common carriers move their overflow freight on and after the statutory dates.

The applicants claimed that by carrying for motor carriers on and after the statutory dates, they were entitled to either contract carrier or common carrier¹⁷ "grandfather" rights. The Commission¹⁸ found that the applicants performed principally for one common carrier, to whom the applicants' drivers had to be acceptable, receiving a lump sum for each trip; that the applicants insured their equipment while the employing common carrier carried insurance for the protection of the general and shipping public; and that the common carrier fixed the routes generally to be followed, required the drivers to "sign in" at registration stations along the route, and directed their departure and time of arrival. Concluding that the applicants operated solely under the direction and control of the common carriers and under the latter's responsibility to the general and shipping public, the Commission held that the applicants did "not qualify as carriers by motor vehicle within the meaning of the act" and consequently were not entitled to a certificate or permit under the "Grandfather Clause."¹⁹

The statutory three-judge District Court,²⁰ found that the applicants had paid the vehicle license fees and reimbursed the common carriers for the premiums of the public liability and cargo insurance, as well as having assumed all responsibility for damage in excess of a certain sum; that the applicants were free to take any route they chose between designated points subject to the "signing in" requirement; that they hired, paid, and discharged the drivers of the trucks; and that often freight of more than one common carrier was on the same truck. The court accordingly set aside the order on

¹⁴*Acme Fast Freight, Inc., v. United States*, 30 F. Supp. 968 (D. C. S. D. N. Y. 1940), *aff'd without opinion*, 309 U. S. 638, 60 Sup. Ct. 810 (1940). This was followed in *United States v. Chicago Heights Trucking Co.*, 310 U. S. 344, 60 Sup. Ct. 931 (1940), holding motor freight forwarders not to be connecting carriers but shippers. Therefore, a division of rates by line haul motor carriers constituted unlawful discrimination against other shippers. To the same effect as *Acme* case, *Kline v. United States*, 41 F. Supp. 577 (D. C. D. Neb. 1941). See *Calvin v. United States*, *infra* note 25.

¹⁵*E.g.*, *Allied Van Lines, Inc., v. Maltbie*, 265 App. Div. 979, 38 N. Y. S. (2d) 617 (3d Dep't 1942).

¹⁶315 U. S. 50, 62 Sup. Ct. 445 (1942). The same opinion also disposed of *United States v. Margolies*, and, except for a "jurisdictional fact" issue, *Lubetich v. United States*, 315 U. S. 57, 62 Sup. Ct. 449 (1942).

¹⁷At common law, one employed by a common carrier did not thereby cease to be a common carrier. *Hinchliffe v. Wenig Teaming Co.*, 274 Ill. 417, 113 N. E. 707 (1916).

¹⁸*N. E. Rosenblum Truck Lines, Inc.*, 24 M. C. C. 121 (1940).

¹⁹*Id.* at 126.

²⁰36 F. Supp. 467 (D. C. E. D. Mo. 1941).

the ground that the applicants had retained sufficient control of equipment, drivers, and operations to give them the status of a contract carrier in bona fide operation, thus entitling them to "grandfather" rights under the Act.

On direct appeal, the Supreme Court²¹ sustained the Commission's order, and held that whether the applicants had operated solely under the control of the common carriers was not determinative. Congress did not intend to grant multiple "grandfather" rights on the basis of a single transportation service, and, since presumably the employing common carriers were entitled to *common carrier* "grandfather" rights over the entire line, "automatically to grant *contract carrier* rights to such operators as appellants who performed part of that service under agreement might result in such a wholesale distribution of permits as would defeat the very purpose of federal regulation."²² The Commission was found to have determined correctly that the applicants were not common or contract carriers within the Act on the statutory dates. The Court added that as to the transportation involved, the applicants were neither entitled nor required to obtain the authorization of the Commission.²³

Two questions suggested by the *Rosenblum* case are: (1) Must a motor carrier deal directly with the shipper in order to gain the benefit of "grandfather" rights? (2) What effect has the control of one carrier by another upon the "grandfather" rights of the controlled carrier?

There is nothing in the Act which indicates that a carrier, to be entitled to "grandfather" rights, must deal directly with the shipper. On the contrary, a carrier who deals with a shipper through a broker can thereby acquire "grandfather" rights;²⁴ this, indeed, was recognized by the Court.²⁵ The *Rosenblum* case holds that when the intermediary between the sub-carrier and the shipper is an employing common or contract carrier, then only the hiring carrier, which deals with the shipper, enjoys "grandfather" rights. In other words, since multiple rights are denied, only one of the carriers

²¹315 U. S. 50, 62 Sup. Ct. 445 (1942). Noted in (1942) 41 MICH. L. REV. 162.

²²315 U. S. 50, 54, 62 Sup. Ct. 445, 448 (1942) (Italics added).

Even if the operations of the applicant had been found to be those of either a common or a contract carrier, it would seem that it could not have earned "grandfather" rights from its operations as a sub-carrier. To do so would involve the recognition of multiple rights. "The result would be to create in this case two services offering transportation to the public when there had been only one on the 'grandfather' date, without allowing the Commission to determine if the additional service was in the public interest." *Ibid.*

For like reasons it has been held under state acts that "grandfather" rights accrue to a partnership rather than to the individual partners. *Westhoven v. Public Utility Comm.*, 112 Ohio St. 411, 147 N. E. 759 (1925); *Re Northern Maine Transportation Co.*, 2 P. U. R. (N. S.) 95, 110 (1933).

²³*Id.* at 56, 62 Sup. Ct. at 449 (1942).

²⁴Section 211(a) of the Interstate Commerce Act [49 U. S. C. § 311(a) (1940)] requires that brokers [those who sell or offer for sale any transportation] be licensed and that the carriers they employ have either a certificate or a permit. See Ruling No. 2, I. C. C. Bureau of Motor Carriers, August 19, 1936 [C. C. H. Fed. Carrier Service ¶ 141.01], holding that broker applying for "grandfather" brokerage rights may represent carrier applying for "grandfather" carrier rights.

²⁵315 U. S. 50, 56-57, 62 Sup. Ct. 445, 449 (1942). The statement in Note (1942) 41 MICH. L. REV. 162, 163, that "the Supreme Court based its decision on whether the applicant had made the contracts with the individual shippers" is incorrect.

engaged in rendering an integrated service can enjoy "grandfather" status, and that one must be the carrier who was the entrepreneur responsible for the particular transportation, or, in the words of the Court, "who offered the complete transportation service to the general public and the shipper."²⁶

The fact of control becomes an issue in the application of the "Grandfather Clause," even where there is no formal control such as between affiliated carriers, because that clause is expressly made subject to Section 210 of the Act, which, as previously pointed out,²⁷ prohibits the granting, except in the public interest, of both a certificate and permit to carriers one of which controls the other or both of which operate under a common control.

On the other hand, however, the element of control may extend to the means and instrumentalities of transportation rather than to the person furnishing them. Where a carrier, for example, gives up control of its employees and equipment to another carrier who deals with the shipper, the holdings are uniform that it thereby ceases, as to this transportation, to be a motor carrier within the Act.²⁸

The elements relevant to the determination of an application for "grandfather" rights have been enumerated as: (1) the bona fides of operation; (2) the regularity and extent of operations; (3) the equipment in use, whether owned or leased; (4) the applicant's control, or lack thereof, with respect to operations and equipment; (5) the relation existing between the applicant and the actual operator; (6) the lawfulness of operations in the different states; and (7) the applicant's responsibility to the public and to the shipper.²⁹

²⁶*Id.* at 54, 62 Sup. Ct. at 448 (1942).

²⁷See *supra* p. 348.

²⁸In *O'Malley v. United States*, 38 F. Supp. 1 (D. C. D. Minn. 1941), the applicant hired equipment from motor contract carriers who employed their drivers and operated their trucks in their own names, procured their own licenses, and maintained their own property damage and liability insurance. Although the applicant contracted with shippers directly, his application for a contract permit was refused on the ground that he exercised no direction or control over the motor vehicles which did the carrying.

In *Calvin v. United States*, 44 F. Supp. 684 (D. C. E. D. Mo. 1942), the equipment of the applicant was operated in a forwarding company's business under the latter's direction and control and in its name. The forwarding company issued the bills of lading and paid for the insurance. The applicant sought to distinguish the *Rosenblum* case, arguing that since it and not the forwarding company owned the equipment, it and not the forwarding company was the motor carrier directly serving the public. The District Court held that a motor carrier need not own the equipment used in its operations and sustained the Commission's denial [28 M. C. C. 755 (1941)] of the application for a contract permit under the "Grandfather Clause." As to this point the Act [Interstate Commerce Act § 203(19), 49 U. S. C. § 303(19) (1940)] is declaratory of the common-law doctrine of the *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542 (1885).

In *Smythe, Contract Carrier Application*, 22 M. C. C. 726 (1940), the applicant leased his equipment of one truck and trailer to a company of which he was president. This company had exclusive control and supervision of the equipment. All operations were in its name. A permit was refused.

A converse situation sometimes arises. In *Interstate Commerce Commission v. Steffke*, 36 F. Supp. 257 (D. C. D. Minn. 1940), a carrier was fined for trying to avoid coming under the Act by leasing its equipment while retaining control of the transportation operations. The court said at 259: "If a carrier leases his vehicles to another carrier or to a shipper he should do so under such terms and conditions as will make the operations conducted by such vehicles the operations of such other carrier or shipper; otherwise the operations will be his."

²⁹*Moore v. United States*, 41 F. Supp. 786, 791 (D. C. D. Minn. 1941), *aff'd without opinion*, 316 U. S. 642, 62 Sup. Ct. 1036 (1942).

II

The Act requires continuous operation from the statutory dates to the time of hearing, except where the carrier "had no control" over the interruptions of service.³⁰ Is an interruption caused by insolvency within this exception?

In *Gregg Cartage & Storage Co. v. United States*,³¹ the applicant's predecessor, having become unable to meet its obligations because of huge tort liabilities thrown upon it by the bankruptcy of its insurance company, secured the appointment, in a state court, of a friendly receiver with authority to continue the business. Thereupon, creditors forced an involuntary bankruptcy under the Federal Act³² bringing operations to a halt. The Commission³³ held that the interruption of service because of bankruptcy as a matter of law was not one over which the carrier "had no control." The Supreme Court, three justices dissenting,³⁴ sustained the Commission's order, and held that the Commission did not have to go behind the bankruptcy adjudication to search for ultimate causes, since even involuntary bankruptcy results from an "act of bankruptcy,"³⁵ which is by definition within the bankrupt's control. Correctly characterizing the decision as creating "an irrebuttable presumption" of control over bankruptcy, the minority contended that the question of control was an issue of fact, and pointed out that the Commission had so regarded it when excusing interruptions of service resulting from floods,³⁶ snow,³⁷ unsafe³⁸ or impassable³⁹ roads, highway construction,⁴⁰ droughts which destroy a carrier's chief source of business,⁴¹ ill health,⁴² strikes,⁴³ and illegal action of governmental authorities.⁴⁴ It is unfortunate that this conclusive presumption of the bankrupt's control over his bankruptcy has been thus extended into the transportation field, for it is fundamentally the same theory which was the basis of the much-criticized decision in *Central Trust Co. v. Chicago Auditorium Association*,⁴⁵ holding bankruptcy to be an anticipatory breach of contract.⁴⁶ There was no need in either case for the Court to resort to what is essentially a legal fiction.⁴⁷

³⁰Notes 4 and 5 *supra*. See note 7 *supra*.

³¹1316 U. S. 74, 62 Sup. Ct. 932 (1942).

³²11 U. S. C. §§ 1 *et seq.* (1940).

³³10 M. C. C. 255 (1938); 21 M. C. C. 17 (1939).

³⁴Douglas, Black, and Byrnes, JJ.

³⁵11 U. S. C. § 21(a) (1940).

³⁶Waltz Transportation, Inc., 10 M. C. C. 30, 33 (1938).

³⁷Lewis McKay, 4 M. C. C. 93, 94 (1938).

³⁸Edwards Motor Transit Co., Inc., 2 M. C. C. 73, 74 (1937).

³⁹Inter-Carolinas Motor Bus Co., 21 M. C. C. 633, 635 (1940); Walter Stages, Inc., 24 M. C. C. 451, 454 (1940).

⁴⁰Magee Truck Lines, Inc., 28 M. C. C. 386, 389 (1941).

⁴¹Barnes Truck Co., Inc., 24 M. C. C. 465, 467 (1940).

⁴²H. Bruce Blackburn, 20 M. C. C. 747, 748, 749 (1939).

⁴³Motor Freight Express, 26 M. C. C. 374, 375 (1940); Transamerican Freight Lines, Inc., 28 M. C. C. 493, 502 (1941).

⁴⁴W. H. Tompkins Co., 29 M. C. C. 359, 362 (1941).

⁴⁵240 U. S. 581, 36 Sup. Ct. 412 (1916). *Contra*: RESTATEMENT, CONTRACTS (1932) § 324.

⁴⁶Criticized in 5 WILLISTON, CONTRACTS (Williston & Thompson, rev. ed., 1937) § 1327.

⁴⁷Treiman, *Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law* (1938) 52 HARV. L. REV. 189.

The majority concluded by adding that even if the causes of the bankruptcy were examined, the result would have been the same since both the insurer, whose failure caused the bankruptcy, and the servants and operators, who incurred the tort liability, were selected by the applicant's predecessor. The dissent found "not the slightest evidence . . . of any negligence, dereliction, or mismanagement on the part of the applicant,"⁴⁸ for, as it emphasized, the Commission's approval of the insurance policy indicated due care in the selection of the insurer.⁴⁹

III

The "Grandfather Clause" of the Motor Carrier Act is a saving clause designed "to assure those to whom Congress had extended its benefits a 'substantial parity between future operations and prior bona fide operations.'"⁵⁰ In short, Congress recognized the desirability, from the point of view of both shippers and carriers, of preserving existing satisfactory motor transportation service.⁵¹ To guard against the abuse of pre-emption by speculators, the Act expressly required the Commission to delimit in the certificate⁵² or permit⁵³ the scope of the service authorized. Under this comprehensive power, the Commission must place geographical restrictions upon the routes or territory to be covered, and economic limitations upon the classes of commodities to be carried and the classes of shippers to be served. In defining these factors, the Commission must recognize and preserve the carrier's functions within the "grandfather" period and still adhere to the proviso in the Act forbidding it to restrict the "right of the [contract] carrier to substitute or add contracts within the scope of the permit,"⁵⁴ and of either common or contract carrier "to add to his or its equipment and facilities" on the routes fixed or in the territory designated so far "as the development of the business and the demands of the public may require."⁵⁵

By directing the Commission to specify the routes or territory to be served, the Act recognizes the geographical distinction between regular and irregular route operators. A major difficulty has arisen in fixing the territorial limitations of the irregular route carrier. In *Alton Railroad Co. v. United States*,⁵⁶ the Supreme Court recognized, over the objection of competing railroads, the power of the Commission to authorize irregular route operations throughout a state where the carrier had professed to carry anywhere within the state

⁴⁸316 U. S. 74, 86, 62 Sup. Ct. 932, 938 (1942).

⁴⁹Interstate Commerce Act § 215 [49 U. S. C. § 315 (1940)] requires the Commission to prescribe rules and regulations governing the filing and approval of policies of insurance for the protection of the public. *Service Mutual Liability Insurance Co. v. United States*, 18 F. Supp. 613 (D. C. D. Mass. 1937).

⁵⁰*Alton Railroad Co. v. United States*, 315 U. S. 15, 22, 62 Sup. Ct. 432, 437 (1942). *And see* *United States v. Carolina Freight Carriers Corporation*, 315 U. S. 475, 488, 62 Sup. Ct. 722, 729 (1942); *Noble v. United States*, 45 F. (2d) 793, 799 (D. C. D. Minn. 1942).

⁵¹*Noble v. United States*, 45 F. (2d) 793, 799 (D. C. D. Minn. 1942).

⁵²Interstate Commerce Act § 208(a), 49 U. S. C. § 308(a) (1940).

⁵³*Id.* at § 209(b), § 309(b).

⁵⁴*Ibid.*

⁵⁵*Supra* notes 52 and 53.

⁵⁶*Alton Railroad Co. v. United States*, 315 U. S. 15, 62 Sup. Ct. 432 (1942).

although it had actually served but a few points therein before or on the statutory date.⁵⁷ The Court cited with tacit approval the Commission's policy of giving decisive weight to dominant characteristics of various types of transportation services in fixing the territorial scope of certificates or permits under the "Grandfather Clause."⁵⁸ The classification of carriers entitled to such broad territorial authorization already includes common carriers of household goods,⁵⁹ of oil field equipment and supplies,⁶⁰ and of automobiles.⁶¹

Conversely, *Howard Hall Co., Inc., v. United States*⁶² upheld the Commission's power to reduce in the certificate of a common carrier of general commodities the area of operations to that in which a substantial portion of the former service was rendered. Nor does such a restriction of the area where shipments mainly originate necessarily preclude the Commission from applying the doctrine of the *Alton* case as regards territory of destination. "The precise geographical pattern for future operations is the product of an expert judgment based on the substantiality of the evidence as to prior operations, the characteristics of the particular type of carrier, the capacity or ability of the applicant to render the service, and the like."⁶³

Whether this distinction between regular and irregular route operators might afford a proper basis for the imposition of economic limitations, as well as geographical restrictions, was before the Supreme Court in *United States v. Carolina Freight Carriers Corporation*.⁶⁴ That case definitely overruled the Commission's attempt to differentiate between such carriers where they held themselves out to carry general commodities. The Court declared: "there is no statutory warrant for applying to irregular route carriers a different or stricter test as to commodities which may be carried than is applied to regular route carriers. The difference between those types of carriers may well justify a sharp delimitation of the farflung territory which an irregular route operator may profess to serve. But, once the territory has been defined, the statutory test of whether an applicant was a 'common carrier' by motor vehicle in 'bona fide operation' during the critical periods is the same for the irregular and the regular route carriers."⁶⁵ The applicant was there engaged during the "grandfather" period in common carriers of commodities principally between

⁵⁷The applicant in this case was engaged in rendering a driveaway common carriage service of new automobiles from Detroit factories, usually by the caravan method, chiefly to a few delivery points in each of several southern and western states.

⁵⁸315 U. S. 15, 21, 62 Sup. Ct. 432, 436 (1942).

⁵⁹*Bruce Transfer & Storage Co.*, 2 M. C. C. 150 (1937); *William J. Wruck*, 12 M. C. C. 150, 151-152 (1938).

⁶⁰*Charles B. Geer, Jr.*, 3 M. C. C. 483 (1937); *Union City Transfer*, 7 M. C. C. 740 (1938).

⁶¹*George Cassens & Sons*, 1 M. C. C. 771 (1937). See also *Charles E. Danbury*, 17 M. C. C. 740 (1939).

⁶²315 U. S. 495, 62 Sup. Ct. 732 (1942), *Frankfurter and Jackson, JJ., dissenting*. Though the applicant had served Birmingham, Alabama, and a few points within a radius of 100 miles, the Commission restricted it to that city and a ten mile radius, in which roughly nine-tenths of its "grandfather" period traffic had been confined.

⁶³*Id.* at 498, 62 Sup. Ct. at 734 (1942).

⁶⁴*United States v. Carolina Freight Carriers Corporation*, 315 U. S. 475, 62 Sup. Ct. 722 (1942). Criticized in Note (1942) 15 *Rocky Mt. L. Rev.* 109.

⁶⁵*Id.* at 484-485, 62 Sup. Ct. at 727-728 (1942).

points in North and South Carolina and the large textile manufacturing centers on the Atlantic seaboard as far north as Massachusetts. The northbound cargoes consisted mainly of cotton yarn, but included a few shipments of other goods. Southbound, the carrier solicited whatever loads it could get and carried a wide variety of commodities. The Commission, in granting the certificate, ruled that since the Act provided that a common carrier may transport only a "class or classes of property," the "grandfather" authorization "should reflect any limitations in the undertaking as indicated by the service actually rendered on and since the statutory dates."⁶⁶ The Commission, therefore, restricted irregular route operators to commodities carried in substantial amount and with some regularity before or on, and continuously since, the pivotal dates, and eliminated other commodities of the same general class not satisfying these requisites. The resulting authorization covered only about one-third of the commodities carried in prior operations.

In reversing the Commission's order, the Court emphasized the class or group aspect of the service actually rendered and pointed out that "if the applicant has carried a wide variety of general commodities, he cannot necessarily be denied the right to carry others of the same class merely because he never carried them before. And where he has carried a wide variety of general commodities, he cannot necessarily be restricted to those which he carried with more frequency and in greater quantities than others."⁶⁷

The Court also struck down the Commission's attempt to restrict the commodities which might be carried between particular points within the authorized territory. "Once the common carrier status of the appellee had been established as respects those commodities, shipments [within the class or group of commodities] to any parts of the authorized territory, or to any of the authorized points therein, should have been permitted, in absence of evidence that the appellee as respects carriage between specified points had restricted its undertaking to particular commodities."⁶⁸

Mr. Justice Jackson's vigorous dissent,⁶⁹ declared that the majority opinion violated not only the elementary principles of administrative law in overriding the Commission's discretionary exercise of authority, but also the general policy behind the Act. On the latter point, the dissent stated: "When a carrier claims grandfather rights to serve the entire Atlantic seaboard as a general common carrier, with equipment consisting on the critical dates of eight trucks⁷⁰ the Commission is obviously forewarned that it must guard against granting franchise privileges that will result in their having a speculative value to the carrier rather than a service value to the public."⁷¹ Mr. Justice Douglas, for the majority, took a more realistic view, recognizing the vital significance of these limitations to the carrier, for, as he said, "empty

⁶⁶24 M. C. C. 305 (1940). Discussed in 315 U. S. 475, 482, 62 Sup. Ct. 722, 726 (1942).

⁶⁷315 U. S. 475, 483, 62 Sup. Ct. 722, 727 (1942).

⁶⁸*Id.* at 487, 62 Sup. Ct. at 728 (1942). *Accord*: Howard Hall Co., Inc., v. United States, 315 U. S. 495, 499-500, 62 Sup. Ct. 732, 734-735 (1942).

⁶⁹*Id.* at 490, 62 Sup. Ct. at 730 (1942).

⁷⁰The applicant's predecessor in interest had from five to eight units between June 1, 1935, and the time when its interest was sold; the applicant possessed seventeen units at the time of hearing. *Id.* at 493, 62 Sup. Ct. at 731 (1942).

⁷¹*Id.* at 495, 62 Sup. Ct. at 732 (1942).

or partially loaded trucks on return trips may well drive the enterprise to the wall.⁷² Return trips should bear their share of expenses; dead mileage is a principal factor cutting into the profits of any transportation operation.

The exercise by the Commission of the further economic limitation as to classes of shippers which the carrier is permitted to serve has been sustained with respect to a contract carrier's permit.⁷³ Where during the crucial period, the carrier was transporting meat products and canned foods for a certain packing plant and for a specific canning company, the court upheld a "grandfather" limitation to carriage of similar property within the approved territory for meat-packers and food canners only. "The power to specify the scope of the business meant the authority to define the extent of the operations which might be conducted under it."⁷⁴ Consequently, where, as here, the Commission found it necessary for effective regulation it might, in addition to specifying the classes of commodities, limit the class of shippers who may be served to those previously served.

IV

The foregoing survey indicates that in general the policy of both the Interstate Commerce Commission and the United States Supreme Court has been to construe strictly "grandfather" rights under the Federal Motor Carrier Act with a resultant limiting of the number of "grandfather" operators.

While it has been stated that the "Grandfather Clause" is intended for the benefit of carriers who were in bona fide operation on and since the statutory dates rather than for the purpose of serving the public convenience and necessity or the public interest,⁷⁵ and that view was largely implemented in the *Carolina Freight Carriers Corporation* case,⁷⁶ there is much to be said for the strict approach. Even if the applicant is denied all or part of expansive claims to "grandfather" rights, a certificate or permit covering additional territory or operations may still be obtained upon a showing of public convenience and necessity or, in the case of the permit, that it is consistent with the public interest. Then, too, as pointed out in the *Carolina Freight Carriers Corporation* case dissent, the speculative pre-emption of "grandfather" rights must be guarded against.⁷⁷ On the whole, the construction and application of the Clause seem to have met well the practical needs of the industry.

⁷²*Id.* at 488, 62 Sup. Ct. at 729 (1942). *A. F. d. 319 U. S. 38, 63 S. Ct. 95 (1943)*

⁷³*Noble v. United States*, 45 F. Supp. 793 (D. C. D. Minn. 1942). *Quaere* whether restrictions in common carrier certificates may go beyond classes of property to classes of shippers.

⁷⁴The proviso forbidding the Commission to restrict the contract carrier from substituting or adding contracts prevents the Commission from limiting operations to individual shippers previously served. *Motor Convoy*, 2 M. C. C. 197 (1937). Nor does the Commission restrict even to a similar class of shippers where the nature of the commodities which the contract carrier is equipped or undertakes to handle would provide its own limitations in this respect. *T. B. Longshore, Contract Carrier Application*, 2 M. C. C. 480 (1937), approved in *Noble* case, *supra* note 73 at 798-799.

⁷⁵*Loving v. United States*, 32 F. Supp. 464, 467 (D. C. W. D. Okla. 1940), *aff'd without opinion*, 310 U. S. 609, 60 Sup. Ct. 898 (1940).

⁷⁶*Supra* note 64.

⁷⁷315 U. S. 475, 493, 62 Sup. Ct. 722, 731 (1942).

As stated in *Noble v. United States*, 45 F. Supp. 793, 799 (D. C. D. Minn. 1942):

Since applications for certificates and permits based on "grandfather" rights had to be made to the Commission within 120 days after October 15, 1935,⁷⁸ upon the final disposition of all the applications filed during that period—tens of thousands in number⁷⁹—the "Grandfather Clause" of the Federal Motor Carrier Act of 1935 will cease to have practical significance in the interstate motor carrier field. The body of decisional law under it will be of value, however, in the construction and application of "grandfather clauses" in the later amendments to the Interstate Commerce Act⁸⁰ and in other federal⁸¹ and state⁸² statutes.

During the war emergency, all means of transportation must be employed to the utmost. Many new applications for motor carrier certificates and permits are being made to operate over routes or in the territory already served. If there is an "immediate and urgent need" for additional service over any route or in any area, the Commission without hearings or other proceedings, is empowered to grant temporary authority to operate.⁸³ To continue operations after the war emergency, these applicants, since, of course, they cannot claim "grandfather" status, must comply with the requirement of "public convenience and necessity" or "public interest."

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"If the plaintiff can show that the public interest would be served by his operation as a contract carrier in other fields, he can obtain a permit for such operation."

⁷⁸February 12, 1936. Under authority conferred by Section 228 of the Act [49 U. S. C. § 327(a) (1940)] the Commission postponed the effective date of the sections dealing with the filing of applications for certificates, permits, and licenses, from October 1 to October 15, 1935. I. C. C. (Div. 5) Order, September 30, 1935.

⁷⁹About 80,000 applications were filed under the "Grandfather Clause." Half of these were contested. I. C. C. ANN. REP. (1936) 70. Discussed in 4 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1937) 130.

⁸⁰54 STAT. 941 (1940), Interstate Commerce Act, Part III (Interstate Water Carrier Act, 1940) § 309(a), 49 U. S. C. § 909(a) (1940). The "grandfather" formula has not been included in Interstate Commerce Act, Part IV (Freight Forwarders Act, 1942) § 410, 49 U. S. C. A. § 1010 (Supp. 1942).

⁸¹52 STAT. 987, § 401 (1938), Civil Aeronautics Act of 1938, § 401(e) (1), 49 U. S. C. § 481(e) (1) (1940). Rhyne, *The Civil Aeronautics Act of 1938 and "Grandfather" Certificates* (1941) 12 AIR L. REV. 245.

⁸²N. Y. L. 1938, c. 543, § 2; N. Y. PUBLIC SERVICE LAW § 63-k (certificates) and § 63-m (permits). For a list of states where "grandfather clauses" have appeared, see Note (1941) 30 CAL. L. REV. 101, 102.

⁸³49 STAT. 543 (1935), Interstate Commerce Act, Part II, § 210(a), 49 U. S. C. § 310(a) (1940). The Second War Powers Act, 1942, § 102 [56 STAT. 177, tit. I] amended Section 210(a) by striking out the previous 180 day limit of such temporary authority. The limit would now seem to be fixed indirectly at December 31, 1944, as per Section 1501 of said War Powers Act, terminating the amending legislation on that date [50 U. S. C. A. § 645 (Supp. 1942)].

Similar temporary authorization for motor carriers of goods is provided for under N. Y. PUBLIC SERVICE LAW § 63-o-1.

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Joseph A. Casser, prior to his induction into the armed forces, assisted in the compilation of material for this study.