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Recommended Citation

John J. George, *Authorization of Contract Motor Carriers by the Interstate Commerce Commission*, 26 Cornell L. Rev. 621 (1941)
Available at: <http://scholarship.law.cornell.edu/clr/vol26/iss4/9>

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AUTHORIZATION OF CONTRACT MOTOR CARRIERS BY THE INTERSTATE COMMERCE COMMISSION

JOHN J. GEORGE

For a dozen years regulatory bodies have devoted increasing attention to contract motor carriers as distinct from common carriers on one hand and from private carriers on the other.¹ The Federal Motor Carrier Act of 1935² differentiates contract carriers and prescribes a regulatory scheme for them, evidenced by a permit as authorization to operate. This paper deals with the issuance of the permit.³

I. WHAT CONSTITUTES A CONTRACT CARRIER?

Section 203 (a) (15) of the Act defines a contract carrier by motor vehicle thus:

"The term 'contract carrier by motor vehicle' means any person not included in paragraph (14) of this section which defines common carriers, who or which, under special and individual contracts or agreements, and whether directly or by lease or any other arrangement, transports passengers or property in interstate or foreign commerce by motor vehicle for compensation."

That contract carriers yet retain the character of private enterprise is evidenced by the Commission observation:

"Contract carriage is a form of private carriage, as distinguished from the carriage for the general public which common carriers hold themselves out to perform. . . . It has become evident, particularly in the motor carrier field, that private carriage is sufficiently affected with a public interest to warrant public regulation, at least to an extent."⁴

Further:

"'Contract carrier' is merely a new name for the common-law private carrier for hire . . . and the use of the new term in the act . . . tends to prevent confusion of the private carrier for hire with the 'private

¹State efforts at differentiating contract carriers and establishing an applicable plan of regulation are presented by the present writer in two articles: (1933) 9 JOURNAL OF LAND AND PUBLIC UTILITIES ECONOMICS 233-46; (1937) 13 *id.* 163-73.

²49 STAT. 543, c. 498 (1935), 49 U. S. C. A. § 301 *et seq.* (Supp. 1940). For background, analysis and evolution of the Act, see George, *The Federal Motor Carrier Act of 1935* (1935) 21 CORNELL L. Q. 249-75.

³Administrative set-up within the Interstate Commerce Commission to handle motor carrier matters is sketched in George and Boldt, *Certification of Motor Common Carriers by the Interstate Commerce Commission* (1941) 17 JOURNAL OF LAND AND PUBLIC UTILITY ECONOMICS 82-91, n. 8.

⁴Contracts of Contract Carriers, 1 Motor Carrier Cases 628-9 (1936).

carrier' defined in section 203 (a) (17), which latter had no place in the common law classification of carriers."⁵

Contract carriers limit their service to particular shippers with whom they have "special individual contracts or agreements."⁶

The fact that a carrier conducts his operations under contracts does not constitute him a contract carrier as defined in the Act.⁷ Consideration must be given to the nature of the contracts in question, and it must be clear that the carrier limits his service to specially selected customers and offers no service to shippers generally who might wish the type of service he furnishes. Thus the number of shippers served and the character of the contracts made enter into the classification of the transportation business involved.⁸ The Commission has stated that the phrase "special and individual contracts" means that a contract carrier must be a party to a contract or agreement different from the contract entered into by a common carrier.

Absence of the words "for the general public" from the statutory definition of contract carrier, and the use of the phrase in defining common carrier reflect the basic distinction between common and contract carriers.⁹

A carrier who hauls specified items in another state for one customer but offers no service to the general public is a contract carrier.¹⁰ Similarly, transporting stated items between stated points as one shipper may require is clearly contract carriage.¹¹

The manner in which trucks are painted and labelled and in whose name operated has entered into determining the contract character of the operation. Painting and equipping trucks as a particular shipper requests and assigning him the exclusive use of the trucks does not take the trucks out of contract carrier classification where the owner retains the control over and the responsibility of the trucks.¹² Contract carrier character attaches to an operator who is required to select the routes to be traveled and to furnish liability for loss of or damage to cargo, and who is compensated by the day, hour, or week even though the names of the shippers are stamped on the vehicles used and (possibly) the vehicles are under shippers' supervision.¹³

⁵Observation by Commissioner Lee, dissenting in *Contracts of Contract Carriers*, 1 M. C. C. 628 at 634 (1936).

⁶*Gibbon Cont. Car. App.*, 17 M. C. C. 729 (1939).

⁷*Slagle Cont. Car. App.*, 2 M. C. C. 127 (1936).

⁸*Ibid.*

⁹*Ibid.*

¹⁰*Francesco Papitto Com. Car. App.*, 11 M. C. C. 59 (1938) (Certificate for common carriage was sought); *Rush Com. Car. App.*, 17 M. C. C. 61 (1939); *Felix Stiscia Cont. Car. App.*, 20 M. C. C. 119 (1939).

¹¹*Schaivo Com. Car. App.*, 11 M. C. C. 593 (1938).

¹²*Columbia Terminals Cont. Car. App.*, 18 M. C. C. 662 (1939).

¹³*Green Bros. Cont. Car. App.*, 18 M. C. C. 94 (1939).

Because contract carriers are more minutely regulated, a motor carrier already operating or an applicant for authorization may attempt to establish contract carrier character; consequently some enlightenment is to be found in commission denials of such character. For example, an operator whose transportation is generally limited to articles specified, who makes only tentative agreements that as freight develops it will be offered to him and that he will haul it, and who performs transportation for the general public also is not a contract carrier, but a common carrier; and a certificate will be issued for that type operation.¹⁴

Does the contract character attach to a collection and delivery service operated for the Pennsylvania and Long Island Railroad companies within the terminal area of Jersey City and New York City? This question arose in 1937 in an application requesting a permit for such service. Holding that the collection and delivery service falls outside the definition of common carrier by motor vehicle and that the Commission could control such operation only as part of the railroad service over which Part I of the Interstate Commerce Commission Act confers jurisdiction on the I.C.C., the Commission denied application "because the transportation in which [applicant] proposed to engage must be judged by the entire service from consignor to consignee, and is distinctly a common carrier service."¹⁵ The precedent thus established that the Motor Carrier Act confers on the Commission no jurisdiction over collection and delivery services operated in a terminal area for railroads, which activities can be reached only by Part I of the basic act, eliminates from Commission consideration such activities of contract or common motor carriage. Subsequent cases follow the 1937 precedent.¹⁶

Several applications for permits have been denied on the ground that the transportation involved was private carriage rather than contract carriage.

An operator who delivers to his customers both goods which he owns and articles which he sells as agent, including in the price of the former a charge for delivery, is engaged in private carriage and not contract carriage.¹⁷ Likewise, the following are examples of private carriage and do not require a permit: transportation by a pipeline construction company of material used on the job;¹⁸ transportation of fruits and vegetables bought in town for sale on return trips;¹⁹ hauling mining timber as incidental to a logging and sawmill business;²⁰ and transportation by a wholesale jobber of his own

¹⁴Vayton Bros. Cont. Car. App., 11 M. C. C. 543 (1938).

¹⁵Scott Bros. Collection and Delivery Service, 4 M. C. C. 551 (1937).

¹⁶Earl Stump Con. Car. App., 14 M. C. C. 9 (1939); Jones Cont. Car. App., 16 M. C. C. 558 (1939); Feagan Cont. Car. App., 11 M. C. C. 597 (1938).

¹⁷Swanson Cont. Car. App., 12 M. C. C. 516 (1939).

¹⁸Williams Cont. Car. App., 14 M. C. C. 749 (1939).

¹⁹Howe Cont. Car. App., 16 M. C. C. 587 (1939).

²⁰Monk Cont. Car. App., 20 M. C. C. 115 (1939).

property to his own warehouse for storage until he sells it to advantage.²¹

Contract carriage does not exist where the proposed operation would be incidental to the applicant's chief occupation—to so authorize by permit might have serious effects on the adequacy and efficiency of service of both common and contract motor carriers already established.²²

But the contract carrier character does attach to an operator who takes order from customers for non-alcoholic beverages which he buys at 52.5 cents a case and delivers to them at 60 cents. The Commission considered this differential sufficient only to cover reasonable charges for transportation; the chief business was the sale of transportation service rather than distribution of non-alcoholic beverages.²³

No contract character attaches to the transportation only of commodities which are exempted by Section 203 (b) (6) of the Act.²⁴ Nor will a permit issue to an applicant operating in one municipality or in contiguous municipalities or in a zone adjacent to and commercially a part of such contiguous municipalities. Such operations are exempted from authorization by the Commission by Section 203 (b) (8). This exemption from the contract permit requirement has figured in cases arising in the regions of Chicago, Philadelphia, and New York City.²⁵

Many cases show that confusion may be general as to whether a particular operation is contract carriage or common. Some who consider themselves contract carriers are found by the Commission to be common carriers, and oftentimes those who style themselves common carriers prove to be contract carriers.²⁶

Even a Commission member may find it very difficult to determine from the record available whether the applicant is a private or contract carrier. In a 1938 case, Commissioner Rogers found himself in such a situation

²¹Hammond Cont. Car. App., 14 M. C. C. 711 (1939).

²²Simpson Cont. Car. App., 16 M. C. C. 527 (1939).

²³Starr Freight Service Cont. Car. App., 16 M. C. C. 209 (1939).

²⁴Christman Cont. Car. App., 14 M. C. C. 787 (1939).

²⁵Ethier Cont. Car. App., 14 M. C. C. 786 (1938); Bacigalupo Cont. Car. App., 14 M. C. C. 769 (1938); McCormick's Express Cont. Car. App., 12 M. C. C. 637 (1938); Sekula Cont. Car. App., 12 M. C. C. 623 (1938); Rossin Cont. Car. App., 12 M. C. C. 69 (1938); Ahrendt Ext., 11 M. C. C. 637 (1938).

²⁶Barringham Cont. Car. App., 20 M. C. C. 606 (1939); Carlisle Cont. Car. App., 16 M. C. C. 161 (1939); Dunning Cont. Car. App., 16 M. C. C. 49 (1939); Learner Transportation Cont. Car. App., 14 M. C. C. 637 (1939); Western Truck Lines Cont. Car. App., 14 M. C. C. 369 (1939); Jeffrey Cont. Car. App., 14 M. C. C. 141 (1939); Mitchell Cont. Car. App., 14 M. C. C. 71 (1939); Witt Cont. Car. App., 14 M. C. C. 41 (1939); Lavine Cont. Car. App., 14 M. C. C. 555 (1939); Mutrie Cont. Car. App., 12 M. C. C. 432 (1938). *Conversely*: Zanette Com. Car. App., 12 M. C. C. 695 (1938); Marco Transfer Cont. Car. App., 12 M. C. C. 647 (1938); Brockway Fast Motor Freight Com. Car. App., 12 M. C. C. 565 (1938).

and wanted the case reargued, but he lost by a two-to-one vote holding the applicant a private carrier.²⁷

II. FACTORS IN GRANTING PERMITS

A. *Bona Fide Operation on July 1, 1935 and Continuously Since*

For some contract carrier applicants this one basic factor has sufficed to obtain the permit. Section 209 directs the issuance of permits as a matter of right to those contract applicants who or whose predecessors²⁸ were in bona fide operation on July 1, 1935, and continuously since, provided application is filed therefor by the original operator within 120 days after effective date of the statute.²⁹

Mere operation or an attempt to begin operation is not sufficient.³⁰ There must have been actual operation, and the burden of proof of the character and extent of his operation rests on the applicant.³¹ The Commission may stage a hearing to determine the fact of bona fide operation.³² Evidence of continuous operation is an essential element in the burden of proof,³³ but documentary evidence will not be required where compliance is beyond the ability of the applicant.³⁴ And "bona fide" requires that the transportation actually done be free from taint of fraud or deceit.³⁵

Use of the term "bona fide operation" has as its purpose the withholding of "grandfather" rights from applicants who, knowing the legislation was pending, made efforts to begin operations for the purpose of obtaining operative rights possessing a money value. Operations conducted surreptitiously or in disguise or under pretense or concealment fail to meet the test.³⁶

After the applicant for a "grandfather" permit has established the fact of actual operation as of the "grandfather" date and continuously since, the Commission feels it a fair assumption that the operation was bona fide, the contrary not being shown. It is up to protestants to offer convincing evidence of lack of good faith in the operations for which a permit is sought.³⁷

²⁷Teton Oil Cont. Car. App., 14 M. C. C. 441 (1938).

²⁸Successors in interest obtained "grandfather" permits because predecessors were in bona fide operation on statutory date and continuously since: Hahn Cont. Car. App., 14 M. C. C. 347 (1939); Dave Redman Cont. Car. App., 11 M. C. C. 220 (1938); Nutt Cont. Car. App., 11 M. C. C. 56 (1938).

²⁹Yaste Com. Car. App., 11 M. C. C. 687 (1938).

³⁰Vedder Oil Cont. Car. App., 1 M. C. C. 758 (1936).

³¹Fowble Cont. Car. App., 6 M. C. C. 791 (1937); Crescent Transportation Com. Car. App., 2 M. C. C. 315 (1936).

³²Benjamin Franklin Lines, 1 M. C. C. 97 (1936).

³³M. C. C. 847 (1936).

³⁴Hagerstown Motor Express Com. Car. App., 3 M. C. C. 786 (1936).

³⁵Brown Motor Freight Com. Car. App., 2 M. C. C. 667 (1936).

³⁶Slagle Cont. Car. App., 2 M. C. C. 127 (1936).

³⁷*Ibid.*

Because of bona fide operation on the statutory date and continuously since, many permits have issued.³⁸ Being badly "mixed up" as to his operative status and rights, an applicant may experience a long delay between the filing and the disposition of his application—even three years or more.³⁹

Many contract applicants have failed to show bona fide operation on⁴⁰ and continuously since⁴¹ July 1, 1935, and consequently the permits were denied. A brief interruption of the service between statutory date and application date destroys continuity of service essential to obtaining the "grandfather" permit unless the interruption was beyond the control of the applicant.⁴²

B. Authorization De Novo

Authorization *de novo* has constituted the chief task in connection with contract carriers. Many applicants who failed to qualify for "grandfather" permits, either because they did not file seasonably or because they failed to prove bona fide operation, have obtained permits under the general *de novo* authorization requirement that the proposed contract carrier service be consistent with the public interest and policy declared in the Act.⁴³

An applicant-operator who had lost her contract with the customer served because she was underbid by a competitor but who got back the contract at the end of five weeks failed to qualify on the "grandfather" basis because of the five-week break in her service. Such interruption of service was adjudged within the applicant's control and therefore the responsibility for the interruption was hers;⁴⁴ but she got a *de novo* permit. Though he had operated for 10 years continuously, a carrier who did not apply seasonably could not qualify on the "grandfather" basis, but was granted a permit on proving consistency with public interest.⁴⁵ Similarly, one who had operated prior to the statutory date and continuously since but had not filed season-

³⁸Illustrative recent cases: Mead Cont. Car. App., 16 M. C. C. 739 (1939); Mitchell Cont. Car. App., 16 M. C. C. 609 (1939); Katz Cont. Car. App., 16 M. C. C. 35 (1939); Leaman Cont. Car. App., 14 M. C. C. 637 (1939); Brewer Cont. Car. App., 14 M. C. C. 604 (1939); Luper Cont. Car. App., 11 M. C. C. 410 (1938); Milstead Cont. Car. App., 11 M. C. C. 157 (1938); Bowar Bros. Cont. Car. App., 11 M. C. C. 123 (1938).

³⁹Geroula Cont. Car. App., 16 M. C. C. 421 (1939).

⁴⁰Manske Cont. Car. App., 16 M. C. C. 729 (1939); Millerton Motor Service Cont. Car. App., 14 M. C. C. 281 (1939).

⁴¹Hurst Cont. Car. App., 14 M. C. C. 703 (1939); Bluhm Cont. Car. App., 12 M. C. C. 751 (1938); Bobo Com. Car. App., 12 M. C. C. 645 (1938); Lusebink Cont. Car. App., 11 M. C. C. 151 (1938).

⁴²Barringham Express, 20 M. C. C. 606 (1939); Hough Cont. Car. App., 20 M. C. C. 55 (1939).

⁴³Section 209 (b).

⁴⁴Emma Berger Cont. Car. App., 11 M. C. C. 43 (1938).

⁴⁵Gokey Cont. Car. App., 11 M. C. C. 587 (1938).

ably had to prove consistency with public interest to get a permit.⁴⁶ Where an application had been filed by an operator through an attorney who let the case go by default, the Commission held that the default forfeited whatever claims to "grandfather" rights the applicant might have had, and that the proceeding would have to be considered on the basis of *de novo* operation; a permit was issued.⁴⁷

All contract operations other than those which are approved on the "grandfather" basis must be determined on the basis of consistency with the public interest. This public interest concept relative to contract carriage is the counterpart of "public convenience and necessity" required as the basis for certification of motor common carriers.⁴⁸ Contrasting the two concepts, the Commission in an early case thus differentiated them:

"The language of the statute makes it quite clear, we think, that the requirements for the issuance of a permit are not as exacting as those governing the issuance of a certificate. In the case of the latter it is necessary to find that the present or future public convenience and necessity require the proposed service, whereas in the case of the former, it is necessary to find only that it is consistent with the public interest and with the policy declared in section 202 (9). . . . Less is demanded in the case of a contract carrier."⁴⁹

Presently the Commission held the "true meaning" of "consistent with the public interest" to be "not contradictory or hostile to the public interest."⁵⁰ In dealing with contract carriers, the consistency concept must be considered and applied in terms of the basic purpose of the Act, and that purpose "is plainly to promote and protect adequate and efficient common-carrier service by motor vehicle in the public interest."⁵¹

More recently the Commission has said that in determining whether the proposed new transportation service by a contract carrier is consistent with the public interest the Commission must decide first whether the proposed service will offer inherent advantages of importance as compared with whatever existing and available transportation is offered by carriers of another type; if such advantages are found the Commission then must decide whether

⁴⁶Lents Cont. Car. App., 11 M. C. C. 457 (1938).

⁴⁷Shirar & Clark Cont. Car. App., 11 M. C. C. 577 (1938).

⁴⁸On the factors entering into "public convenience and necessity" for common carrier certificates see George, *Factors in Granting Motor Carrier Certificates of Public Convenience and Necessity* (1930) 5 IND. L. J. 243, and George, *State Certification of Interstate Motor Carriers* (1935) 6 AIR LAW REV. 34; see George and Boldt, *Certification of Motor Common Carriers by the Interstate Commerce Commission* (1941) 17 JOURNAL OF LAND AND PUBLIC UTILITY ECONOMICS, 82-91.

⁴⁹Bassetti & Lawson Cont. Car. App., 1 M. C. C. 187 (1936).

⁵⁰Scott Bros., Inc., Collection and Delivery Service, 2 M. C. C. 155 (1936).

⁵¹Contracts of Contract Carriers, 1 M. C. C. 628 (1936).

available common carriers can be utilized to obtain the advantages offered by the contract carrier service proposed.⁵²

The above generalizations reveal the difficulties encountered by the Commission in interpreting and applying such a philosophical concept as consistency with the public interest. Each case must be judged on its merits as it arises, and it is to particular cases we must turn to find the practical substance of the concept in application.

In an early case the Commission held that evidence of consistency with the public interest "should show there is a definite need for such operation, or that the service proposed to be rendered is of a special character peculiarly adapted to the transportation of certain commodities, and that similar services are not offered by carriers operating between the same points or in the same territory."⁵³ Thus are introduced the various factors which stem from and at the same time enter into this general factor on the basis of which *de novo* operations are authorized or denied.

1. *Adequacy of the Existing Service.*—For a permit there must be a showing that present service is inadequate or that applicant offers a service not now available.⁵⁴ There being presented no evidence that present facilities are inadequate, the presumption is that they are adequate.⁵⁵ As to the scope of adequacy of service the Commission observed that "shippers are entitled to adequate service by motor vehicles as well as by railroad."⁵⁶

Adequacy of service may be attested by evidence that facilities offered by existing carrier are abundant,⁵⁷ by evidence of the presence of authorized carriers,⁵⁸ or by a satisfactory showing of the adequacy of the service of existing carriers.⁵⁹ The service sought may be declared already supplied by other carriers;⁶⁰ idle equipment of existing carriers may be utilized to perform the transportation offered by applicant;⁶¹ or the adequacy may be

⁵²Gibbon Cont. Car. App., 17 M. C. C. 727 at 729 (1939).

⁵³Whipple Cont. Car. App., 2 M. C. C. 59 (1936).

⁵⁴Ingham Ext., 12 M. C. C. 607 (1938).

⁵⁵Foreman Cont. Car. App., 16 M. C. C. 467 (1939); Veyon Cont. Car. App., 14 M. C. C. 291 (1939).

⁵⁶Reliable Van and Warehouse Cont. Car. App., 14 M. C. C. 81 (1939).

⁵⁷Heim Ext., 20 M. C. C. 329 (1939); D'Elia Cont. Car. App., 16 M. C. C. 23 (1939); Fellows Ext., 14 M. C. C. 643 (1939); Stedman & Hutley Cont. Car. App., 11 M. C. C. 783 (1938); Meyers Cont. Car. App., 11 M. C. C. 245 (1938); Scott Ext., 11 M. C. C. 227 (1938).

⁵⁸Brown Cont. Car. App., 20 M. C. C. 315 (1939); Palmer Ext., 20 M. C. C. 251 (1939).

⁵⁹Palmer Ext., 20 M. C. C. 251 (1939); Gifford Ext., 14 M. C. C. 67 (1939); Hutto Cont. Car. App., 14 M. C. C. 49 (1939); Ingham Ext., 12 M. C. C. 607 (1938).

⁶⁰Jones Ext., 20 M. C. C. 305 (1939); Motor Express Cont. Car. App., 11 M. C. C. 127 (1938).

⁶¹McCoury Cont. Car. App., 11 M. C. C. 721 (1938); Taylor Cont. Car. App., 11 M. C. C. 155 (1938).

declared on the basis of the small volume of business the applicant could obtain were his proposed enterprise launched.⁶²

But where transportation service is adjudged inadequate at points concerned,⁶³ where present motor and rail service is shown to be inadequate,⁶⁴ or where there is no rail or motor carrier service to towns off the main highways in an oil field area,⁶⁵ it is consistent with the public interest to issue permits for the service proposed.

2. *Need for the Service Proposed.*—A close negative counterpart of adequacy of existing service is found in the need for the service proposed. Many indices evidence this need.

a. *Absence of all other service:* Discontinuance of rail service and the total absence of motor service to transport petroleum products from refinery to bulk storage plant may constitute the need,⁶⁶ lack of transportation to mines not served by railroads,⁶⁷ or railway service at such a distance as to involve delay,⁶⁸ or absence of rail facilities to haul hardwood which will not float in a river⁶⁹ may suffice for issuance of permits.

b. *General observation of need:* The Commission has in several cases rested its conclusion in part upon the general observation that there is need for the service proposed, or that there is need and demand, or substantial demand and need for it.⁷⁰ But the view that demand for transportation has declined, *e.g.*, to site of former C.C.C. camps, resulted in denial of the permit.⁷¹

c. *Absence of evidence that the particular service is needed:* Important reliance has been made in several cases on the failure of applicant to show that a particular service proposed is needed.⁷² Where the "testimony of record indicates no lack of rail and motor carrier facilities in the territory at present," need for the particular service was held lacking.⁷³ And "the desire of one shipper to have a particular operator transport for him does not constitute proof of need for the proposed transportation. . . ."⁷⁴

⁶²Draper Ext., 16 M. C. C. 13 (1939).

⁶³Dovel Cont. Car. App., 14 M. C. C. 357 (1939).

⁶⁴Kelly Cont. Car. App., 20 M. C. C. 349 (1939).

⁶⁵Luper Ext., 14 M. C. C. 559 (1939).

⁶⁶Sprout & Davis Ext., 16 M. C. C. 256 (1939).

⁶⁷Canfield Cont. Car. App., 14 M. C. C. 463 (1939).

⁶⁸*Ibid.*

⁶⁹Chapman Cont. Car. App., 14 M. C. C. 96 (1936).

⁷⁰Abbott Ext., 20 M. C. C. 156 (1939); Thornhill & Truax, 20 M. C. C. 51 (1939); Keck Cont. Car. App., 12 M. C. C. 601 (1938); Gonsett & Moore Cont. Car. App., 11 M. C. C. 691 (1938); Presendorf Ext., 11 M. C. C. 281 (1938).

⁷¹Ogg Cont. Car. App., 11 M. C. C. 225 (1938).

⁷²Burchfield Cont. Car. App., 16 M. C. C. 461 (1939); Kansas Cont. Car. App., 16 M. C. C. 557 (1939); Eill Cont. Car. App., 11 M. C. C. 389 (1938).

⁷³Gardner Ext., 16 M. C. C. 593 (1939).

⁷⁴Hay Cont. Car. App., 14 M. C. C. 797 (1939).

d. *Remoteness of delivery points from transportation lines:* This factor has figured in authorization in the following cases: transportation of coal to C.C.C. camps remote from railway lines and improved highways;⁷⁵ transportation of explosives;⁷⁶ service to farmers located inconveniently to railroads and therefore best served by trucks;⁷⁷ service to several radial points off motor carrier or rail lines;⁷⁸ and transportation between a finishing plant and a shipping mill located on different railway and motor common carrier lines.⁷⁹

e. *Declarations by and interests of shippers:* That shippers and their dealers would benefit has served as basis for a permit,⁸⁰ as has a smaller storage capacity and faster turnover which would result from a permit for petroleum transportation.⁸¹ Shippers' satisfaction with the service, or the expressed desire of shippers for a particular service, or declaration that they will have to obtain and operate their own trucks if application is denied have proved sufficient bases for establishing necessity for the proposed service.⁸²

Testimony of shippers that there is much need for the service proposed and that the permit would tend to make their business more efficient⁸³ has carried great weight in the issuance of permits. Application was denied where the Commission concluded the shipper neither needed nor was interested in an expedited service.⁸⁴ Though testimony of the shipper evidences his desire for the proposed service, "mere desire, unaccompanied by some actual need for the service is insufficient to support the grant of a permit to enter upon a new operation."⁸⁵

The urge of the shipper or consignee to secure the proposed service may be so immediate as to obtain the permit though an existing motor common carrier offer to adjust his departure schedule so as to accommodate a publisher of Sunday newspapers sending his product part way by train⁸⁶ or

⁷⁵Cresto Cont. Car. App., 16 M. C. C. 335 (1939).

⁷⁶Fisher Cont. Car. App., 16 M. C. C. 403 (1939).

⁷⁷Fisher Cont. Car. App., 16 M. C. C. 71 (1939).

⁷⁸Gross Ext., 16 M. C. C. 607 (1939).

⁷⁹Gillens Ext., 16 M. C. C. 39 (1939).

⁸⁰Luper Ext., 12 M. C. C. 7 (1938).

⁸¹Clarkson Gas Transport Cont. Car. App., 16 M. C. C. 693 (1939).

⁸²Alpert Ext., 20 M. C. C. 269 (1939); Stiscia Cont. Car. App., 20 M. C. C. 119 (1939); Stauffer Cont. Car. App., 16 M. C. C. 331 (1939).

⁸³Zottola Ext., 11 M. C. C. 743 (1938); Ives Ext., 12 M. C. C. 221 (1938); Pelz Ext., 12 M. C. C. 559 (1938); Jacobs Cont. Car. App., 11 M. C. C. 726 (1938); Berner Cont. Car. App., 16 M. C. C. 203; Hodges and MacIntosh Cont. Car. App., 20 M. C. C. 280.

⁸⁴Thierner Cont. Car. App., 14 M. C. C. 303 (1939).

⁸⁵Witherspoon Cont. Car. App., 14 M. C. C. 17 (1939).

⁸⁶Palisade Film Delivery Cont. Car. App., 16 M. C. C. 389 (1939); Elliott Ext., 14 M. C. C. 84 (1939).

to accommodate a carrier who needs to obtain sugar to operate his factory.⁸⁷

That part of a proposed service supported by shippers' testimony may be granted, while that portion unsupported similarly may be denied in the same application.⁸⁸

f. *Long continued and successful operation*: The fact that past operations have been successful for a long time has proved a weighty factor in establishing need for the service proposed. Many cases attest its continuing effectiveness.⁸⁹

g. *Prospective volume of business for applicant*: That the volume of business likely would be adequate to sustain the enterprise has facilitated granting the permit.⁹⁰ Existence of contracts already made augur well for the venture,⁹¹ and availability of contracts either in negotiation or definitely consummated constitutes an acceptable ground for issuance.⁹²

Conversely, where the outlook was poor or no mention was made of probable tonnage, permits have been denied.⁹³ Where the applicant admits he has not begun negotiation for contracts⁹⁴ or offers no definite information on the subject,⁹⁵ or where it appears that contracts for transportation are only problematical and not assured,⁹⁶ there is a strong tendency toward denial of a permit.

h. *Seasonal requirements and futurity element*: Need has been interpreted in terms of seasonal requirements.⁹⁷ Though the shipper was using two common carriers and one contract carrier and admitted the present service was adequate, the Commission granted a further permit on grounds of the shipper's fear that any of the present carriers "*now performing this transportation . . . should be unable to continue such operation.*"⁹⁸ A recent

⁸⁷Allen Cont. Car. App., 16 M. C. C. 102 (1939).

⁸⁸Wolf Cont. Car. App., 16 M. C. C. 215 (1939).

⁸⁹Individual Trucking Cont. Car. App., 21 M. C. C. 353 (1940); Toon, Lincoln, De Rosa, and Davies Cont. Car. Apps., 20 M. C. C. 87, 185, 266, and 335 (1939); Clayville, Cloury, and Lewers Cont. Car. Apps., 18 M. C. C. 471, 487, and 321 (1939); Curry Cont. Car. App., 16 M. C. C. 649 (1939).

⁹⁰Zenli Cont. Car. App., 16 M. C. C. 613 (1939).

⁹¹Fitzgerald Cont. Car. App., 16 M. C. C. 726 (1939); Cresto Cont. Car. App., 16 M. C. C. 335 (1939); Reed Ext., 14 M. C. C. 599 (1939); Pelz Ext., 12 M. C. C. 559 (1938).

⁹²Kelley Cont. Car. App., 20 M. C. C. 349 (1939); Wahnish Cont. Car. App., 16 M. C. C. 723 (1939); Western Ranch Ext., 16 M. C. C. 713 (1939); Rose Cont. Car. App., 16 M. C. C. 706 (1939); Canfield Cont. Car. App., 14 M. C. C. 463 (1939).

⁹³McNutt Ext., 16 M. C. C. 590 (1939); McQuaide Ext., 16 M. C. C. 551 (1939); Keepers Cont. Car. App., 14 M. C. C. 727.

⁹⁴*Ibid.*

⁹⁵D'Elia Cont. Car. App., 16 M. C. C. 23 (1939); Dresler Cont. Car. App., 12 M. C. C. 63 (1938).

⁹⁶Millerton Cont. Car. App., 14 M. C. C. 283 (1939).

⁹⁷Raymond Cont. Car. App., 16 M. C. C. 640 (1939).

⁹⁸Hypes Ext., 16 M. C. C. 543 (1939), relying on C. & D. Oil Cont. Car. App., 1 M. C. C. 445 (1936). Italics supplied.

application was denied on the basis that the future need of applicant's service was predicated on an assumed increase in steel production in northeastern Ohio in the approaching months and that the extent of that future production could not be determined accurately at the time of the application.⁹⁹ This position comports with that taken very early recognizing the futurity element.¹⁰⁰

C. Offer by Applicant of Better Service Than That Existing

That the applicant offers better service than that existing may be expressed in terms of faster, more direct, more expeditious, and nearer satisfactory service;¹⁰¹ unsatisfactory present motor carrier service;¹⁰² more flexibility;¹⁰³ difficulty experienced in getting truck service suited to particular needs;¹⁰⁴ shorter time for delivery (15 hours in place of three-day rail movement);¹⁰⁵ more efficient and economical transportation;¹⁰⁶ elimination of need for crating the goods—costly in time and money;¹⁰⁷ or the proposed availability of 24-hour service.¹⁰⁸

But lack of evidence that the proposed service would be particularly adapted to the requirements of the shipper constitutes ground for denial of permit.¹⁰⁹

D. Offer of Service Requiring Special Equipment

In several cases the permit issuance has rested on the offer of special service through oil tank cars,¹¹⁰ vehicles for transporting automobiles, busses, and trucks,¹¹¹ or set-up paper boxes,¹¹² and specially equipped trucks including refrigerator trucks to haul dairy products,¹¹³ or explosives.¹¹⁴

⁹⁹Breuer Ext., 14 M. C. C. 397 (1939).

¹⁰⁰Dingman Cont. Car. App., 1 M. C. C. 501 (1936). See also Wilmot Cont. Car. App., 3 M. C. C. 569 (1937).

¹⁰¹Olive Transfer Ext., 20 M. C. C. 389 (1939); Tatleman Cont. Car. App., 16 M. C. C. 667 (1939); Kennedy Cont. Car. App., 14 M. C. C. 505 (1939); Cray Cont. Car. App., 12 M. C. C. 375 (1938); R. & H. Ext., 12 M. C. C. 61 (1939); Novack Cont. Car. App., 11 M. C. C. 729 (1938); Buffer Cont. Car. App., 11 M. C. C. 549 (1938); Buffenmeyer Cont. Car. App., 11 M. C. C. 363 (1938); Truder Cont. Car. App., 11 M. C. C. 20 (1938).

¹⁰²Tatleman Cont. Car. App., 16 M. C. C. 667 (1939).

¹⁰³Smith Ext., 16 M. C. C. 221 (1939).

¹⁰⁴Herpin Cont. Car. App., 14 M. C. C. 501 (1939).

¹⁰⁵Black Cont. Car. App., 16 M. C. C. 393 (1939).

¹⁰⁶Clarkson Cont. Car. App., 16 M. C. C. 693 (1939); Reynolds Ext., 16 M. C. C. 687 (1939); Joseph Cont. Car. App., 16 M. C. C. 165 (1939); Dalton Cont. Car. App., 16 M. C. C. 127 (1939).

¹⁰⁷Adams Ext., 12 M. C. C. 770 (1938).

¹⁰⁸Mandot Cont. Car. App., 16 M. C. C. 615 (1939).

¹⁰⁹Heiston Com. Car. App., 11 M. C. C. 170 (1938).

¹¹⁰Vaughan Ext., 11 M. C. C. 129 (1938).

¹¹¹Rainville Cont. Car. App., 20 M. C. C. 307 (1939).

¹¹²Watts Cont. Car. App., 14 M. C. C. 113 (1939).

¹¹³Lewis Cont. Car. App., 21 M. C. C. 71 (1939); Floistad Ext., 16 M. C. C. 637 (1939); Gross Ext., 16 M. C. C. 607 (1939); Funston Cont. Car. App., 14 M. C. C. 155 (1939).

¹¹⁴Reliable Van and Warehouse Cont. Car. App., 14 M. C. C. 81; Allen Cont. Car. App., 12 M. C. C. 253 (1938); Quarryman's Cont. Car. App., 12 M. C. C. 237 (1938).

Armored car service requires not only personnel of particular training, but equipment of special character as well.¹¹⁵

E. New or Different Service Proposed

Often the existing service may be of such a type and the carriers engaged therein may be in such a situation that a new or different type of service is justified. Such conclusion may arise from the peculiar character of the articles, to transport which the regular route handlers are unprepared,¹¹⁶ from the fact that no one common carrier serves all the points specified and no contract carrier operating between the specified points offer the particular service proposed,¹¹⁷ or from the fact that no other carrier in the area is prepared to furnish such service as the applicant proposes.¹¹⁸

The elimination of two movements required when gasoline is transported by rail which prevents spilling, evaporation, and entrance of foreign matter into the product, justifies a permit for truck transportation.¹¹⁹ Likewise transportation of piece goods for a shirt manufacturer constitutes a type of service he needs which is not otherwise available.¹²⁰ Where customers who had no rail siding and who ordered in less than carload lots experienced difficulty in finding common carriers who served the areas of their customers, a contract carrier application was granted.¹²¹

F. Fitness, Willingness and Ability of Applicant

Section 209 (b) states in part:

“A permit shall be issued to any qualified applicant therefor . . . if it appears . . . that the applicant is fit, willing and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the requirements of this part and the lawful requirements, rules, and regulations of the Commission thereunder.”

The general observation that “applicant is fit, willing and able” is more extensively in evidence than is any other factor involved in issuing a permit.¹²²

¹¹⁵Armored Motor Cont. Car. App., 20 M. C. C. 157 (1939).

¹¹⁶Anderson Cont. Car. App., 12 M. C. C. 587 (1938).

¹¹⁷C. & R. Trucking Co. Cont. Car. App., 12 M. C. C. 499 (1939).

¹¹⁸Wegst Cont. Car. App., 20 M. C. C. 236 (1939).

¹¹⁹Reynolds Cont. Car. App., 16 M. C. C. 687 (1939).

¹²⁰Radcliffe Cont. Car. App., 14 M. C. C. 127.

¹²¹Callahan Ext., 12 M. C. C. 440 (1939).

¹²²The following are illustrative cases of contract carrier applications: Olive Transfer Ext., 20 M. C. C. 389 (1939); Panek, 20 M. C. C. 320 (1939); Tafrow, 20 M. C. C. 233 (1939); Bargione, 20 M. C. C. 215 (1939); Lincoln, 20 M. C. C. 185 (1939); Abbott, 20 M. C. C. 151 (1939); Thornhill & Truax, 20 M. C. C. 51 (1939); Phillippy, 14 M. C. C. 455 (1939); Watts, 14 M. C. C. 113 (1939); Farley, 6 M. C. C. 463 (1937); Burke, 6 M. C. C. 403 (1937); Stamps, 6 M. C. C. 398 (1937); Floistad, 6 M. C. C. 225 (1937); Crawford, 4 M. C. C. 395 (1937); Warner, 4 M. C. C. 328 (1937); Hamilton, 2 M. C. C. 731 (1936); Love, 2 M. C. C. 467 (1936); Gifford,

Less difficult to establish than fitness and ability, willingness to perform the service proposed is usually implied in the application for permit.

1. *Financial ability.*—Although ability may be expressed merely as ability to do the job,¹²³ the term runs heavily to financial ability to perform the service,¹²⁴ and may appear as financially and otherwise able.¹²⁵ For example, one applicant was adjudged financially able to perform the service proposed though his economic worth was rated at only \$700.¹²⁶

2. *Successful and profitable experience in transportation.*—"In the absence of evidence to the contrary, past operations conducted over a long period of time may be taken as some proof of the continuous public need for the service embraced in such past operations"; here 18 years experience under contract with the same concern constituted adequate basis for a permit.¹²⁷

Successful and profitable experience as a factor in fitness figures in a great number of cases, with an extensive range of time and of circumstances in which attained.¹²⁸ It is strong evidence that the applicant is fit to continue operation.¹²⁹

3. *Special knowledge and skill of applicant.*—In a few cases the Commission has recognized as an element in fitness a special skill required in handling each of several articles.¹³⁰

4. *Illegal operation of motor carrier service.*—Much of Commission effort at determining fitness of an applicant has centered around his illegal operation at some time prior to hearing on the application for permit. An applicant acting under the mistaken belief that he was legally entitled to continue in operation while his application was pending was held not to have thereby disqualified himself.¹³¹ Discontinuing contract operations when in-

2 M. C. C. 92 (1936); Kidder, 1 M. C. C. 757 (1936); House, 1 M. C. C. 725 (1936); Diehl, 1 M. C. C. 151 (1936).

¹²³Monk Cont. Car. App., 12 M. C. C. 335 (1938).

¹²⁴Dauphinias Cont. Car. App., 12 M. C. C. 507 (1938); Schlusser Cont. Car. App., 12 M. C. C. 279 (1938); Trago Ext., 12 M. C. C. 119 (1938); Touhy & O'Shea Ext., 11 M. C. C. 707 (1938); Yavelberg Cont. Car. App., 11 M. C. C. 501 (1938).

¹²⁵Johnson Cont. Car. App., 12 M. C. C. 763 (1938); Keck Cont. Car. App., 12 M. C. C. 601 (1938).

¹²⁶Lo Frisco Cont. Car. App., 11 M. C. C. 675 (1938).

¹²⁷Fishe! Cont. Car. App., 14 M. C. C. 119 (1939). Similarly, 18 years experience, Benedict Cont. Car. App., 12 M. C. C. 271 (1938).

¹²⁸Cases in M. C. C. as follows: vol. 20 at 87, 112, 233, 236, and 389; vol. 16 at 71, 117, 155, 221; vol. 14 at 155, 599; vol. 12 at 221, 271, 279, 307, 321, 333, 723; vol. 11 at 371, 587, 589, 743, 753.

¹²⁹Curry Cont. Car. App., 16 M. C. C. 649 (1939).

¹³⁰Hager Cont. Car. App., 20 M. C. C. 416 (1939); Prasky Cont. Car. App., 16 M. C. C. 401 (1939); Palisade Film Del. Cont. Car. App., 16 M. C. C. 389 (1939); Kane & Hoch Cont. Car. App., 16 M. C. C. 107 (1939); Rossadivito Cont. Car. App., 12 M. C. C. 231 (1938).

¹³¹Gifford Cont. Car. App., 2 M. C. C. 92 (1936).

formed of their illegality revealed the desire of one applicant to conform and indicated his fitness for the permit.¹³² If the applicant's proposed service is reasonably in the public interest the fact of his having violated the Act and other measures will not prove an absolute bar to the issuance of the permit.¹³³

Though the Commission had begun court action against an operator-applicant who did not desist on notification that his illegal operations must cease, the Commission refused to adjudge him unfit to receive the permit sought when his application was already pending at the time the cease order was sent him. His qualifications were otherwise acceptable and his services were required by shippers.¹³⁴

Admitting that proved violations of state law might establish unfitness of an applicant for a federal permit, the Commission very early indicated that such an applicant cannot be required to show that he has complied with all state laws to get the permit.¹³⁵ In 1939 the Commission held in two cases that unlawful operation constitutes no absolute bar to the issuance of a permit, one of the opinions emphasizing that the applicant had not operated in willful disregard of the law.¹³⁶ And in two cases in 1939 the Commission reiterated the earlier position that unlawful operations are inadequate ground to deny a permit if it does not appear that the applicant willfully disregarded the statutory requirements.¹³⁷

But a permit was denied to an applicant who admitted that he had operated surreptitiously to avoid compliance with state laws, had posed as a private carrier, had conducted his operation under injunctions obtained through his own effort or by help of others, had shifted a truck to the name of another operator, had escaped inspection by signals from drivers of other vehicles, and had been fined for illegal operation.¹³⁸

An applicant who in 1937 had unauthorizedly extended his operation was adjudged in 1939 as having violated the 1935 Act, and the permit was denied. But sufficient was the service already being offered between the points he proposed to serve.¹³⁹

¹³²Hamilton Cont. Car. App., 2 M. C. C. 731 (1936).

¹³³Diehl Cont. Car. App., 1 M. C. C. 151 (1936). Similarly, see Grover Cont. Car. App., 21 M. C. C. 11 (1939); Leatham Cont. Car. App., 2 M. C. C. 639; Kidder Cont. Car. App., 1 M. C. C. 757 (1936).

¹³⁴Floistad Cont. Car. App., 6 M. C. C. 225 (1937).

¹³⁵Love Cont. Car. App., 2 M. C. C. 647 (1936).

¹³⁶Jones Cont. Car. App., 14 M. C. C. 511 (1938); Phillippy Cont. Car. App., 14 M. C. C. 455 (1939).

¹³⁷Woodrow Ext., 17 M. C. C. 329 (1939); Martin Ext., 17 M. C. C. 127 (1939); Pollon Cont. Car. App., 12 M. C. C. 285 (1938).

¹³⁸Stamps Cont. Car. App. 6 M. C. C. 398 (1937).

¹³⁹Dunn Ext., 20 M. C. C. 24 (1939).

G. Effect of Proposed Service on Existing Carriers

In authorizing contract carriers the Commission must consider consistency with the public interest in terms of the basic purpose of the Act which "is plainly to promote and protect adequate and efficient common carrier service by motor vehicle in the public interest."¹⁴⁰

This clear declaration in favor of common carriers received further emphasis in the pronouncement that existing carriers possess primary rights in the transportation enterprise:

"We think that to foster sound economic conditions in the motor carrier industry, existing motor carriers should normally be accorded the right to transport all the traffic they can handle adequately, efficiently, and economically in the territories served by them."¹⁴¹

This view that existing motor carriers should be allowed all the business they can handle adequately, efficiently and economically without being subjected to additional competition has at other times been asserted and applied by the Commission.¹⁴²

An application for a permit which would not foster the envisaged sound economic conditions within motor carrier enterprise will not be granted.¹⁴³

Great importance attaches to the modifiers, "adequately, efficiently, and economically." Existing service must meet the test in order to prevent authorization of contract applicant; and the testimony of established carriers may be outweighed by testimony of shippers that requested contract service would be more desirable.¹⁴⁴ Shippers are entitled to "adequate" service "by motor vehicle as well as by railroad."¹⁴⁵

The fact that no motor carrier in the area does¹⁴⁶ or can¹⁴⁷ perform the service proposed by contract applicant is proper ground for issuing the permit, as is the case where available motor carrier service is insufficient.¹⁴⁸

Permits have been granted in several instances where the advantages of contract motor service over that of railroads were clearly shown: reduction of rail delivery time from 72 to 15 hours by motor;¹⁴⁹ more dependable and more expeditious than railway service;¹⁵⁰ superiority of motor truck over

¹⁴⁰Contracts of Contract Carriers, 1 M. C. C. 628 (1936).

¹⁴¹C. & D. Cont. Car. App., 1 M. C. C. 329 (1936).

¹⁴²Heiston Com. Car. App., 11 M. C. C. 170 (1938).

¹⁴³Dresler Cont. Car. App., 12 M. C. C. 63 (1938).

¹⁴⁴Corl Cont. Car. App., 1 M. C. C. 292 (1936).

¹⁴⁵Panek Cont. Car. App., 20 M. C. C. 320 (1939); Reliable Van & Warehouse Cont. Car. App., 14 M. C. C. 81 (1939).

¹⁴⁶Hodges & MacIntosh Cont. Car. App., 20 M. C. C. 280 (1939); Wegst Cont. Car. App., 20 M. C. C. 236 (1939).

¹⁴⁷Jones Cont. Car. App., 14 M. C. C. 511 (1938).

¹⁴⁸Mexner Cont. Car. App., 20 M. C. C. 700 (1939).

¹⁴⁹Black Cont. Car. App., 16 M. C. C. 393 (1939).

¹⁵⁰Kennedy Cont. Car. App., 14 M. C. C. 505 (1939).

railway as to transporting petroleum and petroleum products;¹⁵¹ elimination of one handling of goods required in rail shipment;¹⁵² elimination of necessity for crating the goods.¹⁵³

Where to do so will not take away business from established carriers, contract carriage will be authorized,¹⁵⁴ as is the situation where there is no evidence that granting the permit would interfere with the economical and efficient operation of other carriers.¹⁵⁵

Another inquiry is whether the proposed service would have an adverse effect on the interests of established carriers. The absence of such adverse effect goes far to support the permit.¹⁵⁶ The burden of proving that proposed operations will so adversely affect their business as to make them inconsistent with the public interest rests on the existing carriers.¹⁵⁷

Lastly, the effect may be interpreted in terms of competition with existing carriers. A permit will issue if the service sought will not prove competitive with other carriers,¹⁵⁸ if not unduly competitive with or productive of unfair competition with established carriers,¹⁵⁹ or if not in direct competition with them.¹⁶⁰

Where the applicant had transported textile goods for 10 years and testified there were five competitors, the Commission held that issuing the permit would not increase the competition but merely leave it as it was.¹⁶¹

Conversely, protection for existing carriers has resulted in denial of a permit where there was no dissatisfaction with existing service¹⁶² or no

¹⁵¹Petroleum Carrier Corp. Ext., 11 M. C. C. 669 (1938).

¹⁵²Reed Ext., 14 M. C. C. 599 (1939).

¹⁵³Adams Ext., 12 M. C. C. 770 (1938).

¹⁵⁴Wrezenski Cont. Car. App., 17 M. C. C. 794 (1939); Levenson Cont. Car. App., 16 M. C. C. 115 (1939); Buffler Cont. Car. App., 11 M. C. C. 549 (1938).

¹⁵⁵Herpin Cont. Car. App., 14 M. C. C. 501 (1939).

¹⁵⁶Congdon Cont. Car. App., 20 M. C. C. 734 (1939); Stamm Cont. Car. App., 20 M. C. C. 697 (1939); Moore Cont. Car. App., 20 M. C. C. 627 (1939); Soussy Cont. Car. App., 20 M. C. C. 485 (1939); Abbott Cont. Car. App., 20 M. C. C. 151 (1939); Hodges & MacIntosh Cont. Car. App., 20 M. C. C. 280 (1939); Hartman Ext., 20 M. C. C. 277 (1939); Wegst Cont. Car. App., 20 M. C. C. 236 (1939); Tafrow Cont. Car. App., 20 M. C. C. 233 (1939); Abbott Cont. Car. App., 20 M. C. C. 151 (1939); Joseph Cont. Car. App., 16 M. C. C. 165 (1939); Dovel Cont. Car. App., 14 M. C. C. 357 (1938); Jeffries Cont. Car. App., 12 M. C. C. 283 (1938).

¹⁵⁷House Cont. Car. App., 1 M. C. C. 725 (1936); see also Kirbery Cont. Car. App., 3 M. C. C. 465 (1937).

¹⁵⁸Buffenmeyer Cont. Car. App., 11 M. C. C. 653 (1938). Longo Ext., 12 M. C. C. 355 (1938).

¹⁵⁹Fitzgerald Cont. Car. App., 16 M. C. C. 726 (1938); Dauphinias Cont. Car. App., 12 M. C. C. 507 (1938).

¹⁶⁰Silverman Cont. Car. App., 14 M. C. C. 251 (1938); Hillbish Cont. Car. App., 12 M. C. C. 715 (1938); Patrick Cont. Car. App., 12 M. C. C. 329 (1938); Ross Ext., 11 M. C. C. 499 (1938).

¹⁶¹Singer Cont. Car. App., 16 M. C. C. 369 (1938).

¹⁶²King Cont. Car. App., 14 M. C. C. 759 (1938); Stroom Cont. Car. App., 12 M. C. C. 177 (1938).

evidence of inadequacy.¹⁶³ Where rail carriers,¹⁶⁴ truck carriers,¹⁶⁵ or "existing carriers"¹⁶⁶ need the business, the Commission has denied permits for contract carriage competitive therewith. In an extreme case where five common carrier truck lines and five railroads were serving the same town, the Commission recently held that if common carriers performing service beneficial to the general public rather than to a few shippers are or necessarily will be adversely affected by contract carriers offering service at less-than-cost charges, it is more important to maintain the common carriers in healthful economic condition, and refused the permit.¹⁶⁷

As regards the relation between existing common carrier trucking operators and contract carrier applicants to enter into transportation in same area, the Commission position was clearly stated two years ago:

"Where the traffic proposed to be transported is freely moving by existing trucking facilities at prevailing common carrier rates, a proposal by a contract carrier to transport the traffic at a lower rate to meet the desire of a few shippers does not constitute a sufficient ground for granting that carrier the right to enter the trucking field."¹⁶⁸

H. *Contracts of Contract Carriers*

Now constituting an integral part of permit authorization are a few important phases of contracts under which the applicant is operating or proposes to operate.

1. *Form and content of the contracts.*—Because contract service is highly personal, special, selective and flexible, contract carriers possess decided advantages over common carriers.¹⁶⁹ This preferred position of contract carriers early caused great concern to the Commission because the Act declares the policy of promoting and protecting efficient common carrier service in the public interest.

On April 21, 1937, Division Five attempted to equalize and adjust the two types by setting up requirements for contracts: first, each contract must be in writing; second, each contract shall provide for transportation for a particular shipper or shippers; third, it shall be bilateral, imposing obligations on carrier and shipper (or, under modification two months later, on carrier

¹⁶³Foreman Cont. Car. App., 16 M. C. C. 467 (1939); Van Nice Cont. Car. App., 14 M. C. C. 789 (1938); Ross Cont. Car. App., 11 M. C. C. 712 (1938).

¹⁶⁴Millerton Cont. Car. App., 14 M. C. C. 283 (1939); Pearsall Cont. Car. App., 11 M. C. C. 646 (1936); Seider Cont. Car. App., 11 M. C. C. 610 (1939).

¹⁶⁵Dresler Cont. Car. App., 12 M. C. C. 63 (1939).

¹⁶⁶Thiemer Cont. Car. App., 12 M. C. C. 303 (1939).

¹⁶⁷Teter Cont. Car. App., 18 M. C. C. 153 (1939).

¹⁶⁸Cox Cont. Car. App., 14 M. C. C. 777 (1939).

¹⁶⁹(1) Freedom to pick and choose among shippers; (2) privilege under the act to discriminate among its customers; (3) charges can be brought into question only if they fall below a minimum level. *Contracts of Contract Carriers*, 1 M. C. C. 628 (1936).

and other carrier as parties);¹⁷⁰ fourth, it must cover a series of shipments during a stated period of time; fifth, copies of the contract shall be preserved by the carriers parties thereto during the life of the contract and one year thereafter; sixth, while contracts need not cover long periods of time or specify fixed amount of traffic, they should be capable of ready adjustment to changing conditions, and while the rates charged need not be indelibly fixed, they should be clearly ascertainable from the contract.¹⁷¹

Such requirements the majority of Division Five considered beneficial to all concerned. But Commissioner Lee dissented, holding that the Commission has no power to establish such requirements for the contracts, and that, in light of the competitive character of all industry and the impractical task of determining whether all contracts meet the requirements, it is unwise to so require.

2. *Filing and posting the contracts.*—Acting under its discretion conferred by Section 218 (a) the Division on January 19, 1937, ordered subject contract carriers to file with the Commission by February 1, 1937, and to keep open to the public copies of each existing contract for transporting property in interstate or foreign commerce. (The Division could have required instead the filing, posting and publishing of schedules of minimum charges.)

Soon many contract carriers expressed willingness to file the contracts with Commission but disapproved of keeping them open for public inspection. Presently formal request for modification of the order on filing, posting and keeping open was filed with the Commission, and on June 8, 1937, (the original order was to go into effect July 1, 1937) the full Commission modified the order by withdrawing the posting and keeping-open provisions. All subject contract carriers were to file with the Commission on or before July 15, 1937, a copy of each contract in force on that day, and within 20 days after the date of any subsequent contract a copy thereof, "all of which should contain the charges of such contract carriers for transportation of property in interstate or foreign commerce, and any rule, regulation or practice affecting such charges and the value of the service thereunder."¹⁷²

A year later exemption from executing, filing and preserving contracts was granted to contract carriers of "bullion, currency, jewels, and other precious

¹⁷⁰This is a means toward keeping contract carriers from trespassing on common carrier field.

¹⁷¹The accompanying order was to go into effect July 1, 1937.

¹⁷²Filing of Contracts by Contract Carriers, 2 M. C. C. 55 (June 8, 1937). The requirements set up in 1 M. C. C. 628 (1936) as subsequently modified continue to be the basis of authorization. Green Bros. Cont. Car. App., 18 M. C. C. 94 (1939); Carr Cont. Car. App., 16 M. C. C. 541 (1939).

and very valuable articles as a deterrent to robbery of vehicles bearing valuable shipments."¹⁷³

3. *Scope of permit and number of contracts.*—Section 209 directs the Commission to specify in the permit the business of the contract carrier covered by the permit, and the scope thereof, and to attach to the permit when issued and at times thereafter whatever reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier are necessary to carry out with respect to the operations of such a carrier the requirements established by the Commission pursuant to Section 204 (a) (2) and (6), "Provided, however, that no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require."

A casual examination of the above portion of Section 209 reveals that few provisions of public law could equal it for comprehensiveness or conflict in interpretation. Much and sharp contest has risen over its meaning.¹⁷⁴

The holder of a "grandfather" permit is entitled to transport only those items which he was transporting on July 1, 1935, and continuously since has transported.¹⁷⁵ Yet an applicant seeking to transport groceries for wholesale and retail chain food stores is entitled to transport also the equipment, materials and supplies used in such wholesale and retail food enterprise.¹⁷⁶

"Scope of the permit" was early interpreted as relating to the routes or territory the applicant may serve, the commodities it may transport, and not to the shipper or shippers whom it may serve.¹⁷⁷ Permits generally are limited in scope by the following prescription: (a) statement of territory or points to be served; (b) routes over which operations are to be conducted; (c) commodities to be transported; (d) compliance with requirements established in *Contracts of Contract Carriers, 1 M. C. C. 628 (1936)* as modified.¹⁷⁸

For how many shippers may a contract carrier transport without losing

¹⁷³Secrecy is desired in respect to the articles transported and the exact places from which and to which they are to be received and delivered. *Contracts of Contract Carriers*, 11 M. C. C. 693 (1938).

¹⁷⁴Rush Cont. Car. App., 17 M. C. C. 661 (1939).

¹⁷⁵Motor Convoy Cont. Car. App., 2 M. C. C. 197 (1937), reaffirmed in *Keystone Cont. Car. App.*, 19 M. C. C. 474 (1939).

¹⁷⁶De Merchant Cont. Car. App., 21 M. C. C. 585 (1940).

¹⁷⁷Longshore Cont. Car. App., 2 M. C. C. 480 (1936), cited in *Keystone Cont. Car. App.*, 19 M. C. C. 474 (1939).

¹⁷⁸Doudell Cont. Car. App., 17 M. C. C. 684 (1939), citing *Sturlin Cont. Car. App.*, 1 M. C. C. 411 (1936); *Webb Cont. Car. App.*, 1 M. C. C. 414 (1936). And in some instances, specifications as to equipment used and loads carried. *Doudell Cont. Car. App.*, *supra*.

his contract carrier character? Hauling for one shipper,¹⁷⁹ for five,¹⁸⁰ or six¹⁸¹ shippers has received authorization. The Commission has pointed out that the statute recognizes the right of a contract carrier to add or to substitute contracts within the scope of his permit, provided the "new contracts are not added in such numbers and manner as to change his status to that of a common carrier without becoming subject to regulation as such."¹⁸²

Concern that expanding the number of contracts would transform a contract carrier into a common carrier has been expressed by the Commission. The presence of nine other mines in the area in which the applicant proposed to serve six caused the Commission to state that if he should make unlimited contracts with all the fifteen he might cease to be a contract and become a common carrier.¹⁸³

Despite its holding in March, 1939, that "no limitation as to maximum number of shipments to be made could be incorporated in any permit issued, as it would be contrary to Section 209 (b) of the Act,"¹⁸⁴ the Commission reached a critical turning point relative to contracts in October, 1939.¹⁸⁵ American Stores Company having decided to discontinue its private carriage of its own goods, two groups of its former driver-employees applied for permits to transport for the company the general commodity lists. One group asked to transport the general commodity list goods with minor exception within the Baltimore zone, and the other in the Johnstown zone. Transportation would serve 2700 food stores in former zone and 195 in the latter. Some interzone transportation was contemplated as necessary. The company had agreements which it was willing to transform into written contracts, should permits be granted by the Commission.

Significant questions presented for decision were:

One, is the holder of a permit to transport general and special commodities for this food store chain legally entitled to enter into additional contract or contracts to haul for any other person a particular commodity or group of commodities coming within the general commodities list?

Two, shall the contract carriers be limited as to the service to be performed by specifying in these permits the type of shippers who may use their service?

Three, shall the permits issued restrict the holder merely to the territorial extent of operations covered thereby, and thus allow the carriers to add contracts to haul any commodity whatsoever in the territory specified?

¹⁷⁹Rush Cont. Car. App., 17 M. C. C. 661 (1939).

¹⁸⁰Foley & Sheldon Ext., 20 M. C. C. 376 (1939).

¹⁸¹Doudell Cont. Car. App., 17 M. C. C. 684 (1939).

¹⁸²*Ibid.*

¹⁸³Rush case, Cont. Car. App., 17 M. C. C. 661 (1939).

¹⁸⁴Joseph Cont. Car. App., 16 M. C. C. 167 (1939).

¹⁸⁵Keystone Cont. Car. App., 19 M. C. C. 475-507 (1939).

Fourth, does Section 209 (b) directing that the Commission shall specify in the permit "the business of the contract carrier" contemplate that permits issued thereunder "shall specify both the commodities covered thereby and the territorial scope of the operations authorized therein"?

Chief points in the Commission argument that it has power to restrict the permits are as follows: (a) all parties agree that permits can and must specify territorial limits; (b) many and significant are the differences between common and contract carriers;¹⁸⁶ (c) the critically competitive situation between the two types of carriers was recognized in the congressional Act, the purpose of which is to devise an effective regulation of contract carriers as a means of promoting and protecting efficiency and adequacy of motor common carrier service; (d) in directing the Commission in fixing minimum charges for contract carriers to allow no preference or advantage to any carrier in competition with motor common carriers, Section 218 (b) clearly reveals the obvious objective of protecting common carriers against destructive competition; (e) the policy declared in 202 (a) stresses the development of highway transportation system properly adapted to the needs of national commerce and national defense, the fostering of sound economic conditions in highway transportation, and avoidance of destructive competitive practices; (f) Section 209 clearly states our powers and duties relative to granting permits.

These powers and duties the Commission sets forth at some length:

(1) We may specify in the permit "the business of the contract covered thereby and the scope thereof." According to the Commission the above phrase connotes "the exact and precise character of the service to be rendered" by the contract carrier. This means the Commission can include "the territory or points to be served, commodities to be transported, equipment to be used, and any other specification necessary to describe the service authorized *even to extent of limiting the service to be rendered to that of a particular type, such as that rendered a retail food store.*"¹⁸⁷

(2) Because contract carriers vary among themselves as to equipment used and different types of service provided, it would neither describe the true nature or operation of a contract carrier nor allow the regulation contemplated by Congress to state merely that the operator is engaged in the business of being a contract carrier.

(3) Section 204 (a) clearly indicates a specific classification of contract carriers, for it authorizes the Commission to make reasonable classifications of motor carriers "as special nature of the services performed shall require,

¹⁸⁶A lengthy list of differences and of contract carrier advantages is set forth. ¹⁸⁷19 M. C. C. at 493. Italics supplied.

and such just and reasonable rules, regulations and requirements as the Commission deems necessary or desirable in the public interest."

(4) We may attach to permit when issued and at times thereafter reasonable terms and conditions consistent with the character of the holder as are necessary to effectuate the requirements established by the Commission under 204 (a) (2) and (6).¹⁸⁸

(5) "Scope of the permit" we defined in the *Longshore* case,¹⁸⁹ as relating "*to the route or territory which the carrier may serve and to the commodities it may transport, and not to the shipper or shippers to whom it may render its service.*" We now hold that the above statement does not fully reflect the meaning of the term "scope of the permit." "The word 'scope' refers to the full extent of the transportation service authorized by the permit, and plainly covers, in addition to the commodities, routes, points, and territory, all the other essential characteristics of the service rendered by the carrier. As we now see it that entire term relates to not only routes, territory, points, and commodities, but also to the type of the particular service rendered by the contract carrier."¹⁹⁰

Thus did the Commission answer, "No," to questions one and three, and, "Yes," to questions two and four.¹⁹¹ Applications were granted without allowing the interzone operation.

Commissioner Lee, dissenting as to the resulting conditioned operating authority to be granted took the majority to task and objected strongly to the requirement by the majority that contract carriers of the type involved must be restricted to transporting particular commodities, limited not only to carriage over stated routes or in definite area but limited also to particular shippers. Calling attention to early basic cases¹⁹² limiting the "scope of the permit" to routes or territories to be served and the articles to be carried, he recognized the revolution wrought by the majority, whose new doctrine relies largely for justification on the necessity of protecting common carriers. He denies that it was the "patent object of Congress" to protect common carriers at the expense of contract carriers, and insists Congress intended the two classes of carrier to be dealt with evenly.

By limiting to particular shippers the service of a contract carrier the number of contracts a carrier may make can be effectively controlled. This limitation of contracts may prove detrimental to the carrier so limited and beneficial to other contract carriers and to common carriers, both rail and motor.

¹⁸⁸Examples of such requirements are found in *Contracts of Contract Carriers*, 1 M. C. C. 628 (1936), to which requirements the permits issued are made subject.

¹⁸⁹*Longshore Cont. Car. App.*, 2 M. C. C. 480 (1937).

¹⁹⁰19 M. C. C. at 494. Italics supplied.

¹⁹¹Eastman, chairman, wrote a concurring opinion.

¹⁹²*Longshore Cont. Car. App.*, 2 M. C. C. 480 (1937); *Motor Convoy Cont. Car. App.*, 2 M. C. C. 197 (1937).

III. SIGNIFICANCE

Developments to date in the federal regulation of contract motor carriers reveal several points of significance.

First, there is a tendency to utilize devices, methods and experience of the states where began the experimentation with control of this type carrier.

Second, necessarily incomplete, congressional distinction of contract carriers from common carriers on one hand and from private carriers on the other has been supplemented by administrative interpretation. The task of differentiation has been encouragingly begun, but some clarification is yet necessary.

Third, formally contract carriers are rated closer to private carriers than to common carriers; yet there is evidence that the present status may prove a transitional one.

Fourth, much greater ease has been experienced in obtaining "grandfather" permits than permits *de novo*. Consistency with the public interest is being interpreted with increasing care and applied with increasing caution.

Fifth, the chief factors in consistency with the public interest are inadequacy of existing service, need for service proposed and fitness of the applicant.

Sixth, because of the many advantages of contract carriers over common carriers, who are subject to rather strict regulation, it is imperative that the former not be allowed to encroach on the activities and interests of the latter.

Seventh, if they are alert and able, established carriers, rail or motor, are entitled to preference. Proposed service which would jeopardize the best interests of established carriers will not be authorized.

Eighth, some precedents are being set. The legal status of motorized collection and delivery service operated in conjunction with railroads, requirements as to contracts of contract carriers, clarification of the "scope" of the permit and implementing the scope as an instrument of control over the range of contract carrier activity—these serve as leading examples.

Ninth, evolution characterizes the process of regulation. Federal adaptation and refinement from state experimental laboratories constitutes a development anticipated by several interests. Commission experience as to form and filing of contracts, and the interpretation of "scope of permit" so as to use it as an effective control device reflects Darwin rather than Newton.

Finally, throughout the period of federal authorization of contract carriers the Commission has revealed a pragmatic philosophy, recognizing the desirability, hazard and inevitability of trial and error in the regulatory process. Much remains to be done; an encouraging prelude has been staged.