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REGULATION OF MOTOR TRANSPORTATION

I TRANSPORTATION HISTORY

The economist knows no more fascinating study than the history and influence of transportation. Before man had identified himself on this earth, a vast tonnage had been brought together to form it. The hemispheres had moved northward from their South Pole point of origin, mountains had been leveled and deep valleys filled by water and glacier, the bird and the beaver moved the materials for new homes, and the tiniest wind-borne seeds floated silently from one place to another. There was even a considerable passenger business among the kangaroos and certain early anthropoids.

Among the differences between human and other animals is the greater power of man to improve the existing status. It did not take him long to discover that wood and certain other materials would not only float, but would support materials which would not float. He found that the principle of the lever was of the greatest help to him in lifting heavy weights and, perhaps most important of all, he one day awakened to the fact that a roller or wheel tremendously lightened the labor of moving his wife's neolithic furniture.

Thus transportation, having begun long before man, has been steadily developed and improved by him to the present day. It has been one of the vital factors in the upswing of civilization. Raw materials, fuel and markets are all important, but transportation is the single factor involved in them all. We shall pass over the story of the

human burden bearer, the pack horse, canoe, canal boat, conestoga wagon, and the pony express. All had their glorious day, but the people and goods of this country no longer move by them.

II THE TRANSPORTATION SITUATION

We now find that the important agencies involved in transportation are ship lines, railroads, electric lines and motor vehicles. Air service undoubtedly is coming, but it will be of more concern to the future than the present. The development of all of these, including air lines, has rather crowded the transportation field. We now find them all competing to a certain extent, and some of them a bit irritated by the process. It is our purpose to discuss motor transportation, and to digress into the other fields only far enough to learn something of the nature of the transportation world in which this infant industry has suddenly found itself.

Steamships have been increased in size, speed and carrying power. Ports have been improved, and hundreds of millions of both public and private dollars have been spent in improving inland water ways. Many federal and state laws have been enacted to regulate water-borne commerce, the wages, hours and activities of those engaged in it. It is no longer a free moral or immoral agent. It moves about and has its being under a paternalistic government.

Railroads, for reasons which need not be discussed here, have been placed under the closest kind of supervision. They can do nothing, apparently, without the permission of the Interstate Commerce Commission except pass dividends. They have been told that they might go swimming, but they must not go near the water. In these parlous times, they are inclined to blame all troubles either on the Interstate Commerce Commission or the motor vehicle. Passenger business is falling off, tonnage is decreasing, revenues are vanishing; even good temper, so necessary for the "iron horse", has almost disappeared. Thousands of miles of track are abandoned or useless. Station after station is be-

ing closed up. Even a Coolidge Commission is sitting on the railroads.

The electric lines, except in a very few instances, are merely counting the days. These once popular and efficient public servants have been largely retired, either on pension or without. We do not say that with proper care electric transportation may not survive, but we think it must have a different diet and a new nurse in most cases.

The motor vehicle bounces (as if on rubber) into this transportation family, and with horns and rattles makes itself quite unwelcome. At first, it is unregulated and unrestrained. It grows rapidly and wildly. It develops the habit of taking what it wants, and is surprised to find that people really want to give it to them. But often the people do not know what is best for them, and very soon the various states try to quiet this youngster. They want it to grow up and accept the conventional restrictions of maturity. It must be more decorous, more considerate of its neighbors, more restrained in its activities. Hence, every state (with one exception) has undertaken to set up a rule of conduct for the proper guidance, development and education of this newcomer—the motor vehicle. What has Pennsylvania done with this important subject?

III STATE REGULATION

It will clarify the situation if we say immediately that we shall not discuss the so-called pleasure car, which is subject only to police regulation and certain inspections, or the taxi, which has been declared a common carrier in Pennsylvania. Neither shall we include that considerable number of special motor vehicles of all kinds. The motor bus and motor truck alone offer sufficient problems for present consideration.

The Act of July 26th, 1913, P. L. 1374, is known as the Public Service Company Law. It became effective January 1st, 1914, since which date all common carriers of persons and property in intrastate service in Pennsylvania have been within the jurisdiction of the Public Service Commission of Pennsylvania, which is the body created for the

administration of this law. The Commission found the rail and water lines well established, but transportation by bus and truck was just beginning. In theory, at least, this industry has been regulated from the beginning—practically, it was not of sufficient importance in 1914 to receive much attention from the regulatory powers. The law, however, was clear¹ and many later difficult situations would have been avoided if the early Commissions had recognized the necessity for enforcing all the law.

Since the law quoted below does not differentiate between the bus and truck, and since the law covering the requirements for obtaining the necessary certificates of public convenience is the same for both,² one might assume

¹Act of July 26th, 1913, P. L. 1374.

"Section 2. Upon the approval of the commission evidenced by its Certificate of Public Convenience, first had and obtained, and not otherwise, it shall be lawful for any proposed public service company—

(a). To be incorporated, organized, or created: Provided, That existing laws relative to the incorporation, organization, and creation of such companies shall first have been complied with, prior to the application to the commission for its Certificate of Public Convenience.

(b). To begin the exercise of any right, power, franchise, or privilege, under any ordinance, municipal contract or otherwise.

Section 3. Upon like approval of the Commission first had and obtained, as aforesaid, and upon compliance with existing laws, and not otherwise, it shall be lawful—

(a). For any public service company to renew its charter, or obtain any additional rights, powers, franchises, or privileges, by any amendment or supplement to its charter, or otherwise." Article III, Sections 2 and 3.

The "public service company" referred to is defined in Article I, Section 1, as follows:

"The term 'Public Service Company', when used in this act, includes all * * * * common carriers, * * * * and also all persons engaged for profit in the same kind of business within this Commonwealth."

A "common carrier" is described (not defined) as follows:

"The term Common Carrier', as used in this act, includes any and all common carriers, whether corporations or persons, engaged for profit in the conveyance of passengers or property, or both, between points within this Commonwealth, by, through, over, above, or under land or water, or both." Article I, Section 1.

²"Section 13. When application shall be made to the commission by any proposed public service company for the approval by said com-

that one general set of Commission regulations could be devised to govern both. Unfortunately for the student of the law, this assumption is not entirely correct. Partly because bus regulation was undertaken first, but more because of essential differences in the services, much of the system of regulation of the bus is different from that of the truck. The Commission has issued separate general orders for their governance.³ It is true that applications to the Commission for certificates of public convenience are somewhat similar. The filing fee is the same,⁴ the public notices of hearings are advertised to the same extent,⁵ but there are some important matters peculiar to each which have no relation to the other. Let us, therefore, look at some of the regulatory problems of these agencies, with a glance later at federal regulation of both.

Since most of the problems to be considered arise from cases involving the question as to just what types of operation are subject to the provisions of the Public Service Company Law, it would be well to indicate some services which are outside of the Commission's jurisdiction. There are three broad classes of operators who are within this group:

1. Those engaged in interstate commerce.

mission of its incorporation, or organization, or creation; or by any public service company for the approval by the commission of the renewal of its charter, or the obtaining of any additional rights, powers, franchises, or privileges by any amendment or supplement to its charter, or otherwise; or for permission from the commission to begin the exercise of any right, power, franchise, or privilege; * * * * such approval, in each and every such case, or kind of application, shall be given only if and when the said commission shall find or determine that the granting or approval of such application is necessary or proper for the service, accommodation, convenience, or safety of the public." Article V, Section 18, 1913 P. L. 1374.

³General Order No. 18, as amended, applies to motor bus operation.

General Order No. 29 (effective January 1st, 1933) applies to motor truck operation.

⁴\$5.00 for each application.

⁵Once each week for two consecutive weeks in newspapers of general circulation in the territory to be served.

2. Those who operated prior to January 1st, 1914, the effective date of the Public Service Company Law, and have continuously engaged in such operations since that date.

3. Private or "contract" carriers, as distinguished from common carriers.

The question as to whether or not certain types of activities are within these exceptions has been productive of many perplexing and interesting situations. Space limitations prohibit adequate discussions of all of these, and consequently only the more interesting adjudicated and pending problems will be considered in the following pages.

IV SOME PROBLEMS INVOLVED IN STATE REGULATION

(a) Those affecting both bus and truck operations

The cases involving the first two categories of carriers (those engaged in interstate commerce and those who operated prior to 1914) who are free from the jurisdiction of the Commission are similar, whether buses or trucks are involved. The principles of regulation apply generally with equal force to the operations of both forms of transportation. These principles will, therefore, be considered without segregating them as to the carriage of persons or property. On the other hand, the problems arising under the third group (contract or private carriers) so often differ in the factual situations which they develop that it seems better to discuss separately the bus and truck cases involved in this group.

The United States Supreme Court, in the famous *Bush* and *Buck* cases,⁶ made it clear that interstate commerce by motor vehicle could not be burdened by state regulation. These cases have been followed by others,⁷ some of which at first glance seem to modify the *Bush* and *Buck* cases but, upon more careful study, will be found merely to reiterate

⁶*Bush v. Maloy*, 267 U. S. 317; *Buck v. Kuykendall*, 267 U. S. 307.

⁷*Nevin Bus Lines, Inc. v. Public Service Commission*, 99 Pa. Super. Ct. 370; *Garrison v. Paramount Bus Corporation*, 227 N. Y. Sup. 511; and cases cited in next note.

the principle that the police power of the state may be exercised to reasonably restrict speed, weight and size, and regulate actual highway operation.⁸ An Ohio case even upholds a Commission ruling which prohibited interstate commerce on certain highways, because of existing congestion thereon, probably on the theory of promotion of public safety.⁹

As we have said, it is established law that interstate commerce cannot be unduly burdened by any state or state agency, but this is another of those many occasions where a statement of the law does not adequately cover the situation. One immediately asks for a definition of interstate commerce, so that he may know what it is which cannot be unreasonably burdened. Much transportation may be immediately classified as interstate. Any bona fide transportation between two or more states may be safely called interstate, but there are many interesting cases which are not so clear.

The earlier cases nearly all involved railroads, and since the railroads were then interested (to avoid a complication of compensation, liability, or other state laws) in including as much as possible in interstate service, they continuously and effectively urged upon the various commissions and the courts the broadening of the definition of interstate commerce, and undoubtedly aided in formulating the general policies laid down in the decisions. The case

⁸See for example *Morris v. Doby*, 274 U. S. 135; *Inter-State Buses Corp. v. Blodgett*, 276 U. S. 245; *Clark v. Poor*, 274 U. S. 554.

The United States District Court for the Western District of Missouri, in the case of *Schwartzman Service, Inc. v. Milton R. Stahl et al.*, 60 F. (2d.) 1034, in which the constitutionality of a Missouri regulatory statute was in question, declared that the state could impose regulations concerning the safe condition of vehicles, the licensing of competent operators, reporting of accidents, proper identification of vehicles, and general safety of operations, including speed limits, sizes, weights, etc. Such regulation, under the Missouri decision, is not considered an interference with interstate commerce.

⁹*Bradley v. Public Utilities Commission of Ohio* (report not yet published). An appeal was taken to the United States Supreme Court, this Court having consented to take probable jurisdiction on November 7th, 1932. (Appeal No. 395).

quoted below,¹⁰ while possibly not a leading case, is one of the clearest on the subject. During the earlier litigation, the railroads strongly opposed the application to bus operations of the principles laid down in the *Yohn* case (cited below). They said that the crossing of state lines by railroad was quite different from crossing a state line by highway. The rail line was more permanent, the train must move over it, and its right of way was never determined with reference to the location of state lines. The bus might move over any highway and might deliberately select one which crossed a state line, for the purpose of making the operation interstate. The courts and commissions have not recognized the "permanency" of the right of way as a controlling factor, although moving across a state line as a subterfuge is prohibited. (Subterfuge will be discussed later.) We find that the New York courts have applied to bus lines the same rule as governs rail lines¹¹ but not all states have done this. A broader view of the question may be had by a study of cases not directly involving rail service.¹²

¹⁰"It is contended on defendant's behalf that the shipment was not of an interstate character, because the point of origin and the point of destination were in the same state. The contention is untenable. Intrastate commerce is that commerce which is during its whole course of transportation within the jurisdiction of a single state. Commerce which originates in a state, passes into another, and then returns to the first, is interstate, as it has gone beyond the state in which it originated, and then passed back again into it, and so has become subject to different jurisdictions in the course of its transportation. Neither state is able to protect it during the whole period of its transportation, and this fact makes federal control practically necessary, as well as legally possible." *Yohn v. United States*, 279 Fed. 562.

¹¹"A bus line whose route begins and ends in one state, but between these termini passes through another state, is an interstate carrier. State statutes, which require a certificate of convenience and necessity and the consent of local authorities for intrastate lines, do not apply to it." *Garrison v. Paramount Bus Corporation*, 227 N. Y. Sup. 511.

¹²Transportation of stolen automobile—*U. S. v. Winkler*, 299 Fed. 832; *Hughes v. United States*, 4 Fed. 387; transportation by ferry—*Mayor and Board of Aldermen of Town of Vidalia v. McNeeley*, 274 U. S. 576; telegraph and telephone messages—*Western Union Telegraph Co. v. Addie Speight*, 254 U. S. 1765; driving or wandering of cattle across state lines—*Thornton v. United States*, 271 U. S. 414.

In Pennsylvania, the rule is that service between two points within the state is interstate, if it is rendered over a route traversing another state and such route has not been chosen as a subterfuge to avoid the law. The Public Service Commission has decided that transportation from Pittsburgh and other points in Pennsylvania to Camden, New Jersey, where the obvious intent of the passenger was to return immediately to Philadelphia, was intrastate commerce, even though the bus carried the passenger into New Jersey, because such carrying was a subterfuge only.¹³ It has also held that transportation between Pittsburgh and Philadelphia via Emmitsburg, Maryland, was intrastate commerce, it being apparent, to the satisfaction of the Commission, that the short divergence over the Emmitsburg road into Maryland was merely a subterfuge for the purpose of avoiding the law.¹⁴

On the other hand, the Commission has held that transportation of passengers between Scranton and Philadelphia was interstate commerce where the bus operated over fifteen to eighteen miles of New Jersey highway, and where it was shown that this highway was shorter and in much better physical condition. Evidence involved in the case was testimony of transportation experts that the Jersey route was the better, and the introduction of a number of comparative photographs of the Jersey highway and the nearest practicable highway in Pennsylvania. These were rather conclusive evidence that the Jersey highway was preferable. Subterfuge, therefore, could not be established, and the Commission followed the railroad rule in declaring such service to be interstate.¹⁵ A similar conclusion was reached as to transportation between Pittsburgh and Philadelphia, via Wilmington, Delaware, in which case it was shown that the company had a substantial amount of business to

¹³Public Service Commission v. Highway Motor Coach Co., 8 Pa. P. S. C. 402; see also Delaware, Lackawanna and Western Railroad Co. v. Frank Martz Bus Co., 9 Pa. P. S. C. 647.

¹⁴Penna. Railroad Co. v. Nevin Bus Lines, 9 Pa. P. S. C. 723.

¹⁵Delaware, Lackawanna and Western Railroad Co. et al. v. Great Lakes Stages, Inc., 10 Pa. P. S. C. 565.

and from Wilmington, and there were reasonable grounds to presume that the Wilmington route was chosen because of its desirability as an operating route, and not merely as a subterfuge.¹⁶

It has been held in Pennsylvania that the intention of the passenger, as communicated to the company or its agent, is a vital factor in determining whether or not the transportation is interstate. If a person should walk into the office of a Harrisburg bus company operating to Elmira, and ask for a ticket to Williamsport, the fact that the bus company sold him a ticket to Elmira and permitted him to get off at Williamsport would not make the transportation interstate. The knowledge of the company that the prospective passenger proposed an intrastate journey would make the transportation intrastate, regardless of the ticket destination. The intention of the passenger, however, not communicated to the company, as, for example, if the same passenger had walked into the Harrisburg office and asked for a ticket to Elmira, would not involve the company in intrastate transportation, even though the passenger discontinued his journey at Williamsport. When we say the company would not be "involved" in intrastate transportation, we mean that the Commission would not consider it guilty of any offense, even though technically the trip was intrastate.¹⁷

Another class of common carrier motor vehicle operations not within the jurisdiction of the Public Service Commission includes those persons or companies who operated before January 1st, 1914 (the effective date of the Public Service Company Law). The law is not retroactive, and

¹⁶Penna. General Transit Co. v. Great Eastern Stages, Inc., 11 Pa. P. S. C. 27. See also Lehigh Valley Transit Co. v. Quaker City Motor Coach Lines, Inc., 10 Pa. P. S. C. 539; and Delaware, Lackawanna and Western Railroad Co. v. Frank Martz Coach Co., 10 Pa. P. S. C. 560.

¹⁷See generally Penna. Railroad Co. v. Colonial Stages, 10 Pa. P. S. C. 170; and Fullington Auto Bus Co. v. Edwards Motor Transit Co., 10 Pa. P. S. C. 687, in which the Commission decided that tickets between points in different states were sold merely as subterfuge, when the intention of the passenger to make an intrastate journey was known to the agent of the carrier.

one engaged as a common carrier by bus or truck in Pennsylvania before 1914, and continuously since, may now legally render service of the same character and to the same extent as was rendered before the effective date of the Act.¹⁸ This rule is strictly construed, however, as to the type and extent of the service and the identity of the operator. The Commission and the Courts have consistently held that a public service company which operated prior to 1914 is entitled (but not required) to be registered to continue the service theretofore rendered, but only to the extent that the rights and powers possessed before 1914 were actually used and employed.¹⁹ One who operated one motor vehicle as a common carrier, either of passengers or freight, before 1914, may not now use two or more such vehicles.²⁰ If he operated a call and demand service, he may not now operate a scheduled service. If he served a certain limited territory, that is no justification for extending his service. The operator of horse-drawn vehicles in a livery service before the effective date of the Act may not now legally operate buses, even though he says that he will hire them out in the same way as he did horses.²¹ If the service was dis-

¹⁸Article III, Section 12 of the Public Service Company Law provides that—

“Every public service company shall be entitled to the full enjoyment and exercise of all and every, the rights, powers, and privileges which it lawfully possesses, or might possess, at the time of the passage of this Act * * * * .”

¹⁹City Transfer Company v. Public Service Commission, 93 Pa. Super. Ct. 210; Coplay Cement Mfg. Co. v. Public Service Commission, 271 Pa. 55; Peoples Natural Gas Company v. Public Service Commission, 279 Pa. 252; Wilkes-Barre Railway Corporation v. Lawrence C. Hartman, 6 Pa. P. S. C. 362; Edwards Motor Transit Co. v. Burns, 8 Pa. P. S. C. 693; Wayne Automobile Transportation Co. v. Harder, 8 Pa. P. S. C. 256. The earlier case of Wilkes-Barre Railway Corp. v. Pugh, 6 Pa. Corp. Rep. 141, which was much more liberal, has been overruled. Pittsburgh Transportation Co. v. Yellow Cab Co., 9 Pa. P. S. C. 435.

²⁰Application of Keystone Express and Storage Company, Application Docket No. 400.46 for 1932. This ruling has been appealed to the Superior Court but has not yet been argued.

²¹Edwards Motor Transit Co. v. Burns, 8 Pa. P. S. C. 693.

continued for an appreciable period after 1914, it may not again be rendered without a certificate from the Commission. The rule as to the identity of the operator does not permit any substitution. If the original operator has died since 1914, or if an original partnership has since been dissolved, or if the business has been incorporated or a new partnership organized, or any other change has been made in the identity of the operator, the Public Service Commission says that a certificate of public convenience must be obtained before the service may be continued. For the purpose of showing the extent of the service rendered before the date of the Act, and of proving to the Commission the right to continue its operation, applications may be filed with the Commission for the registration (not certification) of the operator. It is not necessary to prove any public necessity or demand in such cases, but it is necessary to prove completely the type and extent of service and the identity of the operator as each existed before January 1st, 1914.

(b) Problems peculiar to bus operations.

The status of the school bus has baffled the Commission in a number of perplexing cases. Of the 98,900 buses in operation in the United States, approximately 48,500²² are school buses; that is, engaged in the transportation of school children. Whether or not such buses are engaged in common carriage is a problem susceptible of diverse solutions. It is held that where the transportation is done under a contract between the bus operator and the school board or district, the operator is a private contract carrier rather than a common carrier and, therefore, need not obtain a certificate of public convenience.²³ On the other hand, if the fare is paid by each passenger student, rather than by the school board, the operator is a common carrier and subject to regulation. The Commission has held that

²²Bus Facts for 1932, published by National Association of Motor Bus Operators.

²³Huffman and Patton v. James Rue, 6 Pa. P. S. C. 682.

the carriage of many groups of school children is common carriage even though the children are transported under terms of contracts made with the school boards.²⁴

Many bus operators who have certificates of public convenience have attempted to bid on school contracts, but the Court and Commission decisions in effect practically preclude them from obtaining such business. They cannot justify such carriage on the ground that it is conducted under a private contract, because one may not be both a common and private carrier.²⁵ Since school districts must take public bids for transportation service, certificated bus owners are at a tremendous disadvantage. Their rates are on file, and they can legally bid only the filed rate. Their competitors, having easy access to these rates, can bid a few cents less than those filed by the common carriers and obtain the business.

Buses owned by hotel companies, and operating between the owner's place of business and railroad stations, have not been regarded as common carriers, even if a charge is made for the service and all patrons of the hotel are transported indiscriminately.²⁶ Where one undertakes to carry his fellow workers with him to the mine or factory, and to return them to their homes, for a fixed amount per week, he is a common carrier.²⁷ This is true even if he makes no fixed charge but does accept gratuities for the service, such as contributions of money²⁸ or, presumably, any-

²⁴Application of P. R. T., 10 Pa. P. S. C. 740.

²⁵Specifically, *Beach v. Renn*, 10 Pa. P. S. C. 223. Generally, *York Motor Express Co. v. Public Service Commission*, 96 Pa. Super. Ct. 174; *Lehigh Valley Transit Co. v. Nase*, 10 Pa. P. S. C. 55; *Traction Bus Co. v. Somerset Bus Co.*, 9 Pa. P. S. C. 743.

²⁶Expressions of authorities not stated in formal opinions.

²⁷*Carrick-Bruceton Consolidated Bus Line v. Zupanic*, 9 Pa. P. S. C. 665; *Wayne Transportation Co. v. Leopold et al.*, 6 Pa. P. S. C. 575. See also *Wilkes-Barre Railway Corp. v. Hartman*, 7 Pa. P. S. C. 228—bus service rendered under contract with an industry for daily transportation of employees held common carriage.

²⁸*York Railways Co. v. Longstreet*, 6 Pa. P. S. C. 711 (this very interesting case holding that service rendered in the guise of a "community bus" was really common carriage); *Lehigh Valley Transit Co. v. Bauder et al.*, 5 Pa. P. S. C. 309.

thing of value. This rule does not apply, however, to group ownership of a vehicle used for the benefit of all the owners. A group of men working at the same place became joint purchasers of a bus in which they all rode to work and back to their homes. This was held not to be common carriage, inasmuch as they did not transport anyone who was not a part owner.²⁹ You may, if you wish, speculate as to whether such owners must all have equal shares, or whether one specially interested might own 99.44% of it and be paid for driving. One also wonders what might happen in the case of stockholders in a corporation which owned one or more buses. Are they such joint owners as would take the operation of the corporation's bus out of the jurisdiction of the Public Service Commission and permit it to compete for the business of established lines? An interesting experiment is now being undertaken in the Pittsburgh district. A corporation has been created to purchase and operate certain buses. Local community associations are then formed, with an entrance fee and dues for members. These associations have agreements with the operating company for the transportation of their members, without direct charge to the passenger. Is such an undertaking within the jurisdiction of the Public Service Commission, and can it be prohibited by it? The operators think not. It seems apparent, however, that the whole scheme was devised for the purpose of avoiding the law, and that very purpose may bring it within the law. It seems to be settled in Pennsylvania that transportation performed under any circumstances which amount to a subterfuge for the purpose of evading the law, does not thereby escape regulation.³⁰ We should not as yet want to sell tires on a mileage basis to the Pittsburgh experimentors. If the reader desires to park off the main highway for a bit, he may engage his mind with the problem of what to do with four men who all work at the same place and each own an automobile. Finding under

²⁹Expressions of authorities not stated in formal opinions.

³⁰See *York Railways Co. v. Longstreet*, *supra*, note 28; *Lehigh Valley Transit Co. v. Bauder et al.*, *supra*; *Jacob Creek Ferry Co. v. Williams*, 10 Pa. P. S. C. 765.

the decisions quoted that they cannot pay one of their number to transport them, and being determined not to run four cars to the plant each day, they decide that each will use his car for one week and transport the others free of any charge. Are all or any of them common carriers? The Commission has said they are not.³¹ A high school student who carried three other students to school on written agreements for a certain sum per week, and who did not hold himself out as willing to carry all who might apply, was also held not to be a common carrier.³²

And so particular and specific problems might be indefinitely multiplied. The controlling principle, however, is whether or not the operator is a common carrier. Determining this question is frequently quite difficult, but it is vitally important, not only to the Commission, but to the lawyer who must advise his client whether or not he is violating the law by operating without a certificate of public convenience. The so-called definition of a common carrier in the law itself is of little use, as it does not define.³³ Actual experience or a thorough study of the cases, or both, are necessary if the right conclusion is to be reached.

(c) Problems peculiar to truck operations.

When we consider the transportation of property by motor truck as distinct from the transportation of passengers, we find a few interesting situations. It appears that a warehouseman, in the business of accepting and storing general merchandise consigned to the warehouse for delivery to later designated consignees, as directed by the owner of the goods, may deliver such goods upon order as have been stored with him, as an incident to his warehousing business, without a certificate of public convenience. "One who receives goods under contract, the main object of which is storage, is a warehouseman; nor is he transformed into a common carrier by reason of his undertaking to trans-

³¹Shaw v. Smith et al., 7 Pa. P. S. C. 59.

³²Somerset Bus. Co. v. Snyder, 8 Pa. P. S. C. 787.

³³See note 1.

port the goods to his warehouse or to forward the goods by direction of the owner." (40 Cyc. 401) It has been the practice all over Pennsylvania for warehouse operators to do this, and while no specific complaint has been before the Commission which would provide a clear-cut decision, the Commission has indirectly recognized the legality of such transportation. The Johnstown Terminal Storage Company was making such deliveries to a number of places, including Altoona. When a subsidiary applied for the right to render a common carrier service over a considerable territory, a restriction was placed in its certificate against transporting merchandise between Johnstown and Altoona, on the ground that there was sufficient service between those points, but it was permitted to transport from Johnstown to Altoona such merchandise as had been stored in the Johnstown Terminal Storage Company, the parent company. This seems to have been done in recognition of the right of the warehouse company to render this service without certificate.³⁴

It would, of course, be unlawful to have goods shipped to a warehouse for delivery to an original consignee as a subterfuge. Merchandise billed from Pittsburgh to Altoona, if such shipment were otherwise prohibited by law, could not be made legal by detaining it a day or so in a warehouse in Johnstown. The bulk of the goods in warehouses, however, are shipped either to the warehouse or to the consignor, and are stored there for delivery to particular consignees when and if sold to them.

The local draymen are practically all common carriers and should secure certificates to operate in call and demand service. It appears that such a drayman delivering the goods of one person only to a large number of receivers is not a common carrier. Any merchant might contract with

³⁴In the application of Montgomery and Co. (Application Docket 24361-1932), the Commission seems to hold that such operations are common carriage. The order (handed down on Sept. 27th, 1932) provides that the applicant may transport within a prescribed distance freight "received at Harrisburg by rail and assigned to the certificate holder for storage or distribution."

a trucker to make all of its deliveries, and such trucker would not be a common carrier. In the *Keystone Warehousing* case,^{34*} however, the Commission determined that one engaged in the business of delivering packages for retail merchants, from their stores to surrounding towns, and who solicited such business generally, was a common carrier. There is a considerable difference of opinion as to whether or not a railroad may make a single contract with a trucker to deliver all of its merchandise and not thereby make the trucker a common carrier. You will immediately observe that in one case all of the goods come from one shipper, while in the railroad case all of the goods are delivered to the trucker by one entity, but the transportation began with shipments from a large number of different consignors. In such case, the the railroad might be merely a forwarder by motor truck, and the trucker, carrying for one shipper only, not be a common carrier. We shall discuss forwarders more in detail later. Where one transports for an organization comprised of a large number of dealers, under an arrangement whereby he hauls the produce and merchandise of its members for mutual advantage, he is a common carrier and must obtain a certificate of public convenience, or desist from carrying.³⁵ The same conclusion was reached where one hauled freight from a freight receiving station only for the members of a "Community Business Men's Association."³⁶

Another difficult problem arises where, for example, a large department store makes deliveries "free" to its customers. Everyone knows that such deliveries are not free, that they must be charged for in the value of the goods, but under the statutes taxing the gross receipts of carriers for hire these companies have been exempt, on the theory that there was no separate and distinct charge for transportation. The same company, however, which delivers much of its goods without a separate charge, may charge for delivery to all points beyond a fixed limit. This company

^{34*}161 Atl. 891 (Pa. Super. Ct.).

³⁵*Henneous v. Henneous*, 6 Pa. P. S. C. 505.

³⁶*Pennsylvania Railroad Co. et al. v. Robinson*, 10 Pa. P. S. C. 198.

then becomes an operator for hire as to these points. In the cases where a charge is made, if the title to the goods is in the purchaser before they leave the store, it may be that such service, being for a large number of persons and for a remuneration, constitutes the operator a common carrier. We know of no case in which this question has been answered, but submit it as one of the many involved problems still facing the regulatory authorities.

Another class of cases which has produced considerable insomnia is that involving so-called forwarders. There is such a thing as a forwarder pure and simple, who is not a common carrier.³⁷ They do not have a part in the transportation, have no interest in the goods nor the conveyance which carries them, and act really as agents for the shipper. Most of the cases concerning forwarders have to do with their liability, which is, of course, greater if they are common carriers. In practically all of these cases, a common carrier is involved somewhere in the transportation. The forwarder ships by rail or by boat, and is regarded as a shipper. With the development of the motor truck industry, there have grown up a considerable number of so-called forwarders, who solicit the business of various shippers and transport the merchandise to its ultimate destination by uncertificated motor trucks. These agencies carry insurance on the cargo and are responsible for delivery to the ultimate consignee. They issue a paper, which may be called a bill of lading or waybill, but which indicates the character of the goods, the charge made for the shipment, its point of origin and destination. These operators claim that they are not common carriers, that they are the

³⁷10 C. J. 50, Par. 27, note 45; 4 R. C. L. 550. The forwarder by rail collects from various shippers small lots of goods, sufficient to constitute a carload. The forwarder then ships the car at the carload rate, thereby saving the difference between this rate and the less-than-carload rate. The forwarder is able to get a fair compensation and to save money for the shippers. See *Great Northern Railroad Co. v. O'Connor*, 232 U. S. 508. When these so-called "forwarders" exercise certain control over the shipment, they are held to be common carriers. *Kettenhofen v. Globe Transfer & Storage Co.*, 127 Pac. (Wash.) 295, excellently annotated in 42 L. R. A. (N. S.) 902.

agents of the shipper, and that they come within the class known as forwarding merchants, who have long been recognized in connection with railroad transportation. If their contention is correct, they may operate as an unregulated group.

In the leading case of *Alko Express Lines v. Highway Freight Forwarding Corporation*,⁸⁸ the Commission held that such companies are common carriers. This case is now on appeal to the Superior Court,⁸⁹ has been briefed and argued, and decision may be expected shortly. It will readily be seen that, if this operator is not a common carrier, and if the trucker who transports the goods does so only for that particular operator, and is, therefore, not a common carrier, very great tonnage may be shipped from a large number of consignors to a large number of consignees in any number of different towns or cities, and no common carriage whatever would be involved. This situation will, of course, cause very considerable confusion in transportation circles if the appellate courts should find that the service may be rendered without any regulation, on the theory that no common carriage is involved.

V. FEDERAL REGULATION

With the constantly expanding service rendered by the motor bus and motor truck, the discovery that its economic service limit may be one, two or three hundred miles instead of twenty-five to fifty miles, as at first supposed, and with the constantly increasing burdens and restrictions placed upon intrastate operators, interstate operation is growing rapidly. There is a large volume of bona fide interstate business and a considerable amount of what might be called "legal" interstate business (being shipments between two points in the same state by way of another state). The *Bush* and *Buck* decisions hereinbefore referred to make it quite clear that there is no existing agency to regulate any of this interstate business when done by motor vehicle.

⁸⁸Complaint Docket No. 9112-1932.

⁸⁹337 October Term, 1932 (Philadelphia District).

For some years, a large number of bus and truck interests, as well as rail interests, have been trying to secure a federal statute regulating such service. The Interstate Commerce Committees of both the United States Senate and House of Representatives have given a great deal of study to the problem. The Interstate Commerce Commission has held hearings all over the country to determine to what extent, if any, interstate common carriage by motor vehicles should be regulated. Everyone except the free lance⁴⁰ operator seems to agree that some regulation should be undertaken. Its nature and extent, however, have not been determined definitely. A number of bills have been introduced in Congress, many hearings have been held before the Interstate Commerce Committees, a great number of conferences have been held by rail, bus and truck interests, hundreds of resolutions have been passed by various organizations concerned, but as yet there is no statute providing for regulation of interstate commerce by motor vehicle. Undoubtedly we are nearer to such regulation, and very strong pressure will be brought upon Congress to provide for it at the present regular session. It is an error, however, to charge, as is frequently done in the newspapers, that the bus and truck interests have opposed such regulation. The bus interests have long been active in favor of it. Many of the truck operators are also in favor of regulation, although this industry has not been organized nationally and has not made its voice heard as directly as has the bus business.

It is scarcely necessary, in closing, to remind you that any one of the various important problems involved in motor bus and motor truck regulation might well be the subject of a much more detailed discussion than this one. This article merely attempts to cover in a sketchy fashion some of the more important present elements of governmental regulation, restriction and prohibition, as applied to the common carrier motor bus and truck.

Harrisburg, Pa.

STERLING G. McNEES

⁴⁰Also known to truckers as the "bootlegger" or "cut-throat", since he hauls what he pleases and cuts or raises rates to suit his convenience.