ILLEGAL LEASE OF OPERATING RIGHTS OR BONA FIDE LEASE OR INTERCHANGE OF EQUIPMENT—A QUESTION OF CONTROL

CLAYTE BINION*

PRELIMINARY

The scope of the inquiry herein is confined to a discussion of the elements and factors that must exist when a motor carrier, as defined by Section 203(a) (16)[1] of the Interstate Commerce Act, seeks to conduct operations under its certificate utilizing equipment owned and operated by (a) another motor carrier, or (b) persons other than motor carriers. If the requisite criteria are met, the transaction may be a bona fide lease or interchange of equipment, and the motor carrier may legally perform service under its certificate, notwithstanding the fact that the equipment is actually owned and operated by another party. On the other hand, if certain factors are not present, then the purported lease or interchange of equipment becomes an illegal lease of the lessee's or interlining carrier's operating rights. The Commission has promulgated rules and regulations governing the leasing and interchanging of equipment and these rules set forth a minimum standard that must be adhered to by the parties to the transaction. However, these rules do not affect the basic proposition that a motor carrier receiving traffic from another through the interchange of equipment with drivers or conducting its operations in equipment owned and operated by another, must have and exercise control over such operations while in its possession.

The question of whether a motor carrier has violated the Commission's lease and interchange regulations and/or whether a lessee motor carrier has exercised sufficient control over the leased equipment and driver frequently arises in proceedings under Section 5 [finance], 204(c) [complaints], 206 and 209 [extensions] and 212(a) [revocations] of the Interstate Commerce Act.[2] As examples: (1) in a finance application, the vendor and the vendee have been performing a through service between points on their respective routes by interchange of equipment with drivers. Is this operation a bona fide interchange or

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1. 49 U.S.C. § 303(a)(16).
2. 49 U.S.C. §§ 5, 304(c), 306, 309, and 312(a) respectively.

an illegal lease of operating rights? (2) In an extension application, the applicant has been performing service to a point sought to be served by interchange with another carrier. Is this past service a bona fide interchange or an illegal lease of operating rights? (3) In an extension application, the applicant proposes to use owner-operators to conduct the motor carrier service proposed. Does the applicant bring himself with the definition of a common carrier by proposing to use non-owned equipment operated by non-employees? (4) In a complaint proceeding, defendants are handling traffic by interchange moving between points on the equipment lessor's routes and points on the equipment lessee's routes by interchange of equipment and drivers at a certain service point. Is the operation a bona fide lease of equipment or an illegal lease of operating rights? (5) In an investigation and revocation proceeding, the respondent is conducting operations by use of owner-operators. Is the respondent performing an adequate and continuous service by virtue of such operation? The above questions can be answered by resolving the control issue, which entails (a) an examination of the involved operation to determine if the Commission's lease and interchange rules and regulations are met; and (b) more importantly, an examination of the mechanics of the operation to determine if the lessor's equipment and drivers operating under the lessee's authority are such an integral part of the service performed by lessee as to be considered mere aids in carrying out the lessee's undertaking to transport.

The element of control exercised by a motor carrier over the operations conducted for it by others, also has implications in the fields of labor, rates, taxes, insurance, workmen's compensation, and social security. However, the requirements of the Social Security Act, the Federal Unemployment Tax Act, the Federal Insurance Contributions Act, and the National Labor Relations Act,[3] and the decisions thereunder are not applicable to a motor carrier's status under the Interstate Commerce Act where the question is one of control vel non. Accordingly, this treatise will not treat with the labor, tax, insurance or rate consequences which arise when a motor carrier seeks to use the facilities and employees of another in providing service. The consideration herein is limited to the control required to be exercised so that the motor carrier performing service in non-owned equipment operated by non-employees is responsible to the Commission, the shipper, and the public generally.

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3. 42 USCA § 301 et seq., 26 USCA § 3301 et seq., 26 USCA § 3101 et seq., and 29 USCA § 151 et seq., respectively.

HISTORICAL

Leasing practices of motor carriers created problems from the inception of regulation, particularly in determining those entitled to certificates and permits under the "grandfather" clauses of the Act.[4] Early in its administration, the Bureau of Motor Carriers informally issued Administrative Ruling No. 4, dated August 19, 1936:

> "Question: Under what circumstances may a carrier add to its equipment by leasing a vehicle and obtaining the service of its owner-driver?
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> "Answer: The lease or other arrangement by which the equipment of an authorized operator is augmented, must be of such a character that the possession and control of the vehicle is, for the period of the lease, entirely vested in the authorized operator in such way as to be good against all the world, including the lessor; that the operation thereof must be conducted under the supervision and control of such carrier; and that the vehicle must be operated by persons who are employees of the authorized operator, that is to say, who stand in the relation of servant to him as master."

In a few early applications, operating authorities were issued to applicants whose practices apparently met the requirements of Administrative Ruling No. 4. Thereafter, the Commission and the courts considered many aspects of the question of motor carrier operations conducted in vehicles not owned by the carriers, and determined the conditions upon which certificates or permits under the "grandfather" clauses of the Act could be granted, based upon such operations. General principles were derived from these proceedings which have been applied in others.[5] Such cases generally held that when a certificate or permit holder furnished service in vehicles owned and operated by others, he must control the service to the same extent as if he owned the vehicles, but need control the vehicles only to the extent necessary to be responsible to the shipper, the public, and the Commission for transportation. If such tests were met, then the vehicle operated in the service of the one holding out the service to the public could be provided by independent contractors so far as authority under the "grandfather" clauses was concerned. However, where operating

4. Section 206(a), 49 USC § 306(a), and Section 209(a), 49 USC § 309(a).

5. See, e.g. *Acme Fast Freight* and *Dixie Ohio Express*, infra.

authority was "farmed out" principally to noncarriers, and the elements of direct control over the movement of the freight, and the full responsibility to the shipper were lacking, it was held that the operator was not a common or contract carrier as defined in the Act and thus not entitled to "grandfather" authority.

A leading decision denying a "grandfather" application for lack of proper control is *Acme Fast Freight, Inc., Common Carrier Application*, 8 MCC 211 (1938).[6] Therein, applicant collected, consolidated, shipped, and distributed less-than-truckload shipments of freight and express throughout the entire United States, utilizing the services of carriers by motor vehicle, rail, and water. Applicant assumed full responsibility for the shipment from the time it left the consignor to the time it was delivered to the consignee, undertook to provide a complete service and charged the shipper therefor. The shipper had no contractual relations with any carrier whose services applicant might utilize, but only with applicant, and usually was not informed as to the means of conveyance which were employed. The applicant contended that it was a common carrier at common law, and would have that status even if it did not operate or own a single vehicle. Applicant argued that it was unnecessary, in order to be a common carrier by motor vehicle, to actually physically operate the vehicle or control the management and conduct of those who conduct the operation. In addition, applicant provided a direct operation in which the carriage was performed by vehicles under its immediate ownership or control without utilization of the services of any other carriers. In a prior report, *Acme Fast Freight, Inc., Common Carrier Application*, 2 MCC 415 (1937), Division 5 found that applicant was a common carrier by motor vehicle only with respect to its direct operations, and not with respect to its indirect operations wherein the services of other carriers were utilized. In affirming Division 5's holding, the entire Commission held (8 MCC 218-219):

> "The question is whether the definition of 'common carrier by motor vehicle' in the act can properly be construed, in the light of the provisions and purposes of the act as a whole, to include such indirect operations. The undertaking of applicant as a common carrier, so far as these indirect operations are concerned, strictly speaking, is not to transport property but to see that it is transported. The words of the definition are 'undertakes . . . to

6. Affirmed *Acme Fast Freight v. United States*, 30 F. Supp. 968 (D.C.D.N.Y. 1940), affirmed per curiam 309 U.S. 638 (1940).

> transport.' It is true that 'undertakes' is followed by the words 'whether directly or by a lease or any other arrangement,' but the word 'lease' clearly refers to the use so commonly made of vehicles which are not owned but held under lease, and the words 'any other arrangement,' which significantly are conjoined with the word 'lease', can and should, we believe, be interpreted to cover any similar means, compatible with an undertaking 'to transport', which permit the use by the carrier of the property of others under its own domination and control."

A leading decision granting a "grandfather" application wherein proper control was exercised is *Dixie Ohio Exp. Co. Common Carrier Application*, 17 MCC 735 (1939). In performing its past operations, applicant utilized equipment owned by it as well as equipment owned by owner-operators. The owner-operator equipment was operated under a form of a written "lease," and specified the particular trip in which the operator was to employ his vehicle and the compensation to be paid to him. Although the lease purportedly gave applicant possession and control of the vehicle and provided for the maintenance of public liability, property damage, and cargo insurance by applicant, it also provided for a payment by the owner-driver of a certain amount on any cargo loss or shortage, and any additional charges occasioned by loss through negligence of the owner-operator. Generally, these leases could be cancelled by either party upon 10 days' notice. Division 5, in finding that applicant was entitled to continue operations as a common carrier by motor vehicle held, as is here pertinent (17 MCC 740-741):

> ". . . *If the vehicles of the owner-operators, while being used by applicant, were operated under its direction and control, and under its responsibility to the general public as well as to the shipper, then its operations, in which such vehicles were employed, come within the phrase or by a lease or any other arrangement' of section 203(a)(14), and applicant, as to such operations, was a common carrier by motor vehicle.* The traffic transported in the vehicles of the owner-operators moved under bills of lading issued by applicant. The vehicles, while in applicant's service, were registered under applicant's operating authority and had applicant's name painted, or otherwise shown, thereon. Insurance covering them was arranged and paid for by applicant. Applicant's dispatchers or other employees directed the time and manner of the loading and unloading of the vehicles and also directed their movement over applicant's routes. We conclude that

> they were operated under applicant's direction and control and under its responsibility to the general public as well as to the shipper, and that applicant, as to its operations in which such vehicles were employed, was a common carrier by motor vehicle as defined in section 203(a)(14)." (Emphasis added.)

For other cases involving the same question as *Acme* and *Dixie Ohio, supra*, see *Boston & Maine Transp Co. Common Carrier Application*, 34 MCC 599 (1942); *Thomson v. United States*, 321 U.S. 19 (1943); *Railway Exp. Agency, Inc. Extension-Waggoner, Ill.*, 44 MCC 1 (1944), 44 MCC 771 (1945); and *Allied Van Lines, Inc., Common Carrier Application*, 46 MCC 159 (1946).

As a result of the aforementioned cases, there was considerable evolution in the concept of the extent of control over non-owned vehicles necessary on the part of one seeking thereby to conduct operations as a motor carrier under Part II of the Act. Administrative Ruling No. 4, referred to above, was in effect overruled by the Commission and the courts, and is no longer followed.

In *Lease and Interchange of Vehicles by Motor Carriers*, 51 MCC 461 (1950)[7] the Commission on its own motion, instituted an investigation respecting the lawfulness of the practices of motor common and contract carriers of property in interstate or foreign commerce, throughout the United States, in the leasing and interchange of vehicles. All such carriers were made respondents to the proceeding. In preparation for the proceeding, an informal investigation was conducted by the members of the Bureau of Motor Carriers' field staff throughout the United States. The members of the staff reported specific instances of leasing practices they discovered which were considered unlawful or undesirable as contrary to the public interest.[8] A brief consideration of the abuses and illegal activities uncovered by the Commission will be helpful at this point, in order to bring focus on the practices the regulations were designed to prohibit:

(1) The control, direction, and domination which carriers exercised over the performance of transportation service in which leased vehicles

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7. The Commission's jurisdiction to promulgate these regulations was upheld in *American Trucking Ass'ns v. United States*, 101 F. Supp. 710 (D.C.N.D. Ala. 1951) and *Eastern Motor Express v. United States*, 103 F. Supp. 694 (D.C.S.D. Ind. 1952), affirmed *American Trucking Association v. United States*, 344 U.S. 298 (1953).

8. The report by the field staff of the Bureau of Motor Carriers, based on an informal investigation early in 1948, is fully set forth in Appendix C to the report of the Commission (51 MCC 540-543).

were used was generally less than that exercised over company-owned vehicles. This condition was brought about as a result of the informality of the hiring arrangements, insufficiency of control over the operation of the vehicles and of the operators, the loss of contacts with shippers, and the attempts of authorized carriers to avoid or shift their responsibilities to others.

(2) Arrangements for the use of equipment were frequently made over the telephone, without any inspection of the vehicle by the lessee to insure compliance with safety regulation requirements or any check as to whether the driver was qualified to operate the vehicle. Lease arrangements were not always concluded before the transportation took place. Sometimes the owner-operator picked up the load first and then shopped around for a carrier who would issue billing under the most desirable arrangement. These owner-operators frequently transported on a carrier's billing without the carrier's knowledge and kept all of the revenue. Some carriers made a regular practice of supplying other carriers and operators of equipment with lease forms signed in blank, pads of bills of lading, freight bills, and placards, to be used in transporting property for their account with the result that frequently other shipments were solicited, transported, and collected for in the carrier's name without the carrier's knowledge or specific authorization. Sometimes no arrangements were made for the removal of the placards upon termination of the lease and the lessors used those placards to secure other loads without the knowledge of the carriers involved and, without notifying those carriers, kept the entire revenue. Because of the informality of the arrangements for the use of equipment, questions frequently arose as to the liability for accidents resulting in injuries to the public and as to whether the insurer of the authorized carrier or the insurer of the owner-operator was liable, and when the liability of one ends and that of the other begins. The fact that leases frequently were not in writing created an obstacle to enforcement of the provisions of the Act. Proof of unauthorized operations was hampered when, upon investigation, the parties stated that an oral lease was in existence. Gypsy operators realized that almost anything could be done under a so-called oral lease and, if they knew the name of a carrier having operating rights, would transport a shipment in its name and, if caught in a road check, state that they were under lease to that carrier.

(3) It was a frequent practice among some equipment lessors to lease only part of the carrying capacity of a vehicle, and/or to lease the same vehicle to several carriers for use at the same time. In the latter instance, formal leases might be executed which provided that each

lessee would have full dominion and control over the vehicle and that the driver would be the employee of such lessee. In practice, however, it was usually the lessor which retained the control. Sometimes vehicles were leased to carriers which were under lease to private carriers at the same time. Intrastate carriers transported shipments on their own authority and interstate shipments allegedly under a lease of their vehicles to an authorized interstate carrier at the same time. In case of accident, it was difficult to determine which carrier was liable. In trip leasing, difficulties arose in establishing responsibility for accidents which occurred after the owner-driver completed delivery.

(4) Carriers did not have sufficient control over the operations of leased vehicles to make the owner-operators comply with the hours-of-service rules. Gypsies would roam over a wide territory, hauling for carrier after carrier, no one of which had control over or knowledge of the time element affecting compliance with the hours-of-service requirements. Complaints most frequently made against owner-operators were that they took the most direct route to destination, regardless of the carrier's operating authority, drove while drunk, carried liquor in the cab, transported unauthorized persons (particularly women), operated unsafe equipment, and charged gasoline and tires to the carriers without authorization.

(5) In leases between carriers in connection with through routes, the parties frequently bypassed the common service point on their respective rights. The point of theoretical interchange would be far removed from any terminal of either carrier. Where both carriers had rights over part of the through route, drivers were checked who were not certain which of the two carriers they represented. Some carriers did not keep account of the transportation in accordance with the requirements of the Commission. Accidents occurred to leased vehicles as to which no reports were made because the carrier did not know of them or, by the time it learned of them, the owner-drivers involved could not be located. The reports of carriers which operated leased vehicles did not show a clear picture as to expenses incurred in license fees, gasoline, tires, drivers' wages, repairs, maintenance, and other items which go into reports covering company-owned equipment. The practice of hiring equipment for a percentage of the revenue made operating statistics of motor carriers worthless.

(6) The practices of leasing and interchanging vehicles were used as devices to circumvent the provisions of the Act. Equipment arrangements were often merely subterfuges to enable carriers to engage in transportation without appropriate authority, to extend the scope of

their operations unlawfully, or to gain an unfair advantage over competitors. Under the guise of leases of equipment, carriers which had no facilities with which to operate and which were not willing to render the service, collected a percentage of the revenue for the use of their rights by others, who did have the facilities and who were willing to provide the service. These carriers protested applications of others for authority to furnish the service on the ground that they had the facilities to furnish the service needed. The facilities to which they referred were those of the ones applying for authority. Abuses of the practices of leasing and interchanging vehicles resulted in motor carriers usurping functions of the Commission. The so-called lessee of the vehicle frequently in effect was giving his operating authority to the lessor and charging a percentage of the revenue for allowing the lessor the right to operate thereunder.

After considering the views and arguments presented by the parties affected by the proceeding, the Commission promulgated rules and regulations governing the lease and interchange of motor vehicle equipment. The Commission pointed out that evasions and violations of the provisions of Part II of the Act occur "in the present practices of motor common and contract carriers of property subject to such provisions, in augmenting their equipment otherwise than by purchase, and in interchanging equipment," and to properly administer the provisions of Part II of the Act reasonable rules and regulations were required.[9]

PRESENT LEASE AND INTERCHANGE REGULATIONS

Title 49, Part 1057,[10] *Code of Federal Regulations*, as republished and redesignated in the Federal Register, Vol. 32, No. 245, pgs. 20056-20059, Wednesday, December 20, 1967, sets forth the present rules and regulations applying to the augmenting of equipment by motor carriers

9. The initial rules were set forth in Appendix H to the Commission's report (51 MCC 546-550). These rules were divided into four sections—Rule 1 pertaining to definitions; Rule 2 pertaining to the augmenting of equipment; Rule 3 relating to the interchange of equipment between common carriers of property; and Rule 4 pertaining to the rental of equipment to private carriers and shippers. Since the Commission's initial pronouncement of these rules, there have been modifications reported in 52 MCC 675 (1951); 66 MCC 361 (1955); 68 MCC 553 (1956); 79 MCC 65 (1959); 79 MCC 251 (1959); 84 MCC 247 (1961); 86 MCC 525 (1961); 89 MCC 683 (1962); 91 MCC 877 (1963) all styled *Lease and Interchange of Vehicles by Motor Carriers.*

10. The regulations originally were designated as Part 207 and the old designation appears in several of the cases cited herein.

of property and to the interchange of equipment between common carrier motor carriers of property by motor vehicle, and to the lease of equipment by common and contract carriers of property by motor vehicle, with or without drivers, to private motor carriers and shippers. For the purpose of the inquiry made herein, only those sections relative to definitions (49 CER 1057.2), augmenting of equipment (49 CFR 1057.4), and interchange of equipment (40 CFR 1057.5) will be considered in detail.[11]

Definitions

Part 1057.2 of the leasing regulations defines eight terms and all definitions for leasing and interchange are found in this section. Other terms not defined in the regulations have the same meaning of the terms as defined in the Interstate Commerce Act.

The term "authorized carrier" is any person or persons authorized to engage in the transportation of property as a common or contract carrier under the provisions of the Interstate Commerce Act.

The definition of "equipment" is all-inclusive and covers a motor vehicle, straight truck, tractor, semi trailer, full trailer, combination tractor-and trailer, combination straight truck and full trailer, and any other type of equipment used by authorized carriers in the transportation of property for hire.

"Interchange of equipment" is defined as the physical interchange of equipment between motor common carriers or the receipt by one carrier of equipment from another carrier, in furtherance of a through movement of traffic, at a point or points which such carriers are authorized to serve.

A "regular employee" is a person not merely an agent but regularly in exclusive full-time employment.

An "agent" is a person duly authorized to act for and on behalf of an authorized carrier.

The term "owner" is defined as a person falling within any one of three classifications: (1) to whom title to equipment has been issued, or (2) who as lessee, has the right to exclusive use of equipment for a

11. 49 CFR 1057.3 related to exemptions and 49 CFR 1057.6 relates to rental of equipment to proviate carriers and shippers. Subsection (a) of the exemptions provide that the augmentation regulations do not apply to equipment owned or held under a lease of 30 days or more by an authorized carrier and is regularly used by that carrier in its authorized service, and leased by it to another authorized carrier for transportation in the direction of a point which lessor is authorized to serve, provided that the two carriers meet certain requirements designed to insure that control and responsibility for the operation of the equipment is that of the lessee.

period longer than 30 days, or (3) who has lawful possession of equipment and has the same registered and licensed in any state or states or the District of Columbia in his or its name.

"Private carrier" is the same as defined in Section 203(a) (17) of the Act.

A "shipper" is any one who consigns or receives property which is transported in interstate or foreign commerce.

Augmenting Equipment

Part 1057.4 of the regulations authorize carriers to perform transportation in or with equipment which they do not own, only under certain conditions. This section authorizes the use of owner-operators by authorized carriers. There are six requirements or conditions which govern the leasing of equipment:

(1) *Contract requirements*. The contract, lease, or other arrangement for the use of the equipment shall be between the authorized carrier and the owner of the equipment; shall be in writing and signed by the parties thereto, or their regular employees or agents duly authorized to act for them; shall specify the period for which it applies, which shall not be less than 30 days when the equipment is to be operated for the authorized carrier by the owner or the employee of the owner;[12] shall provide for the exclusive possession, control, and use

12. The 30 day minimum rule does not apply to equipment leased without drivers, nor does it apply to equipment with drivers, of a farmer, agricultural cooperative or a private carrier of "exempt" commodities, provided that prior to the execution of the lease, the authorized carrier receives and retains a statement signed by the owner of the equipment, or someone duly authorized to act for him, authorizing the driver to lease the equipment for the movement or movements contemplated by the lease, certifying that the equipment so leased is regularly used in the transportation of "exempt" commodities and specifying the origin, destination, and the time of the beginning and ending of the last movement of "exempt" commodities. This exemption refers to and comports with the language of Section 204 (f) (l) and (2) of the Act (49 USC 304 (f) (1) and (2)). Equipment owned by an automobile carrier or tank truck carrier or held by such authorized carriers under lawful leases and used in the transportation of motor vehicles or commodities in bulk, respectively, may be leased or subleased to other such authorized carriers for less than 30 days. The 30 day minimum period does not apply to dump equipment leased or subleased for use in snow control purposes. The 30 day minimum requirement is probably the most controversial provision contained in the regulations. The 30 day rule was intended to control the trip leasing of equipment with drivers and the purpose of the rule was to preclude the one way or trip lease. The 30 day rule was modified to exclude vehicles utilized to transport "exempt" commodities for the reason that after the completion of a one way haul of "exempt" commodities, the exempt hauler was not always able to

of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of the lease and provision may be made therein for considering the lessee as the owner for the purpose of subleasing the equipment to other authorized carriers; shall specify the compensation to be paid by the lessee for the rental of the equipment; shall specify the date and time or the circumstances on which the lease begins, and the time or the circumstances on which it ends; shall be executed in triplicate, the original retained by the authorized carrier in whose service the equipment is to be operated, one copy retained by the owner of the equipment, and one copy carried on the equipment during the entire period of the contract.

(2) *Receipt for equipment to be specific.* When possession of equipment is taken by the authorized carrier or its regular employee or agent duly authorized to act for it, a receipt shall be given to the owner of the equipment, or the owner's employee or agent specifically identifying the equipment and stating the date and time of day possession is taken, and when the possession by the authorized carrier ends, it or its employee or agent shall obtain from the owner of the equipment, or its regular employee or agent duly authorized to act for it, a receipt specifically identifying the equipment and stating thereon the date and the time of day possession is retaken by the owner.

(3) *Safety inspection of equipment by the authorized carrier.* It is the duty of the authorized carrier, before taking possession of the equipment, to inspect the same or to have the same inspected by a person who is competent and qualified to make such inspection and who has been duly authorized by such carrier to make the inspection as a representative of the carrier. The person making the inspection shall certify the results thereof on a report on a form specified in the regulations, which report is retained and preserved by the authorized carrier. In the event the inspection discloses that the equipment does not meet the requirements of the safety regulations, possession thereof shall not be taken. Where an inspection is required to be made, the

obtain a return movement of other "exempt" commodities, and thus the practice developed of such haulers of leasing their equipment for return movement to authorized carriers. The rule was likewise relaxed with respect to automobile carriers and tank truck carriers, in the light of their highly specialized operations and the fact that they have almost entirely one-way revenue hauls. The purpose of the 30 day rule is to insure responsibility for, and control over, leased equipment by the lessee carrier, when the equipment is operated by the owner or employees of the owner. *Lease and Interchange of Vehicles By Motor Carriers*, 64 MCC 361, 364-365, 381-383 (1955). In subsequent reports dealing with the lease and interchange regulations, the Commission has refused to further expand the 30 day rule.

authorized carrier, if an individual, or a member of a partnership, or one of the officials thereof if the authorized carrier is a corporation, shall certify on the inspection report that the person who made the inspection, whether an employee or person other than an employee, is competent and qualified to make such inspection and has been duly authorized by such carrier to make such inspection as a representative of such authorized carrier.[13]

(4) *Identification of equipment.* The authorized carrier acquiring the use of the equipment shall properly and correctly identify such carrier during the period of the lease contract in accordance with the Commission's identification of vehicle requirements set forth in 49 CFR 1058, which requires the name and certificate, permit, or docket number of the authorized carrier leasing the equipment to be displayed on both sides of each power unit operated. The identification of authorized carriers name and certificate number shall be removed before relinquishing possession of the equipment.

(5) *Driver of equipment to be in compliance with safety regulations.* It is the duty of the authorized carrier to make certain that drivers, other than a regular employee of the authorized carrier, are familiar with, and that employment as a driver will not result in violation of any motor carrier safety regulations.[14]

(6) *Record of equipment to be maintained and shipping documents to identify the authorized carrier.* Authorized carriers leasing equipment for periods of less than 30 days must keep and prepare a manifest covering each trip for which the equipment is used, containing the name and address of the owner of the equipment, point of origin, time and date of departure, and the authorized carrier's serial number of any identification device affixed to the equipment. During the time of operation of the leased equipment, there shall be carried bills of lading, waybills freight bills, manifest, or other papers identifying the lading, which shall clearly indicate that the transportation of the property is under the responsibility of the authorized carrier. These requirements also apply with respect to vehicles leased for 30 days or more unless this information is kept at a terminal or office as a part of the records of the authorized carrier.

13. 49 CFR 396 et. seq., sets forth the regulations of the Department of Transportation respecting the inspection and maintenance of equipment.

14. 49 CFR 391 et. seq., 392 et. seq. and 395 et. seq. set forth the regulations of the Department of Transportation respecting the qualifications of drivers, driving and hours of service, respectively.

Interchange of Equipment

Part 1057.5 of the regulations authorized common carriers by contract, lease, or other arrangement, to interchange equipment with one or more other such common carriers, or to receive from another such carrier, any of such equipment, in connection with any through movement of traffic, under the following six conditions:

(1) *Interchange agreement to be specific.* The contract providing for interchange shall specifically describe the equipment to be interchanged; the specific points of interchange; the use to be made of the equipment, and the consideration for the use; and shall be signed by the parties to the contract, or their regular employees or agents duly authorized to act for them.

(2) *Operating authority of carriers participating in interchange.* The certificates of public convenience and necessity of the carriers participating in the interchange must authorize the transportation of the commodities proposed to be transported and service from and to the points where the physical interchange occurs.

3. *Through bills of lading required.* The traffic transported in interchange must move on through bills of lading issued by the originating carrier, and the rates charged and revenues collected must be accounted for in the same manner as if there had been no interchange of equipment. Charges for the use of equipment shall be kept separate and distinct from divisions of the joint rates or the proportions thereof accruing to the carriers by the application of local or proportional rates.

(4) *Safety inspection of equipment.* It is the duty of the carrier acquiring the use of equipment in interchange to inspect such equipment, or have it inspected in the same manner as provided in the regulations dealing with augmentation of equipment.[15] Carriers under common control and jointly maintaining a uniform safety program may dispense with the vehicle inspection, provided the equipment has been inspected prior to the start of the movement in which the interchange occurs and found to meet the requirements. Equipment which does not meet the requirements of the safety regulations cannot be operated in the service of the carrier receiving the equipment until the defects have been corrected.

(5) *Identification of equipment as that of the operating carrier.* Authorized carriers operating power units in interchange service shall

15. See footnote 14, *supra.*

identify such equipment in the same method and manner as specified in the regulations relating to augmentation of equipment.[16] Authorized carriers operating equipment in interchange service shall carry with each vehicle so operated, except trailers and semi-trailers, a copy of the lease contract. This requirement may be dispensed with if a certification that the equipment is being operated by the authorized carrier and identifying the equipment by company or state registration number, showing the specific point of interchange, the date and time of resumption of responsibility for the equipment, and the use to be made thereof is carried in the vehicle. Such certification shall be signed by the parties to the contract or their employees or agents.

(6) *Through movement involving more than two carriers.* The lessee of equipment on a through movement involving more than two carriers is considered the owner of the equipment for the purpose of leasing the equipment for movement to destination or for return to the originating carrier.

The above rules and regulations set forth the minimum standards which must be met by motor carriers in conducting operations in equipment owned and operated by others. However, compliance with such regulations does not insure that the lease or interchange is bona fide and the transaction may nevertheless be held to be an illegal lease of operating rights. Control by the lessee over the vehicle and driver is an indispensable element, the absence of which renders the operation illegal. The rules were designed to assure that the proper degree of control is exercised by the lessee, but the Commission has frequently stated that technical compliance with the lease and interchange regulations will not suffice in all cases.

In order to better understand the Commission's philosophy with respect to the "control" issue, analysis of the Commission's decisions passing on this question is required. As pointed out, *supra*, the question of *control* of leased equipment becomes important in finance and extension applications, and complaint and investigation proceedings. Cases involving each of these types of proceedings are considered and discussed, *infra*. In most instances, the considered decisions demonstrate what *not* to do in a lease or interchange arrangement.[17]

16. See page 15, *supra*, paragraph (4) *Identification of equipment*.

17. In each of the cases analyzed, the details of the lease and/or interchange are set forth for the purpose of demonstrating the acts and/or omissions contributing to the lack of proper control.

FINANCE APPLICATIONS

Strict adherence to the Commission's lease and interchange rules is a necessity in finance proceedings if evidence of shipments handled by interchange between the vendee and the vendor is to be relied upon. In many instances, the vendor and the vendee have been rendering a through service by virtue of an interchange arrangement wherein the same unit of equipment with the same driver moves from origin to destination, and the parties argue that as such through service has been performed in the past, the approval of the transaction by the Commission will not create any new service but will merely authorize a single-line service in lieu of the prior joint-line service. If the parties to the transaction have followed the Commission's lease and interchange regulations and the lessee controls the movement of the shipment, then the argument presented is sound. On the other hand, if the Commission's lease and interchange regulations have not been followed and/or if actual control over the driver and equipment of the lessor is not vested in the lessee, the Commission has consistently held that such operation is in effect an illegal lease of operating rights and the operations performed thereunder are entitled to no consideration, and/or denied the application on grounds of fitness.

In *Vance Trucking Co., Inc.-Pur.-Northern Neck Transfer*, 87 MCC 545 (1961), the vendor and the vendee were handling shipments by interchange in the equipment of vendee, operated by its drivers. Northbound shipments were transported from vendee's territory in vendee's equipment to a given point at which vendee's driver attached vendor's placard. The equipment then proceeded to another point, approximately 140 miles north, where the equipment was inspected. In this respect, applicants pointed out that this method of inspection was made necessary because the territory at which the actual interchange was made did not have any garage facilities providing 24-hour service, and inspection could not be made at that point during the night. At the northern destination, vendee's driver would call vendor's "representative" in Philadelphia, who was also vendee's representative. The representative would direct the driver to a point for the loading of a shipment to be transported southbound. The southbound shipments would then be transported in vendee's equipment to the inspection point for interchange. Subsequently, the shipment would be transported to destination in vendee's territory or interchanged with a third carrier. On prepaid northbound shipments, vendee collected the revenue and paid 5 percent to the vendor. On prepaid southbound shipments, the mutual representative in Philadelphia sent out bills to the shipper and received payment which was transmitted to vendor. Vendor recorded the payments on its books and transmitted 95 percent of the revenue to vendee. The vendor did not pay for any of the inspections, and the inspection tickets, driver's tickets, and driver's logs were transmitted to it from the vendee. Division 3 held that the interchange or purported lease of equipment was merely a device used to lease operating rights in violation of Section 5(4) of the Act, finding as follows (87 MCC 548-549):

> "As affects the operations in which one authorized carrier interchanges and leases equipment with and to another authorized carrier, section 207.5 of the leasing rules provides, among other things (1) that it shall be the duty of the carrier acquiring the use of equipment in interchange to have it inspected in accordance with rule 207.4(c) (before taking possession of equipment) by a qualified representative, (2) that the lessee shall identify the equipment as his own, and (3) that charges for the use of equipment shall be kept separate and distinct from the division of joint rates. Such requirements are designed to protect the public and to insure that lessee or the acquiring carrier has adequate control over the leased vehicles and, in this respect, they are not merely technical requirements which may be met at the convenience of the carriers. Although applicants in connection with their joint operations have attempted to go through some of the motions of complying with the rules, they have completely failed to meet and achieve the fundamental requirements and purposes for which the rules were expressly promulgated. The transfer of control of equipment by one carrier to another under contract, lease, or other arrangement must be preceded by an inspection of the equipment or for our purposes, at least, control is not transferred. The fact that inspection of the vehicle is difficult to accomplish at the point of interchange, a fact which we cannot conclude in the instant proceeding, is of no consequence. Until the inspection has been made, control has not be transferred.
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> "Furthermore, as indicated by the other factors surrounding the considered arrangements, such as the failure to inform vendor in advance of any northbound shipments, the lack of any financial arrangement between vendor and the person making the inspection at Bauer, and the fact that drivers send all shipping documents and their logs to vendee who transmits them to

> vendor, it is apparent that vendor does not exercise any effective control over the equipment. It is our opinion that the interchange or purported lease of equipment is merely a device used to lease operating rights in violation of section 5(4) of the act."

Division 3 concluded that the interchange practices of the vendor and the vendee and the shipments presented by the vendor in support of the application were handled in an unlawful manner, that no weight could be given to the traffic exhibit submitted, and that there was no other evidence of record which would support applicant's burden of proving that the transaction would be consistent with the public interest. The conclusion as to the illegality of the interchange arrangement was predicated primarily upon the failure to conduct a proper inspection of equipment. It is essential that the inspection take place at a common point of service at the time the possession of the equipment passes from one carrier to the other, and the acquiring carrier control the details of the inspection.[18]

The fact that the parties technically comply with the lease and interchange regulations and in addition thereto conduct a proper inspection in some cases is not enough to insure that proper control has passed. The authorized carrier acquiring the equipment must take an active part in the direction, operation and control thereof. In *Burns Motor Freight, Marlington, W. Va., Transferee*, 93 MCC 629 (1964) following the execution of the purchase agreement, the transferor's bulk operations were almost entirely conducted by means of trip leases of transferee's equipment under an arrangement whereby transferee retained 94 percent of the revenues realized from the transportation.

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18. See also *American Red Ball Transit Co., Inc.-Pur.-Fallon*, 87 MCC 391 (1961) wherein the parties were transporting shipments in interline service, such transportation being performed wholly in vehicles owned by the vendee and operated by its employees. The interline was effected at a service station, at which point the service station operator performed an inspection and attached the vendee's placards to the vehicles. The vendor did not arrange for the inspection service, nor had any representatives of the vendor been to the inspection point or communicated with the so-called "agent" in any manner. The service of inspection was engaged by and the cost paid for by the vendee, and the vendee provided all the paper work and payments in connection with the purported interline, including driver's salaries, insurance, taxes, inspection fees, and otherwise control the movement throughout. Division 3 concluded that the leasing arrangement was not in accordance with the leasing rules, was unlawful, and no consideration would be given to any traffic handled by virtue of the interline arrangement. To the same effect *Liquid Transporters, Inc.-Purchase-Black*, 93 MCC 423 (1963) wherein past interline operations were given no consideration for the failure of the party acquiring the equipment to participate in and pay for the inspections.

The drivers were employed by and were under the sole control and responsibility of transferee, who also paid all expenses incurred in connection with the physical operation. On return movements, the equipment was used by, or reverted to the control of the transferee. Transferor, according to his testimony, made out the trip leases and had appropriate equipment inspections made by an independent third party, but otherwise took no active part in the operation. Division 3 concluded that this arrangement was nothing more nor less than a leasing of transferor's operating rights to transferee (93 MCC 633,634):

> "We are satisfied from the foregoing that the parties, while maintaining paper compliance with the Commission's Lease and Interchange of Vehicles by Motor Carriers regulations, 49 CFR 207, have in fact used the vehicle arrangement as a means of leasing transferor's operating rights to transferee without appropriate authority in violation of sections 206(a) (1) and 212(b) of the Act and Section 179.5(f) of the transfer rules. Transferee, which has never established its fitness to operate under the rights of transferor, has performed the physical operations, and unlike *Momsen-Purchase Devries and Paekel*, 63 MCC 631, it would be improper in the circumstances presented to find a genuine agency relationship between transferor and those conducting the actual operations. In the event that applicants desire to continue such operations under a bona fide vehicle lease arrangement, transferor must establish and maintain a degree of direction and control compatible with his status as a certificate holder. Stated differently, transferor must operate as a carrier"[19]

If the parties rely upon traffic handled in interchange service, it is their burden to establish by detailed and competent testimony the

19. In the *Momsen* case cited above, the vendee employed an agent to act as representative of the vendor whose responsibilities were to secure traffic, lease equipment to transport the shipments under the vendor's authority, provide the drivers with a delivery receipt for the consignee's signature, execute the trip lease form, the driver's physical certificate, and freight bill covering the shipments. The vendor collected the freight charges from the shipper, paid the agent for each load secured and paid the vehicle owner a percentage of the total freight charges. The vendor complied with respect to tariff publications, public liability, property damage and cargo insurance, and paid all transportation taxes. The vendee did some solicitation for the vendor, suggested certain changes in its tariff, had the vendor advertise in a motor carrier guide, received greater compensation than other carriers on equipment leased to vendor, was paid travel and solicitation expenses by vendor, and received a share of the vendor's profits. Division 5 concluded that the vendor's use of the agent was lawful, that all necessary functions in

nature and legality of that service. In *Dealer's Transit, Inc.—Control and Merger*, 93 MCC 611 (1964) the vendor leased its equipment and drivers from origin to destination to the vendee, who performed the pickup and deliveries, and the billings and collection of charges. The vendor received 10 percent of the revenues developed from each shipment as a result of miles traveled under its authority, unless such mileage resulted in revenues of less than $100.00, in which event it received a minimum payment of $10.00. The witness for the vendor presented on its behalf to stand cross-examination on its operations, had no knowledge of the location of the inspection station utilized to inspect the equipment interchanged, nor of the identity of the person relied upon to inspect and placard the equipment. When questioned as to shipments moving on government bills of lading in the interchange service, the witness was unable to state whether the vendor had any section 22 quotations on file with the United States Government. When questioned as to who actually obtained the traffic originated in the vendor's territory and handled by interchange, the witness replied that the vendee's terminal manager handled all the details and called the vendor's office concerning the shipment and later sent some papers to the vendor. Based upon this testimony, Division 3 concluded that the applicants failed to show that the interline operations were lawful and thus failed to sustain their burden of proof as to the vendee's fitness, citing *Liquid Transporters, Inc.-Purchase-Black*, 93 MCC 423 (1963).[20]

The rules and regulations pertaining to the augmenting of equipment are designed primarily for the purpose of enabling the leasing carrier to handle additional traffic generated by it and for which it, otherwise, would not have available equipment. If the augmentation is primarily for the purpose of enabling the lessor to solicit additional traffic for its equipment which, otherwise, would have to be moving empty or not at all there is a violation of the regulations. In *Tank Lines, Inc.-Pur.-S &*

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connection with the motor carrier activities were performed by the vendor or its agent, including responsibility and compliance with respect to the filing of tariffs and the maintenance of proper insurance. The *Momsen* case and the *Burns* case can be distinguished on the grounds that in *Momsen* the vendor conducted and controlled its physical operations although they were supervised by the vendee, whereas in *Burns* the vendee supervised, controlled and physically conducted the vendor's operations.

20. See also *Cooper Motor Lines, Inc.-Pur.-Tank Lines, Inc.*, 101 MCC 586 (1966), affirmed *Cooper Motor Lines, Inc. v. United States*, 284 F. Supp. 754 (D.C.D. S.C. 1968) wherein Division 3 held that the interline arrangement between the vendor and the vendee was unlawful; the witnesses for the vendor were unfamiliar with and somewhat confused in describing the nature and extent of the operations.

N Freight Line, Inc., 90 MCC 381 (1962)[21] the vendor was leasing equipment to augment its fleet from the vendee. The vendee was a common carrier, primarily of bulk commodities, operating in a number of states located adjacent to or north of Virginia. The vendor was a general commodity carrier, including bulk commodities, operating in Virginia, Georgia, Maryland, Delaware, New York, Pennsylvania, North Carolina and South Carolina. Under an agreement, the applicants proposed to split off from the vendor's general commodity rights, the authority to transport liquid commodities and transfer the same to the vendee. The vendee had been leasing tank truck equipment to the vendor for several years. The person in control of the vendee solicited bulk traffic for the account of the vendor. Placarding and inspection of the vendee's equipment prior to its use for transporting traffic under the vendor's rights was effected at three New Jersey points. After transportation had been performed, the placards were returned to the vendor by mail, along with the delivery receipts and vendor billed the shippers and collected the revenue, which for the most part was prorated on a percentage basis, with 85 percent going to the vendee. The Finance Board found that even assuming that there had been full compliance with equipment leasing regulations, the arrangement between the applicants resulted in the lease by the vendee of a portion of vendor's operating rights, in violation of the provisions of Section 5(4), and that, in the absence of a lawfully effective lease of those operating rights, the vendee was conducting operations as a common carrier, for compensation, without a certificate in violation of Section 206(a) of the Act. The most damaging evidence was that establishing that the traffic generated under the vendor's operating rights to be transported in equipment leased by the vendor from the vendee was generated by the vendee, and the primary purpose of the lease of equipment from the vendee to the vendor was not to enable the vendor to augment its fleet of equipment, but to enable the vendee to solicit additional traffic for its tank truck equipment which was unloading in the vendor's territory, and available for return movement.[22]

21. Affirmed *Tank Lines, Inc. v. United States*, 236 F. Supp. 354 (D.C.E.D. Va. 1964).

22. The same result was reached in *Ohio Fast Freight, Inc.—Control and Merger*, 101 MCC 171 (1965) wherein Division 1 affirmed and adopted the hearing examiner's finding that the lease of equipment from the vendee to the vendor was for the sole purpose of

A fairly recent case involving an illegal vendor-vendee interchange, which demonstrates the strict view of the Commission regarding such operation, is *Strickland Transp. Co., Inc.-Pur.-England Transp. Co.*, 104 MCC 297 (1967).[23] Therein the vendor and the vendee were purporting to handle traffic by interchange under the following arrangement: the vendee transferred loaded and sealed trailers to the vendor at Shreveport for transportation to New Orleans and at the latter point for transport in the opposite direction; the vendee notified the vendor of how many trailers it would have on any given day at each end of the line and the vendor sent tractors to the vendee's terminals at New Orleans or Shreveport to pick up the trailers; at the opposite end the trailer was delivered intact and still sealed to the vendee's terminal; in New Orleans the vendee broke bulk for distribution to other points; at Shreveport it was presumed that the trailer was shifted to a tractor of the vendee for movement to cities in the upper midwest and east; the vendor cut no freight bills on the individual shipments nor was it shown as a connecting carrier on the vendee's freight bill, except that some of the bills issued by the vendee on shipments transported in this manner bore a rubber stamp to show the routing; the vendor did not pick up, deliver, nor participate in billing or claims as to the shipments; the vendor's president testified that, in order to prepare the abstract of shipments as to traffic transported under this arrangement, it was necessary for him to secure the freight bills from the vendee at its New Orleans terminal; the vendor did not share in a pro rata division on each shipment, but received a flat sum for hauling a trailer, full or empty, between New Orleans and Shreveport; most of the trailers used were the vendee's, a few were the vendor's, but in neither case did there appear to have been any lease arrangement as to any particular trailer. Based upon this set of facts, the entire Commission (Chairman Tucker, Commissioners Brown, Deason and Stafford dissenting) denied the application, finding

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enabling vendee to transport traffic which it had solicited and promoted. The evidence established that the vendor in operating the vendee's equipment under lease did not control any critical features of the operation, namely the traffic, the drivers, and the equipment. The shippers were under instructions to call the vendee for equipment and the vendee's drivers operated in the vendor's territory pursuant to the prior instructions of the vendee. See also *Eagle Motor Lines, Inc.-Pur-Victory Frt. Lines, Inc.*, 101 MCC 368 (1966), affirmed *Eagle Motor Lines, Inc. v. United States*, 271 F. Supp. 594 (D.C.N.D. Ala. 1967).

23. Affirmed *Consolidated Copperstate Lines v. United States*, 293 F. Supp. 858 (D.C.C.D. Cal. 1969), affirmed per curiam 22 L Ed 2d 674, 89 S. Ct. 1470 (1969).

the purported interchange operations to be unlawful, not in accordance with the Commission rules and regulations, and gave no consideration to the traffic handled thereunder pertinently holding (104 MCC 316):

> "This does not constitute interchange within the meaning of our rulings, nor is it any form of interlining as we define it. Interlining is the practice whereby a carrier transfers a *shipment* to another carrier at a point of joint service for delivery or for further movement and later interline with another carrier. Interchange is a kind of interline which involves the exchange of equipment, here trailers but often tractors and trailers with or without drivers. Compare *Gilbertsville Trucking Co. v. United States*, 371 U.S. 115,121. Usually interchange involves loaded vehicles, but in any form it is governed by the *Lease and Interchange of Vehicle Rules*, 49 CFR 307. England and Strickland have not offered lease agreements covering such of Strickland's trailers as were used, and the flat charge for their movement was the same no matter whose equipment was used. If for no reason than failure to comply with section 307.5(c) of those rules, the arrangement between applicants here was not a lawful interchange. That section requires an arrangement under which: . . . the rates charged and the revenues collected must be accounted for in the same manner as if there had been no interchange of equipment. Charges for the use of the equipment shall be kept separate and distinct from divisions of the joint rates or the proportions thereof accruing to the carriers by the application of local or proportional rates . . . England (La.) had no liability to the actual shippers nor is there anything to suggest that England (La.) exercised control or responsibility over the traffic or that it functioned as an independent interchange carrier, as required by law. Because there was no lawful interchange, there was no lawful use of the rights of England (La.). Because the operations were really under the management and control of Strickland, insofar as the relationship with and liability to shippers was concerned, they constitute operations by Strickland without possession of a certificate."

This case particularly points out the dire consequences that will result for the failure of the vendor and the vendee to perform a legal interchange service. Here, the vendee was granted temporary authority to operate the rights sought to be acquired and commenced such temporary operations on October 28, 1964. These operations continued until approximately June of 1969, when they were terminated pursuant to the Commission's Order of Denial becoming final. The economic and operational problems resulting from the discontinuance of a service provided for some four and a half years under temporary authority are obvious. This case demonstrates that the Commission is in no way reluctant to deny an application where it is demonstrated that the parties have engaged in an illegal lease and/or interchange arrangement, even though denial of the application requires the vendee to discontinue long standing operations performed under temporary authority.

EXTENSION APPLICATIONS

As opposed to the strict approach utilized by the Commission in finance cases wherein illegal lease or interchange of equipment is equated to an unlawful lease of operating rights and the operations conducted by the parties by lease or interchange of equipment given no consideration, the Commission in extension proceedings has not utilized such a strict approach. In several cases, illegal lease or interchange arrangements were pointed out in proceedings wherein an applicant was seeking permanent authority, and notwithstanding such violations the Commission held applicant fit to provide the proposed service.[24]

There are some cases wherein the Commission considered an application for operating authority in which the need alleged to exist was predicated on past unauthorized transportation performed under an illegal lease arrangement, and under those circumstances denied the application. In *Tischler Extension—Canned Goods*, 82 MCC 179 (1960), applicant sought authority to operate as a common carrier in the transportation of canned goods from specified points in New Jersey to specified points in New Jersey, New York, and Pennsylvania. Applicant had performed transportation of the involved commodities from and to the considered points without the necessary operating authority by "leasing" equipment to an authorized carrier. Under this so-called oral lease, applicant transported in his own equipment using his own drivers under authority of an authorized carrier, shipments of canned goods. The authorized carrier retained 5 percent of the freight revenue and applicant received the remainder. Division 1 denied the application for several reasons, one of which was that the public need

24. See e.g., *D. T. & C., Inc., Extension—Willow Run, Mich.*, 49 MCC 231 (1949); *Gregory Heavy Haulers, Inc., Ext. Highway Const. Equip.*, 74 MCC 623 (1958); and *Steel Transp. Co., Inc., Extension-Nonferrous Metals*, 81 MCC 637 (1959).

said to exist was predicated upon unauthorized transportation under the so-called "lease arrangement" (82 MCC 181-182):

> "The so-called lease arrangement, in our opinion, is not a bona fide one as contemplated by our regulations promulgated in *Lease and Interchange of Vehicles by Motor Carriers*, 68 M.C.C. 553. Rather, it appears to be an unauthorized lease of operating rights. We note here that no written agreement exists, that the 'lessor' accepts and delivers the shipment, pays the drivers, retains responsibility for the freight, and prepares the billing. The equipment leased to Lerner is loaded for movement before applicant 'leases' the vehicle to Lerner. Therefore, the equipment is unavailable to lessee to augment its fleet as contemplated by the leasing portion of the regulations. Lerner pays nothing for the privilege of leasing the equipment, and, in fact, he receives a portion of the revenue from applicant. We conclude that no lease of equipment actually exists, and that the ostensible lessee-carrier, Lerner, merely accepts a percentage of the revenues as consideration for permitting the ostensible lessor, applicant, to operate under the former's authority. We have repeatedly held that such arrangements are unlawful. Compare No. MC-79695 (Sub No. 18), *Steel Transp. Co., Inc., Extension-Nonferrous Metals*, 81 M.C.C. 637 (decided September 23, 1959) and No. MC-C-2275, *Campbell Sixty-Six Exp., Inc., v. Frisco Transp. Co.*, 81 M.C.C. 53 decided June 24, 1959). Applicant and Lerner are hereby admonished to refrain from entering into such arrangements in the future with one another or other carriers."

There have been some decisions involving extension applications wherein the application was denied, not on the basis of applicant's being unfit to provide the service proposed due to its illegal lease and interchange operations, but for the reason that applicant failed to exercise the requisite degree of control over the vehicles operated and proposed to be operated on its behalf, and thus failed to establish that it was a common or contract carrier by motor vehicle within the meaning of the Act. In *Truckway Corp. Extension-Florida*, 54 MCC 676 (1952) applicant sought to operate as a contract carrier by motor vehicle, transporting specified commodities between points in 20 states and the District of Columbia. Applicant did not have any drivers or other employees on its payroll, nor did it own any motor vehicle equipment or other operating facilities except one trailer. Its operations were performed with tractor and trailers leased from its president who was also the owner and operator of a truck rental company. Applicant leased 10 tractors and 13 trailers under a long-term written contract from the leasing company. Under the terms of the lease, the leasing company furnished oil, gas, repairs, garage facilities and drivers for the leased vehicles and received 80 percent of the freight charges as rental for the equipment with drivers. Public liability and property damage insurance was carried by the leasing company and applicant jointly, their proportionate share of the premiums paid therefor being based on the volume of traffic handled by each. The proposed operation, if authorized, would be carried on in the same manner as that heretofore described. Division 5, after considering the lease arrangement, concluded that "Inasmuch as applicant owns no equipment, it has the burden of establishing that it so controls and directs, and that it assumes the responsibility for, the operations performed through the use of equipment owned by its president as to warrant the conclusion that its status is that of a carrier by motor vehicle, under the act." Division 5 held that such burden has not been met (54 MCC 679, 680):

> "Except for an extremely limited responsibility to the shipper, applicant appears to have none of the attributes of a carrier for hire within the meaning of the act. Clearly it does not have exclusive control and possession of the leased equipment during the entire term of the lease. The facts of record suggest that applicant may be a broker or a mere aid in furthering the present activities of Rehl, but do not provide a sufficient basis upon which to make a definite determination of applicant's exact status. We conclude that applicant has failed to sustain its primary burden of establishing that the proposed operation will be that of a carrier by motor vehicle within the meaning of the act and accordingly we are not justified in granting the authority sought. In view of this conclusion, it is unnecessary to discuss the evidence relative to the question of whether the operation proposed will be consistent with the public interest and the national transportation policy, or whether applicant is fit and able to perform such service.
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> "As indicated above, applicant now holds permits authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle. In the event it is operating thereunder in a manner similar to that proposed herein, it should immediately take steps to reform the operation so as to insure that its future operations will be those of a bona fide contract carrier. Should it

fail to do so it may become necessary for us to enter an appropriate order.

"We find that applicant has failed to establish that the proposed operation would be that of a carrier by motor vehicle within the meaning of the Interstate Commerce Act, and that the application should be denied."[25]

COMPLAINT AND INVESTIGATION PROCEEDINGS

One of the most important requirements of the Commission's rules and regulations is that pertaining to the inspection of equipment. One of the reasons for establishing the leasing rules was to make certain that authorized carriers leased only equipment meeting safety standards set down by the Commission. The most important part of the inspection regulations is that of placing the duty of the authorized carrier, before taking possession of leased equipment, to inspect the equipment in order to insure that the equipment complies with the Commission's safety regulations. If there is a failure to properly inspect the equipment, then in effect control has not passed from one carrier to another.

In *Bowling Green Exp., Inc., Interchange Practices*, 74 MCC 167 (1958), the Commission instituted an investigation for the purpose of determining whether certain interchange arrangements and agreements entered into by respondent Bowling Green Express and several other carriers were in violation of the Interstate Commerce Act and the Commission's rules and regulations governing the lease and interchange of motor vehicles. Under the interchange arrangement, respondent, in connection with its interline carriers, was performing a through service in the handling of traffic moving from origin to destination in the same unit of equipment with the same drivers. Part of the service was performed under the authority of Bowling Green Express and the other performed under the authorities of its connecting line carriers. The

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25. An application for common carrier authority was denied for the same reasons as stated above in *Coldway Food Exp. Inc. Extension-Eastern Pennsylvania*, 79 MCC 171 (1959). These cases do not stand for the proposition that an applicant and/or authorized carrier cannot propose to conduct operations or actually conduct operations in leased equipment. That authorized motor carriers lawfully may conduct operations with the use of leased equipment when leasing arrangements are in conformity with the Commission's rules and regulations is not in dispute and the principal is well established that an applicant may not be found unfit because it makes use of leased equipment provided the leasing arrangements and operations thereunder are lawful and proper. *Point Transfer, Inc., Extension-Pa. and Ohio Origins*, 105 MCC 634, 658 (1957).

interchange arrangement complied with the Commission's lease and interchange regulations for the most part, and the only question was the propriety of the method utilized for the inspection of equipment. One of the connecting-line carriers would originate a shipment in its own equipment with its own driver and transport the same to its Nashville, Tenn. facility, at which point the drivers and equipment of the connecting carrier would be turned over to Bowling Green Express and operated to destination under the latter carrier's operating rights. The question to be determined was whether or not in serving as employees of Bowling Green Express the drivers may inspect the equipment of the employer whose service they have just left, even though authorized by Bowling Green Express and competent to do so. Division 1 pointed out that 49 CFR § 207.5(d) requires the authorized carrier, before taking possession of the equipment, to inspect the same or to have it inspected, by a person who is qualified to do so and has been duly authorized by the carrier to make such inspection as a representative of the carrier and held that the drivers of the carrier originating the shipment may not act as the authorized inspector of such equipment for Bowling Green Express and the involved inspection of equipment violated the Commission's rules. In so ruling, Division 1 considered and approved Administrative Ruling 103 dated January 24, 1957, issued by the Bureau of Motor Carriers (74 MCC 173):

> " 'Question 16. Section 207.4 (c) requires that an inspection of the vehicle be made by a person who is competent and qualified to make such inspection and has been duly authorized by the carrier to make such inspection as a representative of the carrier. May the carrier appoint as its representative to make such inspection a driver or other employee of the person owning the equipment? [Note. Rule 207.5 (d) makes it the duty of the carrier acquiring equipment in interchange to inspect such equipment or have it inspected in the manner provided in rule 207.4 (c) of the rules.]
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> " 'Answer: No. The person making the inspection must make it as a representative of the carrier under whose rights the transportation will be performed, and the carrier may not employ as its representative a person who has an adverse interest, such as the driver or an employee of the owner. [Note. An exception is noted in the answer for situations where the authorized carrier has appointed a person as its exclusive agent under a long-term contract to handle all of its affairs and such person is also the owner of equipment used by the carrier in interchange service but this situation is not present here.]'

"A somewhat similar question and answer were contained in a previous administrative ruling (No. 97 issued September 1, 1953) interpreting the 'old rule' which was in existence prior to the effective date of the present rules.

"We believe that this ruling is sound. The purpose of the rule, of course, is to insure that equipment turned over to the authorized carrier by the connecting carrier is in compliance with our safety regulations. This being so it seems to us that the person making the inspection at the interline point should not be in any material way connected with, or owe allegiance to, the owner of the equipment. We do not believe that drivers who have just left the employment of the owner of the equipment and who will return to such employment as soon as their service for the authorized carrier is completed, can be expected to be as diligent and strict in making such inspection as they would be if unconnected in any way with the equipment owner. In the circumstances we cannot approve the arrangement between Bowling Green and TCT insofar as it concerns the inspection of equipment, and an appropriate order will be entered requiring the discontinuance of this practice."

A bona fide interchange of equipment and drivers between authorized carriers contemplates that the parties thereto will each perform actual operations under their respective operating authorities and assume full responsibility to the shipper, to the public, and to the Commission for the transportation performed by virtue of interchange. In *Stewart—Investigation of Control*, 87 MCC 681 (1961), the Commission considered an interchange arrangement between Speedway Transports, Inc. and Auto Haulers Co., hereinafter referred to by their short titles. Speedway held authority to transport certain commodities from Kenosha, Wis., to points in Missouri. Auto Haulers held authority to transport certain commodities between points in Oklahoma and points in Missouri. Speedway and Auto Haulers entered into an agreement whereby Speedway would originate a shipment in Kenosha, Wis., transport the same to St. Louis, Mo., and at that point interchange the equipment and driver to Auto Haulers who would make delivery at Tulsa, Okla. Under the arrangements, Speedway paid all costs and expenses incurred in operating the "interchange" equipment; assumed complete responsibility for compensating drivers for their services from origin to destination and return; maintained payroll and other driver's records; obtained all licenses and paid all taxes in connection with the operation of such equipment; agreed to defend Auto Haulers and to indemnify and hold the latter harmless against all claims, damages, and liability for injury to persons or property arising out of the operation of such equipment; and assumed responsibility for keeping all interested persons advised as to the location and progress over the entire movement from origin to destination. Division 1 held that although this leasing operation was in technical compliance with the Commission's regulations, it was nonetheless unlawful (87 MCC 696):

> "Technical compliance with the leasing and interchange regulations does not necessarily imply a lawful operation. For example the leasing arrangements of the two codefendants in *Campbell Sixty-Six Exp., Inc., v. Frisco Transp. Co., supra*, [81 MCC 53] although unequivocally categorized as unlawful, were specifically found to be in conformity with the leasing and interchange regulations. These regulations affect in no way the basic proposition that a motor carrier receiving traffic from another through the interchange of equipment with drivers must have and exercise control over the operation of such equipment while it is in its possession. A mere paper agreement saying that control is vested in the connecting carrier is not enough; the carrier under whose rights the interchanged equipment is operated must in fact control the service to the same degree as it would if it were the owner of the vehicles, and must control the vehicles to the extent necessary to assume full responsibility to the shipper, to the public, and to this Commission for transportation performed in such vehicles. While the interchange arrangements between Speedway and Haulers appear not to contravene the applicable interchange rules, it is apparent that Haulers does not exercise full and effective control over the transportation performed from St. Louis to Tulsa under color of its operating rights. Purported interchange arrangements similar to those which have been entered into between Speedway and Haulers were found to be illegal in *D.T. & Co., Inc., Extension-Willow Run, Mich.*, 49 M.C.C. 231, 239, *Gregory Heavy Haulers, Inc., Ext.-Highway Const. Equip.*, 74 M.C.C. 623, 625, and *Campbell Sixty-Six Exp., Inc., v. Frisco Transp. Co., supra*."[26]

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26. A like result is reached if the transaction involves the augmenting of equipment, as opposed to interchange between authorized carriers. In *Coastal Tank Lines, Inc. v. Pioneer Trucking Corp.*, 79 MCC 101 (1959) the lease between the lessor and the lessee recited that the equipment shall be operated under the lessee's direction and control;

The leading decision and the one most cited by the Commission relating to the issue of "control" is *Performance of Motor Com. Car. by Riss & Co., Inc.*, 48 MCC 327 (1948). Riss & Co., Inc. hereinafter referred to by its short title, was authorized to operate as a common carrier by motor vehicle, in interstate or foreign commerce, of general and specified commodities, principally over regular routes between points in various states. The Commission instituted an investigation proceeding into and concerning the performance of service under certificates issued to Riss in order to determine whether the services were performed in accordance with the provisions of Part II of the Act and the rules and regulations of the Commission promulgated thereunder. Riss operated under a so-called "provider plan of operation," which was the subject matter of the investigation proceedings. Operations were conducted pursuant to the provider plan and by virtue of oral agreements entered into between Riss and the so-called providers or owner-operators. The provider plan was essentially a contract or arrangement for the furnishing of motor vehicle equipment and other facilities for use by Riss over the routes and between the termini Riss was authorized to serve under its certificates. In general, the agreement specified that the provider would furnish adequate equipment and facilities such as trucks, trailers, garages, terminals, and offices, together with the personnel necessary to fully maintain and perform all transportation service for Riss under its operating authorities and that Riss did not grant, lease, or invest in the provider any of its operating rights or certificates. The providers were paid on a percentage of the gross revenues collected from freight handled on the Riss bills of lading. The provider agreed to bear all maintenance costs

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however, the lessor supplied the drivers for the vehicles so leased, paid social security and workmen's compensation payments, provided public liability, property damage, and cargo insurance on all vehicles (such insurance naming the lessee as the insured), furnished gas and oil, provided all maintenance for the leased vehicles, and was responsible for keeping the vehicles in a safe condition; paid all necessary taxes and fees, accepted responsibility for the preparation and filing of all documents required by state and federal regulatory bodies, including driver's logs and doctor's certificates. The lessor received 70 percent of the revenue obtained through the use of the leased tractors, and 90 percent when it provided both tractor and trailer. A bill of lading form in the lessee's name was issued which was usually filled in by the driver of the equipment; the original bills were sent to the shipper along with the freight bill which was made out by the employees of the lessor. Taking all these factors as a whole, Division I concluded that the lessee did not exercise the degree of control over the motor vehicle operations or that degree of responsibility to shippers which a motor common carrier must exercise in order to actually hold itself out to the public.

and expenses of every character, except that Riss was to carry at its expense all insurance and was not relieved of its responsibility to the public, even though the provider was required to reimburse Riss for any amount paid by its arising out of cargo, public liability, property damage, and workmen's compensation, not covered by insurance. The provider agreed to advertise service and solicit freight in the name of Riss, to handle all freight on the shipping of documents of Riss, to use the tariff rate published by Riss, and to display plainly the name of Riss on its equipment. The agreement gave Riss the right of direction and complete control of the movement and handling of the freight by the provider, and for this purpose Riss had its representative or representatives present at the provider's place of business. Riss maintained that the provider plan was an arrangement between it and the individual providers for the furnishing of equipment and facilities, to wit, a common carrier by motor vehicle, under which the responsibility to the shipper and the obligation to the general public were effectively and conclusively maintained by Riss as the carrier. Division 5 held that Riss lacked direct or any effective control of the movement and handling of the traffic transported, and did not retain full responsibility to shippers or alone hold out the service to the public. Division 5 set forth certain guidelines and suggested changes in the Riss operation to bring it within the definition of "common carrier by motor vehicle" (48 MCC 363, 364):

> "In order to operate as a motor common carrier, Riss should both offer to the public and be actually engaged in the motor service, with its own bona fide employees having and exercising direct, full, and complete control over the movement and handling of the freight, so that any persons furnishing drivers and equipment to haul freight on Riss' billing are such an integral part of the service offered by Riss as to be considered mere aids in carrying out Riss' undertaking to transport. To this end, changes should be made to insure that Riss alone holds itself out to provide the service for the public and that it alone is responsible to the shippers for the freight. Riss also should provide, pay for, and maintain all necessary insurance; and with and through its own employees it should be responsible for, maintain, and file all necessary records and reports required by the Commission's rules and regulations.
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> "All solicitation of traffic should be in the name of Riss and should be accomplished by Riss through its bona fide employees

or agents, but this is not to say that Riss may not use the services of an authorized broker of transportation. The control of the movement and handling of the freight transported should be directly in Riss. Its own employees should fix the schedules for the movement of the freight and should dispatch all vehicles utilized. They should bill the freight and specify the routes to be used by the drivers of the vehicles carrying the freight, designate for them the amount and particular shipments to be moved, specify for them the places for loading and unloading the traffic, and give them any special instructions incidental to the movement thereof. .

"Riss should establish facilities by which its own employees may make necessary checks of the drivers and vehicles used in performing the transportation in order to insure that the Commission's rules and regulations pertaining to safety of operations are observed, and that Riss' instructions and directions as to the movement and handling of the freight are obeyed. Riss should make, and should be solely responsible for, all necessary arrangements for pick-up and delivery service, except where the tariffs permit the shipper or receiver of the freight to perform the service. Interline arrangements, if any, also should be directly between Riss and the connecting carriers. If Riss deems it necessary, in the exercise of its managerial discretion, to maintain terminal facilities, such terminal facilities should be arranged for, and maintained by, Riss at its own expense.

"In the event Riss desires to use vehicles of others to transport any of its traffic, all arrangements for the use of such vehicles should be made directly between Riss and the owners of the vehicles, and such other persons should be solely responsible to Riss for their service for the duration of the arrangement. Moreover, the mere fact that the arrangements, written or otherwise, between Riss and the owners of the vehicles may require certain performance is not enough; Riss should see to it that the actual practices meet the requirements set forth above."

A recent case reaching a result contrary to that in *Riss, supra*, is *Murphy Motor Freight Lines, Inc.—Investigation*, 99 MCC 707 (1965). Therein the Commission instituted an investigation into and concerning the practices of Murphy Motor Freight Lines, Inc. herein referred to by its short title for the purpose of determining as here pertinent: (1) whether Murphy, in concert with other respondents, failed to render reasonably continuous and adequate service to the public; (2) whether the named respondents, in concert with Murphy, were engaging in for-hire transportation, in interstate or foreign commerce, as common carriers by motor vehicle without a certificate of public convenience and necessity. The controversy involved the utilization by Murphy of so-called cartage operators whereby each of the cartage operators rented equipment to Murphy for use in providing service under Murphy's certificates. Under a so-called "Vehicle Lease Agreement" between the parties the lessor (cartage operator) agreed to the following: (1) to lease specific vehicles to Murphy, the compensation for which was the revenue agreed to in a cartage operator's agreement; (2) to maintain, service, and keep the vehicles in good repair, according to federal and state laws and regulations, and provide all gasoline, tires, and other necessary equipment, and pay driver's salaries, (3) to furnish competent and qualified drivers, and (4) to indemnify Murphy against any loss resulting from injury or death of driver, or damage resulting from the driver's negligence, incompetence, or dishonesty. Murphy, the lessee, agreed to assume full common carrier responsibility for loss or damage to cargo, and for the operation of the vehicle which was solely and exclusively under its direction and control. This lease agreement was subject to cancellation upon 30 days notice by either party. Additionally, Murphy maintained on file for each cartage operator and his driver: (1) a signed statement that the cartage operator and/or drivers had read and were familiar with the provisions of the Commission's motor carrier safety regulations; (2) a record of physical examination and doctor's certificate; (3) employment application; (4) accident record; and (5) daily time sheet and equipment check sheet. Murphy employed two supervisors who inspected each cartage operator's facilities and equipment at least once or twice each month. Murphy's director of safety made inspections of the various cartage operation facilities at regular intervals. Shipments were transported under Murphy's bill of lading and in Murphy's line haul vehicles to the break bulk points. At those points, the shipments were transferred to the cartage operators for ultimate delivery over Murphy's authorized routes to consignees located at small nearby communities less than 50 miles from the break bulk point. Shipments in the reverse direction moved under bills of lading prepared by the shippers and signed by the cartage operators for Murphy. The shippers call the cartage operators directly in requesting pickup service. All revenues collected were remitted direct to Murphy. Murphy compensated the cartage operators on the amount of traffic handled.

Murphy reimbursed the cartage operators for settlement of liability claims not over $5.00. Claims in excess of that amount were forwarded directly to Murphy for settlement. The cartage operators hired and discharged their drivers. The cartage operator's name was affixed to the cab doors, and the sides and rear of the van displayed Murphy's name. The cartage operators supervised the loading and unloading of the leased equipment; scheduled the pickups and deliveries; and paid all expenses incurred in the operation and maintenance of the leased vehicles, including driver's salaries, social security taxes, and workmen's compensation. The Bureau of Enforcement claimed that the above described operation was devised to evade any responsibility by Murphy for the transportation service performed, relying upon *Riss, supra*. Division 1 disagreed,[27] concluded that Murphy exercised proper direction and control and discontinued the investigation (99 MCC 713):

> "Responsibility to the shipper, consignee or any other member of the shipping public rests with Murphy. Nordby is only liable to Murphy. Delivery receipts are sent to Murphy's central office at St. Paul. All claims are forwarded to Murphy. In short, the operation involves one bill of lading, only one carrier signatory to the bill of lading and one carrier paying claims—Murphy. Murphy has the direct, primary, and continuing responsibility to the public from origin to destination. Cf. *Riss*, 49 M.C.C. 111, 118. We conclude, therefore, that there is no indication on this record of unsatisfactory transportation services to the public.
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> The Bureau's claims that Murphy's operation was devised "to evade any responsibility" for the transportation service is unfounded. There is no evidence to indicate how Murphy's operation would prohibit the Commission from having immediate, direct control over safety, hours of service of employees, and other matters pertaining to safe, adequate, and efficient service and the safe operation of vehicles on the highways. Murphy has assumed these responsibilities. In *Riss*, 48 M.C.C. 327, 360, the Commission, division 5, held that—
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> * * * it is of the utmost importance to regulation that * * * [a

27. Division 1 stated: "It is important to emphasize, at the outset, that in Riss the overriding consideration behind the assailed operation was the avoidance by the carrier of financial losses. *Riss, supra*, 359,360. And it was primarily for that reason that the Commission condemned the operation. This is not the case here." (99 MCC 712). However, the most important distinction between the two cases is the fact that Murphy strictly controlled all elements of driver and vehicle safety compliance, whereas Riss did not.

> person claiming to be a motor carrier through the use of vehicles of others] have and exercise direction and control of the operations * * *.
> This Murphy does."

It is obvious that the result reached by Division 1 was predicated primarily upon operational efficiency and economy considerations, as well as the fact that the members of the public utilizing the service of Murphy were satisfied therewith, and no competing carriers nor shippers indicated any deficiency in the quality or the quantity of the service provided. The territory in which the cartage operations were performed was comprised of many small communities, and the representative of Murphy testified that the only way his company could efficiently and economically service many of those communities was by the cartage arrangement, otherwise many of the points would be without service. Unless a comparable factual situation is presented, it would be dangerous to rely on the Murphy case and pattern the details of a lease arrangement thereafter.

CONCLUSION

The cases considered here in some detail represent only a handful of the Commission's decisions relating to the issue of lease, interchange and control, but these cases are the leading decisions of the questions considered. No hard and fast rule can be devised respecting the factors that must be present to insure that proper control is assumed over the leased or interchanged vehicles. Each factual situation will present different problems and a lease arrangement designed to fit one set of circumstances may not be sufficient to legalize a transaction under a different set of circumstances.[28] However, the above cases do establish certain general principles which should be followed to insure a legal operation:

(1) Strict adherence to all requirements of the Commission's lease and interchange rules and regulations;

28. This is borne out by the Commission's liberal view as expressed in the *Murphy* case *supra*, wherein the carrier was obviously given the benefit of the dout due primarily to the fact that the lease arrangement under which operations were conducted was the only method that service to smaller communities could be provided on a regular, satisfactory, and economical basis. On the other hand, where there are no such extenuating circumstances involved, the Commission has applied a very strict approach as evidenced in the *Strickland* case, *supra*, which involved operations between major service points and no economic considerations involving the public interest were involved.

(2) The authorized carrier augmenting its fleet of equipment by lease or receiving a piece of equipment by interchange must control the details of the inspection of the equipment and should bear all expenses incurred in connection with the inspection. The person making the inspection on behalf of the acquiring carrier, in addition to being qualified under the rules and regulations, should not in any material way be connected with, or owe allegiance to, the owner of the equipment.

(3) When an authorized carrier leases equipment to augment its fleet it must be for the purpose of enabling the carrier to handle additional traffic generated by it and for which it, otherwise, would not have available equipment. The lessee carrier must solicit and generate the traffic transported in the leased equipment, prepare the freight bills covering the transportation, and bill and collect the revenues derived from the transportation free of control of lessor.

(4) In an interchange arrangement, the origin carrier must be responsible for the pickup and billing of the freight and the destination carrier responsible for delivery. In other words, each carrier party to an interline movement must function as such carrier and perform all services commensurate therewith.

(5) In an interchange arrangement, the charges for the use of equipment must be kept separate and distinct from the divisions of the joint rates or the proportion thereof accruing to the carriers, and the compensation agreed to between the carriers for the use of equipment should bear some relationship to the transportation performed by each.

(6) The primary responsibility for the payment of expenses incurred in operating the equipment, payment of insurance premiums and taxes should be that of the lessee. However, provision can be made for the reimbursement of these expenses by the lessor.

(7) In no event should the contract contain a hold harmless agreement, whereby the lessor agrees to hold the lessee harmless for any loss or damage incurred by virtue of the operation of the equipment. Such an agreement is an indication that the lessee does not have full dominion and control over the equipment operated under its authority and although this fact standing alone is not controlling, if coupled with other factors reflecting lack of control by lessee, an illegal lease of operating rights could be found to exist.

(8) The authorized carrier leasing equipment with drivers or receiving equipment with drivers through interchange must accept the responsibility and expense of determining that the drivers are fully qualified with respect to all applicable safety rules and regulations.

(9) The agreement covering the lease or interchange should embody all terms and conditions of the transaction, and any oral or written side agreement could have the effect of negating the written contract in the eyes of the Commission.

Considering the serious consequences which flow from a violation of the lease and interchange regulations and/or failing to maintain proper control over equipment operated, the additional time and expense incurred in assuring compliance and proper control is insignificant. The rules and regulations are clear and carriers augmenting their fleet by leasing equipment and/or operating equipment owned by other carriers in interchange service should have no problem in setting up appropriate procedures to insure compliance therewith. The key element in the ultimate is that of control.