

THE AGRICULTURAL EXEMPTIONS IN INTER-STATE TRUCKING: MEND THEM OR END THEM?*

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I

THE OBJECTIVES OF CONTROL

For the lawyer or social scientist interested in the governmental regulation of transportation, it is economic control—not safety regulation—that either warms the cockles of his heart or sends his blood pressure to a dangerous level. Safety regulation means control by public authority as to types of brakes, the maximum number of hours that a truck driver or locomotive engineer may stay at the controls without being relieved, and so on. To oppose such regulation is as hazardous as frowning at Mother's Day; but reasonable men can and do differ as to what measures are appropriate to the objective. In the area of economic regulation, however, reasonable men are not even united on the objectives. Such regulation means control over entry into the business, control as to routes or areas served, control as to rates, and the like. Unless noted otherwise, "control" in this article refers only to economic control.

In this country's earlier ventures in the control, by government, of transportation, protection was sought for shippers and receivers, for investors, and for carriers against each other. This last meant chiefly that railroads were not to be allowed to destroy each other through competition that reflected the consequences of overhead costs and joint costs.

In recent decades, there has been a considerable accent on the regulation of one group of carriers to protect another. The Motor Carrier Act of 1935¹ (part II of the Interstate Commerce Act) brought a large segment of interstate truck and bus operations under economic control by the Interstate Commerce Commission, along lines somewhat similar to the economic control which the federal government had evolved for railroads during a half-century. The railroads' friends rejoiced that the motor carriers thus regulated would no longer be able to subject the railroads to a species of competition in which the railroads had been restrained by public authority and the interstate trucks and buses had not.

Common and contract carriers by highway both provide transportation on a for-hire basis. That is, they exist in order to haul for others—the common carrier

*The views expressed in this article are those of the author, and do not necessarily reflect the views of any government agency.

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¹ 49 Stat. 543, 49 U.S.C. §§ 301-27 (1952).

for all who seek its service, and the contract carrier for a quite limited number of shippers, even as few as one. But the most eloquent reason advanced for the public control of contract carriers is not that their customers need protection from them or that the contract carriers need to be protected against each other, but that unrestrained competition on their part would be disastrous to common carriers.

Between the Association of American Railroads and the American Trucking Associations, Inc., there is a deep cleavage on some basic issues of public policy regarding transport. But they speak as with one voice on the desirability of substantial curtailment of the agricultural-commodities exemption in interstate trucking—the statutory provision whereby the interstate, for-hire trucking of numerous commodities, coming directly or indirectly from the farm, is free of economic control by the federal government. Both organizations want protection for their members, through the extension of economic control to this uncontrolled segment of the transport industry.

So far as safety regulation is concerned, the Interstate Commerce Act gives to the ICC almost as full authority over the operators of exempt, for-hire motor vehicles (whether agricultural haulers or others) as over the motor carriers subject to economic control. The only disparity concerns insurance.² On the nonexempt motor carriers, the ICC can impose (a) requirements as to insurance covering personal injury to passengers and damage to cargo, which is a form of economic regulation,³ as it deals with quality of service; and also (b) requirements as to insurance covering personal injury or property damage to others (such as motorists), which is a form of safety regulation. Exempt carriers are free of both.

The agricultural-commodities exemption has become a strange amalgam. Certainly this character has been achieved at least in part by amendment. There are critics who would say that judicial interpretation is likewise responsible. At all events, it is impossible to understand the proposals for changing the exemption, or the complications inherent in any attempt at such change, without knowing the origin and history of this and the other agricultural exemptions.

II

ORIGIN OF THE AGRICULTURAL-COMMODITIES EXEMPTION

In 1935, when a proposal was made to regulate interstate truck and bus transportation, the Senate—traditional friend of the farmer—passed a bill in which there were some exemptions from economic regulation, but no exemption which referred to farmers or their products or farmers' trucks.⁴ This was done despite a protest by various farm organizations—the American Farm Bureau Federation, the National Grange, and others—that such a law would increase truck rates, impair the flexibility

² 49 Stat. 557 (1935), as amended, 49 U.S.C. § 315 (Supp. V, 1958).

³ See D. PHILIP LOCKLIN, *ECONOMICS OF TRANSPORTATION* 699 (1954).

⁴ S. 1629, 74th Cong., 1st Sess. (1935).

of highway transportation, "impose rigid and extreme regulation" upon truckers, and "squeeze out" the small truckers.⁵

The bill, as reported to the House of Representatives by its Committee on Interstate and Foreign Commerce, however, contained an exemption from economic regulation, as regards "motor vehicles used exclusively in carrying livestock or unprocessed agricultural products"—unless and until the ICC should find that such regulation was necessary to carry out the policy of Congress enunciated in the bill.⁶ Nevertheless, the House debate on the bill and how to temper it to the shorn farmer was extensive. One member, declining to support the bill at all, declared that ". . . the influences behind this measure are centered largely amongst the railways, both the officials of the railroad companies and the members of the railway labor unions." The railroads, he indicated, hoped that the bill would reduce the number of trucks competing with railroads and raise the rates of those that survived.⁷ Another member called the bill "simply a move in restraint of trade."⁸ Another, opposing any economic regulation of trucks and buses, and identifying himself as a farmer, said, "The only relief I have ever seen in my 40 years on that farm from the terrific confiscatory railroad freight rates was when the trucks came."⁹ In contrast, Mr. Rayburn, of Texas, said that ". . . this bill, in the regulation of matters in interstate commerce does not go as far as many of the states have gone in regulating matters of transportation by bus and truck in intrastate commerce, regulations that have been accepted from one end of the land to the other. . . ."¹⁰

The House debate concerned not only the merits or faults of the general idea of economic regulation of motor carriers. It also dealt with the adequacy of the agricultural exemption embodied in the bill as reported out by the House Committee. In particular, concern was voiced as to whether "unprocessed agricultural products" was a broad enough phrase to include pasteurized milk and ginned cotton. As one member remarked, ". . . ginning is sometimes synonymous with processing."¹¹ A member of the Committee on Interstate and Foreign Commerce declared, "I imagine the courts may be called upon at some time to interpret that, but it is not for us at this time to go into a lengthy discussion, trying to define all agricultural products which are unprocessed. They would run into the thousands."¹² Nevertheless, perplexity persisted; and the House changed the phrase from "unprocessed agricultural products" to "agricultural commodities (not including manufactured products thereof)."¹³ The word "livestock," put by the reporting House Committee into the exemption without qualification, was accepted by the House. Without dis-

⁵ 79 CONG. REC. 5733 (1935).

⁶ *Id.* at 12219.

⁷ *Id.* at 12197.

⁸ *Id.* at 12214.

⁹ *Id.* at 12216.

¹⁰ *Id.* at 12204.

¹¹ *Id.* at 12220.

¹² *Id.* at 12205.

¹³ *Id.* at 12220.

cussion, the House added "fish (including shellfish)" to the same clause, on the motion of the Chairman of the Committee on Merchant Marine and Fisheries.¹⁴

The net result was section 203(b)(6) of the Interstate Commerce Act, an exemption (from economic regulation) of "motor vehicles used exclusively in carrying livestock, fish (including shellfish), or agricultural commodities (not including manufactured products thereof)."¹⁵ The House also insisted upon removing the authorization for the ICC to set this agricultural-commodities exemption aside.¹⁶

III

ORIGIN OF THE OTHER AGRICULTURAL EXEMPTIONS

A considerable amount of the House debate expressed a determination not to have the government interfere with farmers' hauling their own crops to market in their own trucks and hauling supplies and equipment back to the farm. As regards *all* private trucking, by farmers or others—the trucking of one's own property, in contrast to trucking for-hire—the bill extended only to safety regulation.¹⁷ Furthermore, all provisions of the bill—economic and safety regulation alike—were expressly limited to interstate and international trucking (grouped together in this article under the phrase "interstate"). The interstate trucking that is of greatest concern to a farmer is not likely to be the use of his own truck. However, in addition to the omission of *all* private trucking from the bill's provisions for economic regulation, the House inserted a superfluous exemption of private trucking by a farmer, to and from his farm—section 203(b)(4a) of the Interstate Commerce Act.¹⁸

Of much more practical import was the lively concern shown for the trucking operations of farmer co-operatives. Here the dominant question was not the co-operatives' hauling of their own members' products and supplies, but the hauling of *nonmembers'* products and supplies. Under the Agricultural Marketing Act of 1929, as amended, farmer co-operatives dealing in farm products, farm supplies, or "farm business services" were, at the time of the 1935 debate in the House regarding the agricultural exemptions, already allowed certain benefits (including eligibility for Government-sponsored loans), even if the value of such business transacted with or for nonmembers were as great as (but not in excess of) the value of such business transacted with or for members.¹⁹ A part of the business of these co-operatives was the trucking of farm products from the farm and supplies to the farm. Trucking for nonmembers was a portion of the nonmember business that entered into the reckoning as to whether the co-operative was staying within the fifty per cent limit.

¹⁴ *Ibid.*

¹⁵ 49 Stat. 544 (1935), 49 U.S.C. § 303(b)(6) (1952).

¹⁶ 79 CONG. REC. 12226 (1935).

¹⁷ 49 Stat. 546 (1935), 49 U.S.C. § 304(a)(3) (1952).

¹⁸ 49 Stat. 544 (1935), 49 U.S.C. § 303(b)(4a) (1952).

¹⁹ That Act's definition of "cooperative association" (which includes the 50 per cent ceiling on non-member business) is § 15(a), 46 Stat. 11, as amended, 12 U.S.C. § 1141j(a) (1952). Congress amended this definition by means of 49 Stat. 317 (1935), a few weeks before the House debate on the proposed Motor Carrier Act; and that version of the definition was still unchanged when the Eighty-fifth Congress expired on Jan. 3, 1959.

During the debate in the House regarding the motor-carrier bill, an exemption from the bill's provisions for economic regulation was proposed for "motor vehicles controlled and operated by a co-operative association as defined in the Agricultural Marketing Act" of 1929.²⁰ The amendment simply preserved a right already enjoyed by the agricultural co-operatives. The amendment's sponsor stated that the reasons for his amendment were: (a) in some instances, hauling for nonmembers reduces the expenses of hauling for members; and (b) some farmers, nonmembers of the co-operative, would be left entirely without transportation if the co-operative were not allowed to haul for them.²¹ His amendment was adopted, and became section 203(b)(4b), now section 203(b)(5), of the Interstate Commerce Act.²²

The Senate accepted sections 203(b)(4a), (4b), and (6) of the Interstate Commerce Act as added by the House. They provided exemption (from economic regulation) for:

(4a) motor vehicles controlled and operated by any farmer, and used in the transportation of his agricultural commodities and products thereof, or in the transportation of supplies to his farm; or

(4b) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended; or . . .

(6) motor vehicles used exclusively in carrying livestock, fish (including shellfish), or agricultural commodities (not including manufactured products thereof);

IV

SCOPE AND ANTICIPATED IMPACT

Thus, the Motor Carrier Act of 1935 went on the books with two agricultural exemptions covering both farm products and farm supplies, and an agricultural-commodities exemption. Of the three, it is this last that has, in the years since 1935, been most commonly heard of in the courts, in Congress, and in the sundry journals which, in a practical or a scholarly way, are concerned with transportation.

On its face, section 203(b)(6) of the Interstate Commerce Act, as originally enacted and, indeed, as amended prior to the Transportation Act of 1958,²³ seems to run in terms of the nature of what is hauled—not the country where it was produced, or who hauls it, or from what sort of origin, or to what sort of destination, or how far, or for what purpose. As for the commodities covered by this exemption, in 1935, *all* agricultural commodities were included, but with no definition except the negative device of excluding products *manufactured from* agricultural commodities. Somewhere between the cotton gin and the shirt factory, a line was to be drawn by interpretation. Livestock was included, but meats were not named in the exemption. Fish was listed, but with no clue, in the statute or the debate, as to whether they must be alive or dead, whole or sliced, raw or cooked. In this article and in such discussions generally, "the agricultural-commodities exemption" means

²⁰ 79 CONG. REC. 12218 (1935).

²¹ *Ibid.*

²² 49 STAT. 544 (1935), 49 U.S.C. § 303(b)(5) (1952).

²³ 72 STAT. 568 (codified in scattered sections of 49 U.S.C.).

all of section 203(b)(6) of the Interstate Commerce Act, including the fish, despite the fact that they are neither a field crop nor a ranch product. "The agricultural exemptions" means this provision plus the two for trucking by farmers and farmer co-operatives.

The regulatory scheme to which sections 203(b)(4a), (4b), and (6) of the Interstate Commerce Act were enacted as exceptions is, as noted above, solely the regulation of interstate and foreign commerce. Unlike the ICC's role in railroad regulation during the past half-century, its role in the regulation of motor carriers expressly excludes, by the statute's own terms, any jurisdiction over intrastate operations. This judgment of Solomon applies even if the business of a single run consists partly of interstate traffic and partly of intrastate traffic in a half-dozen states.

The extensive debate in the House which produced these exemptions reflected a keen desire to provide the farmer with inexpensive, convenient transportation. In the House, the only opponents of these exemptions, in any sense, were members who apparently believed that the exemptions' purposes could be achieved by the bill as reported to the House by its Committee on Interstate and Foreign Commerce. These members and the exemptions' proponents had one thing in common, however: silence as to whether the exemptions would substantially preclude attainment of whatever objectives the Motor Carrier Act had; or whether economic regulation of the transportation covered by sections 203(b)(4b) and (6) of the Interstate Commerce Act might be beneficial or harmful to the exempted trucking firms involved, to their employees, to the competing regulated firms (whether motor carriers or others), or to their employees.

In a different but somewhat related way, Congress has shown its concern for the farmer's stake in transportation by provisions authorizing and directing the Secretary of Agriculture to make complaint or petition to the ICC, the Federal Maritime Board, the Civil Aeronautics Board, and "other Federal or State transportation regulatory" bodies as to transportation charges, practices, and services relating to farm products and supplies.²⁴ The Secretary of Agriculture is represented in numerous proceedings before such bodies and also in transportation-regulation cases when they reach the courts. The matters involved include the issue of whether a given trucker who wishes to haul certain commodities for-hire can do so under the agricultural-commodities exemption or whether, instead, he must get ICC operating authority.

The pattern of motor-carrier regulation differs substantially between the federal and the state governments and among the latter. The same may be said as to the pattern of agricultural exemptions. Such exemptions are by no means universal among the states; and those exemptions that exist are of widely divergent types.²⁵

²⁴ Agricultural Adjustment Act of 1938, § 201, 52 Stat. 35, 7 U.S.C. § 1291 (1952); Agricultural Marketing Act of 1946, § 203(j), 60 Stat. 1087, 7 U.S.C. § 1622(j) (1952).

²⁵ *Hearings Before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce on Problems of the Railroads*, 85th Cong., 2d Sess., pt. 3, at 1856-57 (1958).

Moreover, those states without agricultural exemptions differ greatly in the diligence with which they enforce the authority that they theoretically wield.

V

EXEMPTIONS ALL 'ROUND

The agricultural exemptions from the economic regulation of trucking are far from unique, even if we limit our horizon to the federal jurisdiction in contrast to that of the states, and to highway transportation as distinguished from the other modes of transport. As it now stands, section 203(b) of the Interstate Commerce Act sets out the three agricultural exemptions plus a wide assortment of others, including one for interstate taxicabs (such as those plying between downtown Washington, D. C., and its extensive suburbs in Maryland and Virginia) and one for "motor vehicles used exclusively in the distribution of newspapers" (an aspect of transportation which likewise has its greatest importance where big cities are located near a state boundary).²⁶

Despite the lack of anything resembling exact information as to the number of ton-miles or passenger-miles hauled by motor vehicle under the Interstate Commerce Act's sundry exemptions from economic regulation, it would probably be correct to say that the three agricultural exemptions combined, or perhaps the agricultural-commodities exemption alone, accounts for more transportation than any other single exemption in section 203(b) of the Interstate Commerce Act. Certainly the exemptions under sections 203(b)(5) and (6) (farmer co-operatives' trucking, and commercial trucking of agricultural commodities) of the Act are outstanding in terms of the volume of traffic which moves in competition with regulated transportation.

The Interstate Commerce Act's part III, added in 1940, provides for ICC economic regulation of common and contract carriers by water, with respect to transportation provided by them in interstate commerce and (in some circumstances) in the domestic part of movements in foreign commerce. From this control, there is an exemption for the transportation of commodities in bulk (*e.g.*, wheat, coal, and phosphate rock) when the cargo space in the vessel or barge tow—a string of barges, towed as a unit—carries no more than three such commodities. The statute further limits this exemption in such a way that it does not apply in equal degree to (a) transportation on rivers, canals, etc., and (b) coastwise and Great Lakes shipping; and it does not apply at all to (c) intercoastal movements via the Panama Canal. From the ICC's jurisdiction under part III, there is also an exemption for "liquid cargoes in bulk in tank vessels," with no distinction as to the waterway or body of water involved; and there are still other exemptions, some of them conditional upon the ICC's consent.²⁷ Some years ago it was estimated that ". . . the water carriers

²⁶ 49 Stat. 544 (1935), 49 U.S.C. § 303(b)(2) and (7) (1952).

²⁷ 54 Stat. 931 (1940), as amended, 49 U.S.C. § 903 (1952). See also 54 Stat. 950 (1940), 49 U.S.C. § 920(a) (1952).

subject to the Interstate Commerce Act transport only about 10 percent of all water tonnage."²⁸

Under the Shipping Act, the Federal Maritime Board's powers as to rates, discriminatory practices, and the like apply to common carriers by water in foreign commerce, but not to contract carriers.²⁹ The Civil Aeronautics Board's powers of economic control over interstate and foreign air transportation and over the air transportation of mail are likewise limited to common-carrier operations. Moreover, the CAB is authorized to grant, to individual common carriers by air or to classes of such carriers, exemption from most aspects of economic regulation.³⁰ None of these exemptions from economic control by the ICC, FMB, and CAB is accompanied by statutory exemption from federal safety regulation.

VI

RELATED ISSUES OF FEDERAL ECONOMIC CONTROL OF TRUCKING

To understand the economic role of the agricultural-commodities exemption and the legislative battles regarding it, we need to consider, at least briefly, several aspects of the Interstate Commerce Act's part II that dovetail with it. First, the ICC's authority over *private* trucking—transportation not performed for compensation, which usually means that the carrier and the owner of the cargo are the same person—is limited to safety regulation.³¹ It may be asked, "How could it be otherwise?" Truly enough, a man does not charge himself rates or render himself a quality of service about which he might conceivably protest to a helpful commission. But whether he engages in transportation at all, even of his own goods, may be subject to a governmental power to loose and to bind. During World War II, there were proposals to prohibit all trucking beyond a specified distance, whether the hauling were private or for-hire. In more recent years, the for-hire segment of the transportation industry, including both motor-carrier and railroad interests, have demanded that private trucking be reduced to what is "legitimate"—the all-round, handy adjective of almost any businessman to distinguish himself from his least admired rivals. As recently as 1958, Congress heeded this complaint with a tightening up of the Interstate Commerce Act's definition of private trucking.³² But despite frequent complaints that much of what passes as private trucking—*e.g.*, in "buy and sell" operations—is for-hire trucking in disguise, this topic of controversy causes less noise than the agricultural-commodities exemption. The exemption for the farmer co-operatives' trucks also evokes little criticism.

From 1940 until 1957, a "contract carrier by motor vehicle" was defined by the Interstate Commerce Act as "any person which, under individual contracts or agree-

²⁸ 60 ICC ANN. REP. 36 (1946).

²⁹ 39 Stat. 733 (1916), as amended, 46 U.S.C. §§ 812-18 (1952). See also 39 Stat. 728 (1916), as amended, 46 U.S.C. § 801 (1952).

³⁰ 72 Stat. 737, 754-71, 49 U.S.C.A. §§ 1301(3), (10), (19), (21), and 1371-86 (Supp. 1958).

³¹ 49 Stat. 544 (1935), as amended, 49 U.S.C. §§ 303(a)(14), (15), (17), 304(a)(3) (Supp. V, 1958).

³² 72 Stat. 574, 49 U.S.C.A. § 303(c) (Supp. 1958).

ments, engages in the transportation . . . by motor vehicle of passengers or property . . . for compensation” but which, unlike a common carrier, does not hold itself out to the general public to engage in such transportation.³³ Customarily, a motor contract carrier serves a very few shippers—perhaps only one; is even likelier than a motor common carrier to be specialized as to the commodities it hauls or the character of the service it renders; and sometimes functions as so integral a part of a shipper firm served by it that the trucks bear the name and distinctive color scheme of the shipper. The railroads are described by themselves and their friends as the backbone of the nation’s transportation system; and the motor common carriers are happy to adopt this description, without depriving the railroads of it, when they join the latter in demands to keep the contract truckers within “proper” bounds. A statute approved by the President in August 1957 tightened the above definition by transmuting custom into law. Transportation by a contract carrier is required to be, for example, “under continuing contracts with one person or a limited number of persons.”³⁴

At about the same time, Congress satisfied another long-standing complaint by common carriers against contract truckers. Each contract trucker had been required to publish the minimum rates actually charged by it for each part of the transportation service rendered by it. Because the common carriers did not know the actual rates charged to any shipper other than the one benefiting by the lowest rate, it was said that they could not compete effectively. A statute of August 1957 requires each contract carrier by motor vehicle to publish *all* of its actual rates.³⁵

Trip-leasing is a practice that strengthens private trucking and exempt for-hire trucking. Legal restrictions on it, therefore, find considerable support among regulated for-hire truckers. Trip-leasing is the leasing of a motor vehicle—and, ordinarily, the supplying of a driver as well—for a single one-way trip per lease. Generally, the lessor is a firm—one-man or larger in scale—engaged in private trucking or in exempt for-hire trucking, and having nothing to haul on the return trip. This is quite likely to happen, for example, in the trucking of fresh fruits and vegetables from Florida to the North. There are regulated for-hire truckers with traffic unbalanced in the opposite direction. They, therefore, are glad to be lessees of some equipment to meet part of their needs. The owners of the equipment welcome an arrangement that cuts down their net expenses on the return journey, or even yields them a net return above their out-of-pocket expenses or above the fully distributed costs of the return journey. This is a complementing of functions that, to persons intent on the over-all efficiency of the economy, has a strong appeal.

The ICC, in recent years, issued, but repeatedly postponed, regulations limiting to a minimum of thirty days the lease of a motortruck for use by a regulated interstate trucker and prohibiting the fixing of compensation to the lessor as a percentage of the lessee’s revenue from use of the vehicle—the prevailing manner of fixing such

³³ 54 Stat. 920 (1940), 49 U.S.C. § 303(a)(15) (1952).

³⁴ 71 Stat. 411 (1957), 49 U.S.C. § 303(a)(15) (Supp. V, 1958).

³⁵ 71 Stat. 343 (1957), 49 U.S.C. § 318(a) (Supp. V, 1958).

compensation. A trip-lease journey usually is completed in far less than thirty days. The ICC said that these restrictions were necessary chiefly to make its enforcement of safety regulations effective. Indeed, if the ICC is correct in saying that truckers under the agricultural-commodities exemption have an outstandingly bad safety record, then anything that tends to make it impossible for exempt haulers to operate is a boost to safety.

Farm groups denied that this restriction on agricultural haulers was needed for safety reasons. The Interstate Commerce Act, as it stood, was deemed by the ICC to be an adequate basis for the Commission's intended restriction on trip-leasing. Eventually, after considerable controversy outside of Congress, the latter body enacted a remarkably complex amendment⁸⁶ to the Interstate Commerce Act, narrowing the ICC's authority to restrict trip-leasing; and the Commission promptly issued a regulation utilizing to the full its pruned-back powers in this area.⁸⁷ The amendment forbade the ICC to control the duration of lease of a "motor vehicle, with driver, or the amount of compensation to be paid" the lessor in certain situations involving trucks operating under the Interstate Commerce Act's section 203(a)(17) (private trucks)⁸⁸ or under its sections 203(b)(4a) or (5) or (6) (farmers' trucks, farmer co-operatives' trucks, and for-hire trucks under the agricultural-commodities exemption). For the last-named of these four categories of trucks, the ICC was forbidden to impose the specified types of restriction where the vehicle to be leased to a regulated interstate trucker has completed the hauling of a load within the agricultural-commodities exemption and is to be used by the regulated carrier "in a loaded movement in any direction, and/or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based."⁸⁹ This can be illustrated by reference to a man who has his residence in Florida, owns one truck, and hauls Florida produce northward. As an exempt trucker, he may move a load of fresh cabbage from Florida to New York City; there lease his truck, to be driven by himself, to a motor common carrier engaged in the hauling of "general commodities"; proceed with his empty truck to Newark, New Jersey; there pick up part of a load of merchandise; go to Philadelphia and complete his load of merchandise; thence drive to Atlanta; there deliver the load and thus fully carry out the lease agreement; and then proceed with an empty truck—again on his own—to a Florida cabbage-growing area and try to get another load of cabbage. During the few days of the movement from New York City to Newark to Philadelphia to Atlanta, his vehicle is utilized by the regulated carrier, and the ICC is forbidden to keep him from entering into this arrangement or to control the amount he is paid by that carrier for the services of his truck plus himself.

⁸⁶ 70 Stat. 983 (1956), adding subsections 204(e) and (f) to the Interstate Commerce Act, as amended, 49 U.S.C. § 304(e) and (f) (Supp. V, 1958).

⁸⁷ 49 C.F.R. § 207 (Cum. Pocket Supp. 1959).

⁸⁸ 49 Stat. 544 (1935), 49 U.S.C. § 303(a)(17) (1952).

⁸⁹ 70 Stat. 983 (1956), 49 U.S.C. § 304(f)(2) (Supp. V, 1958).

VII

THE AGRICULTURAL EXEMPTIONS' LEGISLATIVE HISTORY

A. Measures Tending to Broaden the Exemptions

In the legislative history of the agricultural exemptions between 1935 and 1958, what Congress omitted doing—after varying degrees of attention to numerous proposals—was more important than what it did. The ICC early enunciated what came to be known as the “poisoned vehicle” doctrine.⁴⁰ This meant that if any truck operating under section 203(b)(6) of the Interstate Commerce Act hauled any non-agricultural commodity at any time, all subsequent interstate transportation by that truck would be subject to economic regulation by the ICC. Indeed, the agricultural-commodities exemption as originally enacted did refer to “motor vehicles used exclusively in carrying livestock, fish . . . , or agricultural commodities. . . .” During the debate in the House in 1935, Mr. Gilchrist offered an amendment which would have substituted “primarily” for “exclusively.” He warned the House of the danger in the latter word, but his amendment was rejected as needless.⁴¹

In 1938, in response to the ICC's poisoned-vehicle doctrine, Congress amended section 203(b)(6) of the Interstate Commerce Act as follows:⁴²

(6) motor vehicles used [exclusively] in carrying *property consisting of* livestock, fish (including shellfish), or agricultural commodities (not including manufactured products thereof), *if such motor vehicles are not used in carrying any other property, or passengers, for compensation*

On its face, the language was still ambiguous as to whether “not used” meant “not used at the same time.”

In 1940, each of the three agricultural exemptions was amended. In section 203(b)(6), “livestock” was qualified by “ordinary”; to section 203(b)(5), federations of farmer co-operatives were added, with the same restrictions as those already applied to the co-operatives themselves; and in section 203(b)(4a), “and used” was changed to “when used”—an effort at clarifying the matter of *when* a farm truck was to be exempt from economic regulation.⁴³ In response to ICC rulings that “agricultural” does not include “horticultural,” Congress in 1952 inserted the phrase “(including horticultural)” after the word “agricultural” in sections 203(b)(4a) and (6).⁴⁴

The net result of these changes was that on the eve of the Transportation Act of 1958, the agricultural exemptions applied to the following:

(4a) motor vehicles controlled and operated by any farmer when used in the transportation of his agricultural (including horticultural) commodities and products thereof, or in the transportation of supplies to his farm; or (5) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved

⁴⁰ See Williams Contract Carrier Application, 2 M.C.C. 685 (1937).

⁴¹ 79 CONG. REC. 12227 (1935).

⁴² 52 Stat. 1237 (1938) (word in brackets was deleted; those in italics were added).

⁴³ 54 Stat. 919-20 (1940).

⁴⁴ 66 Stat. 479 (1952).

June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined; or (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation. . . .

On the whole, the amendments enacted before the Transportation Act of 1958 were intended to broaden the exemptions, by comparison with the original phrasing or an ICC interpretation.⁴⁵ The only *unsuccessful* bills in Congress for broadening the exemptions have been the initial attempt to spell out that horticultural commodities are included in sections 203(b)(4a) and (6) of the Interstate Commerce Act;⁴⁶ the attempt to add "butter"⁴⁷ and "fertilizer and fertilizer materials"⁴⁸ to section 203(b)(6) of the Act (the latter being an extension to farm *supplies*); and a provision that would have expressly included in the latter section "fish or shellfish, and fresh or frozen products thereof *containing seafood as the basic ingredient*, whether breaded, cooked or otherwise prepared"⁴⁹

B. The Farm-to-First-Market Idea

Of the various unsuccessful attempts to amend the agricultural-commodities exemption, the usual ones have been efforts at narrowing it. The proposal behaving most like King Charles's head has been that of limiting this exemption to the movement from farm to first market. Such a restriction on the exemption has been advocated by the ICC for at least twenty years. The ICC or its legislative committee made farm-to-first-market proposals to Congress in 1939, 1940, 1952 (twice), 1955, 1956, and 1957.⁵⁰ None of these was enacted; but the basic idea merits attention because of its high source, its durability, and the fact that it finds impressive support outside the ICC as well. For example, the President of the Association of American Railroads testified in January 1958 that although the AAR had long advocated, and still advocated, the total repeal of section 203(b)(6) of the Interstate Commerce Act,

⁴⁵ Furthermore, in one important instance, the legislative intent may conceivably have been restrictive, but the result was a broader exemption, even there. The Interstate Commerce Act's pt. II, on motor carriers, contains no definition of "ordinary livestock." Pt. I, on railroads, says "the term 'ordinary livestock' shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses. . . ." 24 Stat. 379 (1887), as amended, 49 U.S.C. § 20(11) (1952). This definition was the one contemplated when § 203(b)(6) of the Interstate Commerce Act was amended by insertion of "ordinary" before "livestock." *Monark Egg Corp. Contract Carrier Application*, 44 M.C.C. 15, 18 (1944). The actual effect of the change was to broaden § 203(b)(6), as this restriction of livestock to a list which omits poultry, caused poultry to be considered not as livestock (which needs to be *alive* in order to be livestock and hence exempt), but as coming under the miscellaneous phrase "agricultural commodities." As is noted below, the courts have declared that poultry, alive or slaughtered, is an agricultural commodity and hence exempt. Slaughtered poultry is far more important a form of traffic than are live race horses—which the word "ordinary" removed from the exemption in § 203(b)(6).

⁴⁶ S. 975, 77th Cong., 1st Sess. (1941).

⁴⁷ H.R. 10961, 84th Cong., 2d Sess. (1956).

⁴⁸ H.R. 5765, 85th Cong., 1st Sess. (1957).

⁴⁹ H.R. 12832, 85th Cong., 2d Sess. (1958). (Emphasis added.)

⁵⁰ CELIA SPERLING, *THE AGRICULTURAL EXEMPTION IN INTERSTATE TRUCKING: A LEGISLATIVE AND JUDICIAL HISTORY* 8-9, 11-13 (U.S. Dep't of Agriculture Marketing Research Rep. No. 188, 1957).

it now endorsed the bills embodying the ICC's farm-to-first-market proposals, as being "a step in the right direction."⁵¹

In March 1954, Senator Hoey, of North Carolina, introduced a bill that would have excluded from the agricultural-commodities exemption "leaf tobacco other than that moving from the farm to warehouse, other original storage or market."⁵² This was a proposal to apply the farm-to-first-market restriction to a single commodity. A similar bill was introduced in May 1955 by Senators Thurmond and Byrd, of South Carolina and Virginia, respectively.⁵³ Neither bill was reported out of committee.

As noted above, from its enactment in 1935, down to August 1958, section 203(b)(6) of the Interstate Commerce Act contained a restriction that, on its face, appeared to be solely in terms of the character of the commodities hauled; and in ensuing litigation, the courts upheld such a construction. This means that, for example, a bale of cotton—grown, ginned, and compressed in Georgia—is still an agricultural commodity when it gets to Massachusetts, and not a "manufactured product" of cotton; and, furthermore, it can then be trucked to New Hampshire under section 203(b)(6) of the Interstate Commerce Act regardless of how many successive owners it has had and regardless of how many separate times it may have been hauled and warehoused along the way.

The ICC's farm-to-first-market proposals of at least two decades have been rather like that in the identical bills introduced in the Senate and House at the Commission's request in 1957.⁵⁴ These bills would have limited the exemption to the movement "from the point of production to a point where such commodities first pass out of the actual possession and control of the producer." The point of production was defined for fish as "the wharf . . . at which the fisherman debarks his catch," and for agricultural commodities as "the point at which grown, raised, or produced"; or for either as "the point at which . . . [they] are gathered for shipment." Like all earlier farm-to-first-market proposals, this one met defeat.

The rationale of this type of restriction is that the agricultural exemption was designed to help farmers, and only farmers, and that it is of no financial concern to the farmer whether the transportation of his crop, after he sells it, is cheap or costly, fast or slow. This is a delightful piece of doublethink that is probably believed by many of its advocates. It is true that once a specific farmer has sold a particular bale of cotton, the amount of money he receives for that bale of cotton is not affected by the subsequent transportation charges, beyond his point of delivery. This does not mean, however, that the price he is offered is unaffected by the *prospective* transportation charges beyond that point. Neither does it mean that the price his neighbor will receive for a bale of cotton later today, or the price he himself will receive for a bale of cotton next week, will be unaffected by the transportation charges, from his point of delivery onward, for the bale which the first-mentioned

⁵¹ *Hearings, supra* note 25, at 24.

⁵² S. 3117, 83d Cong., 2d Sess. (1954).

⁵³ S. 1891, 84th Cong., 1st Sess. (1955).

⁵⁴ S. 1689, H.R. 5823, 85th Cong., 1st Sess. (1957).

farmer sold today. When the Grangers rose in wrath against intolerable rate practices of the railroads, they knew better than to think that the freight charge on wheat was of no concern to them except while they held title to the grain. The economics of marketing of farm products is of deep concern to farmers regardless of who holds title at the successive stages. This wide view of the matter is reflected in a piece of farm legislation which covers a good deal more besides transportation—namely, the Agricultural Marketing Act of 1946.⁶⁵

Among farm groups, it is recognized that the farmer benefits from low transportation charges and good transportation service in getting his product to the consumer. The benefit arises partly because a smaller charge for getting it there will leave the farmer a bigger return out of whatever price the consumer is willing to pay. As regards those farm products the demand for which is relatively elastic—those on which the price significantly affects the amount which consumers will buy—the farmer benefits from low transportation charges by being able to sell more. Maintenance of good quality in transit is likewise helpful to producers in that it encourages people to buy.

A peculiarity of the farm-to-first-market proposal for restriction of the agricultural-commodities exemption is that, for any given commodity, the ICC's regulation of trucking would begin at widely varying points in the marketing channel. The beginning point of this control would depend not merely upon the degree to which the commodity has been processed, but also upon whether the grower relinquishes title to the crop in the field, or in the community where the consumers live, or at some place between. For any given commodity, each of these practices may have its adherents. Enforcement personnel attempting to apprehend trucks subject to economic regulation but operating without ICC authorization would need to satisfy themselves not merely as to *what* is in a suspect truck, but also as to who owns it and *whether he grew it*.

To this maze, a further complication is added if the marketing is done by a co-operative (assuming, as is frequently true, that the co-operative has much of its trucking done by for-hire trucks instead of doing all of it in trucks owned by the co-operative). The ICC's regulatory powers over trucking would begin where the commodities "first pass out of the actual possession and control of the producer." When the commodities have passed from the possession of the grower to that of his co-operative, the question remains, when do they pass from his control? Indeed, if his own co-operative possesses them, has he yet lost possession?

Lest it be thought that the farm-to-first-market principle would let a vertically integrated farm enjoy the agricultural-commodities exemption all the way from the cotton field to a retail shirt shop, it should be noted that this principle is proposed to be tacked onto the already-existing restriction. The commodities would still be required to be agricultural, and not manufactured products thereof. As soon as the commodity becomes manufactured, *or* when it reaches the first market, whichever

⁶⁵ 60 Stat. 1087, 7 U.S.C. §§ 1621-27 (1952).

event occurs first, the exemption would cease. Indeed, some of the farm-to-first-market proposals from the ICC and other sources have been offered in combination with proposals for a tightening of the present restriction as to the kinds of commodities embraced by the exemption.

C. Early Proposals to Limit the Types of Commodities

The proposals to limit the agricultural commodities exemption have sometimes taken the form of supplementing the exclusion of "manufactured products" by naming, in broad or specific terms, still other commodities which are to be excluded. A bill introduced in March 1950 would have expressly excluded from "agricultural commodities" (and hence from the exemption) the products of slaughter and preserved, frozen, and manufactured products. From "fish," it would have excluded preserved, frozen, processed, and manufactured products.⁵⁶

Section 203(b)(6) of the Interstate Commerce Act has, from the beginning, embraced "livestock" (later only "ordinary livestock"), a provision deemed⁵⁷ to exclude meats. But live poultry—although not regarded as livestock—was accepted by the ICC as an "agricultural commodity" before the Commission was compelled by the courts⁵⁸ to accept dressed poultry as being in that category. The court decisions (in 1953-56) to the effect that dressed poultry is an agricultural commodity have led to proposals to insert "live poultry" into this section—in order that, by analogy to the divergent status of livestock and meats, dressed poultry would cease to be deemed an exempt commodity. Such was the approach to poultry in the bills which emanated from the ICC in March 1957 and died with the Eighty-fifth Congress.⁵⁹ These same bills would have expressly excluded all *frozen* foods from section 203(b)(6).

D. Exemption for American Products Only?

Until 1958, the agricultural-commodities exemption made no distinction as to whether the commodities were produced in this country or abroad. This fact prompted still another approach to the narrowing of the exemption: proposals to exclude imported products. At times, this has meant an exclusion of any consignment actually imported. Sometimes it has meant the listing, for exclusion, of particular commodities not commercially produced in the continental United States. The latter approach is merely a compromise for the sake of practicality. Eggs in trucks near the Canadian border might need to carry their birth certificate with them if all imported products were excluded from the exemption. Furthermore, a truckload of eggs in that region is sometimes partly American and partly Canadian in origin. The whole of such a load would be excluded from the exemption, in as much as the presence of any amount of a nonexempt commodity in a given truck-

⁵⁶ H.R. 7547, 81st Cong., 2d Sess. (1950).

⁵⁷ *Frozen Food Express v. United States*, 128 F. Supp. 374 (S.D. Tex. 1955).

⁵⁸ *ICC v. Kroblin*, 113 F. Supp. 599 (N.D. Iowa 1953), *aff'd*, 212 F.2d 555 (8th Cir.), *cert. denied*, 348 U.S. 836 (1954). *East Texas Motor Freight Lines v. Frozen Food Express*, 351 U.S. 49 (1956).

⁵⁹ See note 54 *supra*.

load brings the whole truckload under economic regulation. Nevertheless, the first of these two ideas has been advocated by the ICC to Congress.⁶⁰

VIII

THE AGRICULTURAL EXEMPTIONS' JUDICIAL HISTORY

A. Poisoned Vehicles and the Channels of Commerce

A basic legal difference as to the freight traffic of railroads and of regulated motor carriers is that railroads are required to provide a comprehensive freight service,⁶¹ whereas regulated truckers are permitted to haul only the commodities specified in their operating authority. This may be a rather limited array, regardless of whether the trucker is a common or a contract carrier.

When someone engaged in interstate trucking says that the service falls within section 203(b)(5) or (6) of the Interstate Commerce Act and this person lacks operating authority from the ICC for the particular movements of the particular commodities involved, a holding by the Commission that the trucking operation is not within the exemption means that the person must get such operating authority or go out of business. If the Commission rules that the transportation at issue is not within the exemption, it may or may not thereupon grant operating authority—a permit to a contract carrier or a certificate of convenience and necessity to a common carrier.

In the judicial history of the agricultural exemptions, the ICC has, with perseverance and ingenuity, stuck to the principle that exemptions in remedial legislation are to be strictly construed in order that the basic statute itself be liberally construed—*i.e.*, in order that the latter will have broad application.⁶² Litigation as to the scope of the agricultural exemptions has been concerned chiefly with section 203(b)(6) of the Interstate Commerce Act, the agricultural-commodities exemption, the most commercial of the three. The poisoned-vehicle doctrine arose quite early, as a restriction on trucking under section 203(b)(6). For example, in *Williams Contract Carrier Application*, in 1937,⁶³ the ICC held that intrastate, for-hire hauling of farm machinery in Williams's one truck precluded its being used, even on separate hauls, for the interstate, for-hire movement of agricultural commodities on an exempt basis. However, the Commission did not regard the private trucking of nonagricultural commodities as tainting a vehicle against the for-hire trucking of exempt commodities.⁶⁴

As noted, Congress tried to dispel the poisoned-vehicle doctrine in 1938;⁶⁵ but the doctrine was still good law from the Commission's standpoint two years later, in

⁶⁰ 69 ICC ANN. REP. 128 (1955).

⁶¹ *Hearings*, *supra* note 25, at 15.

⁶² *Monroe Common Carrier Application*, 8 M.C.C. 183, 185 (1938).

⁶³ 2 M.C.C. 685 (1937).

⁶⁴ *Monroe Common Carrier Application*, 8 M.C.C. 183 (1938).

⁶⁵ See note 42 *supra*.

the first *Monark Egg* case.⁶⁶ Monark Egg Corporation operated trucks to haul its own eggs. For back-haul, on a for-hire basis, it trucked fish, oysters, New York-dressed poultry (*i.e.*, killed and plucked but not eviscerated), and shelled nuts, all of which it claimed were within section 203(b)(6) of the Interstate Commerce Act. The Commission ruled that the poultry and nuts were nonexempt. It said, moreover, that if any commodity ever hauled by any given truck for compensation were nonexempt, then all subsequent interstate trucking in that vehicle would be subject to economic regulation. In this fashion, the ICC found that each of Monark's trucks was subject to such regulation.

The case was reheard on request, and the Commission shifted to the "channels of commerce" principle.⁶⁷ For some years, the ICC adhered to both this principle and the poisoned-vehicle doctrine. Indeed, there is nothing inconsistent between them; and, in any given situation, one or the other, or both, may be handy for restricting the agricultural-commodities exemption. The channels-of-commerce idea is an approach (through *interpretation* of the statute) that is similar to the farm-to-first-market idea that the Commission has recurrently advocated as an *amendment* to the statute.

Shelled peanuts were a part of Monark's for-hire traffic. The ICC declared:⁶⁸

. . . When the peanut has reached the shelling plant and has been processed by removal of the shell, it has entered the ordinary channels of commerce and the operation performed upon it at that point removes it from the class of unmanufactured agricultural commodities which was intended to be designated by . . . [section 203(b)(6) of the Interstate Commerce Act].

Similarly, the Commission remarked that "the commercial killing and dressing of poultry" is generally done, not by farmers, but by packing firms. Also, the subsequent transportation is under refrigeration. Hence the poultry is no longer an unmanufactured agricultural commodity.

The channels-of-commerce doctrine (unlike the farm-to-first-market idea) does not hinge upon whether a particular consignment of a commodity is still owned by the farmer who produced it. It is a somewhat less mercurial standard, hinged upon what is customary with regard to the commodity at issue. But even custom can be fickle. In the same case, the ICC tried to apply the channels-of-commerce principle to fish—much of which is beheaded and gutted before being landed from the fishing boat. The situations were so varied that the Commission concluded "that only fish and shellfish dead or alive, as taken from the water, are within the purview of this exemption."⁶⁹

The channels-of-commerce principle was invoked in the *Harwood* case, in 1947, where the ICC found that "the washing, cleaning, and packaging of fresh vegetables in cellophane bags . . . for sale to consumers place such commodities in the ordinary

⁶⁶ Monark Egg Corp. Contract Carrier Application, 26 M.C.C. 615 (1940).

⁶⁷ Monark Egg Corp. Contract Carrier Application, 44 M.C.C. 15 (1944).

⁶⁸ *Id.* at 19.

⁶⁹ *Id.* at 21.

channels of commerce and remove them from the class of unmanufactured agricultural commodities . . ." covered by section 203(b)(6) of the Interstate Commerce Act.⁷⁰ Harwood wanted to use his four vehicles part of the time for hauling commodities recognized by the Commission as agricultural, but that body invoked the poisoned-vehicle doctrine as well, and thus adjudged *all* of his proposed interstate, for-hire trucking to be subject to regulation.

The *Dunn* case involved interstate, for-hire trucking of baled cotton and intrastate, for-hire trucking of admittedly nonagricultural commodities. For the latter service, Dunn possessed operating authority from the Georgia Public Service Commission. The ICC, relying on the poisoned-vehicle doctrine, sought to enjoin him from the interstate trucking of cotton unless he obtained operating authority from it. The district and circuit courts held for Dunn.⁷¹ The Circuit Court rejected the poisoned-vehicle doctrine regardless of whether the nonagricultural commodities move in intra- or interstate commerce and showed a lively awareness of those aspects of transport economics which preoccupy the friends of the agricultural-commodities exemption. "It is rare," said the court, "for a motor vehicle to be used for no other purpose than the carriage of agricultural commodities. Such carriage is usually seasonal or intermittent."⁷² Such use and other uses are complementary; and the vehicles of nonagricultural truckers like Dunn, whose five trucks made a total of only nineteen interstate trips with cotton in 1946, are, the court declared, a reserve supply of equipment for the movement of agricultural commodities and fish.

But what of the view that such a trucker as Dunn should meet his problem and the farmer's need for transportation by getting operating authority from the ICC? The court paid its respects to the conflict between certain administrative processes and marketing. "To get a certificate or permit from the [Interstate Commerce] Commission involves much delay, inconvenience, and expense, and often disappointment. Relief from this is offered [by section 203(b)(6) of the Interstate Commerce Act] in order to aid the prompt and free transportation of the named commodities, which transportation is . . . often urgent because it is of perishables. . . ."⁷³ The court did not apply this last word to cotton, but observed that section 203(b)(6) of the Interstate Commerce Act is so phrased as to embrace perishables and nonperishables alike.⁷⁴

The general policy⁷⁵ of the Interstate Commerce Act . . . includes "to cooperate with the several States and the duly authorized officials thereof" . . . But the proposed construction makes war on the intrastate business which Dunn has been authorized to do by the officials of the State [It] also makes war on the very interstate transportation which the exemption was plainly intended to foster and encourage.

⁷⁰ Harwood Contract Carrier Application, 47 M.C.C. 597, 599 (1947).

⁷¹ *ICC v. Dunn*, 166 F.2d 116 (5th Cir. 1948).

⁷² 166 F.2d at 118 (quoting from *Monroe Common Carrier Application*, 8 M.C.C. 183, 185 (1938)).

⁷³ *Ibid.*

⁷⁴ 166 F.2d at 118.

⁷⁵ Added by 54 Stat. 899 (1940), 49 U.S.C. declaration preceding § 1 (1952).

To the court's remarks, it could be added that the poisoned-vehicle doctrine would preclude most trip-leasing by exempt truckers.

Commissioner Lee, in his dissent from the second *Monark-Egg* decision, had declined to go along with the majority of ICC Division Five in its reliance on the channels-of-commerce principle and, instead, used the test which has since come to be called that of "continuing substantial identity." He cited two Supreme Court decisions⁷⁶ under the tariff laws to the effect that "the application of labor to an article, either by hand or by mechanism, does not make the article necessarily a manufactured article . . ." unless the result is "a new and different article having a distinctive name, character or use." From the *Anheuser-Busch* case, he quoted a line that has since been echoed, with variations, in the judicial history of section 203(b)(6) of the Interstate Commerce Act: "A cork put through the claimant's process is still a cork." Using this approach, he declared dressed poultry and shelled peanuts not to be manufactured.⁷⁷

In *ICC v. Love*, the courts reversed an ICC ruling that fresh and frozen beheaded shrimp are outside the exemption.⁷⁸ It appeared that shrimp were not hauled in any other condition beyond the point of debarkation. The court decisions in the *Love* case were important for practical reasons, since they kept the ICC from reducing the exemption for shrimp to a nullity. Also, in retrospect, the district court's language can be viewed as a step toward judicial acceptance of the test for which Commissioner Lee argued; and, indeed, the court cited with approval some conclusions he had reached in the above dissent—but without mentioning the test that he had advocated or any other test (except common usage of words found in the statute) that would enable one to distinguish between things that are still fish or agricultural commodities and those that have been such but, in the course of processing, have ceased to be. The ICC's view in 1958 was that the *Love* decision in 1948 began an excessive enlargement of the agricultural-commodities concept.⁷⁹

In the *Love* case, the district court cited with approval^{79a} an ICC ruling^{79b} that, in section 203(b)(6) of the Interstate Commerce Act, the phrase "(not including manufactured products thereof)" modifies only "agricultural commodities," and not "fish" or "livestock."

After the district court's decision in the *Love* case, the ICC reopened the *Monark Egg* case, so far as fish were concerned. The ICC now held that⁸⁰

"fish (including shell fish)" . . . includes frozen, quick frozen, and unfrozen fish in the various forms in which it is shipped, such as . . . beheaded and gutted fish, filleted fish,

⁷⁶ *Hartranft v. Wiegmann*, 121 U.S. 609 (1887); *Anheuser-Busch Brewing Ass'n v. United States*, 207 U.S. 556, 562 (1908).

⁷⁷ 44 M.C.C. at 22-23 (1944).

⁷⁸ 77 F. Supp. 63 (E.D. La. 1948), *aff'd, per curiam*, 172 F.2d 224 (5th Cir. 1949).

⁷⁹ *Hearings, supra* note 25, at 1830-31.

^{79a} 77 F. Supp. at 66-67.

^{79b} *Monark Egg Corp. Contract Carrier Application*, 44 M.C.C. 15, 17-18 (1944).

⁸⁰ *Monark Egg Corp. Contract Carrier Application*, 49 M.C.C. 693, 699 (1949) (the Commission's third decision in this case).

. . . crab meat and lobster meat, but excluding fish in hermetically sealed containers or fish which has been otherwise treated for preserving such as smoked. . . .

The Commission remarked that, like shrimp, these "other species of . . . fish . . . are never transported to the market in the form in which they are taken from the water." That is to say, the broader conception now applied to sundry species of the fish mentioned in section 203(b)(6) of the Interstate Commerce Act was necessary if the exemption was to mean anything for fish—a point which the court had made as regards beheaded shrimp in particular, in the *Love* case.

In *ICC v. Weldon*, the district court held that raw, shelled peanuts are not "an agricultural commodity . . . in its natural state," but, as declared by the ICC, a manufactured product.⁸¹ This decision has, on occasion, been regarded as embodying the channels-of-commerce principle. Some of the language gives color to that contention, but the decision could even more persuasively be classed as one not based on any clearly stated test.

Although the ICC was not yet ready to abandon the poisoned-vehicle doctrine, another circuit court, in *ICC v. Service Trucking Co.*, citing the holding in the *Dunn* case, joined in condemning this doctrine.⁸² The Service Trucking Company did *interstate* trucking of both the concededly agricultural commodity (eggs in the shell) and the allegedly nonagricultural commodity (dressed poultry) in the same vehicles; but this distinction from the *Dunn* case was not viewed by the court as material. Now, too, the decision hinged on the fact that the two commodities were hauled on separate occasions.

For some years, the ICC has not applied the poisoned-vehicle doctrine. Instead, it has proceeded as if section 203(b)(6) of the Interstate Commerce Act were an exemption of "motor vehicles *while* used in carrying . . . agricultural commodities . . . , if such motor vehicles are not *at the same time* used in carrying any other property, or passengers, for compensation." (The italicized words are not a part of the statute's actual phrasing; but the Act's legislative history warrants interpreting the section as if it were, indeed, thus phrased.) A substantial part of the trucking under this exemption is back-haul by regulated carriers—some of them very large—that lack balanced traffic. While any truck owned and operated by an ICC-regulated motor carrier is hauling a load of, let us say, fresh vegetables, the rates charged and the origin and destination served are completely free of ICC control—even though the movement be interstate and for-hire.

B. Continuing Substantial Identity: Early Developments

Because the ICC and the courts were somewhat at odds as to what commodities fall within section 203(b)(6) of the Interstate Commerce Act, the Commission, on its own motion, instituted an investigation (the *Determinations* case⁸³) as to what are

⁸¹ 90 F. Supp. 873 (W.D. Tenn. 1950), *aff'd*, 188 F.2d 367 (6th Cir.), *cert. denied*, 342 U.S. 827 (1951).

⁸² 186 F.2d 400 (3d Cir. 1951).

⁸³ Determination of Exempted Agricultural Commodities, 52 M.C.C. 511 (1951).

"agricultural commodities (not including manufactured products thereof)." Upon petition by the United States Department of Agriculture and others, it reopened the *Harwood* case (involving washed, cellophane-packed vegetables) for hearing on a consolidated record with the investigation proceeding. The Department of Agriculture contended that the exemption⁸⁴

should be construed by the Commission to exempt the transportation of all agricultural commodities on which some labor has been performed or mechanical skill applied in order to place such commodities on the consumer markets so long as such treatment does not clearly and by scientific analysis constitute manufacturing.

On the Department's behalf, natural scientists testified as to which forms of processing change an agricultural commodity into a manufactured product.

The ICC decided that⁸⁵

. . . the term "agricultural commodities" as used in section 203(b)(6) embraces all products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits, and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live poultry, and bees (such as milk, wool, eggs, and honey).

It also concluded that⁸⁶

. . . the term "(not including manufactured products thereof)" means agricultural commodities in their natural state and those which, as a result of treating or processing, have not acquired new forms, qualities, properties, or combinations.

This is the idea elsewhere called "continuing substantial identity." In the proceeding leading up to this opinion, those who opposed such a view were chiefly advocates of the channels-of-commerce principle.

The latter principle was here expressly rejected by the ICC. Oddly enough for a body that had so staunchly upheld the channels-of-commerce restriction upon section 203(b)(6) of the Interstate Commerce Act, the ICC now referred to remarks in the 1935 congressional debate by the subcommittee chairman sponsoring the amendment that had replaced "unprocessed agricultural products" with "agricultural commodities (not including manufactured products thereof)." The Commission now discovered that—although pasteurization "is customarily done . . . in the larger cities"—the subcommittee chairman had mentioned pasteurized milk as being within the language which he proposed. The Commission even alluded to the fact that pasteurized milk usually moves in bottles (a consumer package). When the ICC made these belated discoveries, it seemed to accept a vastly broader conception of section 203(b)(6) of the Interstate Commerce Act than it had long tried to apply. In rejecting the channels-of-commerce principle, the ICC even said that, "in many instances, [it would] prevent the movement by exempt vehicle of items processed or packaged by farmers themselves, a result obviously not intended by Congress."⁸⁷

⁸⁴ SPERLING, *op. cit.* *supra* note 50, at 27-28.

⁸⁵ Determination of Exempted Agricultural Commodities, 52 M.C.C. 511, 519 (1951).

⁸⁶ *Id.* at 521.

⁸⁷ *Id.* at 524.

In its findings, the Commission specified some commodities (e.g., pasteurized, homogenized milk, with vitamin D added) that it deemed to be agricultural and not manufactured ("unmanufactured agricultural commodities").⁸⁸ It specified others (e.g., frozen milk) that it deemed to be manufactured products of agricultural commodities.⁸⁹ It specified others (e.g., nursery stock, flowers, and bulbs) that it deemed not to be agricultural, regardless of how unmanufactured they might be.⁹⁰ Of course, not one of these three groups purported to be exhaustive. However, these findings, plus a discussion in the decision as to various types of processing, were intended as a future guide to determinations concerning commodities not covered by the findings in this decision. Yet, if the *Determinations* case was intended as the dawn of a new day in distinguishing between agricultural commodities and manufactured products, the dawn was murky. Thus, with regard to dehydrated, pulverized, packaged manure, the Commission decided that ". . . the evidence is not sufficiently comprehensive to enable us to determine the point at which the commodity becomes a manufactured product."⁹¹ Apparently it does become one, the only question being: When?

The ICC also reversed its *Harwood* decision and ordered that in so far as its other past findings about specific commodities differed from those made in the *Determinations* case, the former be overruled. Concurrently with this decision, the Commission handed down a new opinion in the *Monark Egg* case—its fourth decision in that hardy proceeding.⁹² As regards fish and shellfish, the ICC expressly rejected the channels-of-commerce principle and spoke of the various kinds of processing of fish as causing or not causing the fish to lose their identity as fish.

In *ICC v. Yeary Transfer Co.*, redried leaf tobacco (a product not visibly different from that which goes into the redrying chamber) was held by the courts not to have become a manufactured commodity.⁹³ The district court's decision, which was affirmed *per curiam* by the court of appeals, was not explicit as to the test to be applied in determining whether the product was manufactured. It cited the *Anheuser-Busch*⁹⁴ and *American Fruit Growers*⁹⁵ cases, however, and on that score and in its phrasing, it was consistent with the continuing-substantial-identity test. Bills introduced in Congress afterward would have had the effect of reversing this holding as to the particular commodity at issue,⁹⁶ but they died aborning.

C. The *Kroblin* Case⁹⁷

The *Kroblin* decision is viewed by some of the opponents of the agricultural-commodities exemption as having opened the floodgates for an alarmingly broad in-

⁸⁸ *Id.* at 551.

⁸⁹ *Ibid.*

⁹⁰ *Id.* at 555.

⁹¹ *Id.* at 549.

⁹² *Monark Egg Corp.*, Contract Carrier Application, 52 M.C.C. 576, 581 (1951).

⁹³ 104 F. Supp. 245 (E.D. Ky. 1952), *aff'd*, 202 F.2d 151 (6th Cir. 1953).

⁹⁴ *Anheuser-Busch Brewing Ass'n v. United States*, 207 U.S. 556 (1908).

⁹⁵ *American Fruit Growers, Inc. v. Brogdex Co.*, 283 U.S. 1 (1931) (a case under the patent laws).

⁹⁶ S. 3117, 83d Cong., 2d Sess. (1954); S. 1891, 84th Cong., 1st Sess. (1955).

⁹⁷ *ICC v. Kroblin*, 113 F. Supp. 599 (N.D. Iowa 1953), *aff'd*, 212 F.2d 555 (8th Cir.), *cert. denied*, 348 U.S. 836 (1954).

terpretation of section 203(b)(6) of the Interstate Commerce Act. Among the friends of this exemption, there are some who view the *Kroblin* decision as a monumental return to the intent of Congress, after lamentable divergence by the ICC.

Kroblin, without benefit of ICC operating authority, engaged in the interstate trucking of fresh dressed poultry, both eviscerated and New York-dressed. The ICC contended that when Congress changed the proposed exemption from "unprocessed agricultural commodities" to "agricultural commodities (not including manufactured products thereof)" in 1935, its purpose was simply to make sure that ginned cotton and pasteurized milk were within the exemption. Kroblin and the Secretary of Agriculture (as *amicus curiae*) claimed that the amendment was not intended to be thus limited and that Congress intended that other agricultural commodities which have been processed without becoming manufactured would not lose their exempt status by virtue of being processed. They also pointed out that, with but a single exception, all court tests of the validity of the ICC's interpretations of section 203(b)(6) of the Interstate Commerce Act had resulted in decisions that these interpretations were erroneous. The district court, after reviewing the exemption's legislative history, held for Kroblin. It said that ". . . an opposite holding would . . . constitute an attempt to accomplish by . . . judicial construction that which Congress has steadfastly refused to allow to be accomplished by legislation."⁹⁸ The court of appeals affirmed the decision, and the Supreme Court denied certiorari.

The *Kroblin* case did not establish a new test as to whether a commodity falls within the agricultural-commodities exemption; yet it accomplished something at least as valuable. Judge Graven, of the Northern District of Iowa, served in the socially useful role of historian. By tracing the exemption's career from 1935 onward in Congress, before the ICC, and in the courts, he reminded those with a will to listen that the exemption was initially meant by Congress to be of substantial scope and that Congress had remained steadfast in this attitude. His analysis of the Commission's equally steadfast but inevitably complex efforts at a very restrictive interpretation of the exemption made clear that an approach markedly different from those that had generally been used thus far by the ICC was appropriate. But he made no such summary of his own analysis.

D. Continuing Substantial Identity: Triumph of the Doctrine

A short while later, the Supreme Court handed down a decision holding both fresh and frozen dressed poultry to be within section 203(b)(6) of the Interstate Commerce Act.⁹⁹ Frozen Food Express Company, a motor common carrier certificated by the ICC, was engaged in the interstate, for-hire trucking of such poultry and also fresh and frozen meats and meat products between points not authorized by its certificate. It claimed all of these commodities were within section 203(b)(6) of the Interstate Commerce Act. The ICC, finding none of these commodities to be

⁹⁸ 113 F. Supp. at 631.

⁹⁹ *East Texas Motor Freight Lines v. Frozen Food Express*, 351 U.S. 49 (1956), *affirming in part*, *Frozen Food Express v. United States*, 128 F. Supp. 374 (S.D. Texas 1955).

within the exemption, sought to compel the carrier to desist from the transportation involved. A three-judge district court held that fresh and frozen dressed poultry are agricultural commodities, but that the other commodities fall neither within that class nor within the category of livestock.

As to these latter commodities, Frozen Food Express accepted its defeat; but as to dressed poultry, the ICC and certain regulated carriers by rail and highway appealed. In a five-to-four decision, the Supreme Court held that dressed poultry, whether fresh or frozen, is an agricultural commodity. Mr. Justice Douglas, for the majority, cited the *Anheuser-Busch* decision of the Supreme Court as to import duties. There the Court had said,¹⁰⁰

Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor and manipulation. But something more is necessary. . . . There must be transformation; a new and different article must emerge, "having a distinctive name, character or use."

This was the decision and this was the test that Commissioner Lee had cited a dozen years before, when he tried to persuade his brethren that dressed poultry and shelled peanuts are not manufactured products.¹⁰¹

The idea that processing may or may not have so much effect as to constitute manufacturing is an echo not only of the *Anheuser-Busch* decision, but of the *Hartranft*¹⁰² and *American Fruit Growers* decisions as well. "A chicken that has been killed and dressed," the Supreme Court declared in the *East Texas Motor Freight Lines* case,¹⁰³

is still a chicken. . . . [W]e cannot conclude that this processing which merely makes the chicken marketable turns it into a "manufactured" commodity.

At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been "manufactured" within the meaning of Section 203(b)(6) [of the Interstate Commerce Act].

Here was the continuing-substantial-identity test in clear-cut form; and the Court also rejected the channels-of-commerce doctrine, although not by name.^{103a}

The Court, citing the congressional debate in 1935, said that the exemption in section 203(b)(6) of the Interstate Commerce Act¹⁰⁴

was designed to preserve for the farmers the advantage of low-cost motor transportation. . . .¹⁰⁵ The victory in the Congress for the exemption was recognition that the

¹⁰⁰ 207 U.S. at 562.

¹⁰¹ See *supra* notes 76 and 77, and accompanying text.

¹⁰² *Hartranft v. Wiegmann*, 121 U.S. 609 (1887).

¹⁰³ *East Texas Motor Freight Lines v. Frozen Food Express*, 351 U.S. 49, 54 (1956).

^{103a} *Id.* at 54 n. 3.

¹⁰⁴ *Id.* at 51-52. (Emphasis added.)

¹⁰⁵ In the *Kroblin* case, the district court remarked: "In the present case, it was claimed . . . by counsel for the defendant and the Secretary of Agriculture that the biggest benefit to the farmers of exempting commercial truckers engaged in hauling farm commodities from the certificate provisions of the Act was the flexibility of operations permitted such carriers." 113 F. Supp. at 627. This advantage differs from the one accented by the Supreme Court.

price which the farmer obtains for his products is greatly affected by the cost of transporting them to the consuming market in their raw state *or after they have become marketable by incidental processing.*

“Killing, dressing, and freezing a chicken” were apparently viewed by the Court as meeting the latter description and were stated to be¹⁰⁶

no more drastic a change than the change which takes place in milk from pasteurizing, homogenizing, adding vitamin concentrates, standardizing, and bottling. Yet the Commission agrees that milk so processed is not a “manufactured” product but falls within the meaning of the “agricultural” exemption.

Mr. Justice Burton, for the minority, noted that no appeal had been taken from the ICC’s decision that fresh and frozen meats are manufactured products. “The Commission’s like treatment of poultry is not arbitrary or unreasonable.”¹⁰⁷ Neither Mr. Justice Burton nor Mr. Justice Douglas remarked that the ICC itself distinguishes between live poultry, which it regards as an agricultural commodity, and ordinary livestock, which it views as a special category.¹⁰⁸ Certainly “ordinary livestock” is specifically named in section 203(b)(6) of the Interstate Commerce Act, and if the term does not include poultry, but poultry is an “agricultural commodity” instead, then the slaughtered form of these respective animals can be viewed differently as well.

Two weeks later, a three-judge district court in the State of Washington applied the continuing-substantial-identity test to frozen fruits and vegetables and held them to be within section 203(b)(6) of the Interstate Commerce Act on the authority of *East Texas Motor Freight Lines v. Frozen Food Express*.¹⁰⁹ Using that same precedent, a three-judge district court in New Jersey soon overruled the ICC’s contention that—even on the basis of the continuing-substantial-identity test—raw, shelled nuts are manufactured. “We think that it must be said that a raw shelled nut is substantially identical to a raw unshelled nut” said the court.¹¹⁰ Similarly, a three-judge district court in Texas in 1956 took its cue from this Supreme Court decision, and, on the basis of the continuing-substantial-identity test, it held that various commodities, including raw, shelled peanuts, were agricultural,¹¹¹ although they were adjudged by the ICC in the *Determinations* case to be manufactured. The ICC appealed from the Texas decision only as regards dried egg powder, dried egg yolks, powdered milk, buttermilk, and quick-frozen fruits and vegetables. The Supreme Court upheld the lower court.¹¹²

The regulated motor-carrier industry and the railroad industry expressed mounting alarm over this swift tide of events. The ICC itself showed signs of accepting

¹⁰⁶ 351 U.S. at 52.

¹⁰⁷ *Id.* at 55.

¹⁰⁸ Determination of Exempted Agricultural Commodities, 52 M.C.C. 511, 519 (1951).

¹⁰⁹ *Home Transfer & Storage Co. v. United States*, 141 F. Supp. 599 (W.D. Wash.), *aff’d mem.*, 352 U.S. 884 (1956).

¹¹⁰ *Consolidated Truck Service v. United States*, 144 F. Supp. 814, 818 (D.N.J. 1956).

¹¹¹ *Frozen Food Express v. United States*, 148 F. Supp. 399 (S.D. Texas 1956).

¹¹² 355 U.S. 6 (1957), *affirming per curiam*.

a broader conception of section 203(b)(6) of the Interstate Commerce Act. On February 11, 1958, applying the continuing-substantial-identity test, the Commission decided that tea, cocoa beans, green coffee beans, and salt-cured cucumbers were agricultural commodities. In connection with the first three of these, the Commission concluded that the exemption embraces alike the foreign-grown and the domestically-grown agricultural commodity¹¹³—a view for which there was judicial precedent.¹¹⁴ Commissioners Arpaia and Hutchinson expressed their indignation and incredulity as regards an exemption to benefit farmers in foreign countries. They also denounced the continuing-substantial-identity test as vague and uncertain; and they attacked the exemption itself as fostering chaotic, discriminatory rates, poor service, and violations of safety rules. Closely similar views were being expressed at the same time in the hearings on problems of the railroads, before the Smathers Subcommittee in the Senate.¹¹⁵

E. Neither Either Nor Or

Quite apart from determinations as to whether a commodity has made the transition from "agricultural" to "manufactured," there are decisions as to whether a commodity ever *has* been agricultural. The latter kind of question has not been an abundant source of litigation. As noted above, the ICC held in the *Determinations* case in 1951 that nursery stock, flowers, and bulbs are not "agricultural." By July 23, 1952, when a district court decided that "agricultural" includes "horticultural" and hence includes cut gladiolus and gladiolus bulbs,¹¹⁶ Congress had—on July 9—amended sections 203(b)(4a) and (6) of the Interstate Commerce Act by inserting "(including horticultural)" after "agricultural."¹¹⁷ Peat moss has also been found to be agricultural,¹¹⁸ despite the ICC's view that it neither is nor has been agricultural.

F. Litigation as to Co-operative Trucking

There has been a small amount of litigation as to the scope of section 203(b)(5) of the Interstate Commerce Act, which deals with trucking by farmer co-operatives. In *ICC v. Jamestown Farmers' Union Federated Cooperative Transportation Association*,¹¹⁹ appellee was a federation of farmer co-operative associations, possessing no greater powers or purposes than those possessed by each of its member co-operatives. The latter observed the restrictions in the Agricultural Marketing Act of 1929. Appellee's sole business was the trucking of livestock from North Dakota to South St. Paul Stockyards, in Minnesota, and merchandise on the return haul to North Dakota. All livestock was received by appellee from its member co-operatives, and all merchandise was received from member co-operatives and delivered to other

¹¹³ Determination of Exempted Agricultural Commodities (reopened for further consideration), 74 M.C.C. 549 (1958).

¹¹⁴ *Premier Peat Moss Corp. v. United States*, 147 F. Supp. 169 (S.D.N.Y. 1956).

¹¹⁵ *Hearings*, *supra* note 25, *passim*.

¹¹⁶ *Florida Gladiolus Growers Ass'n v. United States*, 106 F. Supp. 525 (S.D. Fla. 1952).

¹¹⁷ 66 Stat. 479 (1952).

¹¹⁸ *Premier Peat Moss Corp. v. United States*, 147 F. Supp. 169 (S.D.N.Y. 1956).

¹¹⁹ 151 F.2d 403 (8th Cir. 1945).

member co-operatives. Between three and fourteen per cent of this merchandise was eventually bought by nonfarmers. The typical run—outbound or inbound—neither began nor ended at a farm.

On these facts, the ICC sought to hang a conclusion that appellee's hauling of merchandise was, from the standpoint of the Agricultural Marketing Act of 1929, neither a "farm business service" nor an authorized activity of a co-operative, and that appellee consequently was not entitled to the exemption set out in section 203(b)(5) of the Interstate Commerce Act. The Commission stated that these conclusions were required by a strict construction of that exemption.

The court of appeals held that it was not the exemption but the Agricultural Marketing Act of 1929 that required construction and that, being remedial, this act was entitled to a liberal construction. The court found that nothing in the Marketing Act required the transportation done by a co-operative to begin or end on a farm; hence it held that no such requirement might be applied to a federation of such co-operatives. As noted earlier, the Marketing Act requires only that a co-operative "not deal in farm products, farm supplies, and farm business services with or for non-members in an amount greater in value than the total amount of such business transacted by it with or for members." The court (implying that the nonfarmers who ultimately bought some of the merchandise hauled by the Jamestown federation were necessarily nonmembers of it and of its co-operatives) strongly asserted the right of either a farmer co-operative or a federation of such co-operatives to transport farm supplies and to render farm service to or for nonmembers so long as it stays within the fifty per cent limit. With regard to all transportation in which it had been engaging, the appellee was held entitled to the exemption for trucking by farmer co-operatives set out in the Interstate Commerce Act.

The court did not discuss whether something potentially usable as farm supplies but actually used in part by nonfarmers (*e.g.*, steel fence posts) is "farm supplies" if used by nonfarmers. If that approach to the exemption for trucking by co-operatives be adopted, however, there emerges the startling fact that the Marketing Act does not expressly prohibit a farmer co-operative from hauling nonagricultural cargo, such as oil-drilling equipment, for nonmembers in *any* amount. The fifty per cent rule, on its face, merely says that for nonmembers, the co-operative must not deal in *farm* products, *farm* supplies, and *farm* business services in an amount greater in value than the total amount of these same types of dealings undertaken by it for members. It is silent as to commodities and services which are exclusively nonagricultural. And the Interstate Commerce Act exempts "motor vehicles controlled and operated by" a farmer co-operative or federation of such co-operatives, without explicit reference to what the vehicles haul. But even if the legislation is broad, there is, as yet, no evidence that many organizations identifying themselves as farmer co-operatives exploit it to its greatest limit. The United States Department of Agriculture has urged upon farmer co-operatives that if they engage in *any* kind of transportation not directly connected with their business for members, this should

be incidental to something done for members (e.g., handling back-haul cargo for nonmembers when the outbound cargo is hauled for members). This may, indeed, be the discreet thing for any farmer co-operative to do if it does not wish to forfeit certain federal income tax exemptions available to farmer co-operatives.¹²⁰

IX

EXEMPT TRUCKING'S IMPORTANCE AS TO VOLUME

The role of trucking in the nation's transportation is large, and it is on the increase, both in terms of tons and in terms of the ratio to the rail share of the freight traffic. In 1956, the railroads accounted for a bit less than half the nation's ton-miles, while the remainder was divided, almost equally, among the trucks, the oil pipelines, and the inland water carriers.¹²¹ The railroads, thinking of what might have been, decline to take comfort from the fact that in 1956, they accounted for nearly twice as many ton-miles as they did in 1939. While the rail ton-miles grew from 339 billion to 656 billion the truck ton-miles mounted from 53 billion to 254 billion.

There are no comprehensive statistics showing how much of this truck transportation was under the agricultural exemptions. The data at hand, however, are indicative enough. In 1957, at thirteen of the nation's biggest cities combined, for an important group of eight fresh fruits and vegetables, of all that was unloaded, sixty-two per cent had arrived by truck.¹²² Predominantly, the produce was hauled interstate. The part that moved interstate by truck moved presumably either by private truck or, if by for-hire truck, under the agricultural exemptions. In recent years, eighty-odd per cent of the cattle, calves, and hogs reaching the major public markets arrived there by truck.¹²³ Again, a very substantial part of this traffic moved interstate and on a for-hire basis, and, therefore, moved under the exemptions.

In a recent nation-wide sample survey of the outbound transportation from poultry-processing firms which ship in interstate commerce, it was found that more than ninety-nine per cent of the volume of fresh dressed poultry, inter- and intrastate shipments combined, went by truck.¹²⁴ For frozen dressed poultry, roughly eighty-five per cent went by truck. The study covered two years for each commodity—the second being a twelve-month period beginning July 1, 1956, shortly after the Supreme Court's decision in the *East Texas Motor Freight Lines* case that fresh and frozen dressed poultry are agricultural commodities. The earlier year for

¹²⁰ U.S. Dep't of Agriculture, News for Farmer Cooperatives, May 1958, p. 16.

¹²¹ CLEM C. LINNENBERG, JR., RAIL AND TRUCK SHARES IN THE HAULING OF PERISHABLES—SOME RECENT DEVELOPMENTS 41 (U.S. Dep't of Agriculture Research Rep. No. AMS-266, 1958). The figures here cited cover both for-hire and private transportation of perishables and nonperishables.

¹²² *Id.* at 43.

¹²³ *Hearings, supra* note 25, at 1625.

¹²⁴ JAMES R. SNITZLER & ROBERT J. BYRNE, INTERSTATE TRUCKING OF FRESH AND FROZEN POULTRY UNDER AGRICULTURAL EXEMPTION 5, 9-20 (U.S. Dep't of Agriculture Marketing Research Rep. No. 224, 1958).

each commodity—1955 for frozen; 1952 for fresh—was a time at which the commodity had been held—either by only one district court, as regards the frozen product, or by no court, as regards the fresh product—to be agricultural. In the earlier period, the ICC's view that dressed poultry is a manufactured product was still dominant.

About three-fourths of the nation's commercial poultry processors ship in interstate commerce; and about three-fourths of the fresh and the frozen product of these interstate firms moved interstate during each year studied. This means that since the Supreme Court's decision in the *East Texas Motor Freight Lines* case, probably the greater part of this commodity has been moved out of the processing plants by means of transportation that is now exempt from ICC economic regulation. Of all the poultry moving out of the surveyed plants by truck in the latest year studied, about one-half of the fresh and three-fourths of the frozen moved by for-hire truck, and the rest moved by private truck. In so far as the interstate loads were concerned, for-hire and private movements alike were free of ICC economic regulation. Poultry is an important type of freight. It has a relatively high value per pound, which means that it can bear a higher transportation charge than many other commodities; and, in the last year covered by the cited transportation study, more than 3,000,000,000 pounds of dressed poultry moved out of the nation's commercial processing plants.

At the hearings of the Smathers Subcommittee in 1958, a witness for the National Fisheries Institute indicated that frozen seafood moves predominantly by truck, and that his own firm, one with gross annual sales of about \$10,000,000, made shipments chiefly as split deliveries—*i.e.*, with each truckload having two or more consignees, a pattern unsuitable for rail shipment.¹²⁵

X

MERITS AND FAULTS OF EXEMPT TRUCKING

The arguments advanced in favor of exempt trucking hinge upon both a relatively low rate level and good service. The chief accusations against it are rate instability, poor service, and a bad safety record. There is a dearth of information or even discussion of the relative merits of regulated and exempt trucks from the standpoint of the welfare of the drivers and other personnel as to wages or hours or working conditions. Much of the exempt trucking is done by one-man firms. If the man behind the steering wheel wished to complain to the boss, he would have to complain to himself.

A representative of the United States Department of Agriculture testified in 1958 before the Smathers Subcommittee on the basis of the previously mentioned study of the trucking of dressed poultry under regulation and after decontrol, and on the basis of a similar study of the transportation of frozen fruits and vegetables.¹²⁶ He

¹²⁵ *Hearings, supra* note 25, at 1499-1500.

¹²⁶ *Id.* at 2101-2120.

emphasized "that the principal benefit [from exempt trucking] which is shown by the surveys . . . is the service benefits. . . ." He said that exempt trucking brought "the ability to reach more markets and a broader total market." Indeed, service is so important that, on occasion, exempt trucks haul a greater share of a particular type of traffic than do the railroads, even where railroad rates are lower,¹²⁷ or exempt trucks are able to charge shippers a higher rate than that charged by regulated trucks.¹²⁸

In the before-and-after survey of the trucking of dressed poultry, the poultry processors were asked about the relative advantages of using regulated and exempt motor carriers. Their views on both pertained to the same period: the year following decontrol. To a substantial extent, the shippers continued to use regulated motor carriers, although the *transportation* provided by the latter was exempt, in the typical situation of moving a truckload consisting solely of exempt commodities. Four times as many processors attributed advantages to exempt motor carriers as to regulated ones; and more than twice as many attributed disadvantages to regulated motor carriers as to exempt ones.

Among the advantages said to be offered by regulated trucks were better service (such as ability to divert loads en route—*i.e.*, to act on telephoned or telegraphed instructions to change to a different destination—an important factor with price-sensitive commodities) and greater financial responsibility (more adequate cargo insurance). Among the disadvantages attributed to regulated truckers were that their trucks were not readily available, they were unwilling to serve off-line points, and their rates were too high. (Routes and rates were, of course, within the regulated carriers' discretion while engaged in exempt transportation.) More than one out of four processors made the first of these complaints; and more than one out of five made the last two.

One-fourth of the processors commended the exempt truckers for their lower rates; and one-fifth commended them for faster service, the availability of trucking equipment, and their willingness to serve out-of-way points. One processor out of ten complained that the exempt truckers had less financial responsibility than their rivals (less adequate cargo insurance); and one out of twelve said the exempt truckers were the less reliable (as to showing up at the promised time at shipping point or destination).

To a considerable extent, the advantages which the poultry processors saw in exempt motor carriers were the advantages of dealing with a small firm (*e.g.*, "having the same drivers haul the product"). The mental flexibility manifested in willingness to serve off-line points and to allow multiple stop-offs per load is a quality more to be expected in a man on-the-make than in an executive who has arrived. Among the exempt motor carriers covered by the survey, half had

¹²⁷ EZEKIEL LIMMER, RAILROAD AND TRUCK RATES AND MOVEMENTS OF FRESH FRUITS AND VEGETABLES FROM FLORIDA 18 (U.S. Dep't of Agriculture Research Rep. No. AMS-53, 1955).

¹²⁸ *Hearings, supra* note 25, at 1499.

fewer than ten trailers each, while only one-fourth of the regulated motor carriers were this small.

Decontrol was followed by a marked reduction in truck rates. For the numerous important origin-and-destination couplets covered by the survey, the average rate decline on fresh dressed poultry between 1952 and 1956-57 was thirty-three per cent; on frozen, between 1955 and 1956-57, it was thirty-six per cent. The shippers, nevertheless, were overwhelmingly of the opinion that the now-unregulated rates were stable—*i.e.*, they did not fluctuate daily or seasonally on the basis of the supply of and demand for trucking service.

To conventional economists, this will seem incredible. As a fact of life, it is, nevertheless, quite possible. There are some substantial shippers of other agricultural commodities who so emphatically believe that the orderly marketing of their output at satisfactory prices requires stability of transportation rates, that their wishes are respected by the truckers who serve them. There are other commodities, however, such as fresh vegetables from California, in the movement of which the behavior of unregulated truck rates is more nearly a reflection of day-to-day supply and demand.

In the transportation survey of dressed poultry, the processors were asked what effects they would expect from a removal of the exemption from their product. Their most common replies were: an increase in transportation charges, a loss of the more distant markets, and a return to private trucking.

To the Smathers Subcommittee, the ICC's chief complaint against the exemptions in the regulation of trucking and of water transportation was that exempt transport deprives regulated carriers of traffic.¹²⁹ On the basis of road checks (stopping and inspecting vehicles), the ICC also declares that unsafe equipment and practices, such as defective steering systems and the lack of an adequate driver's log (showing hours of service), are more prevalent among exempt trucks than among the regulated. A Scotch verdict would be more appropriate until the Commission compares exempt and regulated carriers of comparable size. On the average, the regulated trucking firms are considerably the larger; and the ICC's own road-check data indicate that, among these regulated carriers, the biggest have the safest equipment and practices.¹³⁰

Before the Smathers Subcommittee, a new voice spoke of the exempt trucks' contribution to hazard on the highway. The National Agricultural Transportation League's Executive Secretary, in the course of presenting this Florida-fresh-fruit-and-vegetable-trucker group's stand against the exemption of the commodities it hauls, said, "Our safety record is bad." He spoke less of defective equipment than of overworked drivers—trucks operated with a one-man crew instead of with two drivers and a sleeper-cab. He saw a link between shaky finances and unsafe performance on the road.¹³¹

¹²⁹ *Id.* at 1830-31.

¹³⁰ ICC Release, Safety Road-Check Results Announced by Motor Carrier Bureau, June 25, 1958, pp. 2, 6, and related releases.

¹³¹ *Hearings, supra* note 25, at 982-83.

In more guarded form, the same sort of view was expressed by the president of a Texas group of fresh-fruit-and-vegetable truckers, the Perishable Commodity Carriers Association, Inc. On other counts, however, this witness was far from guarded. ". . . [I]n our area about one-third of the small exempt truckers go out of business a year," he said.¹³² As for the vaunted responsibility of the regulated motor carrier, this witness declared:¹³³

You just check back and see where that freight line was about 25 years ago. He was a small trucker and he didn't amount to nothing. He couldn't pay his bills or anything. They regulated him to where he could get a decent price for his service and he amounts to something.

XI

RECENT RESTRICTIVE PROPOSALS

The regulated motor carriers have no basic quarrel with the existing pattern of federal regulation of transportation, despite the complaints that some segments of the trucking industry make against the agricultural exemptions and against trucking by private and contract carriers. The railroads' bill of particulars against the federal government's present policies regarding transportation is both long and grave, with the agricultural exemptions rating as a single item among many grievances. In January 1958, the Subcommittee on Surface Transportation (headed by Senator Smathers) of the Senate Committee on Interstate and Foreign Commerce began an extensive series of hearings entitled "Problems of the Railroads." The hearings clearly presupposed that the railroads had the most serious problems afflicting the nation's surface transportation system; and they resulted in the Transportation Act of 1958. This consists chiefly of amendments to the Interstate Commerce Act, most of them designed to help the railroads, the remainder designed to help the railroads and the regulated trucking industry. In this latter category is an elaborate amendment to the agricultural-commodities exemption. Nothing, however, was done to section 203(b)(4a) or (5) of the Interstate Commerce Act.

The ideas proposed in 1957-58 to the Eighty-fifth Congress for amending section 203(b)(6) of the Interstate Commerce Act varied widely. A bill introduced by Senator Smathers in July 1957¹³⁴ would have had this much in common with the existing statute: It would have expressed the exemption's boundaries in terms of the *stage of processing* reached by a commodity. However, the general distinction between agricultural commodities and manufactured products—a distinction long interpreted by the ICC and the courts—would have been extensively supplemented by specifying certain kinds of processing that would remove some commodity groups from within the exemption (*e.g.*, various commodities were to be excluded from

¹³² *Id.* at 1005.

¹³³ *Id.* at 1008.

¹³⁴ S. 2553, 85th Cong., 1st Sess. (1957). This should not be confused with a later Smathers bill in the same Congress, S. 3778, 85th Cong., 2d Sess. (1958), introduced after the hearings on Problems of the Railroads, which became the Transportation Act of 1958.

the exemption if concentrated or frozen). Moreover, this bill *listed some commodities* that the courts had adjudged to be agricultural (*e.g.*, shelled peanuts), and it excluded them from the exemption. Both of these approaches embodied the idea, widely discussed in 1956-58, of a *roll-back*—a partial or complete undoing of the courts' recent decisions which had declared sundry commodities to be agricultural after the ICC had said they were manufactured.

Like other proposals to return to the good old days, the roll-back idea prompted diverse suggestions as to the point in history to which a return should be made and, indeed, the exact parts of the old landscape, as of any given date, that ought to be restored. The phrase "roll-back," however, was applied usually to "reregulating" one or more commodities the trucking of which the ICC had declared non-exempt and the courts had subsequently held to be exempt. The friends of the farm-to-first-market idea, even though they also declared themselves to be trying to return to the intent of Congress in 1935, did not usually call their proposal a roll-back (despite the ICC's long fidelity to the farm-to-first-market idea and its past use of the closely-akin channels-of-commerce principle). As for the poisoned-vehicle doctrine, any friends that it had were conspicuous by their silence.

The idea of a *freeze* on section 203(b)(6) of the Interstate Commerce Act had some support from organized agriculture¹³⁵ and other sources. Such a proposal apparently meant that Congress would amend the exemption in some way that would not involve a roll-back, but would, somehow, prevent the courts from declaring exempt any *additional* commodities that the ICC had thus far regarded as non-exempt. Nothing so drastic was proposed, however, as to deprive the courts of the authority to review ICC interpretations of the scope of section 203(b)(6) of the Interstate Commerce Act. Instead, the most nearly lucid embodiment of the freeze idea was a suggestion to the effect that Administrative Ruling 107 of the ICC Bureau of Motor Carriers, of March 19, 1958,¹³⁶ would hereafter be controlling as to which commodities are exempt and nonexempt. The listing in that ruling does not purport to be exhaustive for either category, and to treat it as such would create a twilight zone. The ruling merely lists those commodities which have been declared exempt or nonexempt as a result of proceedings before the ICC or the courts, or so declared by the ICC's Bureau of Motor Carriers in informal expressions of opinion.

A representative of the American Farm Bureau Federation stated to the Smathers Subcommittee that even though his organization was not trying to broaden the exemption beyond the present judicial interpretation, "we recognize that new crops may come into the picture, perhaps new grains, new oilseeds, et cetera, and that such new crops should be classified as agricultural commodities. . . ."¹³⁷ But one need not go so far as to envisage new crops. If only new types of processing are developed for present-day agricultural commodities, another twilight zone would

¹³⁵ *Hearings, supra* note 25, at 1357.

¹³⁶ 49 C.F.R. § 210.25 (Supp. 1959) [hereinafter referred to as Ruling 107].

¹³⁷ *Hearings, supra* note 25, at 1357.

be created, as the processing might or might not be deemed to go so far as to create new commodities, not known on March 19, 1958.

Among persons whose products were shipped under section 203(b)(6) of the Interstate Commerce Act, there was considerable apprehension in 1958 regarding any amendment to the section that would necessitate a repetition of the uncertain and costly process of litigation to *construe* the exemption.¹³⁸ They had an interest not merely in an established pattern of transportation, but also in a past series of proceedings before the ICC and in the courts. This latter interest would have been served either by a freeze (were one feasible) or by leaving section 203(b)(6) of the Interstate Commerce Act as it then stood.

The Association of American Railroads and the American Trucking Associations, Inc., showed an impressive community of immediate aim, before the Smathers Subcommittee, so far as the agricultural commodities exemption was concerned. The AAR's president complained that the exemption takes traffic away from "all regulated carriers"; and he reiterated, as noted above, his Association's desire for complete repeal of the exemption. The ATA president, with equal clarity, disavowed any such wish on the part of his federation. But the immediate goal of both organizations, vigorously expressed by their respective presidents, was the undoing of recent court decisions—a procedure justified as a return to the congressional intent of the statute. To this end, the AAR supported not only the ICC's farm-to-first-market measures (S. 1689 and H.R. 5823) but also Senator Smathers' roll-back bill, S. 2553. The ATA's approach to the matter was described by one of its witnesses as "on a commodity basis rather than basically a redefinition." That is, the ATA wanted Congress to list some specific commodities as being hereafter non-exempt, instead of attempting a roll-back by means of generalized language. It viewed those commodities—*e.g.*, frozen vegetables—as "industrially produced."¹³⁹

One of the most persuasively-reasoned recent proposals for amending section 203(b)(6) of the Interstate Commerce Act was that of Milton Ratner,¹⁴⁰ a physician turned trucking-firm operator, who appeared on behalf of the ATA. Through him, the ATA asked for a roll-back as to seven commodities and commodity groups and also the prevention of "further widening" of the exemption. Language to accomplish these aims was not offered. Dr. Ratner described the list of seven products as a compromise; but criteria underlying the list were stated:¹⁴¹

First, we felt that only commodities recently declared exempt by court order should be included. (This has been followed except for foreign wool, which is a special case.) Second, we decided that as a practical matter we would seek action only on products which were important from a tonnage basis. Third, we agreed that there should be a "transportation reason" for their regulation—that the transportation pattern for the commodity should be comparable to that of industrial products rather than like that of agri-

¹³⁸ *Id.* at 870-71, 1357, 1501.

¹³⁹ Highlights of the AAR position appear in *Hearings, supra* note 25, at 5-6, 23-25; highlights of the ATA position, in *id.* at 771, 861, 865.

¹⁴⁰ *Id.* at 880-85.

¹⁴¹ *Id.* at 881-82.

cultural commodities. Fourth, we gave careful consideration to the extent of direct farmer financial or marketing interest in the products.

It was mainly the third criterion, the commodity's transportation characteristics, that gave this presentation more of the quality of economic analysis than was had by many of the other demands for narrowing the exemption. As regards raw shelled peanuts, for example, Dr. Ratner declared that about sixty-five per cent of the unshelled peanut crop moved into shelling plants in October and November, but that the movement of shelled peanuts from shelling plants to market involved only eleven per cent in the peak month.

Neither the location nor the purchases of firms manufacturing . . . edible products [from peanuts], or those which crush peanuts, change much from year to year. In this movement from shelling plants, there are none of the characteristics which require special flexibility. It is exactly the sort of transportation pattern which fits well into the operation of regulated carriers.¹⁴²

The other commodities which he asked to be excluded from the exemption were frozen fruits and vegetables, frozen eggs, powdered milk, fresh and frozen dressed poultry (eviscerated and noneviscerated), redried tobacco, and imported wool. But only on frozen fruits and vegetables and imported wool did the ATA get its wish in the Transportation Act of 1958.

Two things are remarkable about the farm organizations' response to the demand by various segments of the transportation industry that the agricultural-commodities exemption be substantially reduced in scope. One is that there was nothing resembling a united policy or combined action on their part, despite the fact that such action by agriculture is truly formidable politically, especially if it be used simply for hold-the-line purposes rather than for positive action. Before the Smathers Subcommittee, agriculture appeared considerably less in agreement about the agricultural-commodities exemption than did the AAR and ATA—two organizations which, on sundry other issues, were decidedly in conflict.

Secondly—and this is probably a corollary of the first point—the typical position taken by a farm group was either to express mild concern,¹⁴³ or to focus on the particular commodity of direct interest to its constituency, or to do both. Because a truck traveling inbound is likely to haul a different commodity from what it has hauled outbound, it emphatically is the business of—let us say—fresh-fruit-and-vegetable shippers to see to it that dressed-poultry shippers have an abundant supply of trucks. Pudd'n'head Wilson wanted to own half of the dog he disliked, so that he could kill his half. Killing the inbound half of a trucking operation will cripple, if it does not kill, the outbound half.

An interesting combination of the freeze and roll-back ideas was embodied in three identical bills introduced in May 1958 by Representatives Byrne, of Illinois,

¹⁴² *Id.* at 883.

¹⁴³ See, e.g., the statement on behalf of the National Farmers' Union, in *Hearings, supra* note 25, at 1366.

Boyle, and Gray.¹⁴⁴ The amendment to section 203(b)(6) of the Interstate Commerce Act therein proposed would have added a proviso to the effect that the only commodities to be deemed exempt are those listed as such in Ruling 107 of March 19, 1958. Nothing was said about the nonexempt commodities listed in that ruling; so no twilight zone would have been created. But the ICC and the courts would hereafter have been precluded from treating any commodity as exempt if no question had arisen before March 19, 1958, as to its status and if it had, consequently, been omitted from Ruling 107. The amendment included a roll-back in the form of a further proviso that notwithstanding the first proviso, the exemption would not apply to frozen fruits, frozen berries, frozen vegetables, or imports.

A freeze and a roll-back were also embodied in the form of two provisos in a bill introduced in June 1958 by Representative Pillion.¹⁴⁵ The first proviso would have given congressional sanction to both the exempt and the nonexempt listings in Ruling 107; however, like the ICC's Bureau of Motor Carriers, he would have treated both parts of the list as nonexhaustive. Room was left for growth of both categories through (a) future litigation about existing commodities, not yet the subject of dispute, and (b) technological change. The second proviso specified that, notwithstanding Ruling 107, numerous commodities (named in the proviso) were to be deemed nonexempt.

The position of the National Agricultural Transportation League, of Florida, and the Perishable Commodity Carriers Association, Inc., of Texas, was that as regards their own traffic (the trucking of fresh fruits and vegetables), the exemption should be ended, not mended.¹⁴⁶ Senator Smathers styled this "the most exciting and revolutionary testimony that we have had."¹⁴⁷ The clientele of these truckers, however, made such a case for *flexible* truck service and the unlikelihood of such service if the exemption were abolished that the NATL and the PCCA substantially receded from their initial position. Instead, they proposed that the exemption remain intact during the first movement from field or orchard if the grower still owned the crop. This was a proposal of limited importance in the light of the NATL's testimony that, in Florida, most of the citrus fruit and much of the vegetable crop are sold in orchards and fields. At the same time, they proposed that, from the first market onward, the trucking of fresh fruits and vegetables be subject to ICC rate control and insurance requirements, but not subject to any requirement of a certificate of convenience and necessity or a permit. This meant continued freedom from ICC control over entry into the business and the routes or areas served.¹⁴⁸ This was an attempt to improve the truckers' income without reducing the adequacy or flexibility of service. As matters turned out, the 1958 amendment to section

¹⁴⁴ H.R. 12488, H.R. 12677, H.R. 12681, 85th Cong., 2d Sess. (1958).

¹⁴⁵ H.R. 12964, 85th Cong., 2d Sess. (1958).

¹⁴⁶ *Hearings, supra* note 25, at 977-78, 986-87, 989, 994, 1006-07; N.A.T.L. News, March 1958, pp. 4-7; *id.*, April-May 1958, pp. 6-7; *id.*, Nov. 1958, pp. 8-10.

¹⁴⁷ *Hearings, supra* note 25, at 988.

¹⁴⁸ *Id.* at 998-1000.

203(b)(6) of the Interstate Commerce Act did not in any way modify the exemption of fresh fruits and vegetables.

XII

THE 1958 AMENDMENT

There was little opposition in Congress to the enactment, in the Transportation Act of 1958, of provisions substantially restricting the agricultural-commodities exemption. Section 203(b)(6) of the Interstate Commerce Act was amended by adding two provisos at the end:¹⁴⁹

Provided, That the words "property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)" as used herein shall include property shown as "Exempt" in the "Commodity List" incorporated in ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, but shall not include property shown therein as "Not exempt": *Provided further, however*, That notwithstanding the preceding proviso the words "property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)" shall not be deemed to include frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, and wool imported from any foreign country, wool tops and noils, or wool waste (carded, spun, woven, or knitted), and shall be deemed to include cooked or uncooked (including breaded) fish or shell fish when frozen or fresh (but not including fish and shell fish which have been treated for preserving, such as canned, smoked, pickled, spiced, corned or kippered products) . . .

The political climate in which this amendment took shape may be judged by the fact that whichever house's version of the new exemption was narrower, on any given aspect, was accepted by the conference committee of the two houses of Congress.

The Commodity List (of exempt and nonexempt commodities) in Ruling 107 is incorporated by reference into the Interstate Commerce Act. This is not a delegation of authority to the ICC. It is only the March 19, 1958, version of the list that has the status of a statute; any subsequent changes in it by the ICC or its Bureau of Motor Carriers will have no statutory force without further action by Congress.

Then there are various products that had, as a result of litigation, been declared exempt but that are now returned to nonexempt status by being listed in the Act as outside the scope of the exemption. Most of these are listed in Ruling 107 as exempt. On the other hand, as concerns fish, the elaborate listing agrees with the notations of "exempt" and "nonexempt" in Ruling 107, with one very important exception: The statute shifts cooked fish from the nonexempt to the exempt list. This change was vigorously urged by the National Fisheries Institute.¹⁵⁰ Its traffic counsel said that it is so common to ship a mixed truckload of cooked fish in a frozen condition and frozen uncooked fish that, "if you regulate cooked frozen fish, it will result in the complete abolition of the exemption [as regards fish]."

¹⁴⁹ 72 Stat. 573, 49 U.S.C.A. § 303(b)(6) (Supp. 1958).

¹⁵⁰ *Hearings, supra* note 25, at 1502, 1504-07.

This would follow from the fact that the exemption in section 203(b)(6) of the Interstate Commerce Act applies only to a movement in which the entire truckload consists of exempt commodities. Indeed, the provisions in the 1958 amendment to that section as regards fish are pretty much what the energetic Fisheries Institute asked for. These provisions as to fish are the only part of the 1958 amendment which expands the exemption beyond the point to which its judicial interpretation had brought it.

Until Congress amended section 203(b)(6) of the Interstate Commerce Act in 1958, it had left to the ICC and the courts the task of deciding what specific commodities fell within the general terminology in the law—"ordinary livestock, fish . . . , or agricultural . . . commodities." Congress has now launched on a vast do-it-yourself project. When it decided about wool waste and pickled fish in 1958, it invited an endless series of such decisions in the future. Relieving Congress and state legislatures of tasks so detailed as this, however, was a basic idea underlying the creation of regulatory commissions in the past three-quarters of a century.

In part, such a function is still left to the ICC and the courts. Cumbersome though the revamped exemption is, it does not try to list all commodities that—although originating on the farm—are nonexempt. Neither does it seek to list all exempt commodities. It does not even list all conceivable commodities that might be called "fish." The House version of the 1958 amendment would have declared "products . . . containing seafood as the basic ingredient" to be within the exemption. Even without that language in the law, the ICC and the courts may still decide whether particular products are fishy enough to be within the exemption. Likewise, if a commodity is in some sense agricultural, but is not listed in Ruling 107 as exempt or nonexempt and not listed in the amended section 203(b)(6) of the Interstate Commerce Act itself as exempt or nonexempt, the ICC and the courts may still decide whether it is within the exemption. This is true alike of products already known to mankind and those still beyond the horizon.

There is another departure from the exemption as known from 1935 to 1958. Throughout that period, Congress stuck to the policy that all agricultural commodities were within the exemption. The boundary between what was agricultural and what was manufactured was the subject of judicial interpretation, but the basic principle was there. In the 1958 amendment, Congress excluded from the exemption some specified commodities (*e.g.*, bananas) which are unquestionably agricultural. Presumably they were excluded on some basis other than the distinction between agricultural and manufactured products. Some of the commodities thus excluded are not grown commercially in the continental United States. For wool alone, a distinction is introduced between the imported and the domestically-produced shares of a single commodity. But "No help for offshore farmers!" is not an avowed criterion in the amendment, nor did that point arise in debate. On the other hand, cooked fish had been held by the ICC's Bureau of Motor Carriers to be too highly processed for inclusion in the exemption; and yet, the amendment expressly included

it in the exemption. The 1958 version of the exemption expressly excludes frozen fruits and vegetables; but, by reference, it incorporates Ruling 107's recognition of fresh and frozen dressed poultry as exempt. In the exemption as it stood from 1935 to 1958, there was a principle; and principles, good or bad, can be defended. The remarkable mixture of odds and ends that now comprises section 203(b)(6) of the Interstate Commerce Act, however, will be hard, indeed, to defend.

The Transportation Act of 1958 provided grandfather rights. If any trucker was, throughout the period from May 1, 1958, to the Act's effective date, August 12, 1958, engaged on a particular route or in a specified territory in the interstate, for-hire trucking of an exempt commodity which the Act now made nonexempt, he was to be allowed to apply to the ICC for a certificate or permit to operate as a common or contract carrier (according to the type of operation) hauling that commodity and serving that route or territory. Upon the carrier's establishing to the Commission's satisfaction that it met these requirements, the ICC was required by the Act to grant the requested certificate or permit.¹⁵¹ This sounds simple and automatic, but in practice is neither.¹⁵² In any event, it is no source of new trucking service in the future. Any carrier, new or old, wishing to furnish new service will be subject to the usual requirements in regulated transportation: A common carrier must prove the public convenience and necessity of its proposed service; a contract carrier must prove that its proposed operation will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act.

XIII

A DIRECT APPROACH TO RECOVERY OF TRAFFIC

For some years, the railroads' efforts at regaining traffic lost to their competitors had a strong accent on action through government. Thus, they, like the regulated motor carriers, have been parties to litigation concerning the scope of the agricultural-commodities exemption; the railroads were ardent advocates of the 1955 proposals of the Presidential Advisory Committee on Transport Policy;¹⁵³ and they have shown great energy and versatility in their demands for the abolition or substantial reduction of the scope of section 203(b)(6) of the Interstate Commerce Act. Then, on the eve of success in this last-named approach, they supplemented it by an increased use of a wholly different means of coping with the competition of exempt truckers—namely, efforts to heighten the attractiveness of railroad service and rates. For the sake of brevity, this might be called a direct approach as distinguished from one through government. As regards any particular kind of traffic, the respective shares hauled by truck and other carriers depend partly on the rules or lack of rules imposed by government and on the nature of the commodities and the marketing prob-

¹⁵¹ 72 Stat. 573 (1958).

¹⁵² *Hearings, supra* note 25, at 1505.

¹⁵³ The proposals were analyzed by the present author in U.S. Dep't of Agriculture, *The Marketing and Transportation Situation*, July 1955, pp. 17-29.

lems involved; but their shares depend also on the respective carriers' ability and willingness to make their services and rates satisfactory to shippers and receivers.

Late in 1957, one of the nation's larger railroads began piggyback service (the hauling of fully-loaded truck-trailers on flatcars) for fresh fruits and vegetables from the Lower Rio Grande Valley of Texas to St. Louis and Kansas City at rates competitive with those of the trucks. Piggyback, unlike conventional rail service, lacks the expense and delay of loading and unloading rail refrigerator cars from and to local trucks at origin and destination. For this railroad, the prompt result of lowered rates and improved service was a big shift of Lower Rio Grande Valley produce traffic from over-the-road trucks to piggyback.

A New England railroad was earning about one-third of its revenue by hauling Maine potatoes, and it also got substantial income from fertilizer on the back-haul. The rapid increase in the trucks' share of both kinds of traffic so worried the railroad's management that, in 1957, it worked out with connecting railroads a drastic rate reduction on Maine potato shipments within New England and to other eastern states, and a fifty per cent rate cut on fertilizer carried from Boston to Maine. For potatoes, the minimum load for a carload rate was raised from 36,000 to 50,000 pounds in order to lower the average cost per hundredweight per mile incurred by the railroads.¹⁵⁴

In the rail transportation of fresh vegetables from California, Arizona, and the Southeast and of fresh citrus fruit from Florida, there likewise were recent rate changes designed to foster heavy loading and thus bring the railroads a lower average cost per hundredweight per mile and the shippers a lower average rate. Within a recent three-year period, rail transit time from California to New York City was reduced from ten to seven days.¹⁵⁵ If there were validity to the widespread conception of the Interstate Commerce Act as a device for insuring that the railroads, pinioned by regulation, lose their traffic to unregulated trucks, none of these things could have happened. But the ICC did not intervene with decisions that these various reduced rail rates were less than compensatory. Furthermore, any carrier's efforts at gaining traffic by improving its *service* is generally free of government control.

XIV

UNLIKELYHOOD OF AN AMENDMENT TO BROADEN

The agricultural exemptions in sections 203(b)(4a) and (5) of the Interstate Commerce Act are well enough accepted that there is little need for speculating about possible early changes in them. The exemption for private trucking done by farmers—section 203(b)(4a)—has no different economic or legal implications than exemptions accorded other private trucking, except that farmers engaged in private trucking are a rather unlikely type of law-evader, so far as concerns the ruse of

¹⁵⁴ *Railway Age*, May 5, 1958, p. 32.

¹⁵⁵ U.S. Dep't of Agriculture, *Agricultural Marketing*, Jan. 1959, p. 15.

engaging in allegedly private trucking when actually hauling for the general public. The persons most likely to be guilty of such violations are those who engage in trucking as a main source of livelihood. Farmers and other genuine nontruckers can legally do some for-hire trucking of nonagricultural commodities without operating authority from the ICC, if the transportation is "casual, occasional, or reciprocal."¹⁵⁶ As for the exemption accorded farmer co-operatives engaged in trucking, the transportation they provide for members and nonmembers is simply part of the large array of services rendered by the "farmers' business organizations," and—so far as public policy is concerned—it should stand or fall along with the rest of the array.

Any moderate broadening or narrowing of the agricultural-commodities exemption—section 203(b)(6) of the Interstate Commerce Act—would probably be within the framework of that section as it now stands. This means, for example, that if shippers or truckers are interested in a particular commodity which—expressly in the statute or by the reference therein to Ruling 107—is listed as an exempt or as a nonexempt commodity, they might try to get Congress to enact a law to shift this particular commodity to the opposite classification. There have been such bills in the past, but they ill suited an approach in terms of the broad distinction between agricultural and manufactured products that section 203(b)(6) of the Interstate Commerce Act embodied for twenty-three years. Since the 1958 amendment, however, it is perfectly reasonable to offer a bill to declare frozen dressed poultry non-exempt or a bill to declare frozen berries exempt. This is a prospect so chaotic that it defies analysis.

Had Congress been less intent on the problems of the railroads and more intent on the problems of shippers, it might well have left section 203(b)(6) of the Interstate Commerce Act exactly as it stood at the beginning of 1958. During the period leading up to the 1958 amendment, nothing new was said against or for exempt trucking; but its opponents were eloquent and hard-hitting, while most of its supporters other than the fisheries people were less emphatic. Hence, the agricultural part of this exemption was narrowed, and the part about fish was broadened.

If there was an opportunity early in 1958 to keep the exemption as it stood, the opportunity has been lost. Regardless of whether the 1957 version of the exemption, including the judicially-provided continuing-substantial-identity test, was sound public policy, adherents of that legal framework had best recognize that they can't go home again. A financially weak and politically strong farming interest in the days of the Grangers began this country's policy of governmental control of railroads. In 1935, such an interest achieved, on its own behalf, an agricultural exemption from federal control of trucks. If the farm community—a diminishing part of the population, percentagewise and in absolute numbers—again becomes as ailing financially and as strong politically as it was in 1935, it might persuade Congress to restore the exemption to its 1957 form. Apart from that contingency, the most fruitful

¹⁵⁶ 49 Stat. 544 (1935), 49 U.S.C. § 303(b)(9) (1952).

kind of reflection about the exemption's future would seem to be: If this hybrid of 1958 were wiped out entirely and this segment of truck transportation were to be regulated, what should governmental policy be?

XV

AN ALTERNATIVE TO THE EXEMPTION

The characteristics of exempt trucking emphasized by shippers are a good lead as to what pattern of regulation ought to be developed for the now-exempt motor carriers if the agricultural-commodities exemption were abolished. Ready availability of trucks and flexibility as to when and where they go are much valued by shippers and receivers, particularly in the movement of perishable commodities that are fresh rather than frozen. The proposal of the National Agricultural Transportation League and of the Perishable Commodity Carriers Association for ICC rate control without ICC control over entry into the business would not make trucking service any less available or less flexible, and it might make trucks even more available than they are under the exemption—if the coveted ICC rate regulation did, indeed, substantially raise the rate level. This last, however, is improbable. A governmental attempt to set minimum or exact rates is foredoomed to failure if the government has no control over entry into the business. As soon as the rates are raised, outsiders are likely to think it worthwhile to enter the trucking business. With uncontrolled entry into the business, competition would be so keen that no number of enforcement officers that the regulatory body is likely to possess would suffice to compel the truckers to keep their rates up to the legal minimum, if that were substantially above the level that would exist in the absence of regulation.

The argument that exempt trucking service is flexible and regulated service is not stems from bad experiences, and not from doctrinaire preconceptions about the stifling effect of bureaucracy. The transportation history of the Florida frozen-orange-juice-concentrate industry in its first decade was a case in point. From meager beginnings in 1945-46, the industry grew rapidly. By the 1948-49 season, the concentrate-processing industry was perturbed over the inadequate supply of rail refrigerator cars that could provide the low temperatures regarded as necessary to preserve the product in marketable condition. To meet this standard, mechanically-refrigerated cars were needed, not the ice-and-salt cars that the railroads offered. The commodity was deemed by the ICC to be manufactured, not agricultural; so the industry encouraged motor carriers to apply to the Commission for operating authority to haul frozen orange juice concentrate from Florida to northern destinations, if they possessed or were willing to buy mechanically-refrigerated trucks. Such authority was granted—usually on only a temporary basis at the outset.

In the ensuing years, there was a protracted and intense rivalry between the railroads and the trucking firms, and among the latter, not merely in the form of direct competition for concentrate to haul, but also in the ICC arena. The frozen-orange-juice-concentrate industry was rapidly expanding the number of its processing plants

and customers; plants and customers were increasingly dispersed; and there were numerous split pickups and split deliveries in the transportation of the product. Hence, the industry and the motor carriers favored ICC motor-carrier certificates of convenience and necessity with all of Florida named as the origin and the entirety of one or more states as the destination.

The ICC showed marked solicitude for the railroads in a variety of ways. In issuing motor-carrier certificates, especially on a permanent basis, it followed the practice of naming specific points as the origins. A similar policy was followed as regards destinations, although less persistently.¹⁵⁷ After prolonged controversy, the ICC, in 1956, made an apparent change in policy by granting state-wide origins and destinations for concentrate to a number of motor carriers.¹⁵⁸ Meanwhile, however, not only were the trucks handicapped in their competition with railroads, but shippers trying to develop the market for their product, had less adequate transportation than the trucks were willing and physically able to furnish.

The National Fisheries Institute, Inc., is described by its traffic counsel as a "national organization of fishermen, producers, distributors, wholesalers, everyone that is connected with the fishery industry." The industry relies heavily on exempt interstate trucking. The Institute strongly criticizes the ICC in these terms:¹⁵⁹

We are convinced that the services being performed by our present exempt carriers could not be duplicated by carriers operating under existing ICC regulations. The Commission's policy of restricting carriers' certificates to specific commodities, limited origin and destination points, and specified routes, would act as a serious deterrent to the flexibility required. Our industry is continually *developing new and improved products and expanding its markets and distribution points* in an effort to increase the per capita consumption of seafoods. Our carriers, therefore, require flexibility in the commodities to be hauled, points to be served, and the routes over which they may operate.

There are motor carriers of household goods who have ICC operating authority to make any interstate haul in the United States. If a breadth of authority something like this were to become available in the regulated trucking of agricultural commodities, much of the argument for the agricultural exemption would be vitiated. But would the ICC choose to grant such authority? If there are to be special provisions as to the regulation of truck transportation of agricultural commodities, it would be desirable to include in the statute a requirement that permits and certificates of convenience and necessity for the trucking of these commodities include state-wide origins and destinations, with "state-wide" defined to include one or more whole states.

Certificates for irregular-route service on a radial or nonradial basis are what the National Agricultural Transportation League and the Perishable Commodity Carriers Association advocated in their initial proposal for ICC regulation of fresh-fruit-

¹⁵⁷ MARGARET R. PURCELL, TRANSPORTATION OF FLORIDA FROZEN ORANGE JUICE CONCENTRATE 26-27, 30-36 (U.S. Dep't of Agriculture Research Rep. No. AMS-50, 1955).

¹⁵⁸ Traffic World, Feb. 11, 1956, pp. 46-47. U.S. Dep't of Agriculture, The Marketing and Transportation Situation, Oct. 1956, p. 45.

¹⁵⁹ Hearings, *supra* note 25, at 1505. (Emphasis added.)

and-vegetable truckers. At all events, this was the type of certificate that they hoped the ICC would grant, on a grandfather-rights basis, to the carriers already engaged in produce trucking.¹⁶⁰ They did not say what type of certificate would be appropriate for newcomers to the business or for old-timers who want to expand.

But flexibility as to routes is by no means the only sort of flexibility needed. "Convenience foods," known also as foods with built-in maid service, may be viewed by many of us with boredom or downright hostility; but, the supermarkets, nevertheless, are stocked with such things as fried potatoes that need only to be thawed out and heated before being eaten. In many ways, the marketing of the farmer's crop or the fisherman's catch is a process which evolves so rapidly that it is served poorly by transportation that is subject to narrow definitions as to what the carrier may haul. Any legislation for the economic regulation of trucking that is now exempt should lay down the principle that the delimitation of hitherto-exempt commodities in any given certificate or permit for hauling must be in broad terms. Congress would have to show profound ingenuity to phrase this requirement so as to outwit the regulatory body that imported the channels-of-commerce principle into the agricultural exemption; but the effort is worth making.

If flexibility on these several counts is not built into whatever scheme of regulation is proposed for the now-exempt trucking of agricultural commodities, the exemption should stand, patchwork though it has been since 1958. It does at least have the merit of allowing good transportation service for the commodities that it covers.

Rate regulation of trucks is a less likely source of trouble for agricultural shippers than is the control over who shall engage in the business of trucking, what he shall haul, and where. Furthermore, the potential danger in the regulation of trucking rates is probably not greatly different in the trucking of agricultural commodities (no matter how defined), from that in the trucking of other things. A proposal was advanced a few years ago that each ICC-regulated common carrier (by highway, rail, or other mode) be allowed to charge, for hauling any given commodity between any given points, a rate lying anywhere within a "zone of reasonableness."¹⁶¹ The lower limit of this zone would be the out-of-pocket cost. The contemplated upper limit apparently was the fully-distributed cost (both direct and indirect costs, and both fixed and variable costs). At its discretion, the carrier could change its tariff from time to time within this zone. Because railroads have a lower ratio of out-of-pocket cost to fully-distributed cost than do trucks, such a formula would be useful to railroads in acquiring the traffic of the truck lines in any given area (if the trucks were all regulated) by the railroads' charging less than the lowest permissible truck rate long enough to put all truck lines in that area out of business. Then another area

¹⁶⁰ *Id.* at 978, 1007.

¹⁶¹ Analyzed in U.S. Dep't of Agriculture, *The Marketing and Transportation Situation*, July 1955, pp. 20-22. See *Hearings Before the Subcommittee on Transportation and Communications of the House Committee on Interstate and Foreign Commerce on Transportation Policy*, 84th Cong., 2d Sess., pt. 1, at 177-78 (1956).

could be turned to. It would be crucial as to whether any such change as this in the governmentally defined rate-making rules would be initiated along with the abolition of the agricultural exemption in trucking. The extension of rate regulation to the trucking of agricultural commodities would be relatively harmless only in the absence of all such changes in the *character* of rate regulation.

If the agricultural exemption is to be replaced by ICC economic regulation, one of the most sorely needed features of the new scheme of things, if the newly-regulated truck transportation is to be adequately useful, is not attainable by act of Congress. This feature would be a lessened preoccupation of the Commission with the problems of the railroads. An increased preoccupation with the problems of shippers might, for example, result in a less restrictive approach to the granting of certificates and permits to motor-carrier applicants.

It is not tenable to say that all the exemptions of interstate, for-hire transportation from federal regulation should stand or fall together. It is conceivable, for instance, that agricultural commodities merit no exemption from the motor-carrier part of the Interstate Commerce Act, but that newspapers do. The excitement in recent years about the former exemptions, however, has been accompanied by a remarkable silence about the latter. If the divergence in reaction reflects a difference in the volume of freight involved, that explanation does not carry over to the fact that there has been considerably less complaint about the economic exemptions under the water-carrier part of the Interstate Commerce Act than about its section 203(b)(6). The substantial percentage of interstate water traffic that is exempt is presumably a source of lower average revenue per ton to the carriers than is the motor-carrier counterpart. The railroads' comparatively muted criticism¹⁶² of exempt water transport may well become more vigorous if and when all interstate, for-hire trucking of agricultural commodities has been brought under economic regulation.

While there may be sound reasons why some of the various exemptions of for-hire transportation from federal regulation should be retained and others abolished, there is no reason why the various exemptions should be reconsidered by Congress piecemeal. Surface transportation of freight is so competitive among modes of transport that the various exemptions, if they are to be reappraised by Congress, should all be reappraised at one time. Only thus will legislation to change the boundary between the regulated and the exempt be able to avert the substitution of a new set of anomalies for the old. Such a reappraisal should be comprehensive not only as to the modes of transport investigated, but also by considering the stake of labor, as well as of carriers and shippers, in the nation's transportation system.

¹⁶² *Hearings, supra* note 25, at 5.