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Transportation—Federal Motor Carrier Act—Statutory Interpretation.—Baggett Transp. Co. v. United States.

Crystal J. Lloyd

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without congressional sanction. The inconclusiveness of the Regulations, the lack of precedent, and this congressional inaction are the factors which should have induced the court in the instant case to allow the depreciation deduction in the year of sale.

MICHAEL L. ALTMAN

Transportation—Federal Motor Carrier Act—Statutory Interpretation.—*Baggett Transp. Co. v. United States.*[1]—This action was brought by a protesting motor common carrier to set aside an order of the ICC granting the applicant, H. Messick, Inc., a permit to operate as a motor vehicle contract carrier, transporting dangerous explosives and related articles, while under contract with the Hercules Powder Co. The Commission found[2] that Messick met the requirements of Section 203(a)(15) of the Interstate Commerce Act, by proposing to serve a limited number of shippers and to assign motor vehicles to the exclusive use of the shipper for a continuing period of time. Messick proposed distinctive and specialized services which the Commission evaluated in light of the criteria enumerated in section 209(b) of the act. The ICC concluded that, after balancing these factors, the permit should be granted. The district court, setting aside the order of the Commission and remanding the case for further action, HELD: the Commission erroneously assumed the criteria enumerated in section 209(b) could be weighed in the same manner as an algebraic equation. The court concluded that the method of attaching equal weight to every criterion was an improper standard for the Commission to use.

In 1935, Congress enacted legislation designed to foster sound economic conditions in the motoring industry in order to prevent further destructive proliferation of motor transport concerns and ruinous competition.[3] Part II of the Interstate Commerce Act[4] was federal regulatory legislation designed to promote the policy inherent in prior state-controlled regulation of motor carriers,[5] i.e., to promote the economic welfare of the carriers, shippers and the public by advocating a policy of preserving existing common carriage transportation against the inroads of contract carriage transporation.[6] Regulation was designed as an alternative to completely free-entry competition. Although competition was not wholly eliminated, entrance into the industry was limited by strict controls.[7]

The act distinguished between common carriers by motor vehicle ("any person which holds itself out to the general public to engage in transportation by motor vehicle. . . .")[8] and contract carriers ("any person which

[1] 231 F. Supp. 905 (N.D. Ala. 1964).
[2] H. Messick, Inc., 92 M.C.C. 293 (1963).
[3] Filing of Contracts by Contract Carriers by Motor Vehicle, 20 M.C.C. 8 (1939).
[4] 49 Stat. 543 (1935), as amended, 49 U.S.C. §§ 301-27 (1958).
[5] See Hale & Hale, Competition or Control III: Motor Carriers, 108 U. Pa. L. Rev. 775 (1960).
[6] See C. & D. Oil Co., 1 M.C.C. 329, 332 (1936).
[7] Hale & Hale, supra note 5, at 776.
[8] 49 Stat. 544 (1935), as amended, 49 U.S.C. § 303(a)(19) (1958).

engages in [motor] transportation . . . under continuing contracts. . . .")[9] The former were required to obtain certificates of public convenience and necessity[10] from the Commission before commencing operations, while the latter were required to secure permits from the same source, to be issued if it appeared that the proposed contract operation would "be consistent with the public interest"[11] and the policy declared in section 202(a). Section 202(a) was the 1935 forerunner of the National Transportation policy adopted in 1940. As declared:

> [The] . . . policy of the Congress [is] to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act . . . so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service . . . in transportation . . . without unfair or destructive competitive practices. . . .[12]

Although the Commission had felt that the regulations were designed to promote and protect common carrier service,[13] the act laid far more stringent controls on common carriers than on contract carriers. Common carriers had to hold themselves out to the general public under published, just and non-discriminatory tariffs,[14] while contract carriers were uncontrolled in their charges above a reasonable minimum.[15] The published "just and non-discriminatory" tariffs were set at a higher rate than the "reasonable minimum" tariffs which contract carriers had to charge. The Commission found that contract carriers were abusing this rate-advantage privilege and, rather than performing true contract services on a continuing basis, were making oral agreements for single-haul shipments. Thus, the contract carriers were competing directly with the common carriers, contrary to the announced policy of Congress, and in so doing, escaped the rate-regulations and other controlling devices applied to the common carriers. In 1937, the Commission ruled that all contracts claimed by contract carriers to entitle them to special status must be in writing prior to the granting of a permit.[16] In fact, the Commission steadily construed the act to favor the existing carriers "as against any person now seeking to enter the field of motor-carrier transportation."[17]

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9 49 Stat. 551 (1935), as amended, 49 U.S.C. § 303(a)(15) (1958).

10 49 Stat. 551 (1935), as amended, 49 U.S.C. § 306(a)(1) (Supp. V, 1963).

11 49 Stat. 552 (1935), as amended, 49 U.S.C. § 309(b) (1958).

12 54 Stat. 899 (1940), as amended, 49 U.S.C. Preface to § 301 (1958).

13 Filing of Contracts by Contract Carriers by Motor Vehicle, supra note 3. The dissenting opinion of Commissioner Lee is prophetic of the Supreme Court reasoning in ICC v. J-T Transport Co., 368 U.S. 81 (1961).

14 54 Stat. 924 (1940), 49 U.S.C. § 316(d), 49 Stat. 560 (1935), 49 U.S.C. § 317 (1958).

15 49 Stat. 561 (1935), 49 U.S.C. § 318(a) (1958).

16 Contracts of Contract Carriers, 1 M.C.C. 628, 632 (1937).

17 C. & D. Oil Co., supra note 6, at 332. The then Senator Truman later voiced approval of this policy in 1940, when he presented a bill to amend section 203(a)(15) of the act: "It is intended that all over-the-road truckers shall whenever possible fall within the description of common carriers.

"It is intended by the definition of contract carriers to limit that group. . . ." 86 Cong. Rec. 11546 (1940).

From 1935 to 1957, the ICC regarded the adequacy of existing common carrier facilities to be of high importance in determining consistency with the public interest as defined by the history and purposes of the act. On the basis of this principle, the Commission denied a contract carriage permit when existing service was found adequate to meet the reasonable needs of supporting shippers. The Commission placed the burden of proving the inadequacy of existing services on the applicant.[18] To implement this policy of supporting the existing common carriers, the Commission made several rulings which it used in applying the legislation to the needs of both motor carriers and the public. In order to preserve the financial and operational capacity of common carriers, applicants for contract carrier permits would not be awarded business already adequately handled by existing certified common carriers.[19] The services of a contract carrier had to be shown to be individualized and specialized to satisfy the needs of the shippers.[20] Unless the applicant for the permit could show that its service would be substantially superior to that offered by the protesting carriers, the permits would not be granted, even though the protestants had never undertaken the specific service in the past and there was no assurance that they would offer such service if the permits were not granted.[21]

In 1957, the United States Supreme Court precipitated a new stage of carrier regulation. In *United States v. Contract Steel Carriers, Inc.*,[22] the Court held that "a contract carrier is free to aggressively search for new business within the limits of his license"[23] and such action by a carrier would not support a finding that it was " 'holding itself out to the general public' "[24] as a common carrier. Thus, contract carriers (though no longer able to make oral contracts) could engage in competition directly with common carriers without simultaneously subjecting themselves to rate-regulation as common carriers.

This decision prompted the ICC to seek a restrictive rewriting of sections 203(a)(15) and 209(b) of the act.[25] The Commission feared that the inherent advantages of contract carriers would permit them to "encroach upon the operations of the common carriers and skim off the cream of the traffic upon which they depend to support their overall service to the public."[26] The Commission, under the bill as introduced, wanted to limit the definition

[18] See William Heim Cartage Co., 20 M.C.C. 329, 331 (1939).

[19] C. & D. Oil Co., supra note 6. See also, Eastern Shore Oil Co., 7 M.C.C. 173 (1938).

[20] N. S. Craig, 31 M.C.C. 705, 710 (1941).

[21] See, e.g., C. & E. Trucking Corp., 71 M.C.C. 568 (1957); Beatty Motor Express, 66 M.C.C. 160 (1955) (existing carriers should be accorded the right to transport all traffic . . . which they can handle adequately); William Heim Cartage Co., supra note 18, at 331 (permit denied, burden on applicant to show its service would "substantially improve" a deficiency in existing service).

[22] 350 U.S. 409 (1956).

[23] Id. at 412.

[24] Id. at 411-12.

[25] 70 ICC Ann. Rep. 162-64 (1956).

[26] Hearings on S. 1384 before Subcommittee of the Senate Committee on Interstate and Foreign Commerce, on Surface Transportation-Scope of Authority of ICC, 85th Cong., 1st Sess. 23 (1957).

of contract carrier to one who provides services not provided by common carriers and that existing common carriers are unwilling or unable to provide.[27] Representatives of the contract carrier industry vigorously and successfully opposed some of the ICC's proposed amendments.[28] The carriers felt that the Commission requirement would place an impossible burden of proof on them "since the state of mind of the common carriers concerning their willingness is a matter peculiarly within their own knowledge. . . ."[29] The bill, as passed, amended the act just enough to controvert the Supreme Court's decision in *Contract Steel Carriers*.[30] The amendment to Section 203(a)(15) of the Interstate Commerce Act defines contract carriers by motor vehicle as:

> . . . any person which engages in [motor] transportation . . . under continuing contracts with one person or a limited number of persons either a) . . . through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.[31]

Section 209(b) of the act was amended by adding a sentence which sets forth five factors the Commission shall consider in determining whether the permit should issue:

> In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy . . . the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements.[32]

The first case to arise after the amendments were passed was *ICC v. J-T Transport Co.*[33] The Commission continued, after the adoption of the amendments, to place the burden of proof on the contract carrier applicant, to show that the existing services of the common carrier were inadequate to meet the needs of the shipper. If the applicant failed to carry the negative burden of proof, then the Commission found that the available service was reasonably adequate to meet the shipper's needs and denied the issuance of a permit. This happened in the J-T Transport contract carrier application. The

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[27] See 70 ICC Ann. Rep., supra note 25, at 162.

[28] See Hearing on S. 1384, supra note 26, at 300-05, for statement of contract carriers' opposition.

[29] Id. at 303.

[30] See S. Rep. No. 703, 85th Cong., 1st Sess. 2-3, 6, 7 (1957). H. Rep. No. 970, 85th Cong., 1st Sess. 3 (1957). As Senator Smathers said: "The decision of the Supreme Court clearly means that the Congress should do something to correct the situation." 103 Cong. Rec. 14036 (1957).

[31] 71 Stat. 411 (1957), 49 U.S.C. § 303(a)(15) (1958).

[32] 71 Stat. 411 (1957), 49 U.S.C. § 309(b) (1958).

[33] Supra note 13.

district court[34] held erroneous a Commission decision[35] denying the applicant a permit on the sole ground that the existing service was reasonably adequate to meet the shipper's needs since the applicant had not shown the existing service of the other carrier to be inadequate.[36]

The Supreme Court affirmed the district court decision,[37] holding that the Commission erred in presuming that services of existing common carriers would be adversely affected by loss of potential traffic, even though common carriers may not have handled it before:

> We see no room for a presumption in favor of, or against, any of the five factors on which findings must be made under § 209(b). The effect on protesting carriers of a grant of the application and the effect on shippers of a denial are factors to be weighed in determining on balance where the public interest lies. The aim of the 1957 amendments, as we read the legislative history, was not to protect the *status quo* of existing carriers but to establish a regime under which new contract carriage could be allowed if the "distinct need" of shippers indicated it was desirable.
>
> We cannot assume that Congress, in amending the statute, intended to adopt the administrative construction which prevailed prior to the amendment.[38]

Furthermore,

> The proper procedure . . . is for the applicant first to demonstrate that [its proposal] is specialized and tailored to a shipper's distinct need. The protestants then may present evidence to show they have the ability as well as the willingness to meet that specialized need. If that is done, then the burden shifts to the applicant to demonstrate that it is better equipped to meet the distinct needs of the shipper than the protestants.[39]

Thus, the Court said that the burden of proof was on the applicant to show that it could meet the shipper's distinct needs and not, as previously declared by the Commission, that the burden was on the applicant to show the existing inadequacy of service. No longer was it enough for the protesting carriers to show that they could provide reasonably adequate service; it was now necessary for them to prove they could fill the distinct needs of the shippers.[40]

Mr. Justice Frankfurter, dissenting, felt that the third criterion (the effect which granting the permit would have on the protesting carriers) and the fourth (the effect of denial on the applicant and the shipper) were definitely not "placed in conjunctive equipoise, demanding a balance on untilted scales . . . [with] the fulcrum . . . located . . . at the 'distinct need' of

[34] J-T Transport Co. v. United States, 185 F. Supp. 838 (W.D. Mo. 1960).
[35] J-T Transport Co., 74 M.C.C. 324 (1958), aff'd, 79 M.C.C. 695 (1959).
[36] J-T Transport Co., 74 M.C.C., at 328.
[37] ICC v. J-T Transport Co., supra note 13.
[38] Id. at 89.
[39] Id. at 90.
[40] Ibid.

the shipper. . . ."[41] He believed that the 1957 amendments, viewed in light of ICC precedent and the legislative history of Part II of the Interstate Commerce Act, had not "eliminated preference for existing common-carrier service as a permissible determinant of Commission action."[42] He construed the amendments to have a definite and limited purpose, which was to approve and clarify the criteria adopted by the ICC in its past consideration of such cases and which had been followed in denying the J-T Transport application:

> It would be heedless of the practicalities of legislative procedure to assume that . . . experienced committees chose to use the occasion to overturn a consistent pattern of statutory regulation. . . . To the contrary, it seems clear that these careful architects of motor-carrier regulation fashioned amendments that fit harmoniously into the prior law.[43]

The majority opinion comports with the literal terms of the amendment to section 209(b) of the act, which indicates that the Commission is to weigh the statutory factors against each individual application. This seems to be the interpretation which would give greatest meaning to the criteria. Assuming that Congress would not have added them to the act unless it wished to have them applied, the majority opinion appears doubly important. This interpretation has been accepted as the final interpretation of the meaning of the law in the courts since the 1961 decision.[44]

At issue in the instant case is the weight the Commission should give to each of the five criteria in making its findings, i.e., on a total score basis, weighting some of the five criteria more than others (as was done previously, when the Commission considered the adequacy of existing service as determinative), or on a point-by-point scoring system, granting each of the criteria of section 209(b) equal weight. Viewing the history of the ICC considerations prior to *J-T Transport,* the Commission felt that it had to weight the scales in favor of the existing common carriers at the expense of the petitioning contract carriers and their supporting shippers. The Commission, reappraising the tests and reasons it used in pre-1961 contract carrier applications, used the equal weight, point-by-point method, and found in favor of granting the permit in four of the five criteria.

Specifically, in the Messick contract carrier application, the Commission applied, "seriatim, the five tests enumerated in section 209(b) to the facts involved in these proceedings."[45] (1) The number of shippers to be served: the Commission found a grant of authority warranted here, since the applicant served only two shippers.[46] (2) The nature of the service proposed: the specialized services offered by the applicant to meet the distinct needs

[41] Id. at 106.
[42] Id. at 115.
[43] Id. at 114, 115.
[44] See generally, Baggett Transp. Co. v. United States, supra note 1; Colorado-Arizona-California Express, Inc. v. United States, 224 F. Supp. 894 (D. Colo. 1963).
[45] H. Messick, Inc., supra note 2, at 296.
[46] Id. at 296.

of the shipper did not warrant a grant of authority unless the standard of proof applied by the Commission was met. Thus, a finding for the applicant would be made only if the protestants have not "shown that they are able and willing to meet the distinctive needs involved" and the applicant can show "that it is better equipped to meet these distinct needs than the protestants."[47] The Commission found that the applicant proposed "to render its supporting shipper a distinctive and highly specialized service,"[48] and on examining the capabilities and past performance of the protesting carrier and the applicant, the Commission found the "evidence . . . strongly supports a grant of the authority sought by applicant."[49] (3) The effect which granting the permit would have upon the services of the protesting carriers: the Commission realized that granting the permit would probably result in some traffic diversion away from the protesting carriers, but not so substantially as to impair their services to the general public. On this test, the Commission would deny the application.[50] (4) The effect which denying the permit would have upon the applicant and/or its shipper: the Commission found here that the applicant would not be injured by denial, but the shipper "would be materially and adversely affected"[51] to such an extent that a grant of authority, in light of this fourth test, "would be consistent with the public interest."[52] (5) The changing character of the shipper's requirements: here the Commission found that the shipper was in the process of developing a new product, which, though not currently in production, would be produced with reasonable certainty and would "result in a substantial change in the shipper's transportation requirements."[53] On this point, the Commission found in favor of granting the permit.[54]

In only one of the five tests, therefore, did the Commission find in favor of the protesting carriers. The Commission said:

> Having evaluated the pertinent evidence of record in the light of the criteria enumerated in section 209(b), we are satisfied that the weighing of all five factors warrants, on balance, a finding that issuance of a permit, authorizing operations to the extent herein-

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[47] Id. at 297.

[48] Id. at 297: Applicant proposes:
(1) to assign equipment, which is especially suited to transporting explosives, to the exclusive use of the shipper; (2) to spot equipment at the plants prior to loading; (3) to provide a trailer retention service at jobsite destinations for the storage of nitro carbo nitrate; (4) to provide conveyors for loading and unloading; (5) to conduct two-man operations with experienced drivers familiar with the shipper's magazines who will assist in unloading; (6) to provide 10-wheel trucks for delivery to points inaccessible to tractor-trailer units; (7) to make dropoffs and deliveries at a definite day and hour to jobsite or magazine locations; and (8) to furnish tank vehicles for the transportation of explosive slurry.

[49] Id. at 300.

[50] Ibid.

[51] Ibid.

[52] Ibid.

[53] Id. at 301.

[54] Ibid.

> after indicated, will be consistent with the public interest and the national transportation policy.[55]

The district court apparently, though not expressly, agreed with the dissenting Commissioner's opinion in the ICC report.[56] Commissioner Bush in his opinion, viewed section 209(b) of the act, the majority and dissenting opinions delivered in *J-T Transport*, and the national transportation policy, and felt that weighting each test equally would negate the intent of Congress and the Supreme Court "for such a scoring system would inevitably weigh against common carriers."[57] He favored a total scoring system, weighting certain criteria more than others. This would follow Mr. Justice Frankfurter's dissent which considered the Commission's pre-*J-T Transport* method of testing (giving more weight to the common carriers' reasonably adequate service) as controlling the construction the Court should give the 1957 amendments. The district court, in the instant case, concurred in this:

> [T]he Commission . . . erroneously assumed that these criteria might be treated as though they were factors in an algebraic equation which might be solved mechanically. . . . But we are persuaded by a careful reading of its opinion and the entire record which it was considering that it attached equal weight to each criterion, thereby employing a standard which, under the circumstances of this case, was not a proper one.[58]

The court then remanded the proceedings to the Commission, declaring that the Commission's order did not include an adequate statement of findings.

In an analogous problem of statutory interpretation, the district court in *P. Saldutti & Son, Inc. v. United States*[59] held, in construing the 1957 amendment to section 203(a)(15) of the act:

> It is for the Commission to determine, under the facts of each case, whether a carrier serves a limited number of shippers. If the findings of the Commission on this issue are supported by substantial evidence and in accord with applicable law, this Court will not disturb them.[60]

"[A] simple but fundamental rule of administrative law"[61] is that "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."[62] The procedural requirements of agency findings were more than adequately met in the instant case, for the Commission filed a lengthy

55 Ibid.
56 Id. at 304.
57 Ibid.
58 Baggett Transp. Co. v. United States, supra note 1, at 907.
59 210 F. Supp. 307 (D.N.J. 1962).
60 Id. at 311.
61 SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).
62 SEC v. Chenery Corp., 318 U.S. 80, 94 (1943).

opinion[63] specifying the facts and considerations it deemed applicable in reaching its conclusion.[64] Section 14(1) of the act does not require the Commission to include detailed findings of fact in its decision except where damages are given.[65] Apparently, then, the court's remand was based on a concept of the substantive law which does not follow the majority opinion in *J-T Transport,* but, instead, follows the statutory interpretation found in Mr. Justice Frankfurter's dissent. In the Messick application, the ICC considered the *J-T Transport* Court as concluding "that it is the responsibility of the Commission to weigh all five factors in determining on balance where the public interest lies and not to load the scales by attaching greater weight to one criterion than another."[66] It was in light of this mandate, as the Commission saw it, that it granted the permit. Its view is amply supported by a careful reading of the majority opinion. As Mr. Justice Douglas said:

> By adding the five criteria which it directed the Commission to consider, Congress expressed its will that the Commission should not manifest special solicitude for that criterion which directs attention to the situation of protesting carriers, at the expense of that which directs attention to the situation of supporting shippers, when those criteria have contrary implications.[67]

It is just such "special solicitude" that the court in the instant case is requesting the Commission to offer. For the Commission to "judge them with as much delicacy as the prospective nature of the inquiry permits"[68] it must consider the enumerated criteria seriatim, to comply with the Supreme Court's interpretation of the amendments. This is, in fact, what the Commission did in considering the Messick application and issuing the permit on the basis of its "equal weight" point-by-point scoring system. The Commission's method of implementing *J-T Transport,* as evidenced in the instant case, is clearly the most logical method of evaluating the 1957 statutory requirements: The Commission's procedures and methods of weighing the five criteria, therefore, should prevail over the more limited construction which the district court placed upon the amendments to section 209(b).

MRS. CRYSTAL J. LLOYD

[63] H. Messick, Inc., 92 M.C.C. 293 (1963). The Commission examined some criteria in more detail than others, but they made findings on each one with record evidence that would tend to support the findings. In fact, the amount of detail the Commission recorded in the instant case, is quite consistent with some of the other contract carrier applications the Commission has weighed since the *J-T Transport* decision. See Griffin Mobile Home Transp. Co., 91 M.C.C. 801 (1963); Carlton M. Moyer, 88 M.C.C. 767 (1962).

[64] See also, Capital Transit Co. v. United States, 97 F. Supp. 614, 621 (D.D.C. 1951).

[65] 54 Stat. 911 (1940), 49 U.S.C. § 14(1) (1958). See Alabama Great Southern R.R. v. United States, 340 U.S. 216, 227-28 (1951).

[66] H. Messick, Inc., supra note 63, at 296.

[67] ICC v. J-T Transport Co., 368 U.S. 81, 89 (1961).

[68] Ibid.