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Competition Versus Regulation: The Agricultural Exemption in the Motor Carrier Act

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COMPETITION VERSUS REGULATION: THE AGRICULTURAL EXEMPTION IN THE MOTOR CARRIER ACT

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Transportation of passengers or property by motor carriers engaged in interstate or foreign commerce has been subject to federal regulation by the Interstate Commerce Commission since 1935. At that time motor carriers in intrastate commerce were regulated in all the states of the Union by state commissions which controlled entry into the industry, rates, and safety of operations, but there was no comparable federal regulation. The Federal Motor Carrier Act of 1935, now part II of the Interstate Commerce Act,[1] was intended to fill this gap by creating a federal regulatory scheme similar to that provided by the states. In addition, the Act was deemed necessary as "a part of a complete and coordinated program of legislation touching all forms of transportation."[2] Indeed, the 1934 Report of the Federal Coordinator of Transportation had called attention to the fact that the various modes of transportation "interlock and react, one against another, in a multitude of ways." Hence, he suggested that "the system cannot permanently be half regulated and half unregulated."[3]

Nevertheless, the Motor Carrier Act contains a number of specifically described exemptions from economic regulation, the most important of which relate to agriculture.[4] Thus, motor vehicles controlled and operated by a farmer when used in carrying agricultural commodities from and supplies to the farm, and vehicles of cooperative associations as defined in the Agriculture Marketing Act are exempt from control as to entry into the business and rates and charges; they remain subject to regulation pertaining to qualifications of drivers and safety of operations.[5] The same status is accorded to:

> motor vehicles used in carrying property consisting of ordinary livestock,

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1. 49 STAT. 543 (1935), as amended, 49 U.S.C. §§ 301-27 (1952), as amended 49 U.S.C. §§ 303-05, 315, 321 (Supp. IV, 1957).
2. H. R. REP. No. 1645, 74th Cong., 1st Sess. 3, 5 (1935). The program was completed by the Civil Aeronautics Act of 1938 (52 STAT. 977, 49 U.S.C. § 401-722 (1952), as amended, 49 U.S.C. §§ 421, 481, 483, 486, 683-84, 722 (Supp. IV, 1957)), and Parts III and IV of the Interstate Commerce Act: Water Carriers (54 STAT. 929 (1940), 49 U.S.C. §§ 901-23 (1952)) and Freight Forwarders (56 STAT. 284 (1942), 49 U.S.C. §§ 1001-22 (1952), as amended, 49 U.S.C. § 1020 (Supp. IV, 1957)).
3. H. R. Doc. No. 89, 74th Cong., 1st Sess., 12 (1935).
4. 49 U.S.C. § 303(b) (1952).
5. 49 U.S.C. §§ 303(b) (4a), (5) (1952).

> 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.[6]

Consequently, interstate trucking is divided into a regulated and an unregulated segment, and it is precisely this dual treatment which has caused continuing controversies in the administrative, judicial and legislative arenas. Obviously, railroads and common and contract motor carriers subject to supervision by the Interstate Commerce Commission with respect to their rates and services[7] and unable to operate without Commission approval[8] cannot help resenting the existence of a considerable number of motor carriers free from these restrictions. Since administrative control over exempt carriers is limited to the enforcement of safety rules,[9] their freedom to compete with the regulated carriers is regarded by the latter as an unfair and intolerable threat.[10] The Interstate Commerce Commission itself has recommended legislation to narrow the agricultural exemption.[11] By contrast, spokesmen for farm, dairy and fishery organizations vigorously defend the exemption and oppose all changes of the present law.[12]

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6. 49 U.S.C. § 303(b)(6) (1952).

7. See 49 U.S.C. §§ 2, 3, 6, 15, 312, 316-318 (1952), as amended, 49 U.S.C. § 6 (Supp. IV, 1957).

8. See 49 U.S.C. §§ 1(19), (20), 306-309 (1952).

9. A. W. Hawkins, Inc. v. United States, 244 F.2d 854, 857 (4th Cir. 1957) (Conviction of motor carrier of milk for falsifying records affirmed; "carriers of agricultural commodities are not exempt from keeping proper logs . . . pertaining to hours of service.")

10. See testimony of spokesmen for the railroads in "Study of Domestic Land and Water Transportation," *Hearings before the Subcommittee on Domestic Land and Water Transportation of Senate Committee on Interstate and Foreign Commerce,* pursuant to S. RES. No. 50, 81st Cong., 2d Sess., 234-41 (1950) (hereafter cited as *Transportation Hearings 1950),* and in "Domestic Land and Water Transportation," *Hearings before the Senate Committee on Interstate and Foreign Commerce,* 82d Cong., 2d Sess., 431-36 (1952) (hereafter cited as *Transportation Hearings 1952).* See also Helmetag (Asst. Gen. Counsel, Pennsylvania Railroad Co.), *Judicial Expansion of the Agricultural Exemption in the Motor Carrier Industry,* 43 VA. L.R. 211, 225 (1957), recommending repeal of the exemption. For testimony of representatives of the regulated truckers see *Transportation Hearings 1950, supra,* at 753-818, 855-58, and *Transportation Hearings 1952, supra,* at 372-80, 473-75, 496-509; on page 403, Senator Bricker commented: "Of course transportation is a part of the public utility field . . . The problem that we have got here is whether or not a portion of it shall remain regulated and a portion of it remain untouched and whether or not one segment of the shipping public will be served with an unregulated free enterprise system and the rest of the public will be submitted to a regulated carrier system." The Executive Committee of American Trucking Associations, in a statement of policy adopted on January 25, 1957, recommends legislation to narrow the agricultural exemption.

11. ICC, 70TH ANN. REP. 162 (1956). This recommendation would be carried out by S. 1689 and H.R. 5823, 85th Cong., 1st Sess. (1957). See also S. 2553, 85th Cong., 1st Sess. (1957) for another proposal to narrow the exemption.

12. *Transportation Hearings 1950, supra* note 10, at 534-35, 909-23, 1170, 1171, 1259-64, 1366-71; *Transportation Hearings 1952, supra* note 10, at 380-92, 406-20, 436-9, 442-73, 476-84, 515-16. See also Senate Select Committee on

What is the present law? And what are the merits or demerits of proposals for a change?

I.

The statutory language quoted above[13] has been the subject of much litigation before the Commission in the courts. While the Commission has consistently interpreted that language narrowly, the courts have moved in the opposite direction. Congress seemingly supported this judicial trend by amendments which expanded the exemption beyond its original scope.

As enacted in 1935, the exemption referred to

> motor vehicles used exclusively in carrying livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof)....[14]

In 1938 the word "exclusively" was deleted, and the phrase "if such motor vehicles are not used in carrying any other property, or passengers, for compensation" was added at the end.[15] The siguificance of these amendments was explicitly acknowledged by the Commission in *Newman Contract Carrier Application*[16] where it held that a carrier of apples from orchards to produce houses was exempt although he leased his equipment for the return trip to other carriers for transportation of nonexempt commodities.[17]

Subsequently, however, the Commission took the position that operating authority is required whenever a carrier of exempt commodities also uses his vehicles at some other time for transportation of nonexempt goods. Thus, in *ICC v. Dunn*,[18] the Commission sought an injunction to restrain a carrier engaged in intrastate transportation under a certificate issued by the Georgia Public Service Commission from using his trucks in hauling baled cotton to points in adjacent states. Nothing else was carried on these trips. In affirming a judgment adverse to the Commission, the United States Court of Appeals for the Fifth Circuit squarely held that the construction urged by the Com-

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Small Business, *Competition, Regulation, and the Public Interest in the Motor Carrier Industry*, S. REP. No. 1693, 84th Cong., 2d Sess. 15-18 (1956).

13. See text to note 6 *supra*.

14. 49 STAT. 545 (1935) (later amended by 52 STAT. 1237 (1938), 54 STAT. 919 (1940), 49 U.S.C. § 303(b)(6) (1952)).

15. 52 STAT. 1237 (1938) (later amended by 54 STAT. 919 (1940), 49 U.S.C. § 303(b)(6) 1952)).

16. 44 M.C.C. 190 (1944).

17. The Commission referred to Monroe Common Carrier Application, 8 M.C.C. 183, 185 (1938), holding that the exemption was not destroyed "where the only additional use of the motor vehicle is for carrying of other commodities without compensation."

18. 166 F.2d 116 (5th Cir. 1948).

mission was irreconcilable with the statutory language as amended in 1938 and would cripple the legislative policy to free interstate transportation of the favored products from the restraints and delays of economic regulation. "Relief from this is offered in order to aid the prompt and free transportation of the named commodities, which transportation is usually seasonal and intermittent, but often urgent because it is of perishables. . . ." Small intrastate truckers—defendant had only five trucks—constitute "the reserve to be drawn on under this exemption. . . . When called on to move . . . privileged commodities to another state they could not afford to buy a new truck for the purpose . . . nor take the time and trouble . . . to get an authority from the Commission."[19]

According to this decision the exemption applies unless the carrier transporting exempt commodities also transports nonexempt goods *at the same time in the same vehicle.* The Commission refused to accept this rule outside the territory of the Fifth Circuit and began litigation involving the same issue in the Third Circuit[20] against an interstate trucking firm which carried dressed poultry from Maryland to Chicago pursuant to a certificate of public convenience and necessity. In *ICC v. Service Trucking Co.*,[21] the Commission sought to enjoin as unauthorized defendant's use of its vehicles for transporting eggs—concededly an exempt product—on the return trip. The court, following the *Dunn* case, agreed with defendant that no authority for the return haul of eggs was needed, thus making unnecessary a decision on defendant's additional contention that dressed poultry was also an exempt commodity.[22] Since this second defeat the Commission has consistently held that transportation of agricultural commodities in

19. *Id.* at 118.
20. *Transportation Hearings 1950, supra* note 10, at 822.
21. 186 F.2d 400 (3d Cir. 1951), *affirming* 91 F. Supp. 533 (E.D. Pa. 1950).
22. A determination of that issue was also avoided in ICC v. Woodall Food Products Co., 112 F. Supp. 639 (N.D. Ga. 1953), *aff'd* 207 F.2d 517 (5th Cir., 1953) on the ground that defendant owned the poultry it carried and, therefore, was exempt as a private carrier. See 49 U.S.C. § 304(a)(3) (1952).
23. Hurshel Craig Common Carrier Application, 69 M.C.C. 42, 12 F.C.C. 33,819 (1956); Zero Refrigerated Lines Extension—Meat Products from Several Packing House Points, 12 F.C.C. 33,853 (1957); Herrett Trucking Co., Extension—Feeds, 69 M.C.C. 487, 12 F.C.C. 33,845 (1957); J. M. Blythe Common Carrier Application, 66 M.C.C. 560 (1956); West Coast Fast Freight, Inc., Extension—Intermediate and Off-Route Points, 11 F.C.C. 33,542 (1956); Frozen Food Express Extension—West Texas, 71 M.C.C. 321, 12 F.C.C. 33,916 (1957); Kahan Extension—Cut Flowers, 67 M.C.C. 32, 11 F.C.C. 33,583 (1956); Colonial and Pacific Frigidways, Inc., Extension—Five States, 69 M.C.C. 725, 12 F.C.C. 33,873 (1957): Rail service as to nonexempt transportation found unsatisfactory "because of slow transit time, inconvenience of holding shipments until full carloads are assembled, inflexibility in making split pickups and deliveries and difficulty in serving consignees located at off-rail points or who require less than carload shipments." Applicant preferred to operate under certificate, fearing that some now exempt commodities may in the future be removed from exempt classification. Penn-Dixie Lines, Inc., Extension—Western New York, 69 M.C.C. 444 (1957).

vehicles not used *at the same time* in carrying nonexempt products is exempt; operating authority must be obtained only when the carrier wishes to combine in the same truck mixed shipments of exempt and nonexempt articles, and such authority will be granted upon the usual showing of public convenience and necessity with respect to transportation of the latter.[23]

Consequently, the *Dunn* and *Service Trucking Co.* cases forced the Commission to consider each vehicle rather than the total operations of the carrier as the test in the application of the exemption. In other words, the same carrier may and frequently does combine regulated and unregulated operations.[24] Sometimes, the combination occurs in the same truck, as in *Direct Transit Lines, Inc., Extension-Unmanufactured Agricultural Commodities.*[25] Transit held authority to haul exempt and nonexempt commodities in certain designated areas. In reply to much demand for such service, it proposed to transport less-than-truckload shipments of both types of products in the same truck, dropping off the nonexempt articles at points which it was authorized to serve and continuing with the exempt commodities to points beyond. The Commission dismissed the application on the ground that applicant needed no authority to carry out its plan, but observed that it considered this undesirable, and "the remedy for the inherent evils of such operations is in legislation." It might be added, however, that the practice thus condemned permits regulated carriers to compete with unregulated carriers by invading the domain of those whose entire operations are in the exempt classification. This may be a partial answer to the complaints of the regulated truckers about unfair and unequal treatment.

The Commission's dislike for scrambling of regulated and exempt loads in the same truck is based on the difficulty of supervising such a system.[26] These difficulties became apparent when the question arose as to whether rates and tariffs must be filed for agricultural products which move in mixed shipments. In *Fawley Motor Lines v. Cavalier Poultry Corp.*,[27] a successful suit by a shipper against a carrier for recovery, with interest, of charges not provided for in defendant's filed tariffs, a majority of the United States Court of Appeals for the Fourth Circuit stated:

> If vehicles are used for carrying other [non-exempt] property for compensation, tariffs must be prescribed for the agricultural products so carried as well as for the other property; and these tariffs must, of course, be

24. See cases cited note 23 *supra.*
25. 62 M.C.C. 231 (1953).
26. See *Transportation Hearings 1950, supra* note 10, at 1140-41.
27. 235 F.2d 416, 418 (4th Cir., 1956), *reversing in part* 138 F. Supp. 583 (W. D. Va. 1955). See also St. Germain v. Alamo Motor Lines, 12 F.C.C. 81,170 (5th Cir. 1958).

observed with respect to the agricultural products as well as to the other property.

Judge Soper suggested in a concurring opinion that defendant was bound by the tariff which became part of its contract with the shipper, but that the act does not require filing of tariffs applicable to exempt goods. Under this view the filing of a tariff covering an exempt commodity would be an expensive mistake. The Commission seems to agree with the majority, probably on the ground that the *Dunn* and *Service Trucking Co.*, cases compel such a result. In the *Motor Carrier Rates New York City Area* case[28] a trade association asked that established rates remain in effect with respect to wool and mohair in the grease which had previously been held to fall within the agricultural exemption. Hence, the Association urged that the Commission's order requiring cancellation of numerous less-than-truckload commodity rates should not apply to wool and mohair. The Commission rejected this argument on the ground that the exemption "applies only when no nonexempt traffic is transported for compensation in a vehicle at the same time," but permitted further study by interested parties "with a view to agreement on reasonable levels of rates." Here, the advantages of the exemption were lost by reason of the mixing of exempt with nonexempt goods in the same truck.

Apparently, no figures are available as to how much of such mixing is actually going on. However, it seems to be assumed that it is of relatively minor siguificance by comparison with the number of vehicles carrying only exempt products.[29] Many of those vehicles may be owned by certificated carriers. In any event, the question as to precisely what products are or are not exempt presents the most important and the most bitterly contested issue.

II.

When the bill which later became the Motor Carrier Act reached the floor of the House it exempted from regulation, except as to safety,

28. 62 M.C.C. 593, 622-23 (1954). See *Transportation Hearings 1952, supra* note 10, at 424.

29. There are approximately 18,000 motor carriers subject to economic regulation by the Commission. Reply of the Interstate Commerce Commission to Questionnaire of the Senate Select Committee on Small Business, November 28, 1955, "ICC Administration of the Motor Carrier Act," *Hearings before Select Committee on Small Business, U. S. Senate*, 84th Cong., 1st Sess., at 333 (1955) (hereafter cited as *Small Business Hearings*). The Commission stated that 18,197 common and contract carriers are operating under certificates and permits; the number of private and exempt carriers is unknown, but the Commission has records of 9,610 exempt carriers on whom copies of safety regulations have been served. *Id.* at 319. 320. In 1950 Commissioner Rogers estimated that 40,000 carriers having 150,000 power units are used exclusively in exempt interstate transportation, *Transportation Hearings 1952, supra* note 10, at 442. The testimony of witnesses opposed to the exemption in its present form was directed against the exempt carriers.

"motor vehicles when used exclusively in carrying livestock or unprocessed agricultural products."[30] In the debate on the floor it was pointed out that this "includes all farm commodities produced upon any farm in the raw state ready for market"[31] and was intended "to help the farmer and keep him out of any regulation whatsoever in so far as handling unprocessed agricultural products or livestock on the farm."[32] Congressman Pierce, himself a farmer, emphasized that even the fixing of minimum rates by the Commission in Washington for taking a truckload of hogs from his farm to the market in an adjoining state would mean "the death of the motor transportation which the farmer has had and which has been the only relief that has come to him from the previous excessive railroad rates."[33]

This part of the legislative history indicates that the exemption was established for the benefit of farmers and fishermen. After the bill became law it was vigorously urged by the regulated carriers that farmers and fishermen were intended as the *sole* beneficiaries of the exemption; it should, therefore, be construed as restricting exempt vehicles to operations from the farm or landing place to the primary market or point at which the farmer or fisherman dispose of their products, and that the commodities should be subject to full regulation after they have entered ordinary channels of commerce. This so-called "channels of commerce" principle was, indeed, applied by the Commission in its first and second report in *Monark Egg Corporation Contract Carrier Application*,[34] where it held that shucked oysters, gutted and filleted fish, shelled pecans and shelled walnuts and dressed poultry were not exempt. Referring to the fact that "the ordinary fisherman sells his catch at the pier," that the applicant's fish products were processed in processing plants, and that the drawing of distinctions between various forms of processing would involve "distinctions so subtle as to be wholly impractical," the Commission concluded that "only fish and shellfish dead or alive, as taken from the water, are within the purview of this exemption."[35] Similarly, peanuts sold in the shell by the farmer were exempt only until they reach the shelling plant.[36]

30. 79 CONG. REC. 12205 (1935). Fish and shellfish were added later.
31. *Ibid.*
32. *Id.* at 12213.
33. *Id.* at 12217.
34. 26 M.C.C. 615, 618 (1940), 44 M.C.C. 15, 18, 19 (1944): "The legislative history indicates that the benefits of the exemption were intended for the farmer by affording relief in the transportation of his products to the point where they first enter the ordinary channels of commerce. Before adopting the exemption, Congress broadened it by including fish and shellfish within its scope, and the natural and logical inference to be drawn from this action is that a like relief was intended for the fisherman as was granted the farmer."
35. 44 M.C.C. at 21.
36. *Id.* at 19.

The "channels of commerce" doctrine did not long survive as a rule of interpretation because it could not be supported by the legislative history, let alone by the plain language of the statute. The only canon of construction in its favor, that exemptions should be strictly construed, was not very helpful because the language does not even contain a remote hint as to geographical points of departure and destination of the exempt transportation.[37] The ambiguous clause "(not including manufactured products thereof)" does not apply to fish but only to "agricultural commodities," as the Commission itself acknowledged in the second *Monark Egg* report;[38] that clause was substituted for the words "unprocessed agricultural products" used in the original bill.

The substitution occurred at the conclusion of a debate about the scope of the exemption and general agreement that the term "unprocessed" was too narrow.[39] The present language was proposed by Congressman Pettengill who said:

> . . . we have heard a good deal of discussion . . . as to what is a processed agricultural product, whether that would include pasteurized milk or ginned cotton. It was not the intent of the committee that it should include those products. Therefore, to meet the views of many members we thought we would strike out the word "unprocessed" and make it apply only to manufactured products.
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> . . . .
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> *Mr. Whittington:* In other words, under the amendment . . . cotton in bales and cottonseed transported from the ginneries to the market or to a public warehouse would be exempt if the language remained, because ginning is sometimes synonymous with processing.
> *Mr. Pettengill:* That is correct.[40]

In 1951 this colloquy was brought to the attention of the Commission in the course of an investigation instituted on their own motion into the meaning of the agricultural exemption. In that proceeding, known as the *Determination* case,[41] the Commission abandoned the "channel of commerce" principle. Said the Commission:

> Although the object of the partial exemption as originally framed was to aid the farmer in marketing his products, the substitution of the present

37. By contrast, 49 U.S.C. § 303(b)(4a) explicitly provides for exemption of vehicles owned by farmers "when used in the transportation of . . . commodities . . . or in the transportation of supplies to his farm."
38. 44 M.C.C. at 17-18: "A comma is placed after 'livestock,' again after 'fish (including shellfish),' and again after 'agricultural commodities (not including the manufactured products thereof).' We conclude that each of the terms set off by commas is a complete commodity description."
39. 79 CONG. REC. 12205 (1935).
40. *Id.* at 12220. The vote adopting the amendment followed.
41. Determination of Exempted Agricultural Commodities, 52 M.C.C. 511 (1951).

> language for the words "unprocessed agricultural products" clearly resulted in a broadening of the exemption. That this is so was made plain by the chairman of the subcommittee sponsoring the amendment when he stated that pasteurized milk and ginned cotton were intended to come within the partial exemption. He also indicated that cottonseed would fall within the exemption. It must be assumed that Congress was familiar with the practices obtaining in the industry incidental to the marketing of these and other agricultural commodities. As hereinafter shown, the uncontradicted evidence . . . is that pasteurization, among other processing, and bottling of milk for sale to consumers, is customarily done at dairies in the larger cities . . . and that the bulk of the cottonseed is sold by the farmer to the ginners. In the light of these practices . . . and the clear intent of Congress [as to pasteurized milk and cottonseed] . . . it is difficult to conclude that Congress intended that other agricultural commodities, processed (but not manufactured) or packaged for consumer use, regardless of ownership, should be treated differently.[42]

In the same proceeding the Commission held that the term "agricultural commodities" as used in 49 U.S.C.A. §303 (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,[43] live poultry and bees (such as milk, wool, eggs, and honey).[44]

The term "(not including manufactured products thereof)" was explained as meaning

> 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.[45]

The "channel of commerce" principle was also discarded with respect to the interpretation of the word "fish" after the Commission's application of that principle in the *Monark Egg Corporation* Application[46] had been disapproved by the Fifth Circuit in *ICC v. Love*.[47] In that case the Commission sought to enjoin transportation without authority of fresh, headless shrimp, packed in ice, and frozen headless shrimp. It was found that heading of shrimp was deemed necessary

42. 52 M.C.C. at 523-24. The Commission added that pasteurized milk, ginned cotton and cottonseed "were intended to be illustrative of the types of processing permissible under the . . . exemption as now phrased." The Commission concluded that the channel of commerce doctrine "is not appropriate for use in determining the applicability of the . . . exemption." *Id.* at 525.

43. As defined in 49 U.S.C. § 20(11). The word "ordinary" was inserted before the word "livestock" (54 Stat. 921 (1940)) for the purpose of clarifying that reference.

44. 52 M.C.C. at 519.

45. *Id.* at 521.

46. See note 34 *supra*.

47. 77 F. Supp. 63 (E.D. La. 1948), *aff'd per curiam*, 172 F.2d 224 (5th Cir. 1949).

by the industry prior to shipment to markets, and that fresh headless shrimp was taken to quick-freezing plants and thence transported by defendant's trucks to the East. The court observed that "shrimp, as handled by defendant . . . continue to be shrimp in their natural state," that the Commission's holdings "would nullify the exemption . . . because no shrimp are transported to market which are not beheaded," and that the word "fish" in the statute must be given "its ordinary and commonly understood meaning, the meaning which is used in transportation parlance. . . ." It "includes fish in the various forms in which it is customarily shipped, when not packed in hermetically sealed containers."[48]

This decision compelled the Commission to reopen and reverse its previous holding in the *Monark Egg Corporation* Application.[49] Indeed in its third report in that case the Commission observed that "the major part of the total catch of fish and shellfish is subjected to some processing at the pier before being moved to market" and "a sound distinction cannot be made between fresh and frozen headless shrimp and other species of fresh and frozen fish which are transported to market both in the form in which they are taken from the water and in other forms such as gutted fish, fillets, shucked oysters, etc."[50] In its fourth and final report in April 1951 the Commission stated that the "channels of commerce" or "movement to primary market" principle, held inapplicable to agricultural products in the *Determination* case, was "equally inapplicable" to fish.[51]

The posture of the law as of the Spring of 1951 may thus be summarized as follows: *First:* It was admitted that not only producers (farmers and fishermen), but also processors were intended to benefit from the exemption in that they could avail themselves of unregulated truck transportation. *Second:* The exemption does not apply to truck transportation of products which have passed from mere processing to manufacturing. The question when that transformation takes place was examined in detail and answered with respect to all types of agricultural products in the *Determination* case,[52] the findings in that

48. 77 F. Supp. at 67. The Court quoted the dissent of Commissioner Lee in the second *Monark Egg* report, 44 M.C.C. at 22-23.

49. 49 M.C.C. 693 (1949); 52 M.C.C. 576 (1951).

50. 49 M.C.C. at 698.

51. 52 M.C.C. at 581. The finding was that "fish (including shellfish)" means "frozen, quick frozen and unfrozen fish and shellfish in the various forms in which it is shipped, such as live fish, fish in the round, beheaded and gutted fish, filleted fish, beheaded shrimp, and oysters, clams, crabs, and lobsters, with or without shells, including crab meat and lobster meat, but excluding fish and shellfish in hermetically sealed containers and fish and shellfish which have been otherwise treated for preserving such as smoked, salted, pickled, spiced, corned, or kippered." *Id.* at 582.

52. 52 M.C.C. at 527-34 (vegetables and fruits), 534-36 (cereals), 536-37 (forage crops), 537-39 (nuts and peanuts), 539-41 (fiber crop), 541-42 (tobacco), 542-43 (seeds), 543-49 (poultry and livestock), 549-51 (dairy), 551-53 (forest group), 555 (miscellaneous).

case contain a list of fourteen specifically described groups which the majority of the Commission held included in the exemption.[53]

The subsequent battles have been fought on the issue whether the Commission correctly drew the line between processing and manufacturing.

III.

The controlling case is *East Texas Motor Freight Lines, Inc. v. Frozen Food Express*,[54] decided by the United States Supreme Court on April 23, 1956. The proceeding began before the Commission upon complaint by East Texas and two other motor common carriers who alleged that defendant, Frozen Food, was engaged without authority in truck transportation of fresh and frozen dressed meats and meat products and fresh and frozen dressed poultry. Frozen Food was a duly certificated motor carrier in interstate commerce, but its certificate did not cover the named commodities. The Commission entered a cease and desist order against defendant, holding that "the exemption of vehicles used in carrying ordinary livestock does not extend to fresh or frozen meats, the products of the slaughter of such livestock."[55] The Commission also adhered to its prior view in the *Determination* case that only live poultry was exempt.[56]

On appeal a three-judge court sustained the Commission with respect to fresh and frozen meats,[57] and defendant then acquiesced in that holding which may now be considered settled law.[58] However, the court reversed in so far as fresh and frozen dressed poultry was concerned,[59] and the Commission appealed to the Supreme Court, the Secretary of Agriculture and the Department of Justice opposing the

53. 52 M.C.C. at 557-58. See also the appendix, *id.* at 564-66: "List of Commodities held exempt or non-exempt by the Commission, division 5, or by the Bureau of Motor Carriers under Section 203(b)(6) of the Interstate Commerce Act."

54. 351 U.S. 49 (1956).

55. 62 M.C.C. 646, 651 (1954).

56. *Id.* at 652; 52 M.C.C. at 557.

57. Frozen Food Express v. United States, 128 F. Supp. 374, 380-81 (S.D. Tex. 1955): The term "ordinary livestock" as defined in section 20(11) of the Interstate Commerce Act "may not be tortured to include the carcasses of slaughtered meat animals. . . . Nor may meat, fresh or frozen, be considered an agricultural commodity for present purposes. The exemption has treated the live meat animal in a separate generic class . . . since the enactment of the statute. . . ."

58. In Frozen Food Express v. United States, 148 F. Supp. 399, 403 (S.D. Tex. 1956) the same court again held that slaughtered cattle, fresh meat and meat products were nonexempt; the United States Supreme Court *aff'd per curiam*, 355 U.S. 6 (1957). To the same effect is ICC v. R. J. Rollette, 11 F.C.C. 81,023 (N.D. Ill. 1955).

59. Frozen Food Express v. United States, 128 F. Supp. 374, 379-81 (S.D. Tex. 1955). The court referred with approval to ICC v. Allen E. Kroblin, Inc., 113 F. Supp. 599 (N.D. Iowa, 1953), *aff'd*, 212 F.2d 555 (8th Cir. 1954), *cert. denied*, 348 U.S. 836 (1955), which held that dressed and eviscerated poultry was exempt. In the proceeding before the Commission in East Texas Motor Freight v. Frozen Food Express, 62 M.C.C. 646 (1954), the Commission had refused to follow the *Kroblin* case.

appeal. The Supreme Court affirmed, four Justices dissenting. Mr. Justice Douglas, for the majority, referring to the legislative history outlined above, noted that

> victory in the Congress for the exemption was recognition that the 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.
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> Killing, dressing, and freezing a chicken is certainly a change in the commodity. But it is 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. . . . 52 M.C.C. 511, 551.
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> . . . .
>
> A chicken that has been killed and dressed is still a chicken. Removal of its feathers and entrails has made it ready for market. But we 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* § 203(b)(6).[60] (Emphasis added.)

In more recent cases application of this test resulted in reversal of the Commission and determination of exempt status for frozen fruits and vegetables,[61] peat moss (even if harvested by commercial interests rather than the farmer himself, or imported),[62] and raw shelled nuts.[63]

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60. 351 U.S. at 51-54.

61. Home Transfer & Storage Co. v. United States, 141 F. Supp. 599, 602 (W.D. Wash. 1956): "The processing of fresh fruits for quick freezing . . . is essentially nothing but adding sugars, sirups, and as to peaches ascorbic acid, to better preserve the fruits and improve their color and taste. . . . In other respects . . . these processed fruits and vegetables remain essentially in the same shape and form as non-processed fruits and vegetables." *Aff'd per curiam* 352 U.S. 884 (1956). It should be noted that the Home Transfer & Storage Company had a certificate from the Interstate Commerce Commission authorizing transportation of frozen foods and juices. See Home Transfer & Storage Co., Investigation of Operations, 63 M.C.C. 785 (1955). Upon remand following the Supreme Court's decision Division 1 held that applicant may continue to engage in the transportation of frozen fruits and vegetables without authority so long as they are not transported for compensation in the same vehicle and at the same time with non-exempt commodities, but denied applicant's contract carrier application for other frozen foods because of lack of need and adequacy of existing service. Home Transfer & Storage Co., Contract Carrier Application, 69 M.C.C. 173 (1956).

62. Premier Peat Moss Corp. v. United States, 147 F. Supp. 169, 174 (S.D.N.Y. 1956), *aff'd per curiam*, 355 U.S. 13 (1957). The Commission had refused to accept the decision pending appeal to Supreme Court, see 69 M.C.C. 653.

63. Consolidated Truck Service v. United States, 144 F. Supp. 814 (D.C.N.J. 1956), *reversing* 52 I.C.C. 511, 537-39. The Court refused to follow ICC v. Weldon, 90 F. Supp. 873 (W.D. Tenn. 1950), *aff'd per curiam*, 188 F.2d 367 (6th Cir. 1951), *cert. denied*, 342 U.S. 827 (1951), holding shelled peanuts nonexempt on the ground that Congress intended only to exempt agricultural commodities "in their natural state" and that, in any event, the farmer had parted

Frozen Foods Express was also a party in another proceeding which twice reached the United States Supreme Court. The Company had not participated in the *Determination* case before the Commission, but contended that the findings there made deprived it of its right to carry exempt agricultural commodities to and from all points within the United States. Accordingly, it filed a complaint in a three-judge court asking for an injunction against the enforcement of the Commission's findings. That court dismissed the complaint on the ground that the Commission's findings did not constitute an appealable order.[64] The Supreme Court reversed and remanded the case to the lower court for determination on the merits.[65] Upon remand, the three-judge court held the following commodities exempt because they had undergone some processing, but retained their original identity:

> Frozen whole eggs; dried egg powder; dried egg yolks; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables washed, cleaned and packaged in cellophane bags or boxes; fruits or vegetables (quick frozen); shelled peanuts; peanuts shelled ground; killed and picked poultry (although not drawn); rolled barley; cottonseed hulls; beans (packaged, dried artificially or packed in small containers for retail trade); dried fruits (dried mechanically or artificially); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk, skimmed, vitamin D; milk, powdered; buttermilk; feathers; frozen milk and cream; cotton linters; chopped hay; seeds, deawned or scarified; redried tobacco leaves.[66]

The Supreme Court affirmed per curiam without opinion.[67]

These staggering defeats for the Commission's advocacy of a broad concept of manufacturing were, perhaps, foreshadowed by earlier

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with his rights on delivery to the shelling plant. The *Weldon* case can no longer be considered a precedent because it is inconsistent with East Texas Motor Freight v. Frozen Food, 351 U.S. 49 (1956), is based on the "channels of commerce" principle later repudiated, see text to note 42 *supra*, and seems irreconcilable even with the reasoning of ICC v. Yeary Transfer Co., 104 F. Supp. 245 (E.D. Ky. 1952), *likewise aff'd per curiam by the same Sixth Circuit* in 202 F.2d 151 (1953).

64. Frozen Food Express v. United States, 128 F. Supp. 374, 377-79 (S.D. Tex. 1955).

65. Frozen Food Express v. United States, 351 U.S. 40 (1956).

66. Frozen Food Express v. United States, 148 F. Supp. 399, 402-03, (S.D. Tex. 1956). The Commission had held that only "milk, cream, and skim milk, including that which has been pasteurized, standardized milk, homogenized milk and cream, vitamin "D" milk and vitamin "D" skim milk" are exempt, 52 M.C.C. 557 (1951). It excluded frozen milk—the freezing process converted it into a manufactured product. *Id.* at 551.

See also Penn-Dixie Lines, Inc., Extension—Florida Points, 11 F.C.C. 33,690 (1956); Fresh citrus fruit, peeled and cut into sections, and packed in a glass jar with a screw-type lid held non-exempt. Presumably this is not in conflict with the Court's decision quoted in the text. The Commission did not acquiesce in the holding of the *Frozen Food Express* case prior to its affirmance by the United States Supreme Court; Erickson Transport Corp. Extension—Additional Points, 12 F.C.C. 34,036 (1957).

67. 355 U.S. 6 (1957).

judicial and even legislative actions. Thus it was held that scoured wool was exempt; the scouring process consisted of removing grease and water from raw wool; this was said not to change the form of the raw wool.[68] Similarly, the expensive process of redrying tobacco, usually performed in plants owned by persons other than the growers, was characterized as a mere processing rather than as manufacturing operation, there being "no visible difference in the leaf tobacco which is about to be redried and that which has been redried.[69] The Commission's conclusion in the *Determination* case that nursery stock, flowers and bulbs were not included in the exemption[70] provoked not only litigation,[71] but vigorous complaints to Congress by the American Association of Nurserymen and the Society of American Florists[72] resulting in the amendment which inserted after "agricultural" the words "(including horticultural)."[73] In only one instance did the Commission's view prevail: A conviction for transportation of cowhides without a certificate was affirmed.[74]

In its recent decisions the Commission has, of course, followed, albeit reluctantly, the "substantial identity" test established by the Supreme Court.[75] Nevertheless, further litigation as to how that test should be

68. ICC v. Wagner, 112 F. Supp. 109 (M.D. Tenn. 1953). The Commission acquiesced in this ruling: Determination of Exempted Agricultural Commodities, 62 M.C.C. 87 (1953).

69. ICC v. Yeary Transfer Co., 104 F. Supp. 245, 246 (E.D. Ky., 1952), *aff'd per curiam* 202 F.2d 151 (6th Cir. 1953). The Commission acquiesced, 62 M.C.C. 87, 88 (1953).

70. 52 M.C.C. at 555.

71. Florida Gladiolus Growers Ass'n. v. United States, 106 F. Supp. 525 (S.D. Fla. 1952) (decided after the amendment of the exemption: Gladiolus and gladiolus bulbs held exempt).

72. *Transportation Hearings 1952, supra* note 10, at 380-92, 406-08. In conversation with one of the witnesses Senator Tobey suggested that the committee's chairman might ask the Commission: "How in the devil did you make such a fool decision as that?" (*Id.* at 384). Senator Bricker observed that horticulture and nursery work are taught in the agricultural colleges of the country. (*Id.* at 385).

73. 66 STAT. 479, 49 U.S.C. § 302(b) (4a), (6) (1952).

74. Southwestern Trading Co. v. United States, 208 F.2d 708 (5th Cir. 1953) (hides like fresh meat are the product of slaughter and, therefore, not "ordinary livestock.") See notes 57, 58 *supra*. The only other case in which the Commission was victorious is ICC v. Weldon, 90 F. Supp. 814 (W.D. Tenn. 1950), *supra*, note 63 which, for the reasons there stated, is now obsolete.

75. Bonney Motor Express, Inc., Extension—Peanuts to Nebraska, 69 M.C.C. 480 (1957) (raw shelled peanuts exempt); Querner Truck Lines, Inc., Extension, 12 F.C.C. 33,942 (1957) (same); Zero Refrigerated Lines, Extension—Meat Products from Several Packing House Plants, 12 F.C.C. 33,853 (1957) (follows Home Transfer & Storage Co. v. United States, 141 F. Supp. 599 (W.D. Wash. 1956) and the *East Texas* case with respect to frozen fruits and vegetables and dressed poultry); Hurshel Craig Common Carrier Application, 69 M.C.C. 42 (1956) (shelled corn, whether shelled at farm or in elevator); Penn-Dixie Lines Extension—Western New York, 69 M.C.C. 444 (1957) (*Home Transfer & Storage, supra*, followed after affirmance by Supreme Court); Herrett Trucking Co., Extension—Feeds, 69 M.C.C. 487 (1957) (mixed feed oats and feed screenings exempt, but "pelletized ground refuse screenings, distillers' residues, fish and copra meals nonexempt). In Penn-Dixie Lines, Inc., Extension—Rice, 12 F.C.C. 34,097 (1957), *reversing the prior report in*

applied with respect to commodities whose status has not yet been judicially determined is possible and, therefore, some uncertainty may still exist.[76]

IV.

At this point we must examine the arguments and the evidence presented to the Congress by proponents and opponents of legislation which would reverse the present law.

Complete repeal of the exemption is favored by prominent spokesmen for the railroads,[77] but seems to have no other support.[78] On the

66 M.C.C. 30 (1955), Division 1 held exempt "cleaned rice" which had undergone a heating, drying, hulling and milling process. The holding was "without prejudice to reconsideration . . . in the event that subsequent judicial or legislative action requires a return to our original holding." Continuing denials of exempt status for fruit juices on the ground that they are manufactured products would seem to be consistent with court decisions. See Watkins Motor Lines, Inc., Interpretation of Certificate, 11 F.C.C. 33,692 (1956), *affirming prior report by Division 1,* 64 M.C.C. 455, 459 (1955); J. M. Blythe Common Carrier Application, 66 M.C.C. 560 (1956); Colonial and Pacific Frigidways, Inc. Extension—Five States, 69 M.C.C. 725; 12 F.C.C. 33,873 (1957). See also, J. D. Lewis Common Carrier Application, 69 M.C.C. 603 (1957) (lumber not exempt). Commission rulings handed down prior to April 23, 1956, the date of the Supreme Court's decision in the *East Texas Motor Freight* case, must, of course, be treated with caution. See, West Coast Fast Freight, Inc., Extension—Intermediate and Off-Route Points, 11 F.C.C. 33,542 (1956) (split peas in bags held non-exempt). This is contra to Frozen Food Express v. United States. See text to note 66 *supra.* As to the relationship between exempt transportation and the proviso of 49 U.S.C. § 306(a) (1952), see Peters Common Carrier Application, 12 F.C.C. 34,156 (1957).

76. In W. W. Hughes, Extension—Frozen Foods, 12 F.C.C. 33,935 (1957) applicant had a 10 year old certificate authorizing transportation of fresh and frozen fish and shell fish, fresh frog legs and fresh fruits and vegetables. After ICC v. Love, 77 F. Supp. 63 (E.D. La. 1948) *aff'd per curiam,* 172 F.2d 224 (5th Cir. 1949), he thought he was entirely exempt, and failed to comply with the terms of his certificate which was revoked in 1949. Since then, applicant continued to transport these and newly developed frozen food items, acting on advice of counsel. His instant application was filed at urging of the Bureau of Motor Vehicles. At the time of the Commission's order Frozen Food Express v. United States, 148 F. Supp. 399 (S.D. Tex. 1956), was still pending in the Supreme Court. Hence, the Commission held nonexempt, pending further court action: Frozen strawberries and other purees, frozen french fried potatoes, frozen candied sweet potatoes, frozen eggs and egg yolks, frozen meats, frozen deviled crabs, deviled clams, fried scallops, ready-to-fry and fried oysters, fried fish fillets, fish sticks, codfish cakes, seafood dinners, deviled lobsters and salmon croquettes. With respect to these the application was denied. Some of these commodities may still be non-exempt; with respect to others it may be doubtful to what extent they are sufficiently different from the fish products held exempt in the fourth Monark Egg Corp. Contract Carrier Application, report, 52 M.C.C. 576 (1951).

77. Helmetag, *supra* note 10; Statement of W. L. Grubbs, General Counsel, Louisville & Nashville Railroad Co., for the Association of American Railroads and the Railroad Industry in general, *Transportation Hearings 1950, supra* note 10, at 241. Mr. Grubbs suggested that repeal would not harm the farmers who remain protected by the exemptions in section 203(b)(4a) and (5). See text to note 5, *supra.* However, most farmers do not own or control any vehicles. See statement of H. M. Nicholson, U. S. Department of Agriculture, *Transportation Hearings 1952, supra* note 10, at 442: "That the farmer is not in the transportation business may be fully realized when it is considered, for example, that 147,000 farms in Wisconsin sell milk, but only 56,000 such farms have their own trucks, and that 148,000 farms in Kentucky produce tobacco, but only 50,000 farms have trucks of their own." See also, *id.* at 395.

other hand, bills which would re-establish the narrow scope of the exemption as originally contemplated by the Commission have been repeatedly introduced[79] but failed of enactment up to this time. As previously noted, these bills reflect the wishes of the regulated carriers, particularly the truckers, who keep pressing for "legislative relief to correct the widening of the agricultural exemption by court decisions and to prevent any further spread of exempt carriage."[80]

One basis for this demand was the practice of trip-leasing. Since the movement of agricultural products is generally one-way, from the place of production or processing to market, the trucks may be empty on the return trip, with possibly lethal consequences for the business of carriers specializing in transportation of exempt goods. In order to meet this problem, exempt haulers entered into "trip leasing" agreements permitting "utilization by motor common and contract carriers (under leases, contracts, or other arrangements) of vehicles not owned by them—a practice generally limited to a one-way or round trip movement of property in a vehicle leased with the driver. . . ."[81]

Leasing was not confined to exempt carriers, but was also used in transactions in which both lessor and lessee were regulated truckers. The Commission found this objectionable; particularly, it appeared that safety requirements were not observed by lessors, that lessee-carriers failed to inspect the equipment offered, and that the informal relationships between the parties—often without benefit of a written contract—permitted evasions of geographical restrictions in the certificates of the lessees.[82] Regulated truckers particularly assailed trip-leasing by the exempt carriers on the additional ground that it encouraged cut-rate competition which tended to break down the rate structure,[83] and the International Brotherhood of Teamsters, Chauf-

78. See Fulda, *The Agricultural Exemption in the Motor Carrier Act Should Not Be Repealed*, 43 VA. L. REV. 677 (1957).

79. See the discussion of these proposals in the opinion of Judge Graven in ICC v. Allen E. Kroblin, Inc., 113 F. Supp. 599, 611-13, 615, 620-21, 629-30. (N.D. Iowa 1953). As to the bills now pending in the 85th Congress, see note 11, *supra*. No hearings were held during 1957. Testimony has been presented to the Senate Subcommittee on the problems of surface transportation. See New York Times, Feb. 21, 1958, p. 33, col. 1.

80. Statement of Policy, adopted by Executive Committee of American Trucking Associations, Inc., January 25, 1957.

81. H. R. REP. No. 2425, 84th Cong., 2d Sess. 1-2 (1956). See ICC v. Allen E. Kroblin, Inc., 113 F. Supp. 599, 602-03 (N.D. Iowa 1953).

82. Lease and Interchange of Vehicles by Motor Carriers, 52 M.C.C. 675 (1951); 64 M.C.C. 361 (1955).

83. *Transportation Hearings 1952, supra* note 10, at 377-78; *Transportation Hearings 1950, supra* note 10, at 859. See also, Statement by Howard G. Mathews, president of Mathews Trucking Corp. *Id.* at 758:

"As a result [of the *Love* decision] our balance of operations has been adversely affected to a point where we are unable to give service to our eastbound shippers because of the heavy losses in deadheading equipment back to the Middlewest and Southern states. The problem we are up against, particularly in New England, is this: The 'gypsy' operator calls upon a shipper of fish and will take the load at any price he can get. It amounts to

feurs and Warehousemen joined in this attack.[84] This led to the adoption of rules by the Commission which required at least thirty days' duration of every lease by an authorized carrier of a vehicle for operation by the owner for the carrier and forbade computation of compensation on the basis of a percentage of revenues earned by the lessee with the leased equipment. The validity of these rules was sustained by the Supreme Court in a five to two decision in *American Trucking Associations, Inc. v. United States*,[85] in spite of the fact that they would make trip-leasing by agricultural haulers practically impossible.[86]

Subsequent pressure on the Commission by farm groups forced it to suspend application of the thirty-days minimum lease requirement for agricultural carriers. But this was not enough for the farmers who demanded a statutory guaranty.[87] Accordingly, an amendment to section 204 of the Interstate Commerce Act, approved on August 3, 1956, gave to the Commission authority to regulate the use of vehicles owned by others, but explicitly prohibited regulations as to the duration of any such lease or the amount of compensation to be paid therefor where the leased vehicle "is one which has completed a movement covered by section 203 (b) (6) . . . and such motor vehicle is next to be used by the motor 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."[88] Significantly, the House Report recommended enactment of this provision because of its

> great importance to agriculture and the public, since it would permit the continuation of a flexible and efficient motor transportation service for the marketing of agricultural products which has been threatened with extinction by the Interstate Commerce Commission. This legislation

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no more than expense money on his return trip." Another witness put it this way: "[T]he sort of wildcatter who hauls without any regulation . . . usually starts looking around for some sort of back-haul, and the rate-cutting angle is still worse then because since he figures he is returning empty anyhow that it does not cost him anything to haul, so whatever he gets is that much profit, and where he can offer such a tremendous rate he can nearly always find someone who is willing to give him freight to haul . . . ." *Id.* at 781.

84. *Transportation Hearings 1950, supra* note 10, at 1218. The witness for the union referred to exempt carriers as "gypsy" or "wildcatter" who "bangs around the country in his piece of equipment which he has usually purchased on time and on which he is usually behind on the payments." He asserted that these people flagrantly violate all safety regulations, drive unduly long hours and thus cause "murder on the highways." *Id.* at 1220.

85. 344 U.S. 298 (1953).

86. *Id.* at 317-18. And see Mr. Justice Black's dissent, *id.* at 330-32.

87. H. R. REP. No. 2425, 84th Cong., 2d Sess. 4-5 (1956).

88. 70 STAT. 983 (1956), 49 U.S.C. § 304(f) (Supp. IV, 1957). In Christian v. United States, 152 F. Supp. 561, 567 (D. Md. 1957), the court, rejecting the contention that section 304(f) was unconstitutional, said: "The peculiar problems of agriculture have been frequently recognized in exemptions from regulatory statutes, and such exemptions have been held not to invalidate those statutes."

would also implement the "agricultural exemptions" contained in Section 203(b) of the Interstate Commerce Act.[89]

This emphatic congressional endorsement of the exemption was delivered at a time when its broad judicial interpretations had already reached their peak.[90]

Nevertheless, the regulated carriers insist that it is unfair to permit "the so-called exempt or gypsy carrier"[91] to take business away from them. They state that their costs of operations are infinitely higher;[92] therefore, it is easy for the exempt carriers to offer lower rates to shippers.[93] The result is said to be either severe losses or even bank-

89. H. R. REP. No. 2425, *supra* note 87, at 2.

90. The report quoted in the text is dated June 25, 1956. Although it does not mention the Supreme Court's decision in East Texas Motor Freight v. Frozen Food, 351 U.S. 49 (1956), handed down two months earlier, it would seem to be improbable that the Committee was ignorant of that decision.

91. Statement of O. H. Hendrickson, Los Angeles-Seattle Motor Express, *Transportation Hearings 1950, supra* note 10, at 766: "These . . . operators entered the field without proper financing and with little or no experience and, as a result, the financial mortality rate has been very high and they have . . . injured the trucking industry, as a whole, due to their (1) nonpayment of purveyors for service and supplies rendered them, and (2) nonpayment of taxes to state regulatory bodies, and (3) non-settlement of public liability, property damage and cargo claims rendered against them." This witness admitted, that these carriers are subject to licensing and taxing by the states, but contended that enforcement of state laws against them "is an impossibility." *Id.* at 767. These accusations were vigorously denied by witnesses for farm and fisheries groups. *Id.* at 1263-64; *Transportation Hearings 1952, supra* note 10, at 397-400.

92. Statement of D. G. MacDonald, General Counsel, Refrigerated Carriers Association, in *Transportation Hearings 1952, supra* note 10, at 503:

"Principal among the expenses borne by the regulated carrier (even when transporting an exempt load) and not incurred by the average itinerant owner-operator are the following: (1) cost of preventative maintenance; (2) cost of supervising transportation and maintaining safety program, including examining and training drivers and safety patrol work; (3) pay for union helper loading and unloading; (4) full union pay scale for drivers; (5) extra pay for waiting time; (6) employee benefits of group insurance, etc.; (7) cost of branch terminals for checking equipment, serving shippers on tracers, claims, etc.; (8) cost of tariff publication, and distribution; (9) cost of maintaining claim agent, processing claims and payment of uninsured claims; (10) cargo insurance; (11) public liability and property damage insurance in adequate limits; (12) workmen's compensation insurance; (13) general and administrative expense, including accounting department, communication expense and law expense; (14) State fuel taxes based on reporting mileages; (15) Federal and State unemployment charges; (16) social security payments by employers or employees; (17) office rents. In addition, such owner-operators customarily do not collect, report and pay the 3 per cent Federal transportation tax, which, when not collected from the shipper, becomes the carrier's obligation.

"These services and facilities, which the regulated carrier provides, all cost money and they all are provided in conformity with the requirements of law, the best interest of labor, the needs of the shippers, and protection for the public."

93. The General Counsel of the National Fisheries Institute stated: "The rate per 100 pounds of frozen fish from any point in the Northwest to Chicago . . . via exempt truck is $1.94 as compared to $2.85 with regulated service . . . our exempt rate to St. Louis is $2.04 . . . as compared to the regulated rate of $2.70." *Transportation Hearings 1950, supra* note 10, at 1264. Mr. MacDonald testified in the same Hearings about shippers' pressure for lower rates due to

ruptcy,[94] or depression of rates on exempt commodities accompanied by higher rates for other articles.[95]

These arguments were ineffective. Indeed, in the 1956 legislation Congress, by clear implication, gave its blessing to the lower rates of the exempt carriers. If trip-leasing had been made more difficult for them, their rates would have been forced upward and their competitive advantages *vis-a-vis* the regulated carriers would have disappeared.[96] In that event, farmers would have been deprived of the benefit of the exemption which, to quote a former head of the Antitrust Division,

> means more and more farmers can bargain directly with enterprising small independent truckers over prices, and other terms of service. Thus the services they want can be tailored, on a flexible case by case basis, to farmers' special needs. For these reasons the Department of Justice's actions attacking the Commission's constriction of the exemption is of real importance to every agricultural sector of our economy.[97]

The need of the farmer shipper for such "personalized and individualized service"[98] and the inability or unwillingness of many regulated carriers to supply such service, have been repeatedly stressed by representatives of farm organizations[99] and the Department of Agricul-

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the availability of exempt transportation. *Id.* at 809. In the 1952 Hearings he said:

"[A]fter the Love decision the exempt truckers entered the field, cut the rates, and there was twice as much service as the shippers could use. Some of the regulated carriers tried to ignore the rate-cutting, maintained their rates and lost more than half of their business. One large New England carrier, which transported 52,000,000 pounds of fisheries products from New England in the preceding year, lost 62 per cent of its volume in 6 months. Since then the regulated carriers have tried to meet the rates and their operations have become unprofitable." *Transportation Hearings 1952, supra* note 10, at 502.

94. *Transportation Hearings 1950, supra* note 10, at 769, 789, 805; *Transportation Hearings 1952, supra* note 10, at 376, 377, 502. Mr. MacDonald stated the eleven member carriers of the Refrigerated Carriers Association "have suffered material economic hardship" since the Love case: "one has become bankrupt, two others had large operating losses during 1951 and none has escaped major financial reverses." *Id.* at 496.

95. Testimony of Edgar S. Idol, General Counsel, American Trucking Associations, *Transportation Hearings 1952, supra* note 10, at 377:

"[T]oday, however, more and more regulated carriers . . . have competed for business on a day-to-day basis against the exempt carrier. On the Pacific Coast, there have been fluctuations within 2-week periods of over 100 per cent in trucking rates, with obvious results on operating ratios and profits. The depressed rates on exempt commodities are bound to be reflected somewhere else in the rate pattern."

96. The Commission had intended to bring this about. See American Trucking Ass'n v. United States, 344 U.S. 298, 332 (1953).

97. Statement of Judge Barnes, then Assistant Attorney-General, Anti-trust Division, *Small Business Hearings, supra* note 29, at 141, 154.

98. Statement of M. Triggs, American Farm Bureau Federation, *Small Business Hearings, supra* note 29, at 114.

99. *Small Business Hearings, supra* note 29, at 102-26, 251-54; *Transportation Hearings 1952, supra* note 10, at 393-406, 408-20, 449-60.

ture;[100] they have pointed out that the perishability of the products requires fast and immediately available transportation in all directions,[101] that railroads usually do not or cannot pick up shipments at the farm, that many regulated truckers do not have loading facilities in farm areas[102] and have no interest in providing the necessary "transportation pool on which farmers can call to meet seasonal requirements."[103] Moreover, the regulated truckers are confined to the areas specified in their certificates or permits and, therefore, could not take on or distribute loads at "so many divergent points . . . like a spider web."[104] In short, the type of service needed "cannot wait for action from Washington to grant permits or certificates for operating authority."[105] It should be added that assertions of severe losses on the part of regulated carriers have been questioned because of the general growth of the trucking industry.[106]

All this appears to be persuasive with respect to the need for the exemption to secure the legitimate interests of farmers and fishermen. But it does not directly answer the argument that *only* farmers and fishermen should benefit from the exemption because extension of those benefits to commercial processing interests is unfair and unjustified. Indeed, in its 70th Annual Report the Commission recommended return to the channels-of-commerce principle,[107] and this recommendation would be carried out by enactment of bills introduced in the 1st Session of the 85th Congress. These would provide for exemption

100. *Transportation Hearings 1952, supra* note 10, at 439-42; *Small Business Hearings, supra* note 29, at 52-58.

101. *Transportation Hearings 1952, supra* note 10, at 386, 398, 405, 419. "Farmer's need for transportation is sporadic; but when he needs transportation he needs it badly and on short notice." *Id.* at 443; *Small Business Hearings, supra* note 29, at 104.

102. *Transportation Hearings 1952, supra* note 10, at 397-98, 400, 405. Service by exempt trucks was said to be three times as fast as by rail. *Id.* at 419. "The regulated carrier . . . is interested only in shippers having regular and frequent shipments." *Id.* at 442. Railroads were said to have abandoned thousands of miles of branch lines in rural areas. *Id.* at 447-48, 457-58, 515. See also *Small Business Hearings, supra* note 29, at 103-04, 113-14.

103. *Small Business Hearings, supra* note 29, at 114.

104. *Transportation Hearings 1952, supra* note 10, at 409. As to the significance of geographic and other restrictions as a factor harmful to agriculture see *id.* at 390, 394, 398, 409, 441-42. "By following the harvests from one area to another as the demand for service develops, the exempt trucker fills an economic need which the certificated regular route or radial hauler . . . is not equipped to perform." *Id.* at 443. Regulated trucks are less useful "because of the limited field in which they are permitted to operate." *Id.* at 447, 459, 468. See also *Transportation Hearings 1950, supra* note 10, at 759.

105. *Small Business Hearings, supra* note 29, at 104.

106. *Id.* at 115; *Transportation Hearings 1950, supra* note 10, at 915; See ICC, 70th ANN. REP. 17-21, 44, 187 (1956). The allegations as to the plight of regulated carriers generally, see note 94 *supra*, are not documented.

107. ICC, 70th ANN. REP. 162 (1956). The Commission believes that application of the "substantial identity test" to frozen fruits and vegetables would result in "a serious impairment of the position of the regulated carriers upon whom small shippers, including farmers, are dependent." As shown in the text, farmers feel that they are dependent on exempt carriers.

of vehicles used in carrying ordinary livestock, live poultry, fish or agricultural (including horticultural) commodities (not including manufactured products thereof or frozen foods) "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" is defined as "the wharf or landing place at which the fisherman debarks his catch" and the place where the commodity is "grown, raised, or produced" or "gathered for shipment."[108]

This would be acceptable to the regulated truckers who concede that "regulation of the movement of agricultural tonnage from points of production to primary markets or concentration points is impracticable."[109] Presumably, the exclusion of frozen foods from even this narrow type of exemption would be particularly welcome to them in view of the "fast-growing frozen food industry,"[110] although it may be illogical to exclude frozen foods when the freezing takes place at the point of production. In any event, it is obvious that enactment of this proposal would very substantially curtail the transportation business now open to exempt carriers.[111]

Previous hearings before Congressional Committees contain much testimony pertinent to the problem of codifying the channels of commerce doctrine. For instance, the representative of the National Council of Farmer Cooperatives acknowledged that the regulated motor carriers, "realizing their inability to serve the entire needs of the farmer, only seek a monopoly on the transportation of his products after they have reached the first point in the system of distribution."[112] But this was not satisfactory because the interests of agriculture in-

108. S. 1689 and H.R. 5823, 85th Cong., 1st Sess. (1957). A similar proposal was offered as a substitute bill in 1952. *Transportation Hearings 1952, supra* note 10, at 371-72; it was supported by several members of the Commission. *Id.* at 425, 428. Attention was called to the North Carolina Motor Carriers of Property Act, which exempts from State regulation transportation of "farm, dairy or orchard products from farm, dairy or orchard to warehouse, creamery, or other original storage or market." N.C. GEN. STAT., § 62-121.8 (1) (d) (Supp. 1955). The exemption is unrestricted as to "livestock or fish, including shellfish and shrimp," and "raw products of the forest." *Id.*, § 62-121.8 (1) (f) and (g). Thus, the North Carolina Act applies the "channels of commerce" principle only in part; however, the North Carolina Utilities Commission is authorized to grant exemptions from regulation if it finds that particular operations do not "substantially . . . affect or impair uniform regulation." *Id.*, § 62-121.9 (4) (1952). For discussion of the North Carolina law see *Transportation Hearings 1952, supra* note 10, at 491-94. Compare Ohio Rev. Code Ann. § 4921.02 (A) (5) (Baldwin 1953) (transportation from farm to market exempt).

109. *Transportation Hearings 1952, supra* note 10, at 379; *Transportation Hearings 1950, supra* note 10, at 790, 809.

110. ICC, 70th ANN. REP. 67 (1956).

111. In most of the court decisions discussed in this article the exemption was applied to transportation of articles after they had been processed at points other than the original points of production; the exempt carriers usually are small businessmen owning but a few trucks. See note 91 *supra.*

112. *Small Business Hearings, supra* note 29, at 109.

volve "not only production on the farm but also processing, distribution and transportation in all its complex ramifications." Hence, the farmer

> is not solely concerned with the initial sale. What happens in the market two or three times removed from the farmer's initial point of sale is of major importance as an influence on his ultimate net income. The maintenance of the flexible and economical service afforded by the agricultural hauler is something that can and should be preserved to help the farmer help himself. . . .[113]

Presumably, the public would also be helped by cheaper transportation. The same witness stressed the necessity of "getting food products in every city, village, and hamlet in America every day, in the quantities and in the qualities which the housewife wants,"[114] a job which requires *"immunity from route limitations for trucks hauling agricultural products."*[115] [Emphasis supplied.]

Similarly, a spokesman for the American Farm Bureau Federation observed that exemption from regulation with respect to rates, routes and territory was essential "for the efficient marketing of farm products." He noted that "many markets can be reached via common carrier only by circuitous routing and interchange of equipment, all involving delay and extra operating and administrative costs;"[116] particularly products such as dressed poultry which are processed in numerous small establishments located at many points need transportation to "fan out in all directions."[117]

A member of the traffic committee of the National Fisheries Institute shared these views. Opposing any limitation on the exemption to the fisherman himself as sole beneficiary, he explained that actual marketing "is performed largely by packers or wholesale distributors located at convenient central points."[118] They, rather than the fishermen "determine the market outlets and provide the necessary transporta-

113. *Ibid.* To the same effect is the statement of Dr. L. C. Halvorson, The National Grange: "Farmers benefit from the . . . exemption even in those cases when the commodity is no longer in their possession. Farmers know the terminal market price, and the price at country points quite directly reflects the 'freight charges.'" *Transportation Hearings 1952, supra* note 10, at 453.

114. *Small Business Hearings, supra* note 29, at 110.

115. *Id.* at 104. See also note 104, *supra.*

116. *Id.* at 113. See also statement of Dr. Halvorson, *Transportation Hearings 1952, supra* note 10, at 459: "Frequently shipments are diverted a number of times in transit; with each diversion, the necessity for having available the flexible service of a carrier which is not held to a limited-destination territory becomes greater." This point was also stressed by the Growers and Shippers League of Florida. *Id.* at 464.

117. *Small Business Hearings, supra* note 29, at 119. Without the exemption, there might be no common carrier to serve such small establishments, or only one or two, against whose monopoly position the small processors may not be able to protect themselves. *Id.* at 120.

118. *Transportation Hearings 1952, supra* note 10, at 446.

tion facilities to the various markets."[119] He, too, suggested "that ICC-regulated trucks are bound by rules and regulations to a point whereby they cannot perform the transportation of fish and shellfish as a non-exempt commodity with the flexibility and freedom that is necessary for prompt movement of these commodities"[120] after their transfer to wholesalers.

Perhaps there are answers to these plausible arguments against the channels of commerce doctrine.[121] If so, the advocates of legislation which would revive that doctrine have, up to the present, failed to furnish those answers.[122] Moreover, it must be remembered that under present law, as explained in the first section of this article, the regulated carriers may enjoy the benefits of the exemption with respect to any of their vehicles used at any one time for exclusive transportation of exempt commodities. Thus, present law permits them to compete with carriers specializing in agricultural hauls free from the restrictions of economic regulation, and, at least some of them have, from time to time, availed themselves of that opportunity.[123] Hence, complaints about the ostensible unfairness of maintaining side-by-side a regulated and a free segment of the motor carrier industry appear blunted. In any event, a very heavy burden of proof should be required from those who wish to substitute regulation for the stimulant of free competition. The foregoing analysis demonstrates, I submit, that that burden has not been met.

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119. *Id.* at 447.

120. *Ibid.* See also statement of H. M. Nicholson, Traffic and Management Division, Production and Marketing Administration, U. S. Dep't of Agric. opposing a substitute bill similar to the 1957 bills as disrupting marketing channels. *Id.* at 442. Mr. Nicholson pointed out that the farmer should have a choice between near and distant markets.

121. Possibly it could be demonstrated that flexible transportation in all directions, unhampered by certificate restrictions, is not needed with respect to some commodities now exempt.

122. The Commission has "never . . . made a comprehensive study to determine the injury . . . which results from the exemption." Morgan, *The Function of Research in a Regulatory Agency*, 24 I.C.C. PRACTIONERS' J. 816, 833 (1957). The channels of commerce principle may be workable in intrastate transportation because of smaller distances. See note 108, *supra*.

123. See cases cited note 23 *supra*. In the *1950 Transportation Hearings*, *supra* note 10, at 805, the General Counsel of the Refrigerated Carriers Association referred to a regulated motor carrier in New England which had "set up a separate, though commonly controlled, corporation to conduct exempt operations . . . all over the country." The witness described this as a "bastard company." One may wonder why he deplored rather than welcomed this astute and perfectly legal arrangement. The creation of a separate corporate subsidiary is, of course, not required.