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MOTOR CARRIER REGULATION—AN ADVENTURE IN FEDERALISM

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I.

By virtue of the nature of our federal system every attempt to regulate extensive economic activity involves constantly recurring problems as to the proper allocation of governmental power between the state and national governments, and thus problems as to the proper balancing of local or state and national interests. The development of motor carrier regulation in the United States has been controlled by the general concepts of federalism and exemplifies the nature of the basic problems inherent in those concepts. The purpose of this article is to examine the regulation of motor carriers from the standpoint of the allocation of governmental powers and to offer some tentative conclusions as to the effectiveness of the present system of regulation in this regard.

II.

The third clause of section 8 of article I of the Constitution of the United States provides that the Congress shall have the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." By virtue of the doctrine of federal supremacy, this clause not only serves as a grant of federal power; it also, of necessity, reduces the power of the states in the exercise of powers otherwise belonging to them. Even in the absence of congressional action, state laws may be held invalid as in violation of this clause.¹ The purpose of the clause was to promote a system of free trade among the states and to prevent the states from disrupting or obstructing that system.

The commerce clause does not, however, prohibit all action by the states affecting interstate commerce. It has always been recognized that the states have the power to govern their own local commerce,² even though interstate commerce may be affected thereby. The problem has been to achieve a practical adjustment between the maintenance of free commerce, except insofar as Congress may regulate it, and the maintenance of efficient state and local governments.³

In attempting to achieve this practical adjustment the Supreme

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1. *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1 (1824).

2. *License Cases*, 46 U. S. (5 How.) 504, 574 (1847).

3. *The Minnesota Rate Cases*, 230 U. S. 352, 400 (1913).

Court has from time to time devised and used various expressions of the guiding standards.⁴ The landmark case, however, is still *Cooley v. Board of Wardens*,⁵ where the court said,

Now, the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity which alone can meet the local necessities of navigation.

Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan or regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. . . . [T]he nature of this subject is such, that until Congress should find it necessary to assert its power, it should be left to the legislation of the states; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulation, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits.⁶

The problem is generally considered as one of balancing state interests against national interests. State laws will be upheld in the absence of a requirement of national uniformity or of congressional occupation of the field, unless the state law obstructs or discriminates against interstate commerce.⁷

Where Congress has acted, however, state laws which conflict either with the express provisions or with the congressional policies will be held invalid.⁸ In this regard, however, congressional intent to displace local laws is not, in general, to be inferred unless clearly indicated by consideration of the statutory purposes.⁹ As Justice Murphy said, however, in *California v. Zook*,¹⁰

But whether Congress has or has not expressed itself, the fundamental inquiry, broadly stated, is the same: Does the state action conflict with national policy? The *Cooley* rule and its later application, *Southern Pacific Co. v. Arizona*, *supra*, the question of congressional "occupation of the field," of the search for conflict in the very terms of state and federal statutes are but three separate particularizations of this initial principle.¹¹

4. RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE (1937).

5. 53 U. S. (12 How.) 298 (1851).

6. *Id.* at 319.

7. *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U. S. 179 (1950); *Southern Pacific Ry. v. Arizona*, 325 U. S. 761 (1945).

8. Note, "Occupation of the Field" in *Commerce Clause Cases, 1936-1946: Ten Years of Federalism*, 60 HARV. L. REV. 262 (1946).

9. *Maurer v. Hamilton*, 309 U. S. 598, 614 (1940).

10. 336 U. S. 725 (1949).

11. *Id.* at 729.

Congress may unquestionably redefine the areas of state and national control, and if it chooses, confer upon the states powers which they otherwise would not have.¹²

These basic principles have controlled the distribution of governmental powers in the development of the regulation of motor carriers.

Thus, even in the absence of congressional action, the states have no power to prohibit the operation of interstate carriers on the ground that existing services are adequate and that there is no public convenience and necessity for additional service.¹³ But in the absence of congressional action, the states may regulate the sizes and weights of interstate vehicles,¹⁴ and otherwise adopt uniform laws and regulations to promote safety of the highways,¹⁵ to conserve the highways,¹⁶ to exact reasonable fees as compensation for the use of such highways,¹⁷ to control the routes used by interstate carriers,¹⁸ to require adequate insurance for the protection of the general public,¹⁹ and to regulate the hours of employment for operators of motor vehicles.²⁰

With the adoption of the Federal Motor Carrier Act in 1935,²¹ Congress redefined the areas of national and state control. The reach of both state and national powers in the field of motor carrier regulation thus now turns primarily upon that act and its subsequent amendments.

III.

Motor transportation did not enter the field of intercity operations until approximately 1920. By the early 1930's, however, it had become a major feature in the nation's transportation system. This initial growth was accomplished with no federal and little effective state control.²² Between 1929 and 1933, however, most of the states enacted comprehensive acts regulating motor carriers. By 1935, 47 states regulated common carriers of passengers, 42 regulated common carriers of property, 31 regulated contract carriers of property and 8 regulated private carriers of property.²³

12. *Prudential Ins. Co. v. Benjamin*, 328 U. S. 408 (1946).

13. *Buck v. Kuykendall*, 267 U. S. 307 (1925).

14. *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177 (1938).

15. *Hendrick v. Maryland*, 235 U. S. 610 (1915).

16. *Sproles v. Binford*, 286 U. S. 374 (1932).

17. *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245 (1928).

18. *Bradley v. Public Utilities Comm.*, 289 U. S. 92 (1933).

19. *Sprout v. South Bend*, 277 U. S. 163, 172 (1928). The states cannot, however, require insurance or bonds for the protection of interstate passengers or cargo. *Continental Casualty Co. v. Shankel*, 88 F. 2d 819 (10th Cir. 1937).

20. *H. P. Welch & Co. v. New Hampshire*, 306 U. S. 79 (1939).

21. Part II of Interstate Commerce Act, 49 Stat. 543 (1935), as amended 49 U. S. C. §§ 301-327 (1952).

22. FEDERAL CO-ORDINATOR OF TRANSPORTATION, REGULATION OF TRANSPORTATION AGENCIES REP. 13 (1934).

23. S. REP. No. 482, 74th Cong., 1st Sess. (1935).

While there was considerable variation in the state laws, there was a marked tendency towards certain standard features. Both carriers of passengers and property were regulated. Carriers were divided into common, contract and private, with the latter generally being exempt. Exemptions were generally made as to carriers operating within corporate limits, as to school busses, government vehicles, occasional operations, and as to carriers of certain products, primarily agricultural. Certificates of convenience and necessity were required for common carriers and permits for contract carriers. The granting of operating authority was based upon consideration of the carrier's fitness and ability, on the effect on the highways, on the effect on existing carriers, and on consideration of the public interest or need. The abandonment and transfer of operating authority was controlled by the regulatory agency, which also had the power to revoke or suspend such authority. The regulatory agency had general powers of supervision and inspection, as well as the power to pass on complaints and to make rules and regulations. Rates and charges, facilities and services, financial responsibility and accounts and records were regulated. Generally, the regulation of motor carriers was placed in the same agency which regulated railroads and public utilities.²⁴

In 1934, Joseph B. Eastman, the Federal Co-ordinator of Transportation, submitted to Congress a comprehensive report on the regulation of transportation agencies.²⁵ He found that while the regulation of passenger carriers by the states was generally regarded as relatively successful, the regulation of motor freight carriers left much to be desired.²⁶ Such regulation was said to be characterized by considerable instability, by a lack of uniformity, and by marked differences in the results achieved.²⁷ The chief problems in both fields, however, stemmed from the difficulty in policing unauthorized operations and the inability to regulate effectively interstate carriers.²⁸

As early as 1910 bills had been introduced in Congress for the regulation of motor transportation.²⁹ After the Supreme Court's decision in *Buck v. Kuykendall*³⁰ in 1925, which in effect precluded the effective regulation of interstate carriers by the states, many bills were introduced in Congress in an effort to provide federal regulation.³¹ A number of exhaustive studies were made and extensive hearings were held.

Finally, as a result of the conditions prevailing in the industry, and

24. FEDERAL CO-ORDINATOR OF TRANSPORTATION, REGULATION OF TRANSPORTATION AGENCIES REP., TABLE VII (1934).

25. *Ibid.*

26. *Id.* at 191.

27. *Ibid.*

28. *Id.* at 192.

29. H.R. REP. 5176, 61st CONG., 1st SESS. (1909).

30. 267 U. S. 307 (1925).

31. S. REP. No. 282, 74th CONG., 1st SESS. (1935).

upon the urging of many interested persons and groups, including the National Association of Railroad and Utilities Commissioners,³² Congress passed the Federal Motor Carrier Act of 1935, providing for the regulation of motor carriers by the Interstate Commerce Commission. This act was based upon a proposal made by the Federal Co-Ordinator of Transportation, which in turn was based to a large extent upon a proposal made by the National Association of Railroad and Utilities Commissioners.³³ The act declared the policy of Congress to be

... to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.³⁴

In general, the system of regulation prevailing in the states was followed. Both carriers of passengers and property were regulated. Carriers were divided into common, contract and private. Common and contract carriers were required to obtain operating authority from the Commission, and the Commission was given the usual regulatory powers.

From the standpoint of the allocation of state and national power, the most significant feature of the act is the care taken to preserve the powers of the states. Congress not only did not assume to occupy the entire field of motor carrier regulation, but on the contrary, by express language, left certain areas within the control of the states.³⁵ First, the act provided that it applied

... to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.³⁶

32. Report, *op. cit. supra* note 22 at 25.

33. *United States v. American Trucking Ass'n.*, 310 U. S. 534 (1940); Report, *op. cit. supra* note 22 at 25.

34. 49 Stat. 543 (1935), 49 U. S. C. § 301 (1951).

35. *Tucker v. Casualty Reciprocal Exchange*, 40 F. Supp. 383, 385 (N.D. Ga. 1941).

36. 54 Stat. 920 (1940), 49 U.S.C. § 302(a) (1952).

Interstate commerce was defined as “. . . commerce between any place in a State and any place in another State or between places in the same State through another State. . . .”³⁷ It was expressly provided that nothing in the act should be construed,

. . . to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.³⁸

Except for the provisions relating to qualifications and maximum hours of service of employees and safety of operations or standards of equipment, the transportation of property or passengers within a municipality or contiguous municipalities or within commercial zones was generally exempt from the act.³⁹

By virtue of a proviso to the general requirement that common carriers obtain certificates of convenience and necessity from the Interstate Commerce Commission, carriers operating wholly within a single state under certificates granted by state authorities were not required to obtain certificates from the Interstate Commerce Commission, though such carriers were otherwise subject to the act.⁴⁰

Provision was made for the reference to joint boards, composed of representatives of the state agencies, of the initial decision of a number of matters.⁴¹

In 1940 the act was amended to empower the Commission to issue certificates of exemption to carriers lawfully engaged in operations in a single state when such operations were not of such a character, nature or quantity as substantially to affect or impair uniform regulation by the Commission in interstate or foreign commerce.⁴²

The provision of the act in this regard thus gave effect to the ideas that any federal regulation should build on the experience of the states, should give the states the needed support in carrying out their own regulations,⁴³ and should provide for the full utilization of state cooperation in order to reduce the force of federal agents which would otherwise be necessary.⁴⁴ The presence of these provisions has not, however, eliminated the recurrence of problems and litigation as to the respective powers of the state and national governments in this field.

37. 49 Stat. 544 (1935), 49 U.S.C. § 303(a) (10) (1952).

38. 54 Stat. 920 (1940), 49 U.S.C. § 302(b) (1952).

39. 54 Stat. 920 (1940), 49 U.S.C. § 303(b) (8) (1952).

40. 49 Stat. 551 (1935), 47 U.S.C. § 306(a) (1) (1952).

41. 49 Stat. 548 (1935), 49 U.S.C. § 305 (1952).

42. 54 Stat. 921 (1940), 49 U.S.C. § 304(a) (4a) (1952).

43. Report, *op. cit. supra*, note 22 at 24.

44. Report, *op. cit. supra*, note 22 at 30.

IV.

The fundamental basis for dividing state and national responsibility and authority in the regulation of economic activities is the distinction between interstate and intrastate commerce. Despite the presence of the congressional definition and of a host of precedents, the distinction continues to present problems in the regulation of motor carriers since in many instances the line to be drawn is a fine one.

A good statement of the guiding general principles is contained in the opinion of the Interstate Commerce Commission in *Determination of Jurisdiction of Transportation of Petroleum and Petroleum Products by Motor Carrier in a Single State; Ex Parte No. MC-48*.⁴⁵ In that proceeding, the Commission was confronted with the question as to whether petroleum products which moved by pipeline and barge to terminals were moved in interstate or intrastate commerce from the terminal to points in the same state. In holding that such movements were in intrastate commerce, the Commission first stated that the determinative feature was the essential character of the commerce, and not its external form. In determining that essential character, the Commission said that the most important feature was the fixed and persisting transportation intent of the shipper at the time of the shipment. It found that the major manifestations of the intent, or the absence thereof, on the facts before it appeared in the following factors: (1) at the time of the shipment there was no specific order being filled for a specific quantity of a given product to be moved through to a specific destination beyond the terminal storage; (2) the terminal storage was a distribution point or local marketing facility from which specific amounts of the product were sold or allocated; and (3) transportation in furtherance of such distribution within a single state was specifically arranged only after sale or allocation from storage. The continuity of the transportation was thus held to have been broken. The initial shipments were held to have come to rest and the interstate jurisdiction to have ended at the terminals. The Commission also pointed out that other factors might be considered such as commingling in transit or in storage, processing before reshipment, the form of the bill of lading used, and the rate of turnover at the terminals.

The question frequently arises in connection with the application of rates. The states fix or approve intrastate motor carrier rates and the Interstate Commerce Commission regulates interstate motor carrier rates. Often attempts are made to evade a through interstate rate by use of a combination of intrastate and interstate routes to and from a reshipping point which would result in lower aggregate charges. In

45. 71 M.C.C. 17 (1957).

such cases, the controlling factors are, as indicated above, "the persistent and continuing shipper intent" and the nature of any reshipment or change in the mode of transportation.⁴⁶

The question also arises in connection with the transportation, wholly within a single state by motor carrier, of property which had a prior movement by private or exempt carrier from without the state. Generally such transportation, even though it is in interstate commerce in the broad sense is held not to be such interstate commerce as Congress has regulated under the Motor Carrier Act.⁴⁷

Despite the provision of the act including within the definition of interstate commerce, commerce between places in the same state through another state, the nature of such commerce is still on occasion questioned. In general, such commerce is held to be interstate.⁴⁸ However, if the movement across state lines is not in good faith, but is a mere subterfuge made in an effort to escape state regulation of intrastate commerce, it may be deemed intrastate in character and thus subject to the state's control.⁴⁹

The distinction between interstate and intrastate commerce is inherent in the commerce clause and in the American concept of federalism, and is thus of necessity the basis for allocating national and state responsibility in the regulation of motor carriers. Congress might extend the reach of national power in this field to include all matters affecting interstate commerce and thus in effect pre-empt the entire field. Congress has not, however, chosen to do so. The limits of state and national power in this field must therefore be determined in accordance first, with the general principles governing the distinction between interstate and intrastate commerce, and second, by reference to the particular statutory provisions involved.

V.

In most aspects of motor carrier regulation the line between federal and state authority corresponds to the line between interstate and intrastate commerce. Such is generally the situation with respect to the power to authorize or prohibit operations. The federal act⁵⁰ ex-

46. *Compare* *Crude Talc, California Mines*, 44 M.C.C. 714 (Div. 2 1945) with *William E. Rush, Common Carrier Application*, 17 M.C.C. 661 (Div. 5 1939).

47. *W. J. Holiday & Co.*, 53 M.C.C. 22 (Div. 2 1951); *Iron & Steel Articles, Central Territory*, 53 M.C.C. 769 (Div. 2 1951). *But cf.* *Joe Dora, Motor Carrier Operations within Arizona*, 48 M.C.C. 171 (Div. 5 1948).

48. *Central Greyhound Lines Inc. v. Meaney*, 334 U.S. 653 (1948); *Dohrn Transfer Co. v. Hoegh*, 116 F. Supp. 177 (D. Iowa 1953); *Service Storage & Transfer Co., Declaratory Order*, 71 M.C.C. 304 (Div. 1 1957).

49. *Eichholz v. Public Service Comm.*, 306 U.S. 268 (1939); *Clark v. Public Service Comm.*, 209 Md. 121, 120 A.2d 363 (1956). *Compare* *Atlantic Freight Lines v. Public Utility Comm.*, 163 Pa. Super. 215, 60 A.2d 589 (1948), *cert. denied* 336 U.S. 925, with *Atlantic Freight Lines*, 51 M.C.C. 175 (Div. 5 1949).

50. In 54 Stat. 919 (1940), Congress changed the name of the applicable

cludes intrastate operations from its scope.⁵¹ The states on the other hand have no power to authorize or prohibit interstate operations on grounds of public convenience and necessity.⁵² The Federal Motor Carrier Act, however, does not supersede state statutes requiring the registration of motor vehicles.⁵³ Nor does it preclude the states from requiring interstate carriers to register their interstate authority and to obtain permits from the states for operations therein.⁵⁴ Where the carrier has authority from the Interstate Commerce Commission, however, the granting of such permits cannot involve the exercise of any discretionary power and in effect can be nothing more than a registration of the interstate authority.⁵⁵

Clearly, the states have no power to prohibit a carrier authorized by the Interstate Commerce Commission from operating through or in the state in interstate commerce, even though the carrier has been repeatedly found guilty of violating state laws.⁵⁶ Where, however, the carrier has no authority from the Interstate Commerce Commission, the state may impose punitive sanctions against the carrier, including the revocation of any interstate permit theretofore issued to the carrier.⁵⁷

statute from "Motor Carrier Act, 1935" to "Part II of the Interstate Commerce Act."

51. 54 Stat. 920 (1940), 49 U.S.C. § 302(b) (1952).

52. *Dohrn Transfer Co. v. Hoegh*, 116 F. Supp. 177 (D. Iowa 1953); Cf. *Atcherson, Topeka & Sante Fe Ry. v. Chicago*, 240 F.2d 930 (7th Cir. 1957).

53. *People v. Learned*, 305 N.Y. 495, 114 N.E.2d 9 (1953).

54. *Fry Roofing Co. v. Wood*, 344 U.S. 157 (1952); *Apger v. N.Y. Cent. R.R.*, 310 Mass. 495, 38 N.E. 2d 652 (1941). In *Fry*, Arkansas was held to have the power: (1) to determine if a carrier in interstate commerce was a private or a contract carrier, (2) upon a finding that it was a contract carrier to require it to obtain a permit from the state, and (3) to convict and punish for failure to obtain such a permit. In *Apger* an interstate carrier which had failed to obtain a state permit was held to be illegally operating on the highways and was accordingly denied recovery in an action arising out of a railroad crossing accident.

55. *Railroad Commission v. Querner*, 150 Tex. 490, 242 S.W.2d 166 (1951); and see *Fry Roofing Co. v. Wood*, 344 U.S. 157, 161 (1952); *Castle v. Hayes Freight Lines*, 348 U.S. 61, 63 (1954). In *Castle* the court, speaking through Justice Black in a unanimous decision said, at page 63, "No power at all was left in states to determine what carriers could or could not operate in interstate commerce."

56. *Castle v. Hayes Freight Lines*, *supra* note 55. In this case, a carrier certified by the Interstate Commerce Commission had been found guilty of repeated violations of the state weight law, and the state commission had accordingly suspended the carrier's rights to use the state's highways. The court held that such a suspension was beyond the state's powers. In *Railroad Commission v. Querner*, *supra* note 55, a carrier had been issued a certificate by the Interstate Commerce Commission and a permit by the state commission to engage in interstate commerce. The carrier had been found guilty of repeatedly violating the state statute by handling intrastate commerce without authority, and the state commission accordingly sought to prohibit the carrier's use of the state highways on this ground. The court here held that the state had no power to cancel the carrier's state permit on such grounds or to prohibit the carrier's operations in interstate commerce.

57. *Fry Roofing Co. v. Wood*, *supra* note 54; *Eichholz v. Public Service Comm.* 306 U.S. 268 (1939). In *Eichholz*, the carrier had, prior to the passage

While the states may not revoke or suspend the authority of carriers certified by the Interstate Commerce Commission to operate in interstate commerce, they may unquestionably impose uniform criminal sanctions against such carriers for violating state safety or weight laws.⁵⁸ The Interstate Commerce Commission, however, can revoke or suspend an interstate carrier's operating authority for violation of state laws.⁵⁹ It has also been held that a state has no power to construe a certificate granted by the Interstate Commerce Commission or to punish a carrier for operating in violation thereof.⁶⁰ Nor can a state require carriers to be chartered by the state as a prerequisite to operations therein, even in intrastate commerce, in the face of an order of the Interstate Commerce Commission approving the acquisition of the intrastate certificate by an interstate carrier.⁶¹

While the states generally cannot authorize or prohibit interstate operations, they can prescribe the particular routes or highways to be used by interstate carriers on considerations of the safety of the highways and of the public traveling thereon,⁶² so long as such regulations are reasonable.⁶³

The Motor Carrier Act expressly confers upon the Interstate Commerce Commission the power to establish reasonable requirements with respect to qualifications and maximum hours of service of em-

of the Federal Motor Carrier Act, obtained a permit from the Missouri Commission authorizing operations in interstate commerce. Upon the passage of the federal act, the carrier had applied for a "grandfather" certificate from the Interstate Commerce Commission, but the application had not been acted upon at the time of the decision in that case. The carrier had no intrastate authority in Missouri. The Missouri commission had found the carrier to be guilty of repeated operations in intrastate commerce and had revoked its interstate permit on this ground. The carrier had brought suit to restrain the state commission from enforcing its order of revocation. In denying relief to the carrier, the court held that the state commission could validly revoke the carrier's permit under the facts before it. The distinction between cases involving state action against carriers having authority from the Interstate Commerce Commission and those having no such authority is clearly drawn in *Railroad Comm. v. Querner*, *supra*, note 55.

58. See, *Castle v. Hayes Freight Lines*, 348 U.S. 61, 64 (1954).

59. *Public Utilities Comm.*, 72 M.C.C. 659 (1957); and see, *Castle v. Hayes Freight Lines*, 348 U.S. 61, 65 (1954). *But cf.* *Hyman Rubin & David Greenfield*, 33 M.C.C. 383 (Div. 5 1942).

60. *Andrew G. Nelson, Inc. v. Jessup*, 134 F. Supp. 221 (D. Ind. 1955). Here the carrier held a certificate from the Interstate Commerce Commission and a comparable permit from the state. State officers had arrested the carrier's drivers for carrying commodities not authorized by the state permit. The carrier sued for an injunction against the state officials which was granted. The court said that the state officials had no power to interpret the interstate authority; and that the exclusive jurisdiction of any such complaints was in the Interstate Commerce Commission.

61. *New England Greyhound Lines, Inc. v. Powers*, 108 F. Supp. 953 (D.R.I. 1952); *accord*, *Seaboard R.R. v. Daniel*, 333 U.S. 118, (1948); *Kansas City Southern Ry. v. Daniel*, 180 F.2d 910 (5th Cir. 1950).

62. See, *Gulf Coast Motor Freight Lines, Inc. v. United States*, 35 F. Supp. 136, 137 (D. Tex. 1940).

63. *Associated Transport, Inc. v. Syracuse*, 196 Misc. 1031, 93 N.Y.S.2d 423 (Sup. Ct. 1949).

ployees and safety of operations and equipment.⁶⁴ In so doing, however, Congress clearly did not pre-empt the entire field of highway safety, and interstate carriers must obey state traffic and safety laws.⁶⁵ Where, however, the Commission has prescribed a specific safety regulation, that regulation will supersede any conflicting state law.⁶⁶ The states may prescribe additional qualifications not in conflict with regulations of the Interstate Commerce Commission, for drivers of motor vehicles for carriers, at least where there is a definite local interest involved, as in the case of taxicabs operating in a border area.⁶⁷ State safety laws in order to be valid must not, however, impose any unreasonable burden on interstate commerce.⁶⁸

The Motor Carrier Act makes no provision for the regulation of sizes and weights of motor vehicles by the Interstate Commerce Commission. By directing the Commission to investigate and report on the need for federal regulation in this area, Congress indicated an intent that the power to regulate this feature of motor carrier activity should remain in the states.⁶⁹

The same general principles are applicable in the other areas of motor carrier regulation. For example, with respect to insurance required of carriers in interstate commerce, Congress has empowered the Interstate Commerce Commission to prescribe regulations governing surety bonds, insurance policies and qualifications as self-insurers for the protection of the public in both personal injury and property damage claims,⁷⁰ and the federal regulations have been held to have superseded any conflicting state regulations.⁷¹

Some cases have, however, made a distinction between insurance requirements with respect to passengers and property moving in inter-

64. 49 Stat. 546 (1935), 49 U.S.C. § 304(a) (1-3) (1951). Notice that this provision applies to private carriers of property.

65. *H. P. Welch & Co. v. New Hampshire*, 306 U.S. 79 (1939). The Court here held that the mere grant of power to the Interstate Commerce Commission would not supersede state laws, rather they were superseded only when that grant was implemented by appropriate regulations.

66. *E. I. Du Pont de Nemours & Co. v. Board of Standards*, 5 Misc. 2d 100, 158 N.Y.S.2d 456 (Sup. Ct. 1956); cf. *Watson Bros. Transfer Co. v. Omaha*, 132 F. Supp. 6 (D. Neb. 1955).

67. *Buck v. California*, 343 U.S. 99 (1952).

68. Compare *Navajo Freight Lines v. Bibb*, 159 F. Supp. 385 (S.D. Ill. 1958), where an Illinois statute requiring certain specific types of mud flaps was held to impose an unconstitutional burden on interstate commerce, with *Tom's Express, Inc. v. Division of State Highway Patrol*, 105 F. Supp. 916 (S.D. Ohio 1952), where a general requirement for mud flaps on certain vehicles was upheld.

69. *Maurer v. Hamilton*, 309 U.S. 598 (1940); *Lattavo Bros. v. Hudock*, 119 F. Supp. 587 (W.D. Pa. 1953), *aff'd* 347 U.S. 910 (1954).

70. 49 Stat. 557 (1935), 49 U.S.C. § 315 (1951).

71. *Pennsylvania Greyhound Lines, Inc. v. Public Util. Comm'rs*, 107 F. Supp. 521 (D.N.J. 1952); *University Overland Express, Inc. v. Alson*, 122 Conn. 275, 189 Atl. 458 (1936); *University Overland Express, Inc. v. Griffin*, 89 N.H. 295, 200 Atl. 390 (1938); cf. *New York, New Haven & Hartford R.R. v. Nothnagle*, 346 U.S. 128 (1953).

state commerce and insurance requirements for the protection of the general public, and while recognizing that the federal regulations are controlling with respect to the former, have held that state laws and regulations can be relied upon with respect to the latter, particularly where the carrier is authorized to operate both in interstate and in intrastate commerce.⁷²

Congress has also required all interstate motor carriers to file with the board of each state in which they operate a designation of an agent for the service of process by or under the authority of any court having jurisdiction of the subject matter, ". . . in any proceeding at law or in equity brought against such carriers."⁷³ Despite the breadth of language used the courts have held that the section is limited to proceedings arising under or in connection with the activities of the carriers in interstate transportation;⁷⁴ and that the procedure thereby made available is not exclusive of state procedures, but rather is cumulative.⁷⁵

The issuance of securities by common and contract carriers in interstate commerce is controlled by the Interstate Commerce Act.⁷⁶ Exception is made, however, as to motor carriers where the par value of the securities issued or to be issued does not exceed a certain amount and also as to certain notes. It has been held that the states have the power to regulate the issuance of securities which come within the exceptions made by Congress.⁷⁷

In the field of rate regulation, the Interstate Commerce Commission has exclusive and paramount jurisdiction to regulate the rates of all interstate motor carriers,⁷⁸ while the states retain jurisdiction to regulate rates of intrastate motor carriers. In this connection it should be noted that while the Interstate Commerce Commission has certain

72. *Acme Fast Freight Lines, Inc. v. Blackmon*, 131 F.2d 62 (5th Cir. 1942); *Tucker v. Casualty Reciprocal Exchange*, 40 F. Supp. 383 (N.D. Ga. 1941); *Boyles v. Farmers Mutual Hail Ins. Co.*, 78 F. Supp. 706 (D. Kan. 1948); *Be-Mac Transport Co. v. Lairmore*, 191 Okla. 249, 129 P.2d 192 (1942). In these cases state laws allowing actions to be brought directly against the company insuring the carrier were applied, rather than the federal law which in effect requires a prior judgment against the motor carrier. In *Acme*, the carrier had both interstate and intrastate authority, but the court held that the state law could be relied upon whether or not the particular vehicle was engaged in intrastate commerce at the time of the events giving rise to the action.

73. 49 Stat. 563 (1935), 49 U.S.C. § 321 (c) (1952).

74. *Madden v. Truckaway Corp.*, 46 F. Supp. 702 (D. Minn. 1942).

75. *Esperti v. Cardinale Trucking Corp.*, 263 App. Div. 46, 31 N.Y.S. 253 (1941); *Huber v. Wilson*, 23 Tenn. App. 109, 126 S.W.2d 893 (1938). *Contra*, *Kuris v. Pepper Poultry Co.*, 174 Misc. 801, 21 N.Y.S.2d 791 (1940). As to the effect of § 321(c) on venue, see *Davies v. Mahanes*, 183 F.2d 671 (4th Cir. 1950); and *Annot.*, 8 A.L.R.2d 815, 819 (1949).

76. 49 Stat. 557 (1935), 49 U.S.C. § 314 (1951).

77. *People v. County Transportation Co., Inc.*, 303 N.Y. 391, 103 N.E.2d 421 (1952), *appeal dismissed*, 343 U.S. 961 (1952).

78. 49 Stat. 558 (1935), 49 U.S.C. § 314 (1952).

powers with respect to intrastate rail rates which are found to be discriminatory, the Commission has no jurisdiction whatsoever over intrastate motor carrier rates, even if they are deemed to discriminate against interstate commerce.⁷⁹

Section 5 of the Interstate Commerce Act gives the Interstate Commerce Commission plenary and exclusive jurisdiction over the acquisition of one interstate motor carrier by another, over the unification and merger of motor carriers, and in general, over any sort of transaction whereby two or more carriers are brought under common control.⁸⁰ Certain transactions are expressly exempted from this provision,⁸¹ and others have been held not to come within its terms.⁸² Any transfer of an interstate certificate not within section 5, however, is subject to the jurisdiction of the Interstate Commerce Commission under section 212 (b).⁸³ Thus where a control transaction includes the transfer of both interstate and intrastate operating rights the jurisdiction of the Interstate Commerce Commission under section 5, extends to the entire transaction and to all properties covered thereby including the intrastate operating rights; and the states have no authority with respect to such transactions.⁸⁴ No part of such a transaction, such as the separate sale of intrastate rights, can be lawfully consummated without the approval of the Interstate Commerce Commission.⁸⁵ The jurisdiction of the Commission under section 212 (b) is not, however, exclusive and plenary to the extent it is under section 5. Thus where the basis of the Commission's jurisdiction of a transaction is section 212 (b), and the transaction involves both interstate and intrastate rights, while the Interstate Commerce Commission has exclusive jurisdiction of the interstate rights, it has no jurisdiction over the intrastate.⁸⁶ Where only intrastate rights are involved, the Interstate Commerce Commission has no jurisdiction over transfers or acquisitions.⁸⁷

The general line between federal and state authority over motor carrier regulation still corresponds to the line between interstate and intrastate commerce. Where, however, as in section 5 of the Interstate Commerce Act, Congress has specified that its regulation is to be exclusive, no state regulation can be validly applied even to intra-

79. *Increased Rates Pacific Northwest* 1953, 63 M.C.C. 113 (Div. 2 1954).

80. 54 Stat. 905 (1940), 49 U.S.C. § 5(2) (1952); 54 Stat. 908 (1940), 49 U.S.C. § 5(11) (1952).

81. 54 Stat. 908 (1940), 49 U.S.C. § 5(10) (1952).

82. *E.g.*, *County of Marin v. United States*, 356 U.S. 412 (1958).

83. 54 Stat. 924 (1940), 49 U.S.C. § 312(b) (1952).

84. *New England Greyhound Lines, Inc. v. Powers*, 108 F. Supp. 953 (D.R.I. 1952).

85. *Bruce Motor Freight Lines, Inc.*, 39 M.C.C. 489 (Div. 4 1944).

86. *County of Marin v. United States*, 356 U.S. 412 (1958).

87. *Industrial Transport, Inc.*, 37 M.C.C. 202 (Div. 4 1941).

state commerce. Where Congress specifically leaves an area of regulation to the states, as in the case of sizes and weights of motor vehicles, state regulations can be validly applied even to interstate carriers. But when Congress makes no specific provision, as is true in most areas of motor carrier regulation, it is necessary to examine closely the federal and state laws to determine the purpose of each and to determine what each requires of the regulated activities; and if the existence and operation of the state laws hinders or is inconsistent with the federal program, it is reasonable to conclude that Congress intended to supersede state control.⁸⁸

VI.

As has been indicated, one of the basic purposes of the Federal Motor Carrier Act was the encouragement of co-operation between federal and state agencies in the regulation of motor carriers. This purpose is evidenced in many provisions of the act. Of particular significance are two provisions with respect to motor carriers operating in interstate commerce wholly within a single state. Section 204(a) (4) (a) empowers the Commission to grant certificates of exemption to motor carriers lawfully engaged in operations in a single state, where their activities do not substantially affect or impair uniform regulation by the Commission of interstate carriers.⁸⁹ The second proviso of section 206(a) (1) excluded from the general requirement that common carriers obtain a certificate of convenience and necessity from the Interstate Commerce Commission, carriers operating wholly in a single state under certificates granted by state authorities, though such carriers were left otherwise subject to the act.⁹⁰

The purpose of section 204(a) (4) (a) was to enable small local carriers operating wholly within a single state, principally in intrastate commerce, to be relieved of the necessity of obtaining certificates or permits or otherwise complying with the Motor Carrier Act where their interstate operations are of little consequence and have little effect upon carriers regulated under the act.⁹¹ The language of the section and the undoubted purpose of the act would justify an interpretation recognizing a broad power in the Commission to grant such exemptions. On the basis of the general principle of statutory construction that exceptions to general remedial statutes should be

88. *E.g.*, *Pennsylvania Greyhound Lines, Inc. v. Public Utility Comm'rs*, 107 F. Supp. 521 (D.N.J. 1952). It has been held, however, that coincidence either in purpose or in detail, does not automatically mean invalidity in an area of substantial state interest. *California v. Zook*, 336 U.S. 725 (1949).

89. 54 Stat. 921 (1940), 49 U.S.C. § 304(a) (4a) (1951).

90. 49 Stat. 551 (1935), 49 U.S.C. § 306(a) (1) (1951).

91. *Eldred Winter*, 32 M.C.C. 679 (Div. 5 1942).

strictly construed, the Commission has, however, placed a strict and narrow construction on this section.⁹²

The Commission has held that the exemption must apply to the entire operation of the motor carrier, and thus that there can be no partial exemption.⁹³ The exemption will be denied if the carrier has any operations in more than one state, even if such operations are exempt from regulation under some other section of the act.⁹⁴

In order to come within the exemption, the carrier must be lawfully engaged in operations in the state, and thus where state laws require an intrastate certificate, the carrier must have such a certificate before the exemption will be granted.⁹⁵ It is not necessary for a carrier to hold operating authority from the Interstate Commerce Commission in order to be entitled to the exemption.⁹⁶ The fact that an applicant for the exemption would also be exempt under the applicable state statute will also be considered as a basis for denying the exemption.⁹⁷

In determining whether the applicant's operations have a substantial affect on interstate transportation, the Commission has generally taken a narrow view of what is substantial.⁹⁸ It has considered in this regard the volume of traffic in interstate commerce,⁹⁹ the affect on regulated carriers,¹⁰⁰ the presence of joint tariffs with regulated carriers,¹⁰¹ and the frequency and regularity of interstate transportation by the applicant.¹⁰²

The second proviso to section 206(a) (1) was based upon similar considerations of policy and has in general been similarly construed. The purpose of the second proviso was to exempt from the necessity of obtaining an interstate certificate of convenience and necessity as to commerce between points in a single state any carrier holding an intrastate certificate to operate between such points.¹⁰³ The reason for the exemption was that since such carriers have already shown the existence of public convenience and necessity for their services

92. Yosemite Park & Curry Co., 47 M.C.C. 81 (Div. 5 1947).

93. Rock Port, Langdon & Northern Ry. Co., 33 M.C.C. 315 (Div. 5 1942).

94. Yosemite Park & Curry Co., 47 M.C.C. 81 (Div. 5 1947).

95. Lloyd A. Miller, 41 M.C.C. 783 (Div. 5 1943).

96. L. M. Slocum, 30 M.C.C. 169 (1941).

97. Eldred Winter, 32 M.C.C. 679 (Div. 5 1942).

98. *E.g.*, International Ry. Co., 44 M.C.C. 789 (1945). Note here the dissenting opinion of Commissioner Allredge where he suggested that the Commission should exempt the carrier from all provisions of Part II except those pertaining to interstate fares.

99. Stockton Motor Express, 49 M.C.C. 841 (Div. 5 1949).

100. International Ry. Co., 44 M.C.C. 789 (1945); Stockton Motor Express, 49 M.C.C. 841 (Div. 5 1949).

101. International Ry. Co., 44 M.C.C. 789 (1945); W. H. Shackelford, 34 M.C.C. 15 (Div. 5 1942).

102. International Ry. Co., 44 M.C.C. 789 (1945).

103. Gulf Coast Motor Freight Lines v. United States, 35 F. Supp. 136 (S.D. Tex. 1940).

between such points, they ought not to be required to make another such showing merely because they transport goods in both interstate and intrastate commerce.¹⁰⁴

The early decisions of the Interstate Commerce Commission were in conflict as to the nature and effect of the proviso. In some cases the proviso was conceived as a statutory grant of an interstate operating right, while in other cases it was conceived as a mere exception and not a grant at all.¹⁰⁵

In the leading case on the construction of the proviso, *Baggett Trans. Co.*,¹⁰⁶ the full Commission held, with four members dissenting, that the proviso was a mere exception, not a grant of right, and did not authorize a grant of right by the Commission. The majority of the Commission reasoned that section 206 (a) states a general rule of conduct requiring certificates of convenience and necessity from the Commission; that the proviso is an exception to that rule; that exceptions to remedial statutes must be strictly construed; and that therefore the proviso must be strictly construed. In a vigorous dissent, Chairman Eastman argued that the majority were ignoring the intent of Congress; that in recognition of the interest of the states Congress had provided that the Commission should in effect rely upon the finding of the state commissions in cases coming within the proviso; that the state certificate was intended to be accepted as a substitute for a federal certificate; and that carriers holding such certificates and coming within the proviso should be recognized as motor carriers for all purposes of the act.

In the *Baggett* case, the Commission also spelled out the prerequisites of the proviso: (1) the carrier must be lawfully engaged in operations in a single state;¹⁰⁷ (2) there must be a board in such state having power to grant certificates of convenience and necessity

104. *Ibid.*

105. *Compare* Illinois Greyhound Lines, 15 M.C.C. 86 (Div. 5 1938) with Indiana R.R., 21 M.C.C. 73 (Div. 4 1939).

106. *Baggett Transp. Co.*, 36 M.C.C. 659 (1941).

107. The Commission has strictly construed this requirement. The Commission has held the exemption not applicable on this ground: Where an interstate carrier was merely in a position to exercise control over the intrastate carrier through common employees or family relationship, Refrigerated Transp., Inc., 54 M.C.C. 625 (1952); Wilson Transp. Co., 51 M.C.C. 233 (Div. 5 1950); where the carrier conducted operations in another state under the exemption provided under § 203 (b) (8) dealing with operations in commercial zones, Jet Cartage Co., 51 M.C.C. 551 (Div. 5 1950); and where the carrier's operations in other states were under a permit as a contract carrier, *Baggett Transp. Co.*, 29 M.C.C. 103 (Div. 5 1941). The Commission has, however, held the exemption to be applicable even though the carrier operated in other states under the agricultural exemption provided by § 203 (b) (6) on the ground that the agricultural exemption enjoys a favored status, *Peters, Application*, 73 M.C.C. 331 (1957); and even though the carrier was under common control with an interstate railroad, *Monon Transp. Corp.*, 44 M.C.C. 325 (1945).

authorizing intrastate operations; and (3) the carriers must have obtained such a certificate from such board.¹⁰⁸

The extent of the carrier's operating authority in interstate commerce under the proviso coincides with the operating authority it holds in intrastate commerce,¹⁰⁹ and to this extent the state Commission does define the limits of the carrier's authority in interstate commerce. However, by the terms of the act, proviso carriers are otherwise subject to the jurisdiction of the Interstate Commerce Commission under part II of the Interstate Commerce Act.¹¹⁰

By reason of the Commission's conception of the nature of the proviso carrier's rights to operate in interstate commerce as a mere exempt status, such carriers, though otherwise subject to the act, are at a distinct disadvantage. For example: (1) they cannot freely extend their operations into other states; (2) they cannot transfer their right to operate in interstate commerce, rather they can transfer only their intrastate authority and the transferee thereof must requalify for the exemption if the interstate service of the transferor is to be continued; (3) they cannot obtain alternate routes for operating convenience crossing state lines; and (4) since their right to operate in interstate commerce is not secure and is not readily marketable, the value of their operating authority is not as great as would be true of an interstate certificate.¹¹¹

As a result of these disadvantages, proviso carriers frequently sought certificates from the Interstate Commerce Commission duplicating their state certificates. For a time the Commission was rather liberal in granting such applications, but in recent years the Commission has adopted a policy of refusing to grant such applications for proviso carriers except in special circumstances.¹¹² The basis of the Commission's policy has been that the granting of such certificates made possible an undesirable duplication of operating rights.¹¹³ In fact, the problem of controlling the duplication of operating rights in connection with proviso carriers has led the Commission to urge the repeal of the proviso.¹¹⁴

Conclusion

In few, if any, federal regulatory systems has Congress shown as

108. *Gulf Coast Motor Freight Lines v. United States*, 35 F. Supp. 136 (S.D. Tex. 1940); *W. M. Daniels*, 32 M.C.C. 585 (Div. 5 1942).

109. *South Florida Freightways, Inc.*, 67 M.C.C. 35 (1956).

110. *E.g.*, *Renner, Investigation*, 70 M.C.C. 195 (Div. 4 1956); *Leo Miller*, 58 M.C.C. 350 (Div. 4 1952).

111. *Baggett Transp. Co.*, 36 M.C.C. 659 (Div. 5 1941); *H. A. Day*, 53 M.C.C. 672 (Div. 5 1952).

112. *H. A. Day*, 53 M.C.C. 672 (Div. 5 1952).

113. *Ibid.*

114. *Hearings before Sub-Committee of Committee on Interstate and Foreign Commerce on S. 1720*, 85th Cong. 1st Sess. 29 (1957).

much consideration for local and state interests as in the regulation of motor carriers. The overall effectiveness of the present system of regulation involves matters far beyond the limits of this article. Assuming, however, that the premise of cooperative federalism is sound, and that matters which are primarily of local concern should be regulated by the states rather than by the national government, certain conclusions appear warranted in this regard.

Any system of federal regulation will encourage mergers and large scale operations and discourage small operations to the detriment of local interest unless the latter are to some extent exempted from the burdens necessary to the effective regulation of the former.¹¹⁵ On the whole, the present system of regulation of motor carriers is satisfactory in its accommodation of state and federal interests. A more flexible approach is needed, however, in the application of the present exemption as contained in section 204(a) (4) (a) and in the second proviso of section 206 (a) (1). In the application of the former section, the basic consideration should not be so much the proportion of interstate business done by the carrier as the nature of that business, that is, whether essentially local,¹¹⁶ and whether regulation of that business could not be effectively accomplished by the states. In this connection, provision should be made for partial exemptions under this section, for example, some carriers might be exempted except as to the application of the rate provisions of the act. A more liberal approach should also be taken with respect to the granting of exemptions. With a provision for partial exemption it should be more feasible to exempt carriers according to class than is apparently true at present.

In the application of both sections, the Commission should be less concerned about the possible abuse through common control with regulated carriers and more concerned about granting exemptions when federal regulation will serve no substantial purpose.

The proviso should not be repealed, rather it should be clarified so as to provide for the grant of a certificate from the Interstate Commerce Commission to carriers coming within its terms. The Commission could effectively control any undue proliferation of operating rights under its present powers. However, it might be well to write into the act a prohibition against the split of interstate and intrastate operating rights. Proviso carriers should not be treated as unwanted

115. FEDERAL CO-ORDINATOR OF TRANSPORTATION, REGULATION OF TRANSPORTATION AGENCIES REP. 28 (1934); and see annual reports of Interstate Commerce Commission with respect to the trend towards larger and fewer units.

116. For example, the distribution of freight from a city distribution point to small towns and villages is essentially local in character, even though most of that freight may have come to the city from outside the state. There is no good reason to subject the little carrier operating between a city and three or four small towns to the full burdens of regulation by the federal government.

stepchildren, but should be fully equal to those whose rights stem from the findings of the Interstate Commerce Commission.

In any event, the regulation of motor carriers should continue to accommodate both the national and local interests in accordance with the concepts of cooperative federalism.

