# Single-State Truck Transportation of Petroleum and Petroleum Products

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Recent decisions of the Interstate Commerce Commission hold the promise of reducing the cost of distributing petroleum and petroleum products from marine or pipeline terminals.

The savings to be achieved result from the differentials in the rates of interstate and intrastate truckers. The former to a great extent have been deregulated, and their rates are at fairly low levels. The latter, however, continue to be regulated in many states, and their rates remain relatively high.

For decades single-state truck transportation from marine or pipeline terminals had been held to be in intrastate commerce, notwithstanding that the petroleum or petroleum products came from out-of-state or overseas sources. The ICC, based on the facts of the cases, concluded that the interstate portion of the movements ended when the petroleum and petroleum products entered the terminal storage tanks from which they subsequently were sold and transported by truck.

Recent decisions of the ICC, however, have focused on the intent that the commodities be transported beyond the transfer points at the time

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of their introduction into the stream of commerce, making the subsequent single-state truck transportation a continuation of the commodities' movement in interstate commerce.

No less importantly, the ICC has backed away from its earlier holdings that for the commodities to have entered the stream of interstate commerce the initial transportation must have been by a carrier subject to its jurisdiction. Its decisions open the way for finding single-state truck transportation beyond terminals to be in interstate commerce, notwithstanding that the petroleum or petroleum products were transported from their out-of-state or overseas sources by private vessel or pipeline.

The question whether a particular truck movement is in interstate or foreign commerce and, hence, subject to its jurisdiction[1] is one with which the ICC has had to grapple from the inception of motor carrier regulation more than half a century ago.[2] The single-state truck transportation of no commodity or group of commodities more clearly has called for the ICC's delineation of its jurisdiction than has the distribution of petroleum and petroleum products from marine or pipeline terminals.

For decades the ICC held that single-state truck transportation of petroleum and petroleum products from marine or pipeline terminals was in intrastate commerce, beyond its jurisdiction to regulate.[3] It did so largely on the facts of the cases before it, which almost invariably showed that there was a break in the continuity of the interstate movements when the petroleum and petroleum products were placed in the terminals' storage tanks, from which they subsequently were sold and transported by truck.

In one of the first of its motor carrier decisions, *Bausch Contract Carrier Application*,[4] the ICC denied the applicant's request for contract carrier operating authority on the ground that the services it proposed to render were in intrastate commerce and, therefore, not within the ICC's power to approve. The applicant sought to render single-state truck

1. Section 202(b) of the Motor Carrier Act of 1935, gave the ICC jurisdiction, among other things, over "the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce." 49 U.S.C. § 302(b) (1988). The term "interstate commerce" was defined, in part, as "commerce between any place in a State and any place in another State . . . whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water." 49 U.S.C. § 303(a)(10) (1988). As recodified, the Act gives the ICC jurisdiction "to the extent that passengers, property, or both, are transported by motor carrier between a place in a State and a place in another State." 49 U.S.C. § 10521(a)(1)(A) (1988).

2. *See, e.g.*, Ross Common Carrier Application, 1 M.C.C. 607, 609 (1937); Sproul Contract Carrier Application, 1 M.C.C. 465, 466 (1937); Nelson Extensions of Operations, 1 M.C.C. 285, 287 (1936).

3. Motor carriers rendering interstate operations need operating authority for their services, 49 U.S.C. § 10901 (1988), their rates must conform to certain standards, 49 U.S.C. § 10701 (1988), and their mergers and acquisitions are subject to advance approval by the ICC. 49 U.S.C. § 11341 (1988).

4. Bausch Contract Carrier Application, 2 M.C.C. 4 (1937).

transportation of refined petroleum products from a pipeline terminal at Superior, Nebraska, to which such products had been shipped from an out-of-state origin. The ICC noted, "No specific consignment or amount thereof is intended for any particular shipper to consignee when the products leave the refinery . . . . Such products are stored at Superior as property of the [oil company] and are sold at that point as required by the various dealers."[5] The ICC Held, "It must be concluded, therefore, that products so transported are no longer in interstate commerce after delivery into the storage tanks at Superior, but have come to the end of their interstate journey, and any movement therefrom must be considered as another shipment separate and distinct from and not a continuation of the movement thereto."[6]

A similar result was reached by the ICC a year later in *Moses Contract Carrier Application*.[7] The single-state truck transportation of liquid petroleum products proposed by the applicant in that proceeding was from a terminal in Syracuse, New York, to which the products had been transported from an out-of-state refinery by tank barges or tank railroad cars. Again the ICC found:

> It appears that no specific consignment or amount thereof is intended for any particular shipper or consignee when the products leave the [refinery]. . . . Such products are stored in storage tanks at Syracuse as the property of the [oil company] and are sold at that point as required by the various dealers and purchasers.[8]

The ICC concluded:

> [P]roducts so transported are no longer in interstate commerce after delivery into the storage tanks at Syracuse, but have come to the end of their interstate journey, and any movement therefrom must be considered as another shipment separate and distinct from, and not a continuation of, the movement thereto.[9]

An application for motor common carrier authority to transport petroleum and petroleum products within Illinois was dismissed for want of jurisdiction in *Eldon Miller, Inc., Extension — Illinois*.[10] The applicant proposed to render single-state truck transportation from barge and pipeline terminals, supplied from out-of-state sources. The ICC noted, "The terminal storage tanks are considered to be distribution points, from

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5. *Id.* at 5.
6. *Id.*
7. Moses Contract Carrier Application, 4 M.C.C. 425 (1938).
8. *Id.* at 426.
9. *Id.*
10. Eldon Miller, Inc., Extension — Illinois, 63 M.C.C. 313 (1955). The *Eldon Miller* decision was relied upon for the dismissal of two additional applications for authority to perform single-state truck transportation from marine or pipeline terminals. *See* James J. Williams, Inc., Extension—Washington, 66 M.C.C. 523 (1956); Wheeling Pipe Line, Inc., Extension—Arkansas, 63 M.C.C. 353 (1955).

which sales and shipments are made to the ultimate customer . . . ."[11] The agency concluded that the truck transportation was in intrastate commerce, saying:

> The shippers do not make pipeline and barge shipments on through bills of lading to any points beyond the pipeline or barge terminal; they have no knowledge of the ultimate destination of the shipments beyond the knowledge that they will probably be consumed within the State; the shipments are not segregated as to a shipper or amount upon arrival at the terminal, and all go into storage at the pipeline or barge terminal, for some appreciable time.[12]

Common to its decisions was the ICC's reliance upon the Supreme Court's opinion in *Atlantic Coast Line Railway v. Standard Oil Co.*.[13] In that case the oil company operated marine terminals in Florida, from which it distributed petroleum and petroleum products which it purchased from suppliers that brought them by vessels from refineries in Louisiana and Mexico. The issue was whether the subsequent railroad transportation of the petroleum and petroleum products from the marine terminals to the oil company's bulk and service stations in Florida was in interstate or foreign commerce. The Supreme Court concluded that it was not, saying:

> The important controlling fact in the present controversy, and what characterizes the nature of the commerce involved, is that the plaintiff's whole plan is to arrange deliveries of all of its oil purchases on the seaboard of Florida, so that they may all be there stored for convenient distribution in the state to the 123 bulk stations and to fuel oil plants in varying quantities according to the demand of the plaintiff's customers. . . . There is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers beyond the primary seaboard storages of the plaintiff company at Tampa, Port Tampa, Jacksonville, or the St. Johns river terminal [where title passes].[14]

Interestingly, the ICC reached a different conclusion, finding the single-state truck transportation to be in interstate commerce, when there was no change in the ownership of the petroleum or petroleum products at the transfer point and their placement in the storage tanks was for a brief period of time and as an incident in their continuous transportation to

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11. *Id.* at 315.

12. *Id.* at 319. The emphasis upon the through billing was to distinguish the case from *Petroleum Carrier Corp. Common Carrier Application* in which the ICC did grant single-state trucking authority from a pipeline terminal, to the extent "performed under the proportional rates and transit tariff of the pipe line." Petroleum Carrier Corp. Common Carrier Application, 48 M.C.C. 719, 722 (1948).

13. Atlantic Coast Line Ry. v. Standard Oil Co., 275 U.S. 257 (1927).

14. *Id.* at 269; *accord* Alabama Highway Express, Inc. v. U.S., 175 F. Supp. 143 (Ct. Cl. 1959); Atlantic Coast Line Ry. v. Standard Oil Co. of NJ, 12 F.2d 541 (4th Cir. 1926); Washington Dehydrated Food Co. v. Great N. Ry., 102 I.C.C. 363 (1925); *see also* Burlington Northern v. Weyerhaeuser Co., 719 F.2d 304 (9th Cir. 1983); Southern Pac. Transp. Co. v. ICC, 565 F.2d 615 (9th Cir. 1978).

an out-of-state destination. In the *Eldon Miller* proceeding the applicant was granted single-state truck transportation authority to handle crude oil from Mississippi producing fields to pipeline pumping stations within the state. The ICC said:

> [T]he storage tanks at the pipeline pumping stations] are a facility necessary as a practical matter to accomplish the transfer of the products from motor-carrier tank vehicles to the pipeline . . . In the combined motor-pipeline operations for [the oil companies], the shipments are owned by the shipper from the time they are delivered to the originating carrier and are characterized by a retention of ownership throughout their interstate journey.[15]

So, too, in *R.B. "Dick" Wilson, Inc., Extension — Petroleum*,[16] the ICC found:

> The record shows that these movements are from producing wells to out-of-State refineries, involving a combination of motor and pipeline transportation; and that it is the intention of the shipper at the time the shipments are dispatched from the well sites to the pipeline terminals by motor carrier that such shipments will continue beyond such terminals by pipeline to out-of-State destinations.[17]

The ICC concluded, "We think it clear that the character of the motor movement from the wells to the pipeline terminals is definitely established as a portion of a through interstate movement, and that the entire movement, including the motor portion, is one in interstate commerce."[18]

The status of single-state truck transportation of petroleum and petroleum products from marine and pipeline terminals was the subject of the ICC's comprehensive investigation in *Petroleum Products Transported Within a Single State*[19] in which the ICC concluded that it would look to the "bundle of circumstances" in determining "the essential character of the commerce."[20] As applied to the type of traffic therein considered, continued the ICC, the intrastate character of the single-state truck transportation may be found in the following:

> (1) At the time of shipment there is 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 is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated, and (3) transportation in the furtherance of this distribution within the single State is specifically arranged only after sale or allocation from storage.[21]

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15. Eldon Miller, Inc., Extension — Illinois, 63 M.C.C. 313, 324-25 (1955).
16. R.B. "Dick" Wilson, Inc., Extension — Petroleum, 68 M.C.C. 169 (1956).
17. *Id.* at 173.
18. *Id.*; *see also* United States v. Majure, 162 F. Supp. 594 (S.D. Miss. 1957); Railroad Comm. of Texas v. Oil Field Haulers Assn., 325 I.C.C. 697 (1965).
19. Petroleum Products Transported Within a Single State, 71 M.C.C. 17 (1957).
20. *Id.* at 29.
21. *Id.*

As is evident, the agency's standards were little more than a reiteration of the indicia of intrastate transportation to which it had looked in its earlier determinations.

Significantly, the ICC's decision in its investigation proceeding did not address the question whether the transportation that preceded the single-state truck transportation needed to be by a carrier subject to regulation by the ICC. Arguably, having found in its earlier decisions that the distribution from marine and pipeline terminals was in intrastate commerce, the ICC did not have to reach the question whether the marine or pipeline transportation to the terminals was in interstate commerce. In fact, however, the ICC had treated the transportation that preceded the single-state truck transportation as if it were in interstate commerce, even when it was performed by the shipper in proprietary transportation not subject to the ICC's regulatory jurisdiction;[22] for purposes of its decisions, the agency considered the marine or pipeline transportation to the terminals to be in interstate commerce.

In the *Bausch*[23] case the ICC had noted that the petroleum products had been transported to the pipeline terminal at Superior "by the owner thereof . . . in its private pipeline."[24] Nevertheless, as already noted, the ICC deemed such transportation to have been "in interstate commerce."[25] Similarly, in the *Moses*[26] case the ICC had noted that the petroleum products had been transported to the terminal at Syracuse "by the owner thereof . . . in [its] tank barges or tank cars," such transportation being "in interstate commerce."[27] And in the *Eldon Miller*[28] case the single-state truck transportation that was certified by the ICC as being a part of the crude oil's "interstate journey" was to the terminals of the oil company's "private pipeline."[29]

The ICC's decisions in that regard were consistent with its holdings in other cases, involving commodities other than petroleum and petroleum products, in which the agency found the single-state truck transportation to be in interstate commerce, when part of a continuous movement to or from an out-of-state locale, even though the connecting carriage was private and not for-hire.[30]

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22. The ICC does not have jurisdiction over the truck transportation by a person engaged in business other than transportation when such transportation is within the scope and in furtherance of such business. 49 U.S.C. § 10524 (1988).
23. Bausch Contract Carrier Application, 2 M.C.C. 4 (1937).
24. *Id.* at 5.
25. *Id.*
26. Moses Contract Carrier Application, 4 M.C.C. 425 (1938).
27. *Id.* at 426.
28. Eldon Miller, Inc., Extension — Illinois, 63 M.C.C. 313 (1955).
29. *Id.* at 325.
30. *Accord* Haffner and Hanson Common Carrier Application, 69 M.C.C. 581, 584 (1957);

That changed, however, with the ICC's decision in *Motor Transportation of Property Within Single State*.[31] The ICC observed:

> Generally, whether transportation within a single state, is, in fact, interstate is determined by the essential character of the commerce, the most important factor of which is the presence or absence of a fixed and persisting intent of the shipper that his goods move to a destination in another state. *Baltimore & O.R. Co. v. Settle*, 260 U.S. 166 (1922).[32]

Nevertheless, the ICC held that, for purposes of ascertaining the shipper's fixed and persisting intent, "transportation begins only when merchandise has been placed in the possession of a carrier subject to economic regulation."[33] The agency added:

> [U]nder part II [relating to motor carriers], just as under part I [relating to railroads], the transportation must be considered as beginning at the point where the shipper tenders his goods to a for-hire carrier. If delivery is then made at a point in the same State, the relevant transportation is not interstate transportation.[34]

The ICC rested its decision upon the Supreme Court's opinion in *Pennsylvania Railway Company v. Ohio Public Utilities Commission*.[35] In that case the transportation of coal across the state line was by the operator of the mine, first in its own barges and then on its proprietary railroad. Only thereafter was the coal tendered for single-state transportation by a common carrier railroad. The Supreme Court, in upholding a decision of the Ohio PUC requiring adherence to the local switching charges said:

> Transportation begins for [regulatory] purpose, if not for others, when the merchandise has been placed in the possession of a carrier.
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> The only transportation of this coal by a common carrier of merchandise either by railroad or by water was intrastate transportation in Ohio between Negley and Youngstown. The transportation between Pennsylvania and Ohio was by the owner, who was not a common carrier, but furnished implements of carriage for its own use exclusively.[36]

The case might have been decided on the principles enunciated in *Atlantic Coast Line Railway Company v. Standard Oil Company of New*

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Dora Motor Carrier Operations Within Arizona, 48 M.C.C. 171, 175 (1948); Bisceglia Contract Carrier Application, 34 M.C.C. 233, 236-37 (1942); Roethlisberger Transfer Co. Ext. — Frankenmuth, Mich., 32 M.C.C. 709, 710 (1942); *cf.* Iron and Steel Articles, Central Territory, 53 M.C.C. 769 (1951); W.J. Holliday & Co., Inc., v. Liberty Trucking Co., 53 M.C.C. 22 (1951); Service Transp. Co. Contracts and Agreements, 44 M.C.C. 419 (1945).

31. Motor Transportation of Property Within Single State, 94 M.C.C. 541 (1964), *aff'd sub nom.*, Pennsylvania Ry. v. United States, 242 F. Supp. 890 (E.D. Pa. 1965), *aff'd mem.*, 382 U.S. 372 (1966).

32. *Id.* at 549-50.

33. *Id.*

34. *Id.*

35. Pennsylvania Ry. v. Ohio Pub. Util. Comm., 298 U.S. 170 (1936).

36. *Id.* at 175.

*Jersey*,[37] for the movement of the coal was not a continuous one. Rather, at the end of the proprietary movement, the coal was dumped, washed and sorted into the sizes suitable for sale. "only then for the first time," said the Court, was it "ready for shipment to fill specific orders, which often are not received until after it has left the mines."[38] The Court concluded, however, "[w]e have found it unnecessary to consider in the disposition of the case whether the treatment of the coal at Negley would break the continuity of the movement from the mines, even if interstate transportation would otherwise exist."[39]

It was not only unregulated private carriage to a marine or pipeline terminal that would cause the subsequent single-state truck transportation to be in intrastate commerce, however; the ICC believed that for the single-state truck transportation to be in interstate commerce the preceding transportation must have been subject to its jurisdiction, even if performed by a for-hire carrier. Any doubt that remained that the ICC would expect the marine or pipeline transportation to the terminals to be by a carrier subject to its jurisdiction, was removed by *Petroleum Products — Water-Motor — Inland Navigation Company*.[40] In that proceeding the ICC found that there was a break at the transfer facilities in the continuity of the movement of petroleum products, but it also found that the single-state truck transportation from the marine terminals was in intrastate commerce because the preceding barge transportation from without the state was exempt from the ICC's jurisdiction.[41] Similarly, in *Transport, Inc., Extension — Ex-Rail Cement*[42] and *Behnken Truck Service, Ext. — Exbarge Traffic*[43] the ICC denied applications for authority to perform single-state truck transportation following unregulated barge movements from out-of-state origins in the belief that the principle of the Court's *Pennsylvania Railway Company v. Ohio Public Utilities Commission*[44] decision "is applicable when the property is transported into the State by private carriage and is equally applicable when the property is transported into the State in for-hire carriage that is excepted or exempted from economic regulation under the act."[45]

37. Atlantic Coast Line Ry. v. Standard Oil Co. of N.J., 12 F.2d 541 (4th Cir. 1926).
38. *Pennsylvania Ry.*, 298 U.S. at 172.
39. *Id.* at 177.
40. Petroleum Products — Water-Motor — Inland Navigation Co., 311 I.C.C. 219 (1960).
41. *Id.* The ICC does not have jurisdiction over the transportation by water carriers when carrying not more than three commodities in bulk in the vessel or tow. 49 U.S.C. § 10542 (1988).
42. Transport, Inc., Extension — Ex-Rail Cement, 96 M.C.C. 671 (1964).
43. Behnken Truck Service, Ext. — Exbarge Traffic, 103 M.C.C. 787 (1967).
44. Pennsylvania R. Co. v. Ohio Pub. Util. Comm., 298 U.S. 170 (1936).
45. *Behnken*, 103 M.C.C. at 794-95; *accord*, Allen — Investigation of Operations and Practices, 126 M.C.C. 336, 349 (1977); Commercial Carrier Corp. Extension —Salt, 112 M.C.C. 415 (1970); *see also* Long Beach Banana Dist. v. Atchison, T. & S.F. Ry., 407 F.2d 1173 (9th Cir.

A marked change in the regulation of motor carriers was effected by the enactment of the Motor Carrier Act of 1980.[46] As the Supreme Court observed in *Maislin Industries United States v. Primary Steel, Inc.*:[47]

> The [Act] substantially deregulated the motor carrier industry in many ways in an effort to 'promote competitive and efficient transportation services.' In addition to loosening entry controls, the [Act] also created a zone of reasonableness within which carriers can raise rates without interference from the ICC.[48]

Moreover, as the Court found, "The Commission has also relaxed the regulations relating to motor common carriers. . ."[49]

It was not surprising, therefore, that, beginning with its decision in *Armstrong, Inc. — Transportation Within Texas*,[50] the ICC has issued a series of decisions in which it has found the considered single-state truck transportation to be in interstate commerce, rather than in intrastate commerce. Its decisions pertained particularly to those states in which pervasive schemes of motor carrier regulation remained in effect and the truckers' rates, accordingly, were relatively higher on intrastate moves than on comparable interstate moves.[51]

Common to each of the ICC's decisions is its observation, as in the *Armstrong*[52] case:

> It is well settled that characterization of transportation between two points in a State as interstate or intrastate in nature depends on the "essential character" of the shipment. *Texas & N.O.R.R. v. Sabine Tram Co.*, 227 U.S. 111, 122 (1913). Crucial to a determination of the essential character of a shipment is the shipper's fixed and persisting intent at the time of shipment. *Baltimore & O.S.W.R.R. Co. v. Settle*, 260 U.S. 166 (1922). This intent is

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1969); *cf.* Iron Steel Articles, Wilmington to Points in N.C., 323 I.C.C. 740 (1965), *aff'd sub nom.*, North Carolina Util. Comm. v. United States, 253 F.Supp. 930 (E.D. N.C. 1966).

46. Pub. L. 96-296, 94 Stat. 793 (1980) (codified as amended at 42 U.S.C. § 10101 (1988 & Supp. 1991)).

47. Maislin Industries U.S. v. Primary Steel, Inc., 110 S. Ct. 2759 (1990).

48. *Id.* at 2769.

49. *Id.* at 2770.

50. Armstrong, Inc. — Transportation Within Texas, 2 I.C.C. 2d 63 (1986), *aff'd sub nom.*, Texas v. United States, 866 F.2d 1546 (5th Cir. 1989).

51. *See infra* pp. 1110-1112; *see also* Motor Carrier Interstate Transportation, 8 I.C.C. 2d 470 (1992); Association of Texas Warehousemen, et al. —Petition for Declaratory Order — Certain For-Hire Motor Carrier Transp. Within Tex., Docket No. MC-C-30194, served Mar. 27, 1992 (unreported); Willbanks Steel Corporation v. The Squaw Transit Company, Docket No. MC-C-30152, served Oct. 27, 1989 (unreported); *see, e.g.*, Swift Textiles, Inc. v. Watkins Motor Lines, Inc., 799 F.2d 697 (11th Cir. 1986); Bob Roberts v. Leonard W. Levine, Fed. Carr. Cas. (CCH) ¶83,592 (8th Cir. 1990); *cf.* Pacific Coast Building Products, Inc. — Petition for Declaratory Order, Docket No. MC-30121, served Jan. 3, 1989 (unreported); United States Department of Transportation — Petition for Rulemaking — Single-State Transportation in Interstate or Foreign Commerce, Ex Parte Docket No. MC-182, served Feb. 12, 1987 (unreported).

52. Armstrong, Inc. — Transportation Within Tex., 2 I.C.C. 2d 63 (1986), *aff'd sub nom.*, Texas v. United States, 866 F.2d 1546 (5th Cir. 1989).

ascertained from all the facts and circumstances surrounding the transportation.[53]

What the facts were that persuaded the ICC to conclude in the several proceedings that the shipper at the time of the shipment's inception had the fixed and persistent intent that the single-state truck transportation be a continuation and integral part of the preceding interstate movement varied with the proceedings. In *Armstrong* it evidently was the motor carrier's storage-in-transit arrangement pursuant to which the carpeting was shipped form the out-of-state mills.[54] In *Matlack*[55] it seemed to be the fact that most of the shipments involved supply contracts and other sales arrangements entered into prior to shipment. In *Quaker*[56] it appeared to be the use of forecasts of expected consumption of its products, giving the company an accurate idea in advance of their shipment where, beyond the transfer points or distribution centers, they were destined. In *Victoria Terminal*[57] it was the shipment of fertilizer pursuant to specific orders or customer estimates of their needs. In *James River*[58] it seemed to be the fact that shipments were made pursuant to long-term supply contracts and customers' past buying practices. No single indicium of interstate commerce was deemed to be controlling; all of the circumstances attending the transportation were considered by the ICC in reaching its conclusions.

In *Bigbee*,[59] which involved the shipments of petroleum and petroleum products, the motor carrier seeking the declaratory order from the ICC argued that transportation practices in the industry had changed since the Supreme Court decided *Atlantic Coast Line*[60] and that it and the ICC's early decisions relying thereon no longer should be viewed as having precedential value. The motor carrier contended that the increase in pipelines and terminal facilities have made more common the transport of

53. *Id.* at 69.

54. *Id.* at 63.

55. Matlack, Inc. — Transp. within Mo. — Petition for Declaratory Order, Docket No. MC-C-10999, served June 17, 1987 and Dec. 31, 1987 (unreported), *aff'd sub nom.*, Middlewest Motor Freight Bureau v. ICC, 867 F.2d 458 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 234 (1989).

56. The Quaker Oats Co. — Transportation Within Tex. and Cal. — Petition for Declaratory Order, Docket No. MC-C-30006, served Aug. 26, 1987 and Mar. 8, 1988 (unreported), *aff'd sub nom.*, California Trucking Ass'n v. ICC, 900 F.2d 208 (9th Cir. 1990).

57. Victoria Terminal Enter., Inc. — Transp. of Fertilizer Within Texas — Petition for Declaratory Order, Docket No. MC-C-30002, served Dec. 15, 1987, Apr. 29, 1988 and Feb. 3, 1989 (unreported), *aff'd sub nom.*, Central Freight Lines v. ICC, 899 F.2d 413 (5th Cir. 1990).

58. James River Corporation of Va. — Transportation Through Woodland, Cal. — Petition for Declaratory Order, Docket No. MC-C-30044, served July 15, 1988 (unreported), *aff'd sub nom.*, International Bhd. of Teamsters v. ICC, 914 F.2d 904 (9th Cir. 1990).

59. Bigbee Transportation, Inc. — Transportation Within Alabama, Mississippi and Georgia — Petition for Declaratory Order, Docket No. MC-C-30065, served Nov. 1, 1988 (unreported).

60. Atlantic Coast Line Ry. v. Standard Oil Co., 275 U.S. 257 (1927).

petroleum and petroleum products by pipeline and then by motor vehicle to purchasers' final destinations.[61] The ICC agreed, finding:

> Here the record shows that ODO's intent is to ship fuel to a particular airfield, and that the particular installation's fuel needs is known in advance. DOD intends the fuel to continue its movement through the storage facilities for delivery to a known airfield. The fact that DOD's fuel may be temporarily stored does not destroy the continuity of the single interstate movement. DOD's intent at the time of the initial movement is that the jet fuel be delivered to various DOD installations.[62]

Arguably, the ICC considered the same "bundle of circumstances" it identified the *Single State*[63] proceeding more than thirty years ago in determining whether the single-state truck transportation of petroleum and petroleum products was in interstate commerce. Thus, if the facts establish that, at their inception, the shipments were intended to satisfy requirements at destination, whether based upon specific orders, historical patterns or estimated needs, and that their storage at the transfer point was brief and in aid of the movement to their final site, the single-state truck transportation can be found to be an integral part of their transportation in interstate commerce. Such particularly is the situation if there is no change in the ownership of the shipments at the transfer point, and the sale occurs either at the commencement or conclusion of the journey. The court in *Central Freight Lines v. ICC*,[64] however, said that the ICC "appears to have implicitly recharacterized the applicable test" of the *Single State* proceeding.[65] Similarly the court in *California Trucking Association v. ICC*[66] said, "[e]ven though the ICC has never explicitly stated that it was abandoning the more structured [*Single State*] test, it appears that its use of that standard has been refined, if not phased out."[67]

The ICC appears no less to have come full circle with respect to the status of the carriage that precedes the single-state truck transportation in question. In *May Department Stores*[68] the ICC was concerned with the truck transportation within California of shoes and handbags imported from the Far East. Clearly, the ocean transportation that preceded the motor carrier movement was not subject to regulation by the ICC. Nevertheless, the ICC found the single-state truck transportation to be in interstate commerce stating, "The fact that this Commission does not regulate

61. *Bigbee*, at 3.
62. *Id.* at 7.
63. Petroleum Products Transported Within a Single State, 71 M.C.C. 17 (1957).
64. Central Freight Lines v. ICC, 899 F.2d 413 (5th Cir. 1990).
65. *Id.* at 421.
66. California Trucking Ass'n v. ICC, 900 F.2d 208 (9th Cir. 1990).
67. *Id.* at 213.
68. The May Department Stores Co. and Volume Shoe Corp. — Petition for Declaratory Order — Transp. Within Single State of Merchandise Imported by Water, Docket No. MC-C-30146, served June 15, 1990 (unreported).

the water portion of the movement does not preclude our jurisdiction over the motor portion."[69]

In reaching its conclusion, the ICC relied upon its earlier decision in *Victoria Terminal*.[70] That proceeding also had a preceding water movement not subject to ICC jurisdiction, but in *Victoria Terminal*, unlike in *May Department Stores*, the preceding water movement was a domestic one.[71] The ICC said:

> The proposition that the ex-barge movements are not subject to Commission regulation was based in large part on a review board decision in *Behnken Truck Service, Inc., Ext—Exbarge Traffic*, 103 M.C.C. 787 (1967). *Behnken*, in turn, was based upon a decision of the Supreme Court in *Pennsylvania Railroad Co. v. Public Utilities Commission of Ohio*, 298 U.S. 170 (1936). In *Pennsylvania*, the Court held that a single-state movement by rail was not part of interstate transportation (and thus could be regulated by the State) because the preceding movement into the State by private carriage was not "transportation" within the meaning of the Interstate Commerce Act.
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> Upon closer analysis, we believe the review board erred in the *Behnken* line of cases in applying the holding of *Pennsylvania*, regarding the extent of the ICC's *rail* jurisdiction, to a determination of its *motor* jurisdiction. This conclusion is based on the original (pre-recodification) language of the Interstate Commerce Act setting forth the Commission's jurisdiction over these modes.
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>
> The statute does not preclude the Commission from licensing and regulating *motor* carriage that is conducted in interstate commerce, even if it does not regulate the transportation at the moment it crosses State lines [footnotes omitted].[72]

Although in *Victoria Terminal* the ICC considered unregulated for-hire transportation preceding the single-state motor carrier movement,[73] its rationale applies with equal force to preceding unregulated proprietary transportation.[74] Indeed, *Altoona Express*,[75] at least in part, involved the outbound transportation from distribution sites of products brought there in private carriage. Nevertheless, the ICC held:

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69. *Id.* at 6.

70. Victoria Terminal Enterprises, Inc. — Transportation of Fertilizer Within Texas — Petition for Declaratory Order, Docket No. MC-C-30002, served Dec. 15, 1987, Apr. 29, 1988 and Feb. 3, 1989 (unreported), *aff'd sub nom.*, Central Freight Lines v. ICC, 899 F.2d 413 (5th Cir. 1990).

71. *May Department Stores*, decision served Feb. 3, 1989, at 1.

72. *Id.* at 1-2.

73. *See generally Victoria Terminal*, decisions served Dec. 15, 1987, Apr. 29, 1988, Feb. 3, 1989.

74. The court in Central Freight Lines v. ICC, 899 F.2d 413, 425 (5th Cir. 1990), upheld the ICC's conclusion but did not accept its rationale for overturning the *Behnken* decision. *Id.*

75. Pittsburgh-Johnstown-Altoona Express, Inc. — Petition for Declaratory Order, Docket No. MC-C-30129, served Feb. 12, 1990 and May 7, 1992 (unreported).

> [T]he regulatory status of the movement into a State does not dictate the interstate or intrastate nature of a subsequent, single-State movement by *motor* carrier. The nature of the subsequent motor movement is not affected by whether the initial movement across State lines is in regulated, private, or other exempt carriage.[76]

It appears, therefore, that an oil company that maintains control of its petroleum and petroleum products throughout their interstate transportation from refinery to its customers and arranges for their shipment so as to replenish supplies at intervening marine or pipeline terminals in accordance with the projected demands of its customers based upon prior purchases and anticipated sales can utilize ICC regulated motor carriers for the single-state truck transportation from terminals to customers and obtain the benefits of their reduced rates and charges. Moreover, the oil company can do so notwithstanding that the movement of the petroleum and petroleum products to the marine or pipeline terminals was performed by it in private carriage.

To the extent that there is any uncertainty of the oil company's ability to do so, it is for the ICC, the agency that granted the operating authority to the motor carriers in the first instance, to remove such doubt. As the Supreme Court said in *Service Storage & Transfer Company v. Virginia*,[77] "[C]onflicts can best be avoided if the interpretation of I.C.C. certificates is left to the Interstate Commerce Commission."[78] The agency's recent spate of decisions, while not rendering it certain, indicate fairly clearly which way it is likely resolve the question of whether single-state truck transportation of petroleum and petroleum products is in interstate or foreign commerce.

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76. *Id.* at decision served Feb. 12, 1990, at 12; *see also* Amoco Oil Company — Petition for Declaratory Order — Ex-Pipeline Transp., Docket No. MC-C-30191, served September 1, 1992 (unreported).

77. Service Storage & Transfer Company v. Virginia, 359 U.S. 171 (1959).

78. *Id.* at 176.