Legislative and Regulatory History of Entry Controls on Motor Carriers of Passengers

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CONTENTS

I. Judicial History of Entry Controls

The Motor Carrier Act of 1935[1] was not generated by the depression but by the decision of the Supreme Court of the United States in *Buck v.*

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1. Pub. L. No. 255, 49 Stat. 543 (1935).

Kuykendall.[2] Following that decision, bills for the regulation of interstate motor carriers of passengers were introduced in and actively considered by six successive Congresses beginning with the 69th Congress in 1926.

In *Buck v. Kuykendall*, Buck proposed to operate between Seattle, Washington and Portland, Oregon as a common carrier exclusively for the transportation of interstate passengers and express. Buck's application for a certificate of public convenience and necessity was denied by the State of Washington on the ground that existing rail and motor passenger transportation service between Seattle and Portland was adequate.

The Supreme Court held that the State of Washington could not require a certificate of public convenience and necessity to operate in interstate commerce. The primary purpose of controlling entry was to limit or prohibit competition in interstate commerce, a purpose which the Court found to be forbidden by the Commerce Clause of the Constitution. State action in determining whether competition should be prohibited was determined by a standard which the Court found to be essentially Federal in nature—the existence of adequate facilities for conducting interstate commerce. Oregon would have permitted the operation proposed by Buck, a circumstance which aggravated the obstruction to interstate commerce by the State of Washington.[3]

As generally interpreted, *Buck v. Kuykendall* not only wiped out State controls on entry for motor carriers engaged in interstate commerce but also invalidated State requirements respecting insurance and standards of service. Thus, the net effect of the decision was to confine regulation of interstate motor carrier transportation to the area of State police powers: motor vehicle safety and highway conservation.

At the time of the decision in *Buck v. Kuykendall*, some forty states prohibited motor common carriers of passengers from using their highways without a certificate obtained by a showing that the involved service is required by the present or future public convenience and necessity.[4] In general, State requirements for certification were imposed not only on carriers of passengers engaged in intrastate commerce but also on those engaged exclusively in interstate commerce.

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2. 297 U.S. 307 (1925).

3. In a related case, Bush & Sons Co. v. Maloy, 267 U.S. 317 (1925), the court held the State of Maryland could not impose entry controls on interstate motor carriers of property even though the highways over which operations would be conducted were not constructed or improved with federal aid.

4. In an investigation completed in 1928, the Commission found that forty States and the District of Columbia required motor common carriers of passengers to obtain certificates of public convenience and necessity as a condition precedent to the use of their highways. Motor Bus and Motor Truck Operation, 140 I.C.C. 685 (1928).

II. Differences Between The Intercity Bus And Trucking Industries (1925-1935)

On June 15, 1926, in response to the Supreme Court's decision in *Buck v. Kuykendall*, the Commission launched a comprehensive investigation of motor bus and truck operations. In its report, *Motor Bus and Motor Truck Operation*,[5] the Commission said:

> A distinction should be recognized between motor-bus organization and operation and motor-truck organization and operation in considering the regulation of motor carriers. Bus lines have developed so rapidly by consolidation and extension that in the present stage of the industry bus lines have progressed to a point where the administration of regulatory laws covering their operations is practicable. There is also an urgent need for the regulation of the interstate transportation of passengers by motor vehicle. The situation with respect to truck lines is different. They are not so well organized. They usually consist of a small number of units, frequently a single truck. State regulatory bodies appear to have found it much more difficult to regulate trucks than busses. . . .[6]

In its report on a similar investigation concluded four years later, *Coordination of Motor Transportation*,[7] the Commission found that "[b]us operators in keeping with their larger average size, the greater degree of regulation to which they are subject, and the nature of the business, show a greater degree of financial responsibility than do truck operators as a class.[8]

The Commission recommended, as it had in the prior investigation of the motor bus and trucking industries,

> that Congress provide at once to put Federal regulation to the test so far as the transportation of passengers by motor buses is concerned. This would provide an organization which would serve as a nucleus for such further steps in motor-vehicle regulation as experience and added information may show to be desirable and practicable.[9]

Two of the most influential reports leading to Federal regulation of the motor carrier industry were those of Commissioner Joseph B. Eastman issued in 1934 and 1935 in his capacity as Federal Coordinator of Transportation. In the 1934 report, the Federal Coordinator wrote that the intercity trucking industry "is disorganized and much of it is in an economically unsound condition."[10] He added:

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5. *Id.*
6. *Id.* at 742.
7. 182 I.C.C. 263 (1932).
8. *Id.* at 281.
9. *Id.* at 384.
10. Regulation of Transportation Agencies, S. Doc. No. 152, 73rd Cong., 2d Sess., 14 (1934).

> The foregoing analysis does not wholly apply to the intercity motor-bus industry, although it is far from prosperous. The carrying of passengers is, for the most part, a common-carrier business and lends itself to organization on a broad scale. Contract operators, so large and disturbing a factor in the trucking industry, are generally lacking. The responsibilities of the operators are greater and entrance into the industry, therefore, requires substantial financial resources. Travelers, unlike shippers, can do little shopping around and, except in a minor degree, can individually exert no pressure for special rates. The better organization of the industry has also tended to prevent such exploitation of labor as has characterized parts of the trucking industry.[11]

In the 1935 report, the Federal Coordinator noted the bus industry's desire for separate legislation for buses and trucks but concluded, "it has not seemed desirable to the Coordinator to make such a separation, but it can be done, if necessary, and without harm."[12]

Despite the differences between the motor bus and trucking industries, witnesses for NAMBO (National Association Motor Bus Owners) voiced no specific objection to the language of bills eventually embodied in the Motor Carrier Act of 1935.[13]

In weighing the benefits anticipated from the controls over entry prescribed by the Motor Carrier Act of 1935,[14] the differences between the motor bus and trucking industries should be kept in mind. The legislative history of the Act, in explaining the purpose of requiring interstate motor common carriers to obtain certificates of public convenience and necessity, usually fails to distinguish between buses and trucks.

III. Objectives Of Control Over Motor Carrier Entry

In drafting what became the Motor Carrier Act of 1935, the Congress and the Commission, in one sense, were not plowing new ground. They were filling a gap created by the Supreme Court in a long-established

11. *Id.* at 15.

12. Report of the Federal Coordinator of Transportation, 1934, H. Doc. No. 89, 74th Cong., 1st Sess., 62 (1935).

13. From testimony presented by NAMBO (National Assoc. of Motor Bus Owners) witnesses in 1935 before the Senate Committee on Interstate Commerce, it may be inferred they expected to derive the following advantages from separate legislative treatment: (1) Legislation limited to the motor bus industry was more likely to be promptly enacted because Federal regulation of interstate motor carriers of property was more controversial; the trucking industry was split on the issue of Federal regulation and many Members of Congress believed it to be premature or impracticable;

(2) Separate legislation would have authorized administration by an I.C.C. Division of Motor Bus Control, thus minimizing the possibility of confusing the regulatory problems of two dissimilar industries; and

(3) Regulation of the bus and trucking industries under the provisions of a single statute would be detrimental to the former because of the complexities involved in regulating the latter.

14. Pub. L. No. 255, 49 Stat. 543 (1935).

pattern of regulation. For that reason, perhaps, supporters of Federal regulation did not produce detailed economic data or studies showing that control of entry was an essential feature of regulation. However, the legislative history of the Motor Carrier Act of 1935 contains an adequate explanation. The reasons advanced to justify entry controls are listed below in descending order of importance.

1. *Prevention of an Oversupply of Transportation*

In hearings before the Senate Interstate Commerce Committee on bills which became the Motor Carrier Act of 1935, Commissioner Eastman, testifying as the Federal Coordinator of Transportation said:

> The most important thing, I think, is the prevention of an oversupply of transportation; in other words, an oversupply which will sap and weaken the transportation system rather than strengthen it. In the case of railroads that was done in 1920 by the provision that prior to any new construction a certificate of convenience and necessity must be secured from the Commission. In my judgment it would have been much better if there had been such a provision many years before. It would have prevented certain railroad construction which tends to weaken the railroad system and situation at the present time. The States have, I think, in all cases, found the necessity in their regulation of motor transportation to provide for that prevention of an oversupply. It is a provision which has been adopted in most of the foreign countries that I have inquired into; in other words, the granting of certificates or permits in order to prevent an oversupply which weakens the situation.[15]

Section 206 of the Act, added by the Motor Carrier Act of 1935, provides that no motor carrier may engage in operations in interstate or foreign commerce "unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations . . . ."[16]

To protect regular route operators, the Congress prohibited the issuance of a certificate to common carriers of passengers for operations over irregular routes, except in the case of charter or special operations. The proviso to section 207 of the Act had been urged by the Federal Coordinator of Transportation in his 1934 report as "a necessary measure of protection for regular route operators" because the bus industry "differs from the truck industry in that there is no substantial need for operation over irregular routes."[17]

15. *Hearings on* S. 1629, S. 1632, *and* S. 1635 *before the Senate Committee on Interstate Commerce*, 74th Cong., 1st Sess. 78 (1935).

16. Section 309 of the Act, added by the Transportation Act of 1940, provides that "[n]o common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission."

17. Regulation of Transportation Agencies, *supra* note 9, at 62.

Reports of the Senate and House Committees on S. 1629, enacted into law as the Motor Carrier Act of 1935, contain no specific justification for the imposition of entry controls on interstate motor carriers. Such reticence is understandable when it is considered how thoroughly legislation had been considered between 1925 and 1935 by the Congress, the Executive Branch, and the Commission.

Although limitations on entry in the 1935 legislation attracted no substantial opposition, serious misgivings had been expressed prior to that time. Senator Burton K. Wheeler of Montana, Chairman of the Senate Interstate Commerce Committee in 1935, and the generally acknowledged legislative father of the Motor Carrier Act of 1935, joined in a minority report issued in 1930 on a bill to regulate motor carriers of passengers.[18] Senator Wheeler and his dissenting colleagues concluded:

> This provision of the bill will establish one more bureaucratic department of the Government to interfere with the natural development of the people's business. It will mean more red tape on the part of both operators and Government officials. Worst of all, it will prevent that competition that brings lower rates and better service to the people. . . . The minority members of the Interstate Commerce Committee believe the bill should be amended by striking out the provisions requiring application for issuance of the certificate of public convenience and necessity.[19]

The following views of Congressman George Huddleston were shared by most of the 115 members who voted against H.R. 10288:

> The proponents of the bill admitted candidly that its main purpose was to give a monopoly, to eliminate competition. They argued that competition should be forbidden in the interest of efficiency, that an operator can not afford to adequately equip himself and to render regular and dependable service unless he is protected against irresponsible competitors. They argued that, to give good service, an operator must expend large sums for suitable buses and terminals, and that he can not afford to do this except upon an assurance of protection against those who might seek to take the cream of the business without handling the less desirable portion.
>
> This argument is equally applicable to all other kinds of business—to the vast steel industry and to the corner grocer. The grocer, in order to give the best service, must keep an attractive and commodious store, with an ample stock and efficient clerks. It is a hardship on him to be forced to compete with an irresponsible competitor, who by underselling or some other method, seduces the most profitable customers. In principle, to forbid competition between bus lines would warrant forbidding competition between grocery stores. There is the same, and no more, justification for the regulation of buses than for the regulation of the grocery stores.[20]

18. Minority Report to accompany H.R. 10288, S. REP. No. 396, part 2, 71st Cong., 2d Sess. 2, 3 (1930).

19. *Id.* at 3.

20. H.R. REP. No. 783, 71st Cong., 2d Sess. 16-17 (1930).

Commissioner Woodlock was not convinced that the Commission's position on entry controls was sound. In his concurring opinion in *Motor Bus and Motor Truck Operation*, he stated:

> Regulation is not in itself a good thing. The less regulation that is necessary, other things being equal, the better for the community. It is necessary in the case of public-service utilities because of their semimonopolistic nature. Transportation in general is not per se of such nature; transportation by railroad is. Transportation by motor bus and motor truck does not necessarily depend upon monopolistic or semimonopolistic organization or performance. It is manifest that at the present time these services are much more largely of a competitive than of a monopolistic nature. For that reason the need for regulation, except in so far as concerns the public safety, is not wholly clear.[21]

2. *The Need for Equality of Regulation*

In 1935 the railroads were fully regulated and were recognized to be a sick industry. Many argued it was unfair to burden the railroads with comprehensive regulation while turning the trucks loose to take the cream of their commerce and then expect them to offer comparable service.

In *Coordination of Motor Transportation*,[22] the Commission concluded:

> 2. That there is substantial competition between rail and water carriers on the one hand and motor carriers on the other for the transportation of both passengers and freight and that this competition is increasing;
>
> 3. That such competition is conducted under conditions of inequality, particularly in regard to regulation;[23]

It was obviously unfair to continue to regulate rail carriers without enacting a similar system of regulation for motor carriers of passengers.

Proponents of regulation also stressed the inequity in subjecting intrastate motor carriers to full economic regulation while permitting interstate carriers to be wholly unregulated. Commissioner McManamy, in his testimony before the Senate Interstate Commerce Committee in 1935, estimated 80 percent of the highway traffic at the time was regulated, and added: "[I]t is not fair to have 1 truck out of every 5 in a position to disregard State authority. That complicates the situation as to all of them."[24]

3. *Interdependence of Entry Controls and Other Features of Regulation*

At various times in the debate on Federal regulation of interstate motor carriers, the value of a certificate of public convenience and

21. 140 I.C.C. at 750.

22. 182 I.C.C. 263 (1932).

23. *Id.* at 379.

24. *Hearings on* S. 1629, S. 1632, *and* S. 1635 *before the Senate Committee on Interstate Commerce*, 74th Cong., 1st Sess. 116 (1935).

necessity as an enforcement tool was recognized. State regulatory commissions, for example, could suspend or revoke the operating authority of a carrier for failure to provide reasonably adequate service or for wanton disregard of safety regulations. Prior to 1935, the public was frequently victimized by unscrupulous brokers of passenger transportation acting in concert with unregulated interstate carriers. The solution adopted in the Motor Carrier Act of 1935 was to prohibit brokers from using carriers not authorized by a certificate of public convenience and necessity to engage in interstate commerce.

Most of the studies, reports and debates which culminated in passage of the Motor Carrier Act of 1935 dealt with Federal regulation as a whole with little consideration being given to a system of safety and economic regulation which did not include control of entry.

Congress was concerned about the failure of unregulated, interstate carriers to observe schedules; to perform the service promised to the public; to provide liability insurance; to make restitution for loss of baggage; and to a general failure to provide reasonably adequate service. However, the Commission found in its report in 1928 in *Motor Bus and Motor Truck Operation*,[25] that intercity bus service "on regularly certified routes is generally satisfactory throughout the country." The Commission also found that so-called "wildcatters" were cutting fares below compensatory levels and engaging in reprehensible practices which discredited bus travel in the eyes of the general public. Congress and the Commission concluded that these reprehensible practices would be eliminated by Federal legislation of the type eventually enacted as the Motor Carrier Act of 1935 but neither body considered whether such practices could be prevented if virtually unrestricted entry were permitted. In any event, the Commission and Congress believed entry controls to be a useful adjunct to regulation having as its ultimate objective a reliable and efficient system of motor transport.

4. *Charter and Special Operations*

The legislative history of entry controls set forth above applies almost entirely to scheduled passenger service over regular routes. Little attention was paid to charter and special operations because that traffic was an insignificant part of the whole.

Most of the bills introduced prior to 1935 considered only regular-route operators to be common carriers and would not have required charter bus operators to obtain certificates of public convenience and necessity.[26] Such operations would have been permitted under a license

25. 140 I.C.C. 685, 702 (1928).

26. *E.g.*, section 1(a)(10) of the Parker bill which passed the House of Representatives on March 24, 1930 defined the term common carrier by motor vehicle as "any common carrier of

obtained merely upon a showing of fitness. In the Motor Carrier Act of 1935 charter operations were included within the definition of common carriage but authority to conduct them was granted either upon proof of public convenience and necessity or as an incident to a grant of regular-route authority.

As charter operations became progressively more important and as the revenues from such operations began to sustain marginal regular-route service, intercity bus operators sought repeal of the incidental charter authority provision of the Act. In 1966, Congress enacted Public Law 89-804 which amended section 208(c) of the Act to read as follows:

> (c) Any common carrier by motor vehicle transporting passengers under a certificate issued under this part *pursuant to an application filed on or before January 1, 1967, or under any reissuance of the operating rights contained in such certificate*, may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed. [language added by the amendment underscored].[26a]

Abuses of the automatic charter right provision occurred when carriers sought authority to transport passengers over a short regular-route, not for the purpose of providing any significant scheduled service, but for the purpose of acquiring incidental charter authority from points on those routes to all points in the United States. Under section 208(c) of the Act, as amended, all new charter operations must be specifically authorized by the Commission upon a showing of public convenience and necessity.

IV. Regulatory History of Entry Controls

Most proceedings involving applications for authority to transport passengers do not raise any clear issue of law or transportation policy. Grants or denial of authority in such cases are based on evaluation of the evidence of record and have little precedential value. Unsuccessful applicants would be inclined to find the Commission's policy of controlling entry too strict while unsuccessful protestants would be prone to find it too lenient.

In those cases, however, raising some distinct question of law or policy, decisions of the Commission and the courts have generally favored entry.

1. *The Standard of Public Convenience and Necessity*

From the beginning of regulation the Commission has certificated

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persons operating motor vehicles for compensation in interstate or foreign commerce over fixed routes or between fixed termini." H.R. 10288, 71st Cong., 2d Sess. (1930).

26a. Pub. L. No. 89-804, § 208(c), 80 Stat. 1521 (1966).

operations which offer innovative service to the public. In the first passenger application case decided under the Motor Carrier Act of 1935 the Commission emphasized that control of entry and competition are not antithetical concepts. In *Pan-American Bus Lines Operation*,[27] the applicant proposed to operate through-bus service between New York and Miami catering only to long-haul traffic and restricting local service to a comparatively few points. In granting the application, the Commission said

> Nor are we impressed with the idea that a monopoly of motorbus transportation in a section of the country such as this is necessarily desirable. Public regulation can enforce what may be called reasonable standards of safe, continuous, and adequate service, but it can hardly be expected to take the initiative in experimentation and the development of new types of service. In fact the carriers would probably resist regulation in the courts, if it did undertake to follow such a line, on the ground that it was an invasion of managerial prerogatives and discretion. Competition is the best-known spur to such endeavor and we are not persuaded that Congress intended to eliminate it in the motorbus field any more than in the railroad field.[28]

The Commission's philosophy of encouraging non-injurious competition, first expressed in the *Pan American* case, was reaffirmed in *Almeida Bus Lines, Inc., Extension—New York City*,[29] where the Commission said:

> In summation, we have stated a policy that encourages the existence of sufficient carrier capacity to encourage competition and we believe that a second carrier's service, as limited by appropriate restrictions, can be added to the motorbus transportation system under consideration without the creation of excessive capacity that might adversely affect the continuance of effective operations by the existing, joint-line carriers.[30]

Between 1935 and 1955 numerous applications of bus and truck operators were protested by railroads but few applications were denied on the ground that rail service was adequate. The question was resolved in *Schaffer Transportation Co. v. United States*,[31] when the Court held a motor carrier's application for authority should not be denied merely because rail carriers were able to handle the traffic. To do so, said the Court, would give one mode of transportation unwarranted protection from the competition of another.

In recent years the conventional standard of public convenience and necessity appears to have been altered somewhat in cases in which the applicant is a member of a racial or ethnic group and proposes a service

27. 1 M.C.C. 190 (1936).
28. *Id.* at 208.
29. 106 M.C.C. 311 (1967), *aff'd*, Short Line v. United States, 290 F. Supp. 939 (D.R.I. 1968).
30. *Id.* at 327.
31. 355 U.S. 83 (1957).

tailored to the particular desires of members of his group. In *Transportes Hispanos, Inc., Common Carrier Application*,[32] the Commission over the protest of large carriers providing frequent, regular service in modern over-the-road coaches between Chicago and Laredo, Texas, granted the application of a Spanish-speaking applicant who proposed to serve the Spanish-speaking community with Spanish-speaking drivers in mini-buses operated over irregular routes on a non-scheduled basis. Although the Commission has not consistently predicated grants of authority on ethnic or racial considerations,[33] the *Transportes Hispanos* case and several others cannot be explained on any other ground.

2. *Exemptions*

For intercity bus operators the most significant exemption provision of the Act is section 203(b)(1) which excludes from economic regulation—

> (1) motor vehicles employed solely in transporting school children and teachers to or from school;

the scope of the exemption is not illuminated by its legislative history. In *Motor Carrier Safety Regulations—Exemption*,[34] the Commission summarized that history as follows:

> Section 203(b)(1) exempts from the general provisions of the act 'motor vehicles employed solely in transporting school children and teachers to or from school'. No representatives of carriers engaged in this form of transportation appeared and testified at the hearings. Well-informed witnesses stated that, in their opinion, but few, if any, common and contract carriers were engaged solely in transporting school children and teachers to and from school in interstate commerce. It is obvious that each State provides schools for the children living within its borders and therefore transportation of school children and teachers in interstate commerce to and from school does not occur frequently.[35]

With the tremendous increase in transportation to school athletic events and on school-sponsored trips to points of historical, educational, and cultural interest, the Commission was required to decide whether such transportation was within the scope of the exemption or whether the words "to or from school" meant only "to or from the school building." The broader interpretation was sustained by the Supreme Court in *Keller Common Carrier Application*.[36]

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32. 117 M.C.C. 894 (1973).
33. *See generally*: Elegente Tours, Inc.—Broker Application, 113 M.C.C. 156, 160 (1971).
34. 10 M.C.C. 533 (1938).
35. *Id.* at 536-37.
36. 83 M.C.C. 339, 94 M.C.C. 238, *aff'd*, National Bus Traffic Association v. United States 212 F.Supp 659, *aff'd per curiam*, National Bus Traffic Association v. United States, 382 U.S. 369 (1966).

After the decision in *Keller*, the Commission further broadened the exemption by holding that the exclusive use requirement of section 203(b)(1) does not preclude from use under the exemption buses which may be employed at other times in transporting persons other than school children. In other words, the court held that the word "solely," in section 203(b)(1) merely excludes from the exemption transportation of other persons in the same vehicle and at the same time with school children and their teachers. *Schoolbus Exemption.*[37]

Section 203(b)(7a) of the Act exempts from economic regulation "the transportation of persons or property by motor vehicle when incidental to transportation by aircraft. . . ." In *Motor Transportation Service Incidental to Air,*[38] the Commission found, first, that the exemption applies only to the "transportation of passengers who have had or will have an immediately prior or immediately subsequent movement by air."[39] Second, the Commission defined the area of exemption to be a radius of 25 miles from the airport plus the municipalities served by the airport if any part of a municipality falls within that radius.[40] In adopting the 25-mile limitation, the Commission noted in its report that practically every major city and its airports could be served under the exemption.

3. *Charter and Special Operations*

In Ex Parte No. MC-29, Regulations, Special or Chartered Party Service,[41] the Commission undertook to define charter service and to establish rules under which it might lawfully be conducted. Under the regulations a charter bus operator must deal with a preformed group which contracts for the exclusive use of the bus and the group may not be formed by the carrier through the sale of individual tour tickets. In *Fordham Bus Corp. Common Carrier Application,*[42] the Commission noted that grants of authority to conduct special operations were generally limited to round trip, sightseeing and pleasure tours, and drew the following distinction between special operations and charter operations:

> The terms "charter" and "special" operations as applied to motor carriers of passengers under part II of the act are frequently confused and sometimes erroneously used as virtually synonymous. It is clear, however, that, properly employed, each identifies a particular and distinct type of service. Charter service contemplates the transportation of groups, such as lodges, bands, athletic teams, schools, or other travel groups, assembled by someone rather than the carrier, who collectively contract for the exclusive

37. 113 M.C.C. 258 (1971).
38. 95 M.C.C. 526 (1964).
39. *Id.* at 527.
40. The text of the regulation is embodied in 49 C.F.R. 1047.45(a) (1975).
41. 29 M.C.C. 25 (1941).
42. 29 M.C.C. 293 (1941).

> use of certain equipment for the duration of a particular trip or tour. Special service, on the other hand, contemplates that service rendered generally on week-ends, holidays, or other special occasions to a number of passengers which the carrier itself has assembled into a travel group through its own sales to each individual passenger of a ticket covering a particular trip or tour planned or arranged by the carrier.[43]

In its landmark decision in *Tauck Tours, Inc., Extension—New York, N.Y.*,[44] the Commission held that a carrier authorized to engage in charter operations (but not permitted to transport groups formed by it through the sale of individual tickets) by a tour broker whether the broker's license is limited to special operations only or charter operations only. The decision had the practical effect of greatly enlarging the authority of both charter bus operators and tour brokers.[45]

4. *Adequacy of Service*

Certificates authorizing service over regular-routes specify the routes and the intermediate points, if any, which must be served. For carriers holding certificates issued prior to completion of the Interstate Highway System, the Commission established a simplified procedure for obtaining authority to operate on interstate highways. In general, carriers could acquire such authority where the distance over the interstate highway was not less than 90 percent of the distance over the carrier's regular service route, and where adequate service would continue to be provided at all authorized points on the regular service route.[46] Motor carriers of property were permitted to conduct such operations without specific authorization and under a more liberal deviation standard because there is generally less intense competition existing between carriers of property than between passenger carriers.[47]

The Commission has no power to compel a carrier to continue operations in interstate commerce if the carrier desires to abandon its entire operation but it may prohibit discontinuance of a part of the authorized operation.[48]

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43. *Id.* at 297.

44. 49 M.C.C. 491, 52 M.C.C. 373, 54 M.C.C. 291, 63 M.C.C. 493, action to set aside dismissed, National Bus Traffic Association, Inc. v. United States, 143 F. Supp. 689 (D.N.J. 1956), *aff'd*, 352 U.S. 1020 (1957).

45. *But see* Greyhound Corp. v. Edwards, 100 M.C.C. 453 (1966). The Commission has held that shopping or other trips arranged by brokers are not lawful where members of the group have little community of interest and their common purpose is chiefly the desire for direct and expeditious transportation between two points.

46. 49 C.F.R. § 1042.1 (1975).

47. Motor Service on Interstate Highways—Passengers, 110 M.C.C. 514 (1969).

48. Towns of Bristol and Hill, N.H. v. Boston & Maine Transportation Co., 20 M.C.C. 581 (1939).

The Commission's authority to require continuance of service at particular points stems from the carrier's obligation set forth in its certificate to render reasonably continuous and adequate service at all authorized points. In a recent case, applicant proposed to re-route its service to make use of a more direct highway and to provide new service at a town which had no public transportation. However, this change in routing would have deprived residents of towns located on the old route of service for which there was a continuing need. Concluding that the needs of neither town could be ignored, the Commission denied applicant's request to discontinue operations along the old route and granted authority to operate along the new route conditioned upon the rendering of a reasonable amount of service along both routes.[49]

On July 17, 1975, the Commission published a Notice of Proposed Rulemaking in *Ex Parte No. MC-95* looking toward issuance of comprehensive service standards for the intercity bus industry.[50] The proposed regulations would require regular-route operators to have a bus terminal in every community served having a population of 15,000 or more regardless of the volume of traffic generated; to provide toll-free information service throughout the area served by the carrier; and to add or improve facilities and services at some 7,000 bus stations located in restaurants, gasoline stations, and drug stores. If the regulations proposed by the Commission are adopted, entry for many prospective regular-route operators would be foreclosed as a practical matter.

V. Conclusions

The legislative and regulatory history of entry controls supports a presumption for their retention. Entry controls were not thrust upon the intercity bus industry for the first time in 1935 but had been an integral part of State regulations since at least 1920. Between 1925 and 1935 intercity travel by bus was predominantly intrastate[51] and certificates of public convenience and necessity were required to provide the service. The Motor Carrier Act of 1935 was the product of ten years' of Congressional and Commission labor, which was based in turn on a relatively uniform system of controlling entry by 45 of the 48 States.

49. American Bus Lines Discontinuance—Nebr. & Colo., 121 M.C.C. 415 (1975).

50. Interstate Transportation of Passengers by Motor Common Carriers—Adequacy of Service, Equipment and Facilities, 40 Fed. Reg. 30, 134 (1975).

51. For example, of the 31, 975 buses engaged in common carrier operations in January, 1926, 30,475 were operated over intrastate routes and only 1,500 over interstate routes; of the 2,308,805 passengers transported by bus in Minnesota in the first half of 1926, only 61,379 were interstate passengers; and of the 99 certificates issued in 1926 by North Carolina bus operators, only 17 were held by carriers engaged in interstate commerce. Motor Bus and Motor Truck Operations, 140 I.C.C. 685, 698-99 (1928).

Perhaps it would have been better if the States some 75 years ago and the Congress 50 years ago had devised a system of economic regulation permitting virtually unrestricted motor carrier entry. Even so, the intercity bus industry has provided for 40 years, without government subsidy, the most economical and efficient of public passenger transportation available.

In any event, we must come to grips sooner or later with the intrinsic merits and demerits of limitations on motor carrier entry. The chief reason given for requiring certificates of public convenience, citing the railroad experience, was to prevent an oversupply of transportation. The second most important reason advanced in the legislative history for controlling entry was to establish regulatory equality as between unregulated interstate motor carriers of passengers and regulated passenger carriers, both rail and motor. Equality of regulation as between rail and motor carriers of passengers no longer exists since AMTRAK is not subject to the entry, rate, and finance provisions of the Interstate Commerce Act. Equality of regulation as between intrastate and interstate motor carriers was a sound objective in 1935 when the States were responsible for regulating the vast majority of operations. Since intercity bus transportation is predominantly interstate today, it is reasonable to assume that regulatory inequalities resulting from an easing of federal controls on entry would be alleviated by state action or by appropriate language of preemption in the Federal statute.

Economic regulation, including control of entry, was also urged in the interest of achieving the following objectives: prevention of destructive and discriminatory pricing practices; protection of the public against the fraudulent or improvident issuance of carrier securities; the provision of reasonably adequate service to passengers; and protection of both passengers and the general public by requirements for liability insurance. The legislative history of the Act implies that entry controls are required to attain the foregoing objectives but fails to explain why. In fact, there is no reason why regulations designed to achieve such objectives could not be applied effectively to carriers who obtained a permit to operate in interstate commerce merely upon a showing of fitness and ability.

The one conclusive argument against removal of controls on entry by motor carriers of passengers stems from their obligation to provide service to thousands of small cities and towns and to vast rural areas either without profit or at a loss, and from the fact that it would be unconscionable either to permit new entrants to skim the cream of the traffic or to authorize existing carriers to discontinue bus service to thousands of communities having no other form of public transportation. This justification for entry controls is alluded to in the legislative history but not emphasized, probably because the service obligations of most motor

carriers of passengers at that time were being enforced in accordance with the terms of certificates of public convenience and necessity issued by the States.

The action of the 74th Congress in restricting entry into the business of transporting passengers by bus does not differ essentially from the action of the First Congress in restricting the right to transport mail creating the post office. The difference is only one of degree since the entry provisions of the Motor Carrier Act of 1935 are not designed to foreclose all competition.

To date, no one has suggested unrestricted entry for motor carriers of passengers, the unrestricted right of exit, and subsidization of intercity bus service at places where discontinuance results from the unrestricted rights of entry and exit. Such a position, however, is the one to which advocates of free entry ultimately must come. It would be grossly unfair to permit new entrants to engage in "cream-skimming" while requiring existing carriers to continue marginal or unprofitable service. It would not be socially desirable or politically feasible to discontinue intercity bus service to thousands of rural and small urban areas. Service to such communities, in the absence of industry cross-subsidies, can be continued only by a large, new Federal subsidy program entailing at least as much regulation as administration of existing controls on entry.

Finally, entry controls unquestionably benefit existing motor carriers or passengers. The benefit, however, is offset by a bundle of regulatory burdens. If the present degree of insulation against competition is deemed undesirable, the *quid pro quo* should be the modification or repeal of burdensome economic regulation.