SECTION 222 (b) — THE SELF-HELP PROVISIONS OF PART II OF THE ACT — BENEFITS AND PITFALLS

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For many years, persons injured by violations of Part I[1] and Part III[2] of the Interstate Commerce Act have had available statutory remedies through complaints to the Interstate Commerce Commission or through suits brought in their own behalf for the recovery of damages in a district court of the United States.[3] However, until recently no comparable right to bring a private suit for damages, or injunction, against one guilty of operating without appropriate motor carrier authority, or in excess of authority held, existed.[4] Prior to September 6, 1965, only the Commission could seek injunctive relief for violations of operating authority requirements pertaining to motor carriers.[5] In 1965, Congress amended Parts II and IV of the Act to "aid enforcement in the motor carrier field . . . by permitting any persons injured through certain violations of certain operating authority requirements of the act (applicable to freight forwarders as well) to apply directly to the courts for injunctive relief."[6] The 1965 amendment of Part II, so far as here pertinent, is contained in sections 222(b)(2)-(3) of the Act, 49 U.S.C.A. §§ 322(b)(2)-(3), which provide:

> "(2) If any person operates in clear and patent violation of any provisions of section 303(c), 306, 309, or 311 of this title, or any rule, regulation, requirement, or order thereunder, any person injured thereby may apply to the district court of the United States for any district where such person so violating operates, for the enforcement of such section, or of such rule, regulation, require-

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1. 49 U.S.C.A. §§ 1, *et seq.*
2. 49 U.S.C.A. §§ 901, *et seq.*
3. 49 U.S.C.A. §§ 8-9, 908.
4. *Consolidated Freightways, Inc. v. United Truck Lines, Inc.*, 216 F.2d 543 (9th Cir. 1954), *cert. denied*, 349 U.S. 905 (1955); *Hill's Jitney Service, Inc. v. Stlitz, Inc.*, 238 F. Supp. 881 (D.C. Del. 1965).
5. Interstate Commerce Act, § 222 (b), Pub. L. 85-135, § 4, 71 Stat. 352 (1957), *as amended*, 49 U.S.C.A. § 222 (b) (2) (1965).
6. House Rep. No. 253, 89th Cong., 1st Sess., 1965 *U.S. Code Cong. & Ad. News*, pp. 2923-2924.

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ment, or order. The court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such person, his or its officers, agents, employees, and representatives from further violation of such section or of such rule, regulation, requirement, or order; and enjoining upon it or them obedience thereto. A copy of any application for relief filed pursuant to this paragraph shall be served upon the Commission and a certificate of such service shall appear in such application. The Commission may appear as of right in any such action. The party who or which prevails in any such action may, in the discretion of the court, recover reasonable attorney's fees to be fixed by the court, in addition to any costs allowable under the Federal Rules of Civil Procedure, and the plaintiff instituting such action shall be required to give security, in such sum as the court deems proper, to protect the interests of the party or parties against whom any temporary restraining order, temporary injunctive, or other process is issued should it later be proven unwarranted by the facts and circumstances.

"(3) In any action brought under paragraph (2) of this subsection, the Commission may notify the district court of the United States in which such action is pending that it intends to consider the matter in a proceeding before the Commission. Upon the filing of such a notice the court shall stay further action pending disposition of the proceeding before the Commission."

Comparable relief from violation of permit requirements relating to freight forwarders is contained in sections 417(b)(2)-(3) of the Act, 49 U.S.C.A. § 1017(b)(2)-(3). The significance of these provisions to an analysis of section 222(b) will later appear.

As heretofore stated, the general purpose in amending section 222(b) was to aid in law enforcement. More specifically, the House Report delineated the intent and scope of the legislation as follows:[7]

"These new provisions are intended to afford injured parties a measure of self-protection against operations which are openly and obviously unlawful. In each new paragraph the words 'clear and patent' are used and are intended as a standard of jurisdiction rather than as a measure of the required burden of proof. As was stated in the Senate report on S. 2560, 87th Congress (S.Rept. 1588, 87th Cong., dated June 13, 1962), in explanation of an amendment to

7. *Id.* at 2931.

section 222(b) of the act which is identical to that proposed in this legislation:

> No district court is to entertain any action except where the act complained of is openly and obviously for-hire motor carriage without authority under the sections enumerated above. * * * The language of the section is designed to make it clear that the courts would entertain only those suits which involve obvious attempts to circumvent operating regulation."

The purpose of this paper is to inquire into the extent to which the stated Congressional intent has been effectuated.

I.
JURISDICTION AND BURDEN OF PROOF

Though section 222(b)(2) is express in identifying the operating authority sections which if violated will give rise to a private suit for injunctive relief, it may be appropriate at the outset to emphasize that the self-help provisions do not extend to all violations of the Act. For example, jurisdiction does not exist to enjoin alleged unauthorized intrastate operations even though the defendant carrier holds interstate authority and utilizes the same to solicit business for such unauthorized intrastate operations,[8] nor does jurisdiction exist to enjoin a carrier from operating equipment in allegedly defective condition because safety regulations are promulgated under section 204 of the Act, a section not enumerated in section 222(b)(2),[9] nor can one file a self-help action to enjoin carrier activities which, in effect, constitutes a collateral attack upon an order of the Commission rather than an enforcement of the same.[10] Moreover, neither sections 8, 9 nor 222(b)(2) confers any private right of action against a motor carrier for violation of section 5(4) relating to combinations and consolidations of carriers.[11]

"Clear and Patent"

Two "no tacking" cases need to be considered in determining how the courts, thus far, have construed the "clear and patent" standard of jurisdiction.

8. *Schenck Transportation, Inc. v. Inter-County Motor Coach, Inc.*, 350 F.Supp. 306 (E.D. N.Y. 1972).

9. *Hamper v. Transcon Lines Corporation*, 425 F.2d 1178 (10th Cir. 1970).

10. *Chemical Leaman Tank Lines, Inc. v. A. J. Weigand, Inc.*, 359 F.Supp. 1238 (D.C. Del. 1973).

11. *McFaddin Express, Incorporated v. Adley Corporation*, 363 F.2d 546 (2nd Cir. 1966), *cert. denied*, 385 U.S. 900 (1966).

In *Chemical Leaman Tank Lines, Inc. v. A. J. Weigand, Inc.*,[12] Weigand had secured a contract carrier permit authorizing the transportation of various specified commodities between described points. In a subsequent "conversion" proceeding under section 212(c), the examiner recommended the issuance of a certificate in lieu of and commensurate with Weigand's permit, subject to the condition "that the separately stated authorities herein granted shall not be joined or tacked, one to another, for the purpose of performing any through transportation." The certificate resulting from the conversion proceeding failed to include the language of the "no-tacking" restriction imposed by the examiner, and Weigand proceeded to conduct operations entailing joinder of its separately-stated authorities. Chemical Leaman filed a motion to modify Weigand's certificate by including therein the "no-tacking' restriction, the "conversion" proceeding was reopened, and the petition for modification was consolidated therewith. After a further hearing the examiner found that the restriction was omitted from the certificate due to inadvertent clerical error but that Weigand had shown good cause why the restriction should not be imposed. On administrative appeal Review Board No. 3 reversed the examiner and found that the certificate should be modified to include the restriction, and Division 1 affirmed the action of the Board. Prior to the effective date of Division 1's order, Weigand filed a petition for modification of the effective date in order to file and prosecute temporary and permanent authority applications to permit the continuation of unrestricted operations. In response thereto, Division 1 stayed the effective date of its order imposing the "no-tacking" restriction pending final disposition of the new application.

Chemical Leaman, *et al.*, then instituted a self-help action contending that well-established law precluded the tacking of paragraphs constituting a single grant of authority, that the stay order was not intended as authorization for continued unlawful tacking and that if the Commission had purported to issue an order relieving Weigand's certificate of the no-tacking restriction such action would have circumvented requirements of sections 206 and 207. Weigand contended that the stay order constituted recognition by the Commission that its tacking operations were lawful.

Despite plaintiffs' argument that the validity of the stay order was not under attack and was irrelevant to a determination of the existence of a clear and patent violation of the Act, the court denied relief, reasoning as follows (359 F.Supp. at 1242-1243):

"Assuming it were clear that the defendant's certificate includes but

12. *Supra* note 10.

a single grant of authority and that tacking is not permitted, it would not necessarily follow that Weigand's present course of conduct is in clear and patent violation of the Act. Since the Commission's stay order was intended to sanction defendant's tacking on a temporary basis, that tacking could be a clear and patent violation only if the stay order is invalid.

"The Commission obviously thought that it could lawfully sanction defendant's tacking operation until its application for authority could be determined. Assuming it were wrong in this view, as plaintiffs contend, I nevertheless am not prepared to say that the matter is sufficiently clear to place this case within the sole category which Congress intended would be entertained under Secion 322, i.e. 'clear and patent violations.'

"Moreover, this is a case where the Commission has taken final, affirmative action for the purpose of sanctioning particular conduct and a party adversely affected by the action seeks to overturn it. While the complaint does not directly ask for relief from a Commission order, the suit, in practical effect, constitutes a collateral attack on a Commission order. . . ."

The foregoing reasoning, in our view, is fallacious because, *inter alia*, it assumes that the Commission's finding that Weigand's authorities could not be lawfully tacked, a construction in accord with well-established law, was somehow reversed or overcome by the stay order. We cannot distinguish, on principle, the fact situation in *Chemical Leaman* from a situation where the defendant holds no authority, has been denied a grant of authority by the Commission but the effective date of the order of denial has been stayed, and the defendant continues for-hire operations without a certificate or permit. Both situations appear to us to be amenable to a self-help action by injured competitors. Contrary to the holding in *Chemical Leaman*, we think self-help relief ought to be available in both situations and that Congress so intended.

The courts have repeatedly emphasized that the requirement of a "clear and patent" violation is intended as a standard of jurisdiction rather than a measure of the required burden of proof.[13] But the nature of this

13. *Tri-State Motor Transit Co. v. C & H Transportation Co.*, 347 F.Supp. 879, 882 (W.D. Mo. 1972), *rev'd on other grounds*, 479 F.2d 171 (8th Cir. 1973); *Tri-State Motor Transit Co. v. H. J. Jeffries Truck Lines, Inc.*, 347 F.Supp. 864, 867 (W.D. Mo. 1972); *Tri-State Motor Transit Co. v. Leonard Bros. Trucking Co.*, 347 F.Supp. 872, 875 (W.D. Mo. 1972); *Tri-State Motor Transit Company v. International Transport, Inc.*, 343 F.Supp. 588, 593 (W.D. Mo. 1972), *rev'd in part on other grounds*, 479 F.2d 171 (8th Cir. 1973); *Mercury Motor Express, Inc. v. Brinke*, 475 F.2d 1086, 1093 (5th Cir. 1973); *Leonard Bros. Trucking Co., Inc. v. United States*, 301 F.Supp. 893, 898 (S.D. Fla. 1969); *Baggett Transportation*

distinction is very difficult to spell out in a given factual context. Indeed, as stated below, we have concluded that one of the "pitfalls" in the "self-help" field is that ordinary motor carrier lawyers may not be tuned in on the same wave length as federal judges about what kind or degree of certificate violation is "clear and patent" as contrasted to an ordinary run-of-the-mill certificate violation. In any event, the court observed in the *Mercury Motor Express* case:[14]

> ". . . If a plaintiff cannot *show* a 'clear and patent' violation, the proper disposition of his complaint is dismissal for want of jurisdiction; if he can, he is entitled to injunctive relief." (emphasis added)

Under such an analysis, as a practical matter jurisdiction and burden of proof appear to be synonymous. If a complaint alleges conduct on the part of a defendant which would constitute a "clear and patent" violation, the existence, *vel non*, of jurisdiction can only be determined following the reception and weighing of the evidence.

Baggett Transportation Company v. Hughes Transportation, Inc.,[15] like *Chemical Leaman*, involved a self-help action to enjoin unlawful tacking operations by the defendant. Baggett's certificate contained a restriction that "no single portion of the authority contained hereinabove shall be tacked or joined, directly or indirectly, with any other authority contained hereinabove for the purpose of performing any through service." Suit was initially instituted in 1966 by Tri-State Motor Transit Company in the Western District of Missouri, Judge Elmo Hunter presiding. The ICC thereafter instituted an investigation proceeding to consider the lawfulness of Baggett's tacking operations, notified the court of the pendency of such proceeding, and the court proceeding was stayed pending disposition of the administrative proceeding pursuant to section 222(b)(3).[16]

The ICC concluded that Baggett's challenged operations were unlawful and entered a cease and desist order. Prior to the effective date of such order, Baggett filed an action in Alabama, requesting the designation of a three-judge court, to review and set aside the ICC's order and moved for a temporary restraining order. The Alabama court, being advised of the litigation in Missouri, withheld ruling on Baggett's motion, and the Missouri court proceeded to trial at the conclusion of which the court

Company v. Hughes Transportation, Inc., 393 F.2d 710, 716(8th Cir. 1968), *cert. denied*, 393 U.S. 936 (1968).

14. *Supra* note 13, at 1095.

15. *Supra* note 13.

16. The subject of section 222(b)(3) stays will be considered in more detail in Part II below.

declined to enter a temporary injunction in view of the fact that the ICC order requiring Baggett to cease and desist would become effective at midnight on that day. Later that day Baggett obtained a restraining order from the Alabama court enjoining the enforcement and effectiveness of the ICC's cease and desist order, and Hughes, a wholly-owned subsidiary of Tri-State, brought another self-help action in the Western District of Missouri, Judge Hunter again presiding, to enjoin Baggett from performing the type of operations which were the subject of the prior court and administrative proceedings. The Missouri court in this second self-help action found that Hughes was being injured by certificate violations which were "clear and patent" and entered an order temporarily enjoining Baggett from tacking any two or more segments of its authority.

The primary question on appeal related to the right and propriety of the Missouri court to entertain the action and issue the injunction while the validity of the ICC's order, the effectiveness of which had been restrained, was under review in the Alabama appeal.

After first noting that the granting of a temporary injunction was addressed to the discretion of the trial court, the court of appeals held that the issues involved in the Missouri self-help action and the issues involved in the Alabama three-judge review action were different, were based upon separate provisions of the statute, that the granting of one did not necessarily prohibit the exercise of the other as the remedies were designed to be cumulative and not mutually exclusive, and that granting the substantial benefits available under section 222(b)(2) was the "most equitable solution possible."

Not only is the result reached in *Baggett* deemed correct, but the court of appeals' appreciation of the intent of section 222(b)(2) is noteworthy (particularly when contrasted with subsequent self-help actions brought in the Western District of Missouri) (393 F.2d at 716):

> ". . . enforcement action may be brought by any plaintiff who is injured by the clear and patent violation of the Act; attorney's fees as well as costs may be collected; an injunction or restraining order enforcing obedience to the law may be granted immediatley, and plaintiff must post bond security to protect the interests of the defendant in the event the restraining order or injunction be unwarranted. We think, then, Congress was interested in providing for an *immediate* relief with proper protection for anyone who might be injured thereby. . ." (emphasis added)

The "clear and patent" nature of the violation in *Baggett* could not have been a matter of serious controversy in light of the express restriction in Baggett's certificate. Similarly, the courts have demonstrated lit-

tle, if any, reluctance to find, upon uncontroverted facts, that operations by agricultural cooperatives in excess of the exemptions accorded their operations constitute clear and patent violations of the licensing requirements of Part II.[17] However, an understandable reluctance by the involved courts to act on controverted facts and more complex certificate interpretation issues was encountered in the *Tri-State* cases cited in footnote 13, which will hereafter be referred to individually by the names of the respective defendants and collectively as the bomb cases.

In 1967, Tri-State and other munitions carriers filed a self-help complaint in the Western District of Missouri seeking to enjoin International Transport, Inc., a "size and weight carrier," from transporting all Classes A and B explosives. Sixteen days following the filing of such complaint the court, Judge Hunter presiding, issued a preliminary injunction relating to a portion of the relief sought, restraining International from transporting Classes A and B explosives which when boxed or palletized did not exceed 150 pounds per box whether palletized or unpalletized. But the Missouri court did *not* restrain International from transporting 500-pound and 750-pound bombs, and concluded in connection with these bombs that "the factual application of the proper rule is difficult and does not attain that degree of clarity and certainty necessary for this Court to deem their transportation by defendant to be a clear and patent violation of 49 U.S.C. § 303(c) and 306." Judge Hunter further reasoned that the lawfulness of the transportation of such bombs under certificates authorizing the transportation of "commodities which by reason of size or weight require the use of special equipment" "is obviously of the type Congress intended to be decided in the first instance by the Interstate Commerce Commission in the exercise of its expertise."

In September, 1967, the ICC instituted an investigation proceeding to determine if International's transportation of the above-described bombs was within its "size and weight" authority and exercised its stay power of the self-help proceeding under section 222(b)(3). Following hearing, the ICC served a Report and Order on January 14, 1969, in which it held International's transportation of such bombs unauthorized and ordered International to cease such transportation.[18]

Prior to the effective date of the ICC's order, International filed complaints in Missouri and South Dakota, the latter being subsequently consolidated with the Missouri case, to enjoin and set aside the ICC's order.

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17. *Munitions Carriers Conference, Inc. v. American Farm Lines*, 440 F.2d 944 (10th Cir. 1971); *Interstate Commerce Commission v. Southwest Marketing Association*, 315 F.Supp. 805 (N.D. Tex. 1970).

18. *International Transport, Inc. - Investigation and Revocation of Certificates*, 108 M.C.C. 275 (Full Com.).

Leonard Bros. Trucking Co., Inc., an intervenor in the ICC proceeding, filed a complaint in Florida to enjoin and set aside the order of the ICC served January 14, 1969, as well as the order of the ICC dated April 22, 1969, in *Ace Doran Hauling & Rigging Co., Investigation of Operations*, 108 M.C.C. 717 (Full Com.). In the action brought by Leonard Bros., a three-judge court was convened, and such court transferred the appeal, insofar as it embraced the *International* administrative decision, to the involved Missouri court.[19] The International and Leonard Bros. appeals were consolidated, and C & H Transportation Co., Inc., and J. H. Rose Truck Line, Inc., intervened as plaintiffs in each of such suits. The United States, a statutory defendant in each suit, admitted that the ICC's order under review was invalid.

In March, 1970, following hearing before a three-judge court composed of Judges Gibson, Collinson and Hunter, and before Judge Hunter as a single-judge court, said courts entered an Order of Remand[20] remanding the case to the ICC for rehearing and reconsideration so that the ICC might consider the bearing, if any, on its decision of a regulation[21] adopted by the Department of Defense respecting the handling of explosives and to take additional evidence on matters relating to the alleged absence or insufficiency of evidence to support the ICC's findings and conclusions.

The ICC then held a further hearing and issued a further order, served October 29, 1971, affirming its previous order served January 14, 1969, ordering that International cease and desist "from all operations . . . of the character found in said Report to be unlawful," and reciting that "this order shall be effective on a date which is to be later fixed following judicial review of the action."[22]

International, C & H, Leonard Bros. and Rose filed amended complaints to set aside the later order, as well as the order it affirmed, and the United States admitted the invalidity of each order. Hearing was again held before the same three-judge and single-judge courts on January 5, 1972, and said courts, in a single opinion authored by Judge Hunter, entered judgment dismissing the complaints and ordering that the ICC's order of October 26, 1971, become effective January 28, 1972.[23]

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19. *Leonard Bros. Trucking Co., Inc. v. United States*, 301 F.Supp. 893 (S.D. Fla. 1969).

20. *International Transport, Inc. v. United States*, 318 F.Supp. 763 (W.D. Mo. 1970).

21. 49 C.F.R. § 177.835(b).

22. *International Transport, Inc. - Investigation and Revocation of Certificates*, 118 M.C.C. 536 (Full Com.).

23. *International Transport, Inc. v. United States*, 337 F.Supp. 985 (W.D. Mo. 1972), *aff'd mem., sub nom., United States v. Interstate Commerce Commission*, 409 U.S. 904

During the pendency of the *International* litigation, Tri-State, *et al.*, had sued C & H (Jan 21, 1969), Leonard Bros. (Jan. 21, 1969) and H. J. Jeffries (Dec. 13, 1968) under the self-help provisions of section 222(b)(2), alleging violations by each in substantially the same terms as theretofore alleged against International and seeking the same injunctive relief, attorney's fees and costs. Judge Hunter ordered all four cases tried on the merits on February 14, 1972, and the cases, separately tried, were concluded on February 15, 1972. In each case, the District Court found the respective defendants had committed clear and patent violations of the licensing sections of Part II with respect to the transportation of bombs and that each defendant, except C & H, had committed similar violations of said sections with respect to transportation of explosives which individually or boxed weighed 150 pounds or less, granted permanent injunctions against the transportation found in each case to have been unauthorized, and awarded attorney's fees and costs to plaintiffs.[24]

Of singular note, in each opinion the district court predicated his finding of "clear and patent" violations concerning the transportation of bombs on the Commission's decisions and the courts' affirmance thereof which issued *after* the institution of the self-help case against International at which time the same court had found that the transportation of such bombs did *not* constitute a clear and patent violation of the affected sections of the Act and that the legality of the transportation of such bombs was "obviously of the type Congress intended to be decided in the first instance by the Interstate Commerce Commission in the exercise of its expertise."

It seemed inconceivable to those of us who were involved as counsel for defendants in these self-help cases involving the bombs that a controversy which existed for over five years including two ICC hearings, two three-judge trials, a remand to the ICC and two appeals to the United States Supreme Court could become no controversy at all and instead a "clear and patent" violation within a few days following the second three-judge trial. The Court of Appeals for the 8th Circuit agreed,[25] and reversed the judgment of Judge Hunter insofar as it awarded an injunction and attorney's fees concerning the bomb-hauling part of the controversy. No appeal was taken from this 8th Circuit decision. Thus, finally it was determined that when the Missouri district court expressly found in 1967 that the transportation of the involved bombs under "size and weight"

(1972), *C & H Transportation Co., Inc. v. Interstate Commerce Commission*, 409 U.S. 904 (1972).

24. *Supra* note 13, first four citations.

25. *Tri-State Motor Transit Co. v. International Transport, Inc.*, and *Tri-State Motor Transit Co. v. C & H Transportation Co., Inc.*, 479 F.2d 171 (8th Cir. 1973).

authority did not constitute a clear and patent violation of the Act, the complaint with respect to such transportation should have been dismissed as the court was then without jurisdiction to entertain that portion of the action.

"Injured" Parties

A self-help action is available only to one injured by a clear and patent violation. Apparently, past, present or anticipated future injury meet this jurisdictional and proof requirement. *Munitions Carriers Conference, Inc. v. American Farm Lines, Inc.*, 400 F.2d 944, 949 (10th Cir. 1971).

Proof of injury has not thus far presented a hurdle for plaintiffs. In the *Southwest Marketing*[26] case, the court found irreparable injury under the reasoning of a Texas state court case[27] holding:

> "On the issue of whether plaintiffs have discharged the burden, applicable to relief by way of injunction of showing irreparable injury should such relief be denied, it is sufficient to note that injury to their business would be a necessary consequence of unlawful competition by the defendant, and that such injury is of necessity one which could not be ascertained with certainty."

The Missouri district court, in deciding the bomb cases, apparently shared the above-quoted view because the only evidence in each of the four cases upon which its finding of injury to plaintiffs could have been founded was evidence that plaintiffs held either single-line or joint-line authority between the points served by defendants in the transportation of bombs. The plaintiffs in the bomb cases presented no evidence that any traffic had been diverted from them by defendants and wholly failed to show that any shipment transported by defendants could have been or would have been transported by any of the plaintiffs had the same not been tendered to one of the defendants.

The subsequent breach of an injunction granted under section 222(b)(2) provides a prima facie case of injury to the parties who secured the issuance of such injunction.[28] Though, as noted earlier, no right to bring private suits for damages resulting from violation of the operating authority sections of Part II exists, money damages are recoverable for breach of an injunction issued under section 222(b)(2). The appropriate measure of such damages has been found to be the amount of the net revenues

26. *Supra* note 17, at 818.

27. *Missouri Pacific Truck Lines, Inc. v. Brown Express, Inc.*, 399 S.W.2d 430, 432 (Tex. Civ. App.—Fort Worth 1966, writ ref'd n.r.e.).

28. *Munitions Carriers Conference, Inc. v. American Farm Lines, supra*, at 949.

realized by the violator as a result of its contemptuous transportation activities.[29] Such a measure of damages has been approved in a civil contempt proceeding for violation of an injunction granted in a patent infringement suit, *Leman v. Krentler- Arnold Hinge Last Co.*, 284 U.S. 448, 52 S.Ct. 238 (1932), wherein the court said (52 S.Ct. at 241):

> ". . . There is no question here that the respondent has made profits through the infringing sales in violation of the injunction, and the amount of the profits was ascertained, but the appellate court held that petitioners were limited to the damages caused by such sales and that no damages had been shown. We think that the court erred in imposing this limitation. The fact that a proceeding for civil contempt is for the purpose of compensating the injured party, and not, as in criminal contempt, to redress the public wrong, does not require so narrow a view of what should be embraced in an adequate remedial award.
> "While the distinction is clear between damages, in the sense of pecuniary loss, and profits, the latter may none the less be included in the concept of compensatory relief. In a suit in equity against an infringer, profits are recoverable not by way of punishment but to insure full compensation to the party injured . . ."

II.
THE STAY PROVISION OF SECTION 222(b)(3)

Section 222(b)(3) provides that the ICC may notify the district court in which a self-help action is pending "that it intends to consider the matter in a proceeding before the Commission" and upon such notification "the court shall stay further action pending disposition of the proceeding before the Commission." Such language is clear. Nevertheless, the courts have been less than uniform in their construction of this provision.

In *Leonard Bros. Trucking Co., v. United States*,[30] the three-judge Florida court held that a stay effected by Commission notification under section 222(b)(3) constituted a judicial referral within the ambit of exclusive juridsiction and venue statutes, 28 U.S.C.A. §§ 1336(b) and 1398(b). Section 1336(b) provides:

> "When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination,

29. *Munitions Carriers Conference, Inc. v. American Farm Lines*, 303 F.Supp. 1018, 1085 (W.D. Okla. 1969), *aff'd*, 440 F.2d 944 (10th Cir. 1971).
30. *Supra* note 19, at 896-898.

> the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral."

Section 1398(b) provides as to venue:

> "A civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, an order of the Interstate Commerce Commission made pursuant to the referral of a question or issue by a district court or by the Court of Claims, shall be brought only in the court which referred the question or issue."

Having so held, the Florida court found that it was without jurisdiction or venue to entertain the action of Leonard Bros. to set aside the ICC's decision in the *International* case, and that exclusive jurisdiction for review of that decision reposed in the Western District of Missouri. The court did not hold, as later unsuccessfully contended by Tri-State, *et al.*, in a motion before the Supreme Court of the United States, that exclusive jurisdiction and venue reposed in the single-judge court of Judge Hunter, because the Florida court did recognize that a three-judge court is required in order to enjoin and set aside an order of the ICC, 28 U.S.C.A. § 2325, and that any appeal from the decision of the Missouri court would be direct to the Supreme Court.

Before leaving *Leonard Bros.*, one should also note that the court there concluded that the stay provision of section 222(b)(3) is a matter of judicial discretion rather than being mandatory as its language suggests (301 F.Supp. at 898,n. 6):

> "Of course if the Commission could arbitrarily decide whether the judicial proceedings must be stayed there could be some basis for attaching importance to the procedural question [whether the court or the ICC initiates the stay], for it would then be more than procedural. The district court in which the notice is filed, however, presumably will, as it should, make a determination as to whether the issue is one which properly should be first determined by the Commission."

The three-judge court in the second *International* bomb case also held the belief that exclusive jurisdiction and venue to review the ICC's decision lay in the Western District of Missouri but avoided deciding whether such jurisdiction and venue were in the three-judge court or in the single-judge court because "[a]ll three judges have concurred in the instant decision, including Judge Hunter, both in his capacity as the one-judge

court which referred the matter to the Interstate Commerce Commission, and as a member of the three-judge court," and "no possible problem is presented."[31]

We believe these conclusions by the Florida and Missouri district courts respecting the exclusive jurisdiction and venue question are untenable and, further, that such conclusions probably resulted from the view that section 222(b)(3) was intended to afford a device to allow "self-help" courts to resort to the doctrine of primary jurisdiction, *i.e.*, to throw the ball back to the ICC whenever the alleged violation is not "clear and patent."

We believe the better-reasoned view on whether section 222(b)(3) confers "referral" powers on the district court and certainly the view which better gives effect to the actual mandatory language of section 222(b)(3), is articulated in *Mercury Motor Express, Inc. v. Brinke*.[32] Brinke involved a self-help suit brought under section 417(b)(2) of the Act, 49 U.S.C.A. 1017(b)(2),[33] by eight freight forwarders who complained that Brinke was operating as a freight forwarder without an ICC permit in "clear and patent" violation of section 410 of the Act and sought a temporary restraining order, temporary injunction and permanent injunction to halt the alleged violations. In describing Brinke's status, the court through Justice Thornberry said (475 F.2d at 1089):

> "Defendant Brinke holds an ICC broker's license, which was issued to him in 1964, but he has no freight forwarder permit. He applied to the ICC for a freight forwarder permit in December of 1963, about a month before he applied for the broker's license, but his application, adrift on an administrative odyssey which has already lasted over nine years, has not yet received final action."

Countering the complaint, Brinke moved to dismiss on the ground that his broker's license at least colorably authorized his activities and, alternatively, moved to stay the court action pending final disposition by the ICC on his application for a freight forwarder permit. The district court reserved ruling on the motion to dismiss, granted the motion to stay, and denied plaintiffs' application for a temporary restraining order and preliminary injunction. In granting the motion to stay, the district court concluded (*Id.* at 1091, n.8):

> "The interpretation of the broker's license held by defendant and a

31. *Supra* note 23, at 988-990.

32. 475 F.2d 1086 (5th Cir. 1973).

33. As noted at the outset, this section was enacted in the same 1965 amendment as section 222(b)(2) and is identical thereto except that it deals with violations by freight forwarders rather than violations by motor carriers and brokers.

determination of the lawfulness of the activities of defendant conducted pursuant thereto are matters within the particular expertise and primary jurisdiction of the Interstate Commerce Commission."

The Court of Appeals affirmed the denial of plaintiffs' application for preliminary injunction but vacated the district court's stay order and remanded the case for trial on the merits. The cogent bases for vacation of the stay order justify, in our opinion, the length of the following quotation (*Id.* at 1091-1095):

> "The district court stayed further proceedings below pending final action by the ICC on Brinke's freight forwarder permit because it concluded that central issues in the case lay 'within the particular expertise and primary jurisdiction of the Interstate Commerce Commission.' We do not believe, however, that the doctrine of primary jurisdiction may properly be invoked to stay a suit brought under 49 U.S.C.A. § 1017(b)(2).
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> "The judge-made doctrine of primary jurisdiction comes into play when a court and an administrative agency have concurrent jurisdiction over the same matter, and no statutory provision coordinates the work of the court and of the agency. The doctrine operates, when applicable, to postpone judical consideration of a case to administrative determination of important questions involved by an agency with special competence in the area. It does not defeat the court's jurisdiction over the case, but coordinates the work of the court and the agency by permitting the agency to rule first and giving the court the benefit of the agency's views. . . .
>
> ". . .
>
> "Primary jurisdiction reference to an agency is favored when it will promote even-handed treatment and uniformity in a highly regulated area or when 'sporadic action by federal courts would disrupt an agency's delicate regulatory scheme.' United States v. Radio Corporation of America, 1959, 358 U.S. 334, 348, 79 S.Ct. 457, 466, 3 L.ED.2d 354. The importance of uniformity has been recognized especially in cases involving reasonableness of tariffs of rates. E. g., Arrow Transportation Company v. Southern Railroad Company, 1963, 372 U.S. 658, 83 S.Ct. 984, 10 L.Ed.2d 52; Texas & Pacific Railroad Company v. Abilene Cottonoil Company, 1907, 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553. Similarly, primary jurisdiction reference is favored when the agency possesses expertise in a specialized area with which the courts are relatively unfamiliar. In Watts v. Missouri-Kansas-Texas Railroad Company, *supra*, 383 F.2d at 583, for example, this court in affirming the applicability

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of the primary jurisdiction doctrine acknowledged judicial lack of expertise in technical questions of railroad financing.

"With these principles in mind, we turn to the case at hand. We note at the outset that plaintiffs have not sued under a traditional common law of equity theory or under a statute which is arguably foreign or inimical to the regulatory scheme of the Interstate Commerce Act, but under a section of the Act itself— § 417(b)(2), 49 U.S.C.A. § 1017(b)(2). Further, the statute itself is not silent on the problem of coordinating the work of the district courts and the ICC in this type of action, but makes express provision for coordination. Section 1017(b)(2) provides, "The Commission may appear as of right in any such action,' and Section 1017(b)(3) explicitly gives the ICC the power to assert primary jurisdiction in an appropriate case:

> "In any action brought under paragraph (2) of this subsection [§ 1017(b)(2)], the Commission may notify the district court of the United States in which such action is pending that it intends to consider the matter in a proceeding before the Commission. Upon the filing of such notice the Court shall stay further action pending disposition of the proceeding before the Commission.

"The statute thus gives the ICC power to effect a stay of a § 1017(b)(2) action, *but conspicuously omits mention of any corresponding power in the district court* when the ICC does not intervene. We think the conferring of power to stay *only on the Commission* in this thoughtfully designed procedural provision, enacted as an integral part of the regulatory legislation, strongly suggests that Congress intended to supersede and replace the judicial primary jurisdiction doctrine in § 1017(b)(2) suits.

"The high jurisdictional threshold of § 1017(b)(2) reinforces our conclusion that application of the primary jurisdiction doctrine is inappropriate in suits brought under it. The section gives the district court power to enjoin only a 'clear and patent violation of section 1010.' Baggett Transportation Company v. Hughes Transportation Company, 8th Cir. 1968, 393 F.2d 710, 716, cert. denied, 393 U.S. 936, 89 S.Ct. 297, 21 L.ED.2d 272. . . .

" . . .The fact that the district court has the power to enjoin only obvious violations largely removes from § 1017(b)(2) litigation the reasons which underlie the primary jurisdiction doctrine. The courts are unlikely to conflict among themselves or with the ICC in deciding clear cases, and judicial action without prior reference to the

Commission therefore would not jeopardize uniformity in the administration of the regulatory scheme. Further, the value of the agency's specialized knowledge and expertise is at a minimum in cases involving 'clear and patent' violations.

"An analysis of the purpose of the 1965 amendment which became the present § 1017 (b)(2) further confirms the inappropriateness of applying the primary jurisdiction doctrine in this type of litigation. A major purpose was to hasten enforcement procedures in cases of clear violations. *See* Baggett Transportation Company v. Hughes Transportation Company, *supra,* at 715. Before 1965 only the ICC could sue to enjoin unlawful operations; the 1965 amendment allowed broader use by the ICC of this enforcement method by modifying requirements for service of process and, in addition, for the first time gave injured private parties the right to 'apply directly to the courts for injunctive relief' without the necessity of prior, potentially time consuming administrative proceedings. Commenting on the 1965 amendment, Congressman Oren Harris, Chairman of the Committee on Interstate and Foreign Commerce, made clear the congressional intent to avoid delay in the procedures created and to provide a relatively speedy remedy:

> . . . We firmly believe this new enforcement tool will be a good one. It should not be subverted by any practice which will avoid or delay prompt settlement of the issues.

111 Cong. Rec. 9679. Judicial application of the primary jurisdiction doctrine would re-route plaintiffs through administrative proceedings the amendment entitles them to avoid and permit a delay of precisely the type that Congress sought to eliminate in cases of clear violations.

"In sum, we conclude that application of the judicial primary jurisdiction doctrine is inappropriate in § 1017(b)(2) litigation because (1) the statute expressly provides a method for coordinating the work of courts and the ICC, (2) judicial action which is limited to enjoining 'openly and obviously unlawful' operations will not jeopardize the uniform administration of the regulatory system or require a high degree of specialized knowledge on the part of the courts, and (3) primary jurisdiction reference of cases brought under § 1017(b)(2) would thwart Congress's intention to provide a relatively speedy enforcement procedure and remedy for injured parties. If a plaintiff cannot show a 'clear and patent' violation, the proper disposition of his complaint is dimissal for want of jurisdiction; if he can, he is entitled to injunctive relief." (emphasis added)

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CONCLUSIONS

This discussion was intended to explore the benefits and pitfalls of the self-help provisions of Part II. As we see it, the benefits are self-evident. These provisions afford an additional, direct and expeditious means to enjoin flagrant violations of the licensing requirements of Part II. Secondly, they afford an opportunity for the injured party who prevails and is granted such injunctive relief to recover reasonable attorney's fees from his former unlawful competitor. A possible third benefit is the award of damages to injured parties if an unjunction issued pursuant to section 222(b)(2) is subsequently breached.

Likewise, the pitfalls appear to be threefold. First there is the problem of determining and advising your client whether the certificate violation he is suffering from is the ordinary, complex variety that is resolvable only by ICC expertise or is so "clear and patent" as to warrant an immediate judicial injunction. Secondly, after persuading your client to risk the expense of a self-help suit, you must convince an often reluctant judge that in your particular case he is equally able, or more able, than is the ICC to interpret and apply the facts and law to the certificate violation at hand; otherwise he must send you elsewhere for relief and dismiss you out of court. Finally, in any event, you must try to be sure you make a respectable showing that, even if you lose, you had reason to believe that a violation was "clear and patent," because if you do not succeed in this your client may end up paying not only his own but the defendant's attorney fees as well as court costs.

The central question is not whether the self-help provisions constitute good legislation (which they manifestly do) but whether the legislation has achieved the intended result in its application.

In the eight and one-half years since their creation, the rights available under section 222(b)(2) have been rarely exercised. Thus, our basis for assessing the success of the legislation is limited. Our assessment is, however, that the courts are likely to be disposed to grant injunctive relief in flagrant cases, *i.e.*, in instances where the defendant holds no operating rights, operates in violation of express certificate restrictions or operates in excess of well-defined exemptions. On the other hand, when the existence of a violation is dependent upon an interpretation of operating rights and there is some law on both sides of the question, the courts have been and probably will continue to be reluctant to find a "clear and patent" violation. Obviously, most of the case law in this field is yet to be made.

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