INTERMODAL ACQUISITIONS UNDER THE INTERSTATE COMMERCE ACT

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Congressional policy favoring healthy competition in transportation finds expression in Section 5 and other provisions of the Interstate Commerce Act. The applicable provisions of Section 5(2) are clear and unambiguous. Subdivision (2)(a) authorizes specified forms of unification, acquisition or lease arrangement by two or more carriers, and subdivision (2)(b) provides for Commission approval and authorization if "the proposed transaction" is within the scope subdivision (2)(a) "and will be consistent with the public interest." The proviso portion of subdivision (2)(b), however, requires that if the applicant is a carrier by railroad or is controlled by or affiliated with a carrier by railroad within the meaning of Section 5(6), and the transaction involves a motor carrier, then the Commission shall not enter the order of approval and authorization "unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

In addition to the showing which Section 5 requires of all carriers, Congress saw fit to impose upon railroads the further burden of showing that the transaction will benefit the public that it will promote or advance the interest of the public.

Referring to the Motor Carrier Act of 1935, we find that Section 213 thereof,[1] as originally framed, provided for approval and authorization by the Commission of acquisitions of control of motor carriers when such transactions were shown to be consistent with the public interest. A proviso to that section, however, required that in the case of an applicant who was "a carrier other than a motor carrier", the Commission was precluded from approving the transaction unless if found that it would: (a) "promote the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations," and (b) "not unduly restrain competition." Under this proviso, therefore, neither railroads nor water carriers were permitted to acquire a motor carrier without a finding by the Commission that the public interest would be promoted by enabling

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1. 49 Stat. 555.

such rail or water carrier to use service by motor vehicle to public advantage in their operations and would not unduly restrain competition.

Section 213 of the Motor Carrier Act was substantially re-enacted into Section 5(2)(b) of the Interstate Commerce Act when the Transportation Act of 1940 was enacted.[2] In the substantial re-enactment of Section 213 into Section 5(2)(b) only the railroads continue to have the added burden of showing in a transaction to acquire a motor carrier that the public interest will be promoted and that competition will not be unduly restrained. Water carriers, under Section 5(2)(b), are required only to show that the transaction to acquire a motor carrier will be consistent with the public interest. They are relieved of the requirements of Section 213.

Under Section 202 of the Motor Carrier Act of 1935, the policy of Congress was expressed to require the regulation of transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest. This policy was not changed by the enactment of the Transportation Act of 1940. The Commission has followed this Congressional policy consistently through the years beginning with *Pennsylvania Truck Lines Inc—Control—Barker Motor Freight, Inc.*[3] In 1938, the Commission concluded in *Kansas City S. Transport Co., Inc. Comm. Car. Application*[4] that the standards contained in Section 213 (later Section 5(2)(b)) should be followed as a general rule in other situations particularly in applications for certificates of public convenience and necessity under Section 207 of the Act.

In Section 207 proceedings, the Commission as a rule will impose restrictions in certificates issued to railroads. These restrictions are imposed to insure that the service rendered under the certificate will be no more than that which is auxiliary to or supplemental of rail services. Not only the administrative, but also the judicial, current has run in favor of auxiliary and supplemental restrictions. The Supreme Court in *Interstate Commerce Commission v. Parker*,[5] revealed its understanding of the Commission's obligation to consider railroad applications under Section 207 as limited to service "truly supplementary or auxiliary to the rail traffic." Also, in reversing a grant of contract carrier authority

2. See American Trucking Associations v. United States, 355 U.S. 14.
3. 1 M.C.C. 101.
4. 10 M.C.C. 221.
5. 326 U.S. 60.

to a subsidiary of Southern Pacific, the Supreme Court made clear that the "auxiliary and supplementary" limitations are applicable to new contract carrier authority as well.[6]

The Interstate Commerce Act contains no special requirements which water carriers must satisfy in order to acquire a motor carrier. The Commission has ruled that the ordinary standards of Section 5(2) will apply. This is made clear from *TTC Corp.—Purchase—Terminal Transport Co., Inc.*,[7] where the Commission and the reviewing court determined, upon the basis of a literal reading of Section 5(2) and after giving consideration to Congressional policy, that a water carrier acquiring a motor carrier is not required by the Interstate Commerce Act to make affirmative proof that the proposed transaction will promote, further, or advance the public interest. All that is required is that the water carrier show that the transaction is consistent with the public interest—compatible and not contradictory or hostile to the public interest.

The basic statutory provisions relating to railroad-water carrier common ownership are set forth in Sections 5(14)-(16) of the Interstate Commerce Act.[8] Section 5(16) provides:

> Notwithstanding the provisions of paragraph (14), the Commission shall have authority, upon application of any carrier, as defined in section 1(3), and after hearing, by order to authorize such carrier to own or acquire ownership of, to lease or operate, to have or acquire control of, or to have or acquire an interest in, a common carrier by water or vessel, not operated through the Panama Canal, with which the applicant does or may compete for traffic, if the Commission shall find that the continuance or acquisition of such ownership, lease, operation, control, or interest will not prevent such common carrier by water or vessel from being operated in the interest of the public and with advantage to the convenience and

6. American Trucking Associations v. United States, 364 U.S. 1. See also Rock Island M. Transit Co.—Purchase—White Line M. Frt., 40 M.C.C. 457, aff'd United States v. Rock Island Motor Transit Co., 340 U.S. 419.

7. 97 M.C.C. 380 (see also order of November 12, 1965); sustained sub nom. Atlantic Coast Line R. Co. v. United States, 265 F. Supp. 549 (N.D. Ill. 1966).

8. For the underlying rationale of statutory provisions see Lake Line applications under Panama Canal Act, 33 I.C.C. 700; Southern Pac. Co. Operation Pacific Mail S.S. Co., 32 I.C.C. 690; Southern Pac. Co. Ownership of Atlantic S.S. Lines, 43 I.C.C. 168; Missouri Pac. R. Co. and T. & P. Ry. Co., Service by Water, 245 I.C.C. 143; Investigation of Seatrain Lines, Inc., 206 I.C.C. 328; Direct Navigation Co., 46 I.C.C. 378; Southern Pac. Co. Ownership of Atlantic Steamship Lines, 77 I.C.C. 124.

commerce of the people, and that it will not exclude, prevent, or reduce competition on the route by water under consideration: *Provided,* That if the transaction or interest sought to be entered into, continued, or acquired is within the scope of paragraph (2)(a), the provisions of paragraph (2) shall be applicable thereto in addition to the provisions of this paragraph***

Section 5(15) confers jurisdiction on the Commission over applications filed for the purpose of determining whether existing service is in violation of Section 5(14), for the continuance of service, or for authorization under Section 5(16) of ownership, lease, operation, or control.[9]

The Commission may authorize a railroad interest in a water carrier upon two statutory findings. The first is that railroad control will not prevent the water carrier or vessel from being operated in the interest of the public and with advantage to the convenience and commerce of the people. The second required findings is that railroad control will not exclude, prevent, or reduce competition on the route by water under consideration. In addition to these two findings, a railroad must satisfy all of the ordinary requirements of Section 5(2).

An analysis of the cases interpreting the statutory provisions establishes that the mere interest of a rail carrier in a water carrier, or the fact that some competition exists between the rail and water carrier, particularly where the water carrier routes are, in effect, an extension of the rail lines, do not, in and of themselves, warrant a denial of an application by a rail carrier to acquire control of a competing water carrier. Also, a conclusion that some reduction in competition might result would not necessarily justify an adverse finding. It would depend on the effect of a denial. The important considerations are whether the proposed acquisition would prevent the water carrier in the future from being operated in the advantage of, and for the convenience of the people, and whether such control by the rail carrier would prevent, exclude, or reduce competition on the water routes involved. As is evident from cases, the provisons of Section 5(16), including the construction of the phrase "will not exclude, prevent, or reduce competition on the route by water under consideration" must be strictly interpreted and applied. The evidence presented must be specific in showing that the transaction would comply with the provisions of the Act.

9. The statutory provisions covering railroad-water carrier common ownership stem from the Panama Canal Act of 1912.

A railroad applicant to acquire a water carrier thus has a heavy burden in securing Commission approval. This was made apparent by the decision of the Commission in *Illinois Central R. Co.—Control—John I. Hay Co.*[10] The Commission denied the authority sought by two railroads under Section 5(2) of the Act to acquire control of Hay, a water carrier, and also to acquire control of that carrier under Section 5(16). Although the railroads represented that the water carrier would be operated independently, the Commission found not only that Hay would be controlled by the railroads, but also that Hay's all-water service would be managed in such a way as to serve the interests of the controlling railroads and to enhance the movement of traffic over all-trail routes. The Commission thus could not make the statutory findings under Section 5(16) that the proposed acquisition of control would not prevent the water carrier from being operated in the interest of the public and with advantage to the convenience and commerce of the prople. The special burden imposed by Section 5(16) is applicable only to railroads.

In the *Hay* case, the Commission found that the competitive advantage accruing to the water carrier because of railroad backing would be substantial, and foresaw possible complete elimination of competition on the water routes involved. It also found that the fears of protestants that Hay's acquired advantages would be so great as to jeopardize their competitive position, and the continuance of independent water operations, were well-founded. It, therefore, concluded that it could not find that the transaction proposed, if approved, would not exclude, prevent, or reduce competition on the water routes under consideration, or that it would be consistent with the public interest.

There have not been any contested applications subsequent to the *Hay* case, where one or more railroads has sought to acquire a water carrier, and the law, insofar as the Commission is concerned, now seems settled that opposing water carriers may successfully block an acquisition by a railroad if there would be a substantial reduction in the competitive position of such competing water carriers.

Congressional policy of promoting the development of different modes of transportation independent of conflicting interests has been carried forward into Part IV of the Interstate Commerce Act. The pertinent provisions in Part IV are:

> Section 410(c). The Commission shall issue a permit to any qualified applicant therefor . . . No such (freight forwarder) permit shall be issued to any common carrier subject to part I, II,

10. 317 I.C.C. 39.

or III of this Act; but no application made under this section by a corporation controlled by, or under common control with, a common carrier subject to part I, II or III of this Act, shall be denied because of the relationship between such corporation and such common carrier.

Section 411(a)(1). It shall be unlawful for a freight forwarder, or any person controlling, controlled by, or under common control with a freight forwarder, to acquire control of a carrier subject to part I, II, or III of this Act; except that this subsection shall not limit the right of any carrier subject to part I, II, or III of this Act to acquire control of any other carrier subject to part I, II, or III of this Act in accordance with the provisions of section 5 of part I of this Act.

Section 411(c). After the expiration of six months from the date of the enactment of this part it shall be unlawful for any director, officer, employee, or agent of any common carrier subject to part I, II, or III of this Act or of any person controlling, controlled by, or under common control with such a common carrier, in his or their own personal pecuniary interest, to own, lease, control, or hold stock in, any freight forwarder, directly or indirectly; but this subsection shall not forbid or preclude the holding of a director's qualifying shares of stock from which no personal pecuniary benefit is derived by the holder.

Section 411(g). Nothing in this Act shall be construed to make it unlawful for any common carrier subject to part I, II, or III of this Act, or any person controlling such a common carrier, to have or acquire control of a freight forwarder or freight forwarders; and in any case where such control exists, no rate, charge, classification, rule, regulation, or practice of the common carrier or of any freight forwarder controlled by such common carrier or under common control with such common carrier, shall be held unlawful under any provision of this Act because of the relationship between such common carrier and such freight forwarder.

Under Section 410(c) no freight forwarder permit "shall be issued to any common carrier subject to part I, II, or III" of the Act. However, if an application is made under Section 410(c) "by a corporation controlled by, or under common control with, a common carrier subject to part I, II, or III" it shall not be denied "because of the relationship between such corporation and such common carrier."

Section 411(g) has been construed as allowing a person to directly

control both freight forwarders and a carrier or carriers under parts I, II, and III of the Act, notwithstanding the prohibition in Section 411(c). This construction implies that the controlling person's interest in a freight forwarder or forwarders would not be adverse to the other carriers within the apparent intent of Section 411(c).

In *Ownership of Stock in Freight Forwarders,*[11] Sections 411(c) and 411(g) were said to have been intended to allow a carrier to conduct forwarder operations through a subsidiary but that the carrier's control of the forwarder must be direct rather than indirect through common officers. In *Ownership of Stock in Freight Forwarders,* the proceeding was dismissed against respondent Bacon, who had control of two motor carriers and a minority stock interest in a freight forwarder, after he acquired a controlling interest in the freight forwarder. Bacon's acquisition of the controlling interest in the freight forwarder was considered to have rectified what had previously been an unlawful situation. In considering the provisions in Part IV of the Act, the Commission stated:

> In the case of seeming conflict in the provisions of a statute, the construction should be such that both provisions, if possible, may stand. *United States v. Moore,* 95 U.S. 760, 763. Repugnancy in a statute should, if practicable, be avoided, and if the natural import of the words contained in the respective provisions tends to establish such a result, resort may be had to construction for the purpose of reconciling the inconsistency, unless it appears that the difficulty cannot be overcome without doing violence to the language of the lawmaker. *Lamp Chimney Co. v. Brass & Copper Co.,* 91 U.S. 656, 563. And in *United States v. Louisville & N.R. Co.,* 235 U.S. 314, the Court, at page 326, recognized "the rule which requires that a practice which is permitted by one section should not be prohibited on the theory that it is forbidden by another."
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> It is to be noted that section 411(g) provides a rule of construction with respect to provisons of the act concerning certain forwarder relations. Where in an act it is declared that it shall receive a certain construction, the courts are bound by that construction, though otherwise the language would have been held to mean a different thing. *Smith v. State,* 28 Ind. 321, 325. See also *United States v. Gilmore,* 75 U.S. (8 Wall.) 330, wherein the Court impliedly considered as binding upon it a provision in an act

11. 265 I.C.C. 75.

> of Congress that said act should not be construed in a certain designated manner.***
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> From the foregoing it follows that section 411(g) is to be observed as the controlling rule of construction in ascertaining the meaning of section 411(c), and in the event the conflict between these paragraphs is irreconcilable, the provisions of section 411(c) must yield to those of section 411(g). *Farmer's Bank v. Hale,* 59 N.Y. (14 Sickels) 53.

An examination of the first clause of the language found in Section 411(a)(1) shows that it constitutes an absolute prohibition against "a freight forwarder, or any person controlling, controlled by, or under common controll with a freight forwarder" acquiring control of a carrier subject to Part I, II, or III of the Act. The second clause, however, constitutes an exception to the absolute prohibition. The language states that Section 411(a)(1) "shall not limit the right to any carrier subject to part I, II, or III" of the Act "to acquire control of any other carrier subject to part I, II, or III" under provisions of Section 5.

Section 411, according to its legislative history, was drafted to guard against freight forwarder direct domination of other carriers. The exception to 411(a)(1), however, which is similar to that adopted in the passage of the Panama Canal Act, appears to be intended to make inapplicable the prohibition in the first part of 411(a)(1), where the transaction falls within the limits provided therein. In construing this statutory language, the Commission has used the same construction applied by it in determining the meaning of Section 411(c). While bearing in mind that a freight forwarder may not acquire control of a carrier, it has construed Section 411(g) and the exception in Section 411(a)(1) together and observed the former section as the controlling rule of construction in ascertaining the meaning of what would appear to be conflicting sections. Under this construction it has determined that a Part I, II, or III carrier, which is under common control with a freight forwarder, may properly acquire control of a Part I, II, or III carrier.

The Commission gave consideration to the language of Section 411(a)(1) in *Howard Term.—Control—El Dorado Motor Transp. Co.,*[12] where it is stated that the exception in Section 411(a)(1) is a saving clause. There the vendee, which was a freight forwarder and motor carrier, was authorized to purchase the operating rights of another motor carrier after the vendee had transferred its freight forwarder

12. 70 M.C.C. 494.

authority to a subsidiary corporation newly created to receive such authority, and the stockholders of the vendee authorized to assume control of the vendor, another motor carrier. In a subsequent proceeding the merger of the vendor and vendee motor carrier was authorized. It was the view in that proceeding that, although authority might not be given to a freight forwarder to acquire direct control of a motor carrier because of the prohibition in Section 411(a)(1), the Commission was free to authorize a motor carrier which controls a freight forwarder to acquire control of another motor carrier and to authorize the controlling stockholders of the parent company to gain control of the acquired motor carrier. This same approach was followed in *Calore Exp. Co., Inc.—Control and Merger.*[13] There it is stated, "Since Calore (R.I.) already controls Calore (Mass.) and Joseph C. Calore already controls both motor carriers and a freight forwarder, and since all three carriers are the alter ego of Joseph C. Calore, we do not believe the interest of Joseph C. Calore in the freight forwarder is or will be adverse to that of the motor carriers as contemplated by the statute."[14]

13. 87 M.C.C. 379.

14. See also Docket No. MC-F-8505, *Lasham Cartage Co.—Control—Seatrain Lines, Inc.*, recommended report and order of Examiner, served August 31, 1964.