CONVERSION OF CERTIFICATES OF REGISTRATION TO CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND RELATED SECTION 5 FINANCE PROCEEDINGS

BY: JAMES R. STIVERSON*

The subject matter of the instant discussion deals with the problems inherent in the acquisition by a multi-state, interstate operator of a Certificate of Registration held by a single-state operator holding a Certificate of Registration from the Interstate Commerce Commission, which registration is, in turn, coextensively tied into a single-state intrastate operating certificate.

I.

BACKGROUND

A certain amount of historical background is essential for a proper perspective of the issue as it exists today. Prior to October, 1962, single-state operators conducted such interstate operations as they desired by virtue of the former Second Proviso.[1] This was, in effect, an exemption from the provisions of the Motor Carrier Act. It was accomplished by the simple expedient of mailing to the Commission a copy of one's intrastate certificate, accompanied by a simple form (BMC 75) which provided for a certain minimal amount of information concerning the intrastate operator. Except in rather rare instances, an acknowledgment of registration, in letter form, was forthcoming automatically. This put the single-state operator in business, with the legal right to handle interstate commerce, commensurate with its intrastate certificate. For the most part, these were relatively limited operations, wherein the intrastate and interstate traffic could readily be handled, oft times on the same vehicle at the same time. There were, of course, a few notable exceptions where Second Proviso carriers became rather significant operations.

In October of 1962, by virtue of the amendment to Section 206 (a) (7) of the Motor Carrier Act, Certificates of Registration became necessary in order to conduct interstate commerce tied into an intrastate certificate. There was, of course, a Grandfather provision protecting the existing Second Proviso carriers, and also a provision for

* A.B., Denison University (1952); J.D., Ohio State University (1954).

1. Statutes involved abstracted in Appendix A.

future interstate and intrastate joint applications. It appears that this second factor has been sparsely pursued.

The net effect of filings under amended 206 was to create something more than an exemption, and somewhat less than a full-scale Certificate of Public Convenience and Necessity. This Certificate of Registration became a definite grant of single-state operating authority in interstate commerce, but still keyed to an underlying intrastate certificate.

II

The Basic Governing Legal Principle

For many years, a multi-state operator was ineligible for the exemption provisions of former 206. In fact, the law specifically precluded holding a Second Proviso filing, or from acquiring, at least directly, the authority or operations of a Second Proviso carrier. This precept was basically sound and not particularly difficult to cope with historically, until the multi-state operator desired, for any of numerous reasons, to acquire a single-state Second Proviso or Certificate of Registration carrier. The problem has become more acute with the recent developments in the motor carrier industry, wherein there appears to be a pronounced trend to consolidation and combination of operations. The potential and consequent value of a Certificate of Registration carrier to a multi-state operator can thereby become most substantial.

III

Value Potential of a Single-State Certificate of Registration Carrier to a Multi-State Operator

Historically, the single-state registered carrier has served as a feeder carrier, both on inbound and outbound traffic for the long-haul carrier. In Ohio there are innumerable certificates that have been granted in the distant past on a base point of operations theory, permitting movement from and to the base point; or, if you will, between the base point on the one hand, and, on the other, points throughout the State of Ohio. This has resulted essentially in every small town in the State of Ohio being connected to all of the major gateway points in Ohio for interstate traffic. This situation undoubtedly applies in numerous other states. The geography of Ohio is such that it is a natural bridge state—first, on transcontinental east-west traffic, particularly the

northern half of the State; and, second, as a northbound terminus on a great portion of north-south traffic.

This, in effect, makes every major city in Ohio a natural gateway for interstate traffic moving into or out of the State of Ohio. Ohio, further is a relatively compact State in area, and no two points in the State are more distant than the normal hours of service permitted by the Interstate Commerce Commission. The natural gateways of Cleveland, Akron, Canton, Toledo, Columbus, Dayton, and Cincinnati, are obvious; but the many relatively smaller, middle-sized cities in Ohio are just as effective a natural gateway as these larger cities. Further, any small town is potentially such a gateway, particularly by virtue of the type of operating authority issued by the Ohio Commission which permits movements from that small town to any major gateway, or the reverse direction.

For illustration, while the amount of interstate traffic moving between a town such as Orrville, Ohio, and other points in Ohio was undoubtedly relatively minimal, and probably limited to connections at Akron, perhaps Cleveland, and to a lesser extent Mansfield and Columbus, the potential for a Certificate of Registration at Orrville in the control of a multi-state operator is tremendous. Orrville (population, approximately 7,000) is located roughly five miles north of U. S. Highway 30, a major east-west route from coast to coast, and within two hours drive by truck to any of the aforementioned gateways. The traffic moved under the Certificate of Registration from Cleveland and Akron primarily into this small town, or in the reverse direction, can now become traffic to the entire State of Ohio, moving in from any direction or out to any direction so long as, of course, the Orrville gateway is observed. As stated earlier, the number of such certificates in Ohio approaches the hundreds. This, in effect, makes every small town with such a Certificate a potential gateway to the entire State of Ohio. Query—what is the value to a large multi-state operator of operating authority for the entire State of Ohio? Obviously, it approaches a most substantial figure.

IV

PROCEDURAL ASPECTS

The procedure in handling a Sec. 5(a) Proceeding[2] or a finance case of this sort involves several problems. First, the usual Section 5 finance

2. Title 49, United States Code Annotated, Section 5.

application must be prepared and filed; and, secondly, at the same time, it must be accompanied by an operating rights application seeking authority between the base point of the Ohio certificate on the one hand, and, on the other, points in the State of Ohio. At the time of hearing, assuming said case goes to hearing, there are two aspects of the proceeding—an Interstate Examiner hearing the finance section proceeding, and a Joint Board member, as provided in Sec. 205 (a), hearing the operating rights portion. This, obviously, creates complications and differing standards. The finance aspects of such a proceeding are relatively conventional finance case matters, although frequently the contracts and agreements between the parties can become rather complex because of the underlying intrastate transfer proceedings, which are equally essential. The crux of the case arises from the operating rights portion of such a proceeding. The idea of conversion of a Certificate of Registration into a full-scale Certificate of Public Convenience and Necessity, has become a stopgap solution to an otherwise legally barred process. One of the prime underlying problems is precisely what is the standard of proof necessary to warrant a grant of a full-scale certificate which, in turn, can then be acquired by the multi-state operator. Unfortunately, the case law to date is of little help.

It would seem that this should not create that large a problem, as certainly there have been some operations. This is certainly true, but the question then becomes how much operations. It must be remembered that many of these Certificate of Registration operators were relatively small-scaled, and were based at a single point wherein the traffic automatically involved movements between the base point and some few natural gateway points. The size of the base point city basically determined the amount of extraneous traffic that was handled.

A further complicating factor is that many of the Certificate of Registration operators also hold certificates from the Interstate Commerce Commission overriding a portion of their intrastate operations. From a practical standpoint, it is virtually impossible to determine which certificate was utilized on any given movement. Consequently, abstracts of shipments tend to become complex, if not outright confusing. A further complicating factor arises out of the type of traffic handled. In many instances, particularly with the smaller base point cities, traffic tends to fall into a relatively limited category. Yet, in almost every instance, the application under Section 206 was for general commodities.

One further complicating factor is worthy of note. Again, the

geography of Ohio is such that a conversion application can involve, inadvertently, a multi-state Joint Board, i.e., Cincinnati (Kentucky); Toledo (Michigan); Youngstown-Warren-Niles (Pennsylvania), because of the Commercial Zone problem inherent therein. Yet, by the same token, there can be no showing of any lawful prior operations in the extra-state portion of the Zone.

The operating rights portion of such a proceeding is doubly complicated by the fact of the total absence at the present time of an intelligible standard. Conventional operating rights procedures at the present status of the art have definite procedural criteria, as to what it takes to make or defeat an operating rights proceeding. Finance cases are considerably more liberal in terms of what constitutes past operations. Therefore, at the outset, a conversion proceeding is faced with a dual standard—whether as an opponent or proponent.

The factor of an absence of a definite criteria has undoubtedly created more prolonged proceedings than any other comparative case would generate. For example, in many proceedings the number of protestants has approached half a hundred. At first blush, this situation is disturbing to the Commission and the parties as well. Yet, in view of the stakes involved, this is probably a minimal number.

V

Representative Cases

Perhaps the leading representative case arose out of the pre-1962 October amendment era, that of *C & D Motor Delivery Co.—Purchase-Elliott*, 38 M.C.C. 547, wherein the essence of the Commission's decision was the concept of a Section 5 application in conjunction with a related 206 application with a joint hearing. The net result of this case was to establish a method wherein a multi-state carrier could acquire and merge the operations of a single-state, registered Second Proviso carrier. The principles set forth in the Elliott case have been reaffirmed on numerous occasions. For instance, *T.I.M.E. Freight, Inc., Merger*, 97 M.C.C. 310, which was affirmed on appeal by the Federal Court in *Navajo Freight Lines, Inc., et al, vs. U. S.*, 263 Fed. Sup. 438.

Without belaboring the factual details of the above two landmark cases, each vendor carrier had conducted full-scale operations within the scope of its Second Proviso registration, and likewise was of little if any value to the vendee multi-state carrier without the benefit of the interstate authority.

Later, the Commission took a completely reverse approach in the case of *Ohio Fast Freight, Inc.—Control and Merger—Lee, Inc.*, MC-F-8832, and related MC-14702 Sub No. 5. This proceeding involved, in summary, multi-state authority in Ohio Fast Freight between numerous eastern points and the Youngstown-Warren, Ohio, area. Lee, Inc. held a Certificate of Registration between Niles, Ohio and points in the State of Ohio—Niles being a point within the Warren-Niles-Youngstown Commercial Zone. This case was turned down in its entirety by the Commission; and, on appeal to the Federal Court, the decision of the Commission was affirmed. The second section of this case cropped up at a later date in *Youngstown Cartage Co.—Purchase—Lee, Inc.*, MC-F-9529, and related Extension—Niles, Ohio, MC-8958 Sub No. 20, wherein the Examiner ultimately recommended a limited grant of authority to the extent of contractors' equipment, metal and metal products, machinery and iron and steel articles, between Niles, Ohio, on the one hand, and, on the other, points in Ohio. This order has become effective by operation of law, and is undoubtedly a reasonable solution to this case.

This proceeding cites *Spade Continental Express, Inc.—Purchase—B & R Truck Lines, Inc.*, MC-F-9353, and related MC-98210 Sub No. 3, as a precedent for the decision. In B & R/Spade, the basic issue before the Commission involved the holder of an intrastate registered certificate from and to Cincinnati, Ohio. B & R was a small local carrier between Cincinnati, Ohio and Covington and Newport, Kentucky, and a few farther south, northern Kentucky cities. In effect, an operator in the Kentucky portion of the Cincinnati Commercial Zone. The Commission in this proceeding ultimately granted authority for Spade to acquire B & R; and, as a necessity thereof, had to convert Spade's Certificate of Public Convenience and Necessity. It is interesting to note that Spade, in terms of over-all operations, was probably fifty times larger than B & R. This approaches the tail wagging the dog.

An equally pertinent case, and of more recent impression insofar as Ohio Certificates of Registration are concerned, is that of *R.W. Express, Inc.—Control and Merger—Great Lakes & Southern Express, Inc.*, MC-F-9369, and related proceeding MC-55896 Sub No. 25, R.W. Express, Inc., Extension—Ohio. The Commission in this proceeding affirmed the Examiner and the Joint Board recommending a grant of authority on general commodities from and to Toledo, Ohio, to points in the State of Ohio. By granting a certificate to R.W., the multi-state carrier, it in effect opened the entire State of Ohio for R.W. through the Toledo gateway.

The complete reverse situation has occurred in that of *Lyons Transportation Lines, Inc.—Control and Purchase (Portion—The Beiter Line Corp., Lehman Cargage, Inc.—Purchase (Portion—The Beiter Line Corp.*, MC-F-9690, and related MC-109564 Sub 9 Lyons Transportation Lines, Inc., Extension—Ohio; and MC-7573 Sub No. 4 Lehman Cartage, Inc., Extension—Ohio. The examiner sitting in the finance proceeding and also sitting in the extension proceeding by virtue of the waiver of the Ohio Joint Board to participate in a Washington, D.C. hearing, recommended a total denial of the proceedings. In simplified form, Lyons and Lehman seek to divide The Beiter Line Corp. certificate in order to create two gateways—Cleveland, Ohio, and Elyria, Ohio. The ultimate outcome of this proceeding, of course, is still pending and open to discussion; but nonetheless, so far a complete reverse approach to that of R.W. cited hereinbefore.

In all fairness, certain subsidiary cases should be reviewed in this light, i.e., *E.A. Schlairet Transfer Co.*—Purchase—Conrad Trucking, Inc., MC-F-9226, and related operating rights docket, wherein the Commission, in complete reverse of the aforesaid Spade/B & R proceeding, denied the applications in their entirety.

A similar case entitled to note is *Budig Trucking Co.—Purchase (Portion)—Robert Henning*, MC-F-9684, and related operating rights case, wherein the grant of authority was precisely tailored and restricted to the geographical scope of past operations.

One further case is worthy of note, that of *Ohio Southern Express, Inc.—Purchase—Vermilion Truck Line, Inc.*, MC-F-7919, wherein the Ohio registered certificate of Vermilion was permitted to be acquired by Ohio Southern; and, in turn, by virtue of the conversion proceeding and operating rights case, an application and grant of authority was made to Ohio Southern for a Certificate of Public Convenience and Necessity embracing the Vermilion rights. This case was appealed to Federal Court, and resulted in affirmation of the Commission approval. The noteworthy aspect of this case from a historical survey, is undoubtedly the unique feature of the tremendous tax problem with the Federal Government, Department of Internal Revenue, which Vermilion was experiencing.

VI.

The Policy Considerations

The exemption provisions of former 206 has created a specter which

we must all be prepared to cope with. The amendment in October of 1962, which made provisions for something more than an exemption in the form of a Certificate of Registration, is now the law. That law still precludes a multi-state operator in interstate commerce from holding a Certificate of Registration. The concept of converting the Certificate of Registration to a Certificate of Public Convenience and Necessity in conjunction with a finance proceeding under Section 5 of the Act, is the present mode for accomplishing this. Without taking a position as to the merits of this procedure, it would seem a reasonable approach to contain such conversions to that which has been done in the past. In other words, the conversion should be limited to that which the vendor has been performing in the past under its exemption under the old Second Priviso, or by virtue of its Certificate of Registration under the amended Act. This certainly is in keeping with the concept of not creating new competitive services out of the whole cloth by virtue of some accident of law or of fact.

VII.

Conclusion

The amendment of Section 206 in October of 1962, without question solved many problems by creating a specific type of certificate as opposed to what was formerly merely an exemption. At the same time, it created new problems. The same problem of a multi-state carrier vendee acquiring a single-state vendor, still exists as it did before the amendment.

The Commission has handled the procedure in as practical a way as is probably possible under the present status of the law. Yet, by the same token, the case-by-case approach has developed some rather opposed results, based undoubtedly on the facts surrounding the individual case at hand. Perhaps part of the difficulty lies in the two separate standards that are historical in Section 5 proceedings, as opposed to operating rights proceedings. The burdens of proof are simply different. A hybrid proceeding, perforce, must be a compromise between the two standards. The ultimate question to be answered by counsel in this type of proceeding, must be the quantum of operations—both by territory and by commodity.

These are but a few of the problems inherent in the acquisition by a multi-state carrier of a single-state operator holding a Certificate of Registration under the present status of the law; however, they are some of the more essential questions to be resolved in developing this type of proceeding.

APPENDIX A

PERTINENT SECTIONS OF PART II OF THE INTERSTATE COMMERCE ACT:

§ 206(a)(6) On and after October 15, 1962 no certificate of public convenience and necessity under this chapter shall be required for operations in interstate or foreign commerce by a common carrier by motor vehicle operating solely within a single State and not controlled by, controlling, or under a common control with any carrier engaged in operations outside such State, if such carrier has obtained from the Commission of such state authorized to issue such certificates, a certificate of public convenience and necessity authorizing motor vehicle common carrier operations in intrastate commerce and such certificate recites that it was issued after notice to interested persons through publication in the Federal Register of the filing of the application and of the desire of the applicant also to engage in transportation in interstate and foreign commerce within the limits of the intrastate authority granted, that reasonable opportunity was afforded interested persons to be heard, that the State commission has duly considered the question of the proposed interstate and foreign operations and has found that public convenience and necessity require that the carrier authorized to engage in intrastate operations also be authorized to engage in operations in interstate and foreign commerce within limits which do not exceed the scope of the intrastate operations authorized to be conducted. Such operations in interstate and foreign commerce shall, however, be subject to all other applicable requirements of this Act and the regulations prescribed hereunder. Such rights to engage in operations in interstate or foreign commerce shall be evidenced by appropriate certificates of registration issued by the Commission which shall be valid only so long as the holder is a carrier engaged in operations solely within a single State, not controlled by, controlling, or under a common control with a carrier engaged in operations outside such State, and except as provided in section 5 of this title and in the conditions and limitations stated herein, may be transferred pursuant to such rules and regulations as may be prescribed by the Commission, but may not be transferred apart from the transfer of the corresponding intrastate certificate, and the transfer of the intrastate certificate without the interstate or foreign rights shall terminate the right to engage in interstate or foreign commerce. * * *

§ 206(a)(7)(A) In the case of any person who or which on October 15, 1962 was in operation solely within a single State as a common carrier by motor vehicle in intrastate commerce (excluding persons

controlled by, controlling, or under a common control with, a carrier engaged in operations outside such State), and who or which was also lawfully engaged in such operations in interstate or foreign commerce under the certificate exemption provisions of the second proviso of paragraph (1) of this subsection, as in effect immediately before October 15, 1962, or who or which would have been so lawfully engaged in such operations but for the pendency of litigation to determine the validity of such person's intrastate operations to the extent such litigation is resolved in favor of such person, and has continued to so operate since October 15, 1962 (or if engaged in furnishing seasonal service only, was lawfully engaged in such operations in the year 1961 during the season ordinarily covered by its operations, and such operations have not been discontinued), except in either instance as to interruptions of service over which such person had no control, the Commission shall issue to such person a certificate of registration authorizing the continuance of such transportation in interstate and foreign commerce if application and proof of operations are submitted as provided in this subsection. Such certificate of registration shall not exceed in scope the services authorized by the State certificate to be conducted in intrastate commerce, and shall be subject to the same terms, conditions, and limitations as are contained in or attached to the State certificate except to the extent that such terms, conditions, or limitations are inconsistent with the requirements established by or under this Act. If the effectiveness of the State certificate is limited to a specified period of time, the certificate of registration issued under this paragraph (7) shall be similarly limited. Operations in interstate and foreign commerce under such certificates of registration shall be subject to all other applicable requirements of this Act and the regulations prescribed hereunder. Certificates of registration shall be valid only so long as the holder is a carrier engaged in operation solely within a single State, not controlled by, controlling, or under a common control with a carrier engaged in operation outside such State, and except as provided in section 5 of this title and in the conditions and limitations stated herein, may be transferred pursuant to such rules and regulations as may be prescribed by the Commission, but may not be transferred apart from the transfer of the corresponding intrastate certificate, and the transfer of the intrastate certificate without the interstate or foreign rights shall terminate the right to engage in interstate or foreign commerce. The termination, restriction in scope, or suspension of the intrastate certificate shall on the 180th day thereafter terminate or similarly restrict the right to engage in interstate or foreign commerce unless the intrastate certificate shall have been renewed, reissued, or reinstated or

the restrictions removed within said one hundred and eighty-day period. Such certificates of registration shall be subject to suspension or termination by the Commission in accordance with the provisions of this Act governing the suspension and termination of certificates of public convenience and necessity issued by the Commission.

Section 206(a)(1), Interstate Commerce Act, 49 U.S.C. Sec. 306, Prior to its Amendment on October 15, 1962:

Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: Provided, however, That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: And provided further, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State

having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.