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## UNREGULATED TRANSPORT IN THE HISTORY AND ADMINISTRATION OF OKLAHOMA MOTOR CARRIER LAW\*

Larkin Warner\*\*

Prices charged, services offered, products carried and many other economic features of railroads and common and contract trucking firms are subject to federal and state regulation. Although all railroads are regulated, large segments of motor transport are subject to no regulation except in regard to matters of safety. There is economic regulation neither of passenger travel in private automobile nor the carriage of a shipper's property in his own truck. Highway transport of agricultural commodities is exempt from federal economic regulation. For-hire trucking frequently exempted by states includes transport within municipalities, operations of agricultural cooperatives, and the carrying of farm products, fish, and newspapers.<sup>1</sup> In the last decade there has been increasing awareness and concern over the fact that regulated railroads and motor carriers have been losing great amounts of potentially profitable traffic to private<sup>2</sup> and exempt trucking operations. The interstate Commerce Commission has estimated that the share of intercity ton-miles hauled by common carriers declined from three-fourths in 1939 to two-thirds in 1959 and will continue to decline to around 60 per cent by 1970.<sup>3</sup> A report on national transportation problems prepared recently for the United States Senate Committee on Commerce observed this trend and concluded:

We frankly face a shift from a private public carrier-based transport system to a private and exempt carrier-based system along with the prospect of Government-owned railroad industry. The latter would in all likelihood precipitate strict regulation of all the competitors of the Government-owned railroads as it has in other nations where nationalization of railroads has occurred . . .<sup>4</sup>

The relative decline of common carriage is alarming not only be-

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<sup>1</sup> HARPER, *ECONOMIC REGULATION OF THE MOTOR TRUCKING INDUSTRY BY THE STATES*, 71, (1959).

<sup>2</sup> The term "private" trucking as used in this paper refers to a shipper's hauling his own goods in his own or leased truck. There has been some tendency in the past to use the adjective "private" to describe all trucking operations not involving common carriage. Hence Oklahoma intrastate contract carriers are "Class B (Private)" carriers. A better term might be "proprietary" trucking, but this is not widely used.

<sup>3</sup> ICC 75th Ann. Rep. 9 (1961).

<sup>4</sup> Senate Committee on Commerce, *National Transportation Policy*, S. Rept. 445, 87th Cong. 1st Sess. 85 (1961).

cause of the lurking specter of nationalization. Three conditions induce uncertainty as to the extent to which this trend reflects a worsening in the allocation of transport and other economic resources. (1) Common carrier services and rates are subject to control by public agency and are probably not able to react to changed market conditions as rapidly as unregulated prices.<sup>5</sup> (2) Common carrier management has adhered with uncommon tenacity to price and service policies developed under earlier, less competitive conditions.<sup>6</sup> (3) The very survival of the small shipper who is precluded, solely by his smallness, from owning transportation equipment may depend on the outcome of the battle between regulated and non-regulated segments of the transport industry.

Conditions in Oklahoma do not present an exception to the national trend toward private and unregulated trucking. To the extent that Oklahoma is at a disadvantage relative to neighboring states in matters relating to railroad rates, changes in the structure of the trucking industry become particularly important. Moreover, the Oklahoma for-hire trucking industry is currently generating about \$60 million in wage and salary disbursements annually<sup>7</sup> and slightly more than 1 per cent of the state's total employment.<sup>8</sup> This study examines the history and administration of Oklahoma motor carrier legislation in an attempt to identify how public policy has affected the relationship between regulated and unregulated segments of the state's intrastate motor carrier industry.<sup>9</sup> It will be seen that the two primary channels through which this relationship is influenced have been (1) the taxation of different classes of trucks and trucking operations and (2) specific regulation of for-hire trucking.

### THE FORMATION OF THE STATUTORY FRAME- WORK OF REGULATION: 1923-39

The essentials of the statutory framework of Oklahoma motor car-

<sup>5</sup> See HILTON, *TRANSPORTATION REGULATION AND PRIVATE CARRIAGE*, IN *PRIVATE AND UNREGULATED CARRIAGE*, Evanston, Illinois: Transportation Center at Northwestern University 13-31 (1963).

<sup>6</sup> A recent major study places heavy emphasis on noncompetitive pricing by for-hire carriers as a cause for private trucking. OI & HURTER, *ECONOMICS OF PRIVATE TRUCK TRANSPORTATION*, (1965). See also Wilson, *The Effects of Value-of-Service Pricing on Common Carriers*, 63 *JOURNAL OF POLITICAL ECONOMY* 337 (1955).

<sup>7</sup> U. S. Dep't of Commerce Office of Business Economics, *Survey of Current Business* 21 (August, 1964).

<sup>8</sup> Estimate derived from U. S. Dep't. of Commerce, *County Business Patterns*, (Part 8A) (First Quarter, 1962).

<sup>9</sup> Disregarding federal policy and focusing upon state regulation excludes many issues extremely important to the Oklahoma shipping public. For a quick view of the hazy status of federally exempt and non-exempt motor transport see ICC, *Gray Area of Transportation Operations*, Statement No. 6010 (June, 1960). See also the recent important decisions involving a Guthrie, Oklahoma firm in which the scope of private truck-leasing agreements exempt from federal regulation was narrowed considerably. *Oklahoma Furniture Manufacturing Co. et al.—Investigation of Operations*, 79 M. C. C. 403 (1959); *Henry E. Drum v. United States*, 193 F. Supp. 275 (W. D. Okla. 1960); *United States v. Henry E. Drum*, 368 U.S. 370 (1962).

rier regulation had all been shaped by 1939. Certain provisions in the statutes can be understood only with reference to the events of the sixteen year period following Oklahoma's first attempt to regulate the trucking industry. In particular, it is necessary to realize that much of today's law developed at a time when economic regulation of motor carriers was directly connected with a system of vehicle-mile taxation applying only to regulated carriers.

#### FIRST REGULATION: 1923-28

Although Oklahoma's first motor vehicle licensing law was passed in 1915, it was not until 1923 that the state legislature brought for-hire motor transport under specific economic regulation. As in many other states, early Oklahoma trucking legislation emerged from conditions somewhat similar to those which had led to regulation of railroads in the latter decades of the 19th century. Prominent among these conditions were "ruinous" or "destructive" competition threatening carrier financial health, and exorbitant, discriminatory charges flowing from carrier monopoly power. However, there were at least two very important differences between the origins of railroad and truck regulation. While the initial stimulus for railroad regulation came from agrarian groups hostile toward the railroads, truck regulation was promoted by railroads and large truckers who saw regulation as a technique for rationalizing the transportation industry.<sup>10</sup> As a matter of fact, agrarian groups were opposed to motor carrier regulation and frequently succeeded in obtaining exemptions from regulation of for-hire transport of agricultural commodities. Moreover, because trucks traveling over publicly-provided rights of way cause more wear and tear than passenger cars, it became clear that truck operators should bear a relatively greater share of the burden of highway finance. Thus the first economic regulation of Oklahoma motor carriers included a highway user tax.

The 1923 act entitled "Transportation by Motor Vehicles"<sup>11</sup> brought motor carriers under regulation by the state's Corporation Commission. The act defined the term "motor carrier" to include: "... any person, firm, . . . operating any motor vehicle . . . upon any public highway for the transportation of passengers or property for compensation between fixed termini or over a regular route even though there may be periodic or irregular departures from said termini or route."<sup>12</sup> Vehicles operating only in intracity business or not between incorporated towns were exempted from the provisions of the act. The act required that rates set by motor carriers should be "just and reasonable."

<sup>10</sup> See HUDSON & CONSTANTIN, *MOTOR TRANSPORTATION* at 461-62 (1958).

<sup>11</sup> OKLA. SESS. LAWS 1923, at 188.

<sup>12</sup> OKLA. SESS. LAWS 1923, ch. 113, § 1(a).

In order for a firm to offer a type of motor transport service covered by the definition of "motor carrier," it had to seek from the Corporation Commission a certificate of public convenience and necessity. The Corporation Commission was given the power to attach to a certificate "such terms and conditions as in its judgment the public convenience and necessity may require."<sup>13</sup> Certificates could be suspended, altered, revoked, or amended by the Commission for good cause. The Commission was given power to set up safety rules for trucks and to require motor carriers to post public liability bonds.

All motor carriers were to pay a highway user tax of 2 mills per vehicle-mile while carrying freight or passengers for hire. A weight restriction of 15,000 pounds per loaded vehicle was aimed at reducing highway damage by trucks.

In 1923 there were 18,576 trucks licensed in Oklahoma. The following year, the first year the 1923 act was in effect, truck registration jumped to 27,047.<sup>14</sup> During 1924 the Corporation Commission granted 121 certificates of public convenience and necessity. Since the trucking firms of the 1920's were predominantly one- or two-vehicle operations, it may be presumed that a very small portion of the state's total supply of truck transport was subject to the provisions of the act. Nevertheless, the Corporation Commission apparently attempted to take care that no certificates were granted where there was no public convenience and necessity, for in the same year it denied 72 applications.

Objection to the act of 1923 was immediately forthcoming. In *Ex parte Tindall*<sup>15</sup> the Supreme Court of Oklahoma upheld emphatically the right of the state to regulate motor carriers. The court argued that such regulation was proper exercise of a "plastic" police power and did not deny persons' rights guaranteed in the Fourteenth Amendment to the United States Constitution.

#### THE ACT OF 1929

The 1923 legislation had several major defects. Since a great many trucking operations were not included in the definition of "motor carrier," regulation was incomplete. Private trucking was subject to no tax or regulation. The act was so worded that it apparently did not apply to irregular-route carriers.

The statute's treatment of contract trucking was also inadequate. In 1927 in *Barbour v. Walker*<sup>16</sup> the Supreme Court of Oklahoma held that a trucker hauling goods to Shawnee under contracts with five Oklahoma

<sup>13</sup> OKLA. SESS. LAWS 1923, ch. 113, § 4, at 189.

<sup>14</sup> U. S. Bureau of Public Roads, Dep't. of Commerce, *Highway Statistics, Summary to 1955*, at 24 (1957).

<sup>15</sup> 102 Okla. 192, 229 P. 125 (1925).

<sup>16</sup> 126 Okla. 227, 259 P. 552 (1927).

City firms was a "common carrier" under the definition of the act of 1923. In this case, the Oklahoma court wrestled with a United States Supreme Court decision declaring unconstitutional California's motor carrier regulation statute. California law had placed contract carriers automatically into the classification of common carrier by requiring them to obtain certificates of public convenience and necessity. In *Frost v. Railroad Commission of California*<sup>17</sup> the United States Supreme Court held that forcing contract carriers to become common carriers violated the Fourteenth Amendment. Since the Oklahoma legislation of 1923 provided for regulation of "motor carriers" having to obtain certificates of public convenience and necessity, a question arose as to whether forcing the defendant to obtain a certificate was unconstitutional on the same basis as the California statute. By using the term "motor carrier" rather than "common carrier," the Oklahoma statute did not force a contract carrier to assume common carrier obligations. In spite of the fact that the Oklahoma court was able to distinguish the *Frost* case,<sup>18</sup> a question apparently remained concerning the constitutionality of a state's exercising its power to regulate the use of its highways by requiring bona fide contract carriers to obtain *the same* certificate of public convenience and necessity as common carriers.

Another defect which could prove extremely exasperating to the shipping public was the Corporation Commission's lack of authority over discontinuance of service. A certificate is a special and sometimes very valuable privilege granted to private individuals by the state. If the state guarantees, through the certificate, that a firm is safe from competition by new firms, then a reasonable *quid pro quo* should protect the state and its citizens from capricious cessation of a service which has been identified as a public necessity.

The act of 1929 entitled "Motor Vehicle Act Enforcement Fund"<sup>19</sup> established the basic "A-B-C" motor carrier classification which is still in effect. The definition of "motor carrier" was broadened from its original 1923 form by excluding the requirement that service be between "fixed termini or over a regular route."<sup>20</sup> Thus the criterion for indentifying

<sup>17</sup> 271 U. S. 583 (1926).

<sup>18</sup> The Supreme Court of Oklahoma used two routes to distinguish *Frost*. (1) The *Frost* decision had been premised on the California Supreme Court's finding that the California motor carrier law had no relationship to regulation of the use of the state's highways. Since the purpose of the Oklahoma legislation was regulation of the highways, *Frost* could not control. (2) Because defendant Walker had five contracts (rather than one as in the *Frost* case), he was no longer a private carrier and was merely using contracts as a guise to avoid regulation.

*Barbour v. Walker* was cited in support of the conclusion that after the *Frost* case "courts . . . held that there was no objection to requiring either permits or certificates of convenience and necessity for contract carriers, provided the statutes did not cast them into the category of common carriers." HALL, STATE CONTROL OF BUSINESS THROUGH CERTIFICATES OF CONVENIENCE AND NECESSITY 26 (1947).

<sup>19</sup> OKLA. SESS. LAWS 1929, ch. 253, at 351.

<sup>20</sup> OKLA. SESS. LAWS 1923, ch. 113, § 1(b), at 188.

"motor carrier" became simply the transportation of passengers or property "for compensation." Motor carriers were then placed into three classes depending upon the services in which they were engaged. Except for the specification of common carriage, the "Class A" carrier was essentially identical to the "motor carrier" of the 1923 legislation.<sup>21</sup> Class A carriers were prohibited from discontinuing service without first obtaining permission from the Corporation Commission.

"Class C" included private truckers levying transport charges on their customers, but excluded haulers of agricultural products from farm to market and road-building materials.<sup>22</sup>

The residual "B" classification included "all other motor carriers not operating as Class 'A' and 'C' motor carriers, whether as private carriers or common carriers, of persons or property."<sup>23</sup>

A Class A carrier had to obtain from the Corporation Commission a "certificate declaring that public convenience and necessity require [its] operation."<sup>24</sup> Class B and C carriers were required to get permits to operate. The law stated no criteria by which the Commission should judge whether or not to grant Class C permits. In its granting of Class B permits, the Commission could "attach to the exercise of the rights granted by such permit, such terms and conditions as in its judgment the *public convenience and necessity* require."<sup>25</sup> The same section of the law also contained a statement that "it shall not be necessary for any interstate [Class B] carrier . . . to make any showing of a *Convenience and necessity*."<sup>26</sup> This wording, taken on its face, would seem to imply that intra-state Class B carriers were to be required to prove public convenience and necessity. However, the Class B permit was called simply a "permit" and not a "permit of public convenience and necessity." The specific exclusion of interstate carrier from having to show convenience and necessity may have been motivated by the fact that by 1929 it was well established that such a requirement was an unconstitutional interference with interstate commerce.<sup>27</sup>

<sup>21</sup> "Class 'A' motor carriers, shall include all motor carriers operating as common carriers of persons, or property between fixed termini or over a regular route, even though there be periodic or irregular departures from said termini or route." OKLA. SESS. LAWS 1929, ch. 253, § 1(b) (1), at 352.

<sup>22</sup> "Class 'C' motor carriers shall include all carriers which are operated by owners for the transportation of their own property, goods or merchandise who charge or collect from the consignee, purchaser, or recipient of such property, goods or merchandise for transporting or delivering same, provided, however, the provisions of this Act shall not apply to transportation of livestock and farm products in the raw state and trucks hauling road materials." OKLA. SESS. LAWS 1929, ch. 253, § 1(b) (3), at 352.

<sup>23</sup> OKLA. SESS. LAWS 1929, ch. 253, § 1(b) (2), at 352.

<sup>24</sup> OKLA. SESS. LAWS 1929, ch. 253, § 6, at 353.

<sup>25</sup> OKLA. SESS. LAWS 1929, ch. 253, § 7, at 355 (emphasis added).

<sup>26</sup> *Ibid.* (emphasis added). The 1929 legislation also exempted Class A interstate carriers from having to prove convenience and necessity, except when they carried passengers or freight between points in Oklahoma. OKLA. SESS. LAWS 1929, ch. 253, § 6, at 354.

<sup>27</sup> *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570 (1925).

Class A and B carriers were required to post public liability bonds and file tariffs. The Corporation Commission was given the power to remove the liability bond requirements from Class C carriers. The act was so worded that the same rule of "just and reasonable" ratemaking apparently applied to all three classes.

The 1929 act expanded and revised the state's highway user tax system. Class A and B buses were subject to a graduated vehicle-mile tax and a graduated set of registration fees, with buses with larger seating capacities paying higher mileage tax rates and registration fees. Class A carriers of freight had to pay a tax of 4 mills per vehicle-mile, while Classes B and C carriers paid 5 mills. Two factors might explain this peculiar difference in tax rates. First, the Class A carriers, unlike Classes B and C, were also subject to registration fees graduated on the basis of carrying capacity. Second, the Class A carriers' tax was computed in a much more certain manner than that of the Class B carriers. Class A carrier mileage was "determined on the basis of the number of trips scheduled per day and computed on the basis of thirty (30) days per calendar month regardless of whether the motor vehicle carries out its schedule."<sup>28</sup> The taxation of B and C carriers was partially voluntary, for their mileage was only to be calculated "while engaged in the transportation of property" and their tax payment was to include a "verified report, showing the trips made and the mileage traversed."<sup>29</sup>

#### THE COLLINS-DIETZ-MORRIS CASE AND THE ACT OF 1933

The issue of what sort of transportation service was subject to regulation and taxation as Class C carriage was examined by the Supreme Court of Oklahoma in 1932 in a case involving the trucking operations of an Oklahoma City wholesale grocery firm.<sup>30</sup> The Collins-Dietz-Morris Company owned two trucks which it used to deliver wholesale groceries to retail stores outside the city limits of Oklahoma City. The firm used two techniques for billing customers receiving goods delivered in its trucks. For some shipments no specific charge for transportation was levied against the retailer; for others a specific delivery charge was included. The issue before the court was whether or not the Corporation Commission had ruled correctly when it had held that the Collins-Dietz-Morris trucking operations were of a Class C nature. This issue was particularly important to the firm, because if it was not a Class C carrier it would not have to pay the 5 mill per vehicle-mile user tax.

In ruling on whether or not the operations involved transportation

<sup>28</sup> OKLA. SESS. LAWS 1929, ch. 253, §9, at 356.

<sup>29</sup> OKLA. SESS. LAWS 1929, ch. 253, §9, at 357. When a trucking firm challenged this tax differential as discriminatory, the U. S. District Court upheld the tax on the grounds that the cost of collection would be greater in the cases of "B" and "C" carriers. *Roadway Express v. Murray*, 60 F. 2d 293 (W. D. Okla. 1932).

<sup>30</sup> *Collins-Dietz-Morris Co. v. State Corporation Commission*, 154 Okla., 121, 7 P.2d 123 (1932).

for "compensation," the court differentiated between the two types of billing used by the firm. If there is no specific charge for delivery, held the court, then the cost of transport is overhead borne by all the firm's customers and does not involve transport for "compensation." However, when the firm made a specific charge for the transportation service, it was receiving compensation for transportation and was therefore subject to the mileage tax as a Class C carrier.

The court then took the trouble to point out some limitations to the scope of the Corporation Commission's authority over Class C carriers. Completely overlooking the 1929 law's lack of clarity in this matter,<sup>31</sup> the court stated:

An examination of the act discloses that class "C" motor carriers as defined therein are not common carriers and are not subject to the regulation of the corporation commission as to rates, fares, charges and classifications. The schedules, services and accounts of class "C" motor carriers are not subject to regulation or supervision by the corporation commission, the authority of the corporation commission over class "C" motor carriers being limited to the regulation of the use of the public highways by class "C" motor carriers under the restrictions contained in the act.<sup>32</sup>

The grocery firm also charged that the exemption from Class C of road materials and farm-to-market transport of farm products was contrary to the state constitution's prohibitions against discriminatory taxation. The Court, however, held the exemptions constitutional. It noted sufficient basis for the exemptions in the fact that hauling farm produce and road materials does not contribute to the congestion of inter-city highways to the same degree as other forms of trucking.<sup>33</sup>

After the Collins-Dietz-Morris decision, any firm shipping in its own trucks could avoid taxation as a Class C carrier by never identifying transportation charges on invoices. The 1933 Oklahoma Legislature attempted to close this loophole. The definition of "motor carrier" was broadened by adding the phrase "or for commercial purposes" to the provision of the 1929 act, so that "motor carrier" now included firms engaged in

<sup>31</sup> Holding Collins-Dietz-Morris operations involving specific transportation charges subject to taxation as Class C carriage could have set up the following chain of reasoning: (1) Class C operations are, of course, those of a "motor carrier" as defined in the act; (2) The act prescribes that "all charges made by any motor carrier for any intra-state service . . . shall be just and reasonable . . ."; (3) Therefore, charges levied by Collins-Dietz-Morris upon its customers are subject to regulations by the Corporation Commission.

<sup>32</sup> *Supra* note 30, at 131.

<sup>33</sup> This interpretation was reaffirmed in *Pure Oil Co. v. Oklahoma Tax Commission*, 179 Okla. 479, 66 P.2d 1097 (1936) and *Walde v. Oklahoma Tax Commission*, 188 Okla. 142, 106 P.2d 821 (1940).

"transportation of passengers or property for compensation or for commercial purposes."<sup>34</sup>

The scope of exemptions from Class C regulation was expanded and clarified, and several agricultural commodities were specifically listed as exempt.<sup>35</sup> The 1933 law also revised the state's vehicle-mile user tax on motor carriers of property. The act of 1929 had set up flat rates of 4 mills per vehicle-mile for Class A carriers and 5 mills per vehicle-mile for Classes B and C carriers. Under the new provisions all three classes were subject to the same schedule of taxes. However, the tax rate varied directly with vehicle weight. There were five weight classifications, and the rate ranged from 4 to 10 mills per vehicle-mile.

#### FURTHER CLARIFICATION OF PRIVATE TRUCK STATUS: THE PURE OIL CASES

In spite of the action taken in 1933, the Class C loophole had not been closed completely. After the 1933 revision, the Oklahoma Tax Commission sought to tax as Class C carriers the trucks owned and operated by petroleum producers to haul oil field equipment.<sup>36</sup> Since such equipment was rather abundant in Oklahoma, considerable tax revenue was involved.

The Pure Oil Company challenged the Tax Commission's ruling that it was engaged in Class C transport. In 1935, a divided Oklahoma Supreme Court ruled in *Pure Oil v. Cornish*<sup>37</sup> that Pure's trucks were not Class C carriers. In so ruling, the court determined that Pure's hauling oil field equipment did not involve transportation "for commercial purposes" or "in furtherance of any private commercial enterprise." The adjective "commercial" in the Act of 1933 was held to refer to "buying, selling and exchange in goods, wares and merchandise in the general sales or traffic of our own markets."<sup>38</sup> This was contrasted with the "industrial pursuit" in which Pure was engaged. The court noted the ambiguity in the word-

<sup>34</sup> OKLA. SESS. LAWS 1933, ch. 156, §1, at 354.

<sup>35</sup> "Class 'C' motor carriers shall include all other persons, firms or corporations, . . . engaged in the transportation of property in furtherance of any private commercial enterprise and not operating . . . as a common carrier for hire, provided, however, the provisions of this Act shall not apply to transportation of livestock and farm products in the raw state, logs and rough lumber and which raw state shall include cotton, whether in the seed or ginned, cotton seed, hay, whether loose or baled, corn, wheat, oats, and all other articles produced on the farm, from farm to market, nor to trucks hauling road materials." OKLA. SESS. LAWS 1933, ch. 156, §1, at 354-55.

<sup>36</sup> In 1933 the task of collecting the mileage tax was placed in the hands of the Oklahoma Tax Commission. OKLA. SESS. LAWS 1933, ch. 156, §3, at 358. Administration of the granting of permits and certificates remained the job of the Corporation Commission. At the time the Tax Commission was established in 1931, no provision was made for shifting the collection of the tax from the Corporation Commission.

<sup>37</sup> 174 Okla. 615, 52 P.2d 832 (1935).

<sup>38</sup> *Id.* at 618, 52 P.2d at 834.

ing of the Class C provisions of the statute and opined that if the legislature had wanted oil field equipment transport covered by the act, it would have said so.

The dissenting opinion of Justice Riley points out that the majority gave an extremely narrow definition to the term "commerce." The issue is similar to that of the scope to be given to the Commerce Clause of the United States Constitution. Justice Riley supported the broad interpretation given by Marshall in *Gibbons v. Ogden*.<sup>39</sup> The dissenting justice concluded:

The goal of its [Pure's] endeavor, be it production of natural resources or industrial pursuits, is profit. Its use of the highway is "in furtherance" of this. Consequently, by the act, the Legislature sought justly to tax it for the use and upkeep of the public highway appropriated to its private commercial use.<sup>40</sup>

The majority's narrow interpretation of "commerce" however, should be viewed in the light of what was happening at the national level. Six months before this case was decided, the United States Supreme Court had used a narrow definition of "commerce" to strike down the National Industrial Recovery Act.<sup>41</sup> Other parts of Roosevelt's New Deal were soon to crumble on the same basis.

Before the first *Pure Oil* decision had been handed down, the 1935 Oklahoma legislature had amended the 1933 act in an attempt to clarify further the nature of Class C carriage. The new legislation defined "commercial purposes" to include "all undertakings entered into for private gain or compensation, including all industrial pursuits, whether such undertakings involve the handling or dealing in commodities for sale or otherwise."<sup>42</sup>

The Pure Oil Company again challenged the application of the statute to its operations. This time, however, the issues had to do solely with whether or not the legislation was contrary to the Constitution of Oklahoma.<sup>43</sup> Most of the questions posed by Pure had already been treated by the Supreme Court of Oklahoma in *Ex Parte Tindall*<sup>44</sup> and *Collins-Dietz-Morris*.<sup>45</sup> The court saw no reason to depart from its findings in those cases and thus ruled against Pure. The oil firm's appeal to the Supreme Court of the United States was dismissed for want of a substantial federal question.<sup>46</sup>

<sup>39</sup> 9 Wheat. 1 (1824).

<sup>40</sup> *Pure Oil v. Cornish*, 174 Okla. 615, 620, 52 P.2d 832, 837 (1935).

<sup>41</sup> *A.L.A. Schecter Poultry Corp. v. United States*, 295 U. S. 495 (1935).

<sup>42</sup> OKLA. SESS. LAWS 1935, ch. 20, art. §1, at 28.

<sup>43</sup> *Pure Oil v. Oklahoma Tax Commission*, 179 Okla. 479, 66 P.2d 1097 (1936).

<sup>44</sup> 102 Okla. 192, 229 P. 125 (1925).

<sup>45</sup> 154 Okla. 121, 7 P.2d 123 (1932).

<sup>46</sup> *Pure Oil v. Oklahoma Tax Commission*, 302 U. S. 635 (1937).

## REPEAL OF THE MILEAGE TAX

During the 1930's, much controversy over the nature of Class C trucking developed because of uncertainty over the application of Oklahoma's vehicle-mile tax. If the Class C label had any significance at all, it was for the purpose of levying the mileage tax rather than for regulation—in spite of the fact that the label was clearly part of a regulatory framework. By 1939, however, it had become clear that the mileage tax was extremely difficult to enforce and that for many carriers full payment of the tax appeared to be primarily voluntary. Less than one-third of the trucks licensed in the state paid any mileage tax whatsoever. A state legislator estimated that only about half of the mileage tax due was actually collected.<sup>47</sup> Furthermore, it was doubtful that a true record of mileage was always kept by those paying the tax. Evasion was a great deal easier for Class B and Class C carriers who kept their own mileage records than for Class A carriers whose tax was computed on the basis of scheduled trips along regular routes.

Uneven enforcement must have been particularly irritating to some truckers, for state revenues from the vehicle-mile tax were not inconsequential. During the period 1933-39, annual receipts for the tax rose from less than \$200,000 to slightly over \$1,500,000, or about 3 per cent of Oklahoma's total tax revenue.<sup>48</sup> Much of these increased receipts were derived from interstate truckers passing through the "ports of entry" which existed near the state's borders from 1935 through 1939.<sup>49</sup>

The 1939 legislature repealed the vehicle-mile tax and substituted a uniform system of higher license fees for almost all of the state's trucks.<sup>50</sup> The system of registration fees varying directly with vehicle weight was upgraded to provide additional revenues and the vehicle-mile tax on buses was retained. Eliminating the truck vehicle-mile tax was criticized on the ground that a system of taxation relying entirely upon registration fees discriminated against the truck owner who seldom used the highway in favor of truckers regularly using the highway.<sup>51</sup> These objections had been at least partially overcome by earlier provisions in the licensing law providing special treatment for farm trucks and reduced license fees for older trucks. Trucks "used exclusively for farm use . . . and not for commercial or industrial purposes" along with trucks "used exclusively for the transportation of logs, ties, stave bolts, and posts direct from the forest to mill, first market or railroad shipping points" were subject to slightly higher initial license fees, but the license fees decreased at a much more rapid rate with age of the vehicle than was the case for other trucks.<sup>52</sup>

<sup>47</sup> Daily Oklahoman, April 12, 1939, p. 2.

<sup>48</sup> Okla. Tax Commission Fourth Biennial Rep. at 286 (1940).

<sup>49</sup> Okla. Tax Commission Third Biennial Rep. at 23 (1938).

<sup>50</sup> OKLA. SESS. LAWS 1939, ch. 50, at 279-306.

<sup>51</sup> Daily Oklahoman, *op. cit.* *supra* note 47, at 2.

<sup>52</sup> OKLA. SESS. LAWS 1939, ch. 50, at 289. (It is interesting to note that in 1962 the cost of licensing farm vehicles remained at its 1939 level, whereas licensing costs for other trucks has risen between \$25.00 and \$30.00.)

## RECENT LEGISLATIVE CHANGES REGARDING THE SCOPE OF REGULATION

There were no major changes in the Oklahoma motor carrier regulation statutes between 1939 and 1965.<sup>53</sup> The 1965 legislature attacked the problem that coverage of regulation was at the same time too narrow and too broad. Regulation of for-hire trucking applied only to the hauling of goods through or between two or more incorporated cities or towns.<sup>54</sup> This gap in regulation had become more apparent as the development of the interstate highway system permitted a greater number of useful routes which bypass towns completely, or touch only one incorporated place. On the other hand, while interstate carriers of agricultural products are not subject to federal economic regulation,<sup>55</sup> Oklahoma exempted only farm-to-market trucking.<sup>56</sup> Already hampered by insufficient funds, the Corporation Commission's enforcement program was faced with an insurmountable problem in its attempt to regulate agricultural truckers.<sup>57</sup>

In the 1965 legislature's House Bill 922,<sup>58</sup> the motor carrier statutes were amended so that economic regulation now applies to *all* motor carriers using the public highways and not operating in strictly local business. In the same piece of legislation, carriers of unprocessed agricultural commodities were placed in the same category as purely interstate carriers. Such carriers do not have to prove convenience and necessity and may be issued permits without public hearings. Although the definition of unprocessed agricultural products is not spelled out in the act, it may be anticipated that the federal pattern will be adopted.

## OPERATING AUTHORITY BEFORE THE CORPORATION COMMISSION AND THE COURTS

There is no regulatory restriction concerning the sort of services and

<sup>53</sup> Minor changes in the law since 1939 relate to the displaying on trucks of evidence of Corporation Commission Operating Authority (OKLA. SESS. LAWS 1961, ch. 7, at 309.), clarification of the exemption of farm-to-market trucking (OKLA. SESS. LAWS 1961, ch. 7, at 309), clarification of the exemption of farm-to-market trucking (OKLA. SESS. LAWS 1943, ch. 7, at 120.), and the revocation of Class A passenger certificates when a bus line is shut down because of a strike (OKLA. SESS. LAWS 1953, ch. 76, at 209).

<sup>54</sup> 47 OKLA. STAT. § 161(d) (1961). This policy was reaffirmed with respect to the transport of crude oil and similar "deleterious" products in 1963. OKLA. SESS. LAWS 1963, ch. 19, at 404.

<sup>55</sup> Campbell, *Agricultural Exemptions from Motor Carrier Regulations*, 36 LAND ECON. 14 (1960), and Linnenberg, *The Agricultural Exemptions in Interstate Trucking: Mend Them or End Them?* 25 LAW & CONTEMP. PROB. 139 (1960).

<sup>56</sup> 47 OKLA. STAT. § 161 (1961).

<sup>57</sup> In the summer of 1962, the field enforcement staff of the Corporation Commission consisted of seven full-time and four part-time employees operating primarily from weight stations.

<sup>58</sup> Enrolled House Bill No. 992, *An Act Relating to Motor Vehicles*, (June, 1965).

routes which a shipper can provide for himself in his own "Class C" or otherwise unregulated truck. A rational shipper would undertake private trucking only after consideration of alternatives provided by for-hire carriers. Thus examination of the regulation of operating rights of carriers may provide some indication of the limitations to services, rates and routes affecting decisions of potential and actual private truckers.

#### THE IDENTIFICATION OF EXEMPT TRANSPORT

Although the statutory framework of Oklahoma motor carrier regulation has been relatively stable for the past two decades, the problem of defining what transport is and is not subject to economic regulation has by no means been solved. Early attempts at state regulation left the definitions of exempt and private transport extremely unclear; it should not be surprising that there still exists a "gray area" even after considerable clarification during the 1930's. One symptom of this was the apparently widespread illicit passenger transportation operations of "travel bureaus" helping travelers find rides with each other during the 1930's and 40's.<sup>59</sup>

In 1945 the Oklahoma Supreme Court made it absolutely clear that no economic regulation was to be applied to Class C carriers. In *Beverly v. Elam*<sup>60</sup> the court held that the 1929 motor carrier act did not require the issuing of a permit except upon a showing of public convenience and necessity. Although the court's reasoning in this case is open to criticism,<sup>61</sup> the decision nevertheless gives judicial sanction to the lack of the use of the Class C permit. Corporation Commission annual reports list the granting of no Class C permits after 1935. The *Beverly v. Elam* decision also made it clear that Class C carriers were not required to post public liability bonds—as was required of Classes A and B.

Recently there has been some slight activity in the courts relating to the problem of defining private and exempt transport. In 1957 the Okla-

<sup>59</sup> See *Herring v. State*, 60 Okla. Crim. 449, 64 P.2d 921 (1936); *Jack Herring v. State*, 68 Okla. Crim. 32, 95 P.2d 128 (1939); and *Hudgins v. State*, 75 Okla. Crim. 446, 133 P.2d 231 (1943).

<sup>60</sup> 196 Okla. 15, 162 P.2d 180 (1945).

<sup>61</sup> The court was quite explicit in its interpretation of the role of the Class C permit. "The only permit required of carriers under the original (1923) act was a certificate of convenience and necessity, and there is no provision under the 1929 act for a permit to any carrier therein classified and defined except upon showing of convenience and necessity." (*Id.* at 17, 162 P.2d at 182). In reaching this conclusion the court disregarded as "apparently inadvertent" sections of the law requiring a filing fee of Class C permit holders 47 OKLA. STAT. § 166 (1941) and requiring permit holders to file liability insurance policies or bonds with the Commission 47 OKLA. STAT. § 169 (1941). The court also disregarded the fact that the 1929 legislation set up the "C" classification in conjunction with its attempt to collect the state's vehicle mile tax. Further evidence of the rarified atmosphere in which this decision must have been written is the fact that three years earlier the Corporation Commission adopted the practice (which has followed ever since) of not requiring evidence of public convenience and necessity of Class B permit holders operating as contract carriers. See 1942 Okla. Corp. Comm. Ann. Rep. Order No. 15, 639, Rule 4(e), at 262.

lahoma Supreme Court refused to rule on the matter of whether or not the Corporation Commission had jurisdiction over a 'farmers' cooperative hauling products for its own members.<sup>62</sup> Central Oklahoma Milk Producers Association applied to the Commission for a Class B permit for its trucking operations. The application was protested by the Oklahoma Milk Haulers Association, a group of for-hire milk truckers. In what may have been an attempt to avoid a possible unfavorable ruling, the cooperative withdrew its application "for the reason that the Commission did not have jurisdiction over a co-operative operating solely for its own members."<sup>63</sup> The Commission dismissed the case and the for-hire milk haulers appealed the dismissal to the Supreme Court of Oklahoma. The court ruled that since there is no specific statutory provision for appeal from a Corporation Commission ruling regarding a Class B permit (there is such a provision for Class A permits), any judgment on appeal would have to rest on the court's general constitutional powers to review Corporation Commission decisions appealed by "any party affected or . . . any person deeming himself aggrieved."<sup>64</sup> Since the milk haulers were not directly involved in the application, they had no right to appeal, and the court refused to rule.

The Corporation Commission field staff is engaged in apprehending illegal for-hire motor transport in need of operating authority. Frequently violations are clear-cut, and the law-breaking ceases when the carrier obtains appropriate operating authority (usually Class B).

#### CRITERIA USED IN GRANTING "A" AND "B" OPERATING AUTHORITY

The Corporation Commission and the Supreme Court of Oklahoma have handed down numerous rulings describing criteria by which Class A and Class B operating authority applications are to be judged. Some inadequacies in the statutory framework of Oklahoma motor carrier regulation appear in the uncertain relation between the law and practice of granting operating authority.

*Legal Definitions of "Convenience and Necessity."*—As early as 1926 the Supreme Court of Oklahoma attempted to define standards by which to identify "convenience and necessity" in motor carrier cases. In 1925 the Corporation Commission granted a certificate to operate interurban bus service between Chickasha and Waurika in competition with the Chicago, Rock Island and Pacific Railway Company. The railroad appealed the issue to the Supreme Court of Oklahoma, which in turn directed the Commission to disallow the petition on the grounds that no evidence was presented to the effect that service offered by the railroad was inadequate.<sup>65</sup> While the court felt that some travelers might find such bus service a "convenience," it would be unlikely that any would find it a "necessity." The court then proceeded to define "necessity." Clearly, said the court, it does not involve a service which is "essential or absolutely indispensable." Necessity would be proved if "the motor vehicle service

<sup>62</sup> Application of Central Oklahoma Milk Producers Association, 312 P.2d 500 (Okla. 1957).

<sup>63</sup> *Id.* at 501.

<sup>64</sup> *Id.* at 502.

<sup>65</sup> Chicago, R.I. & P. Ry. Co. v. State, 123 Okla. 190, 252 P. 849 (1926).

would be such an improvement of the existing mode of transportation as to justify or warrant the expense of making the improvement."<sup>66</sup> To the individual businessman, expected profit is the criterion by which an "expense" is "justified" or "warranted." Thus the Supreme Court of Oklahoma directed the Corporation Commission to use broader criteria than mere individual profit. Evidence was required showing that "the inconvenience of the public occasioned by the lack of motor carrier transportation is so great as to amount to a necessity."<sup>67</sup>

The Rock Island continued to battle the growth of bus transport and brought another certification case to the Supreme Court of Oklahoma in 1927.<sup>68</sup> The certificate in question was for a bus line from Enid to El Reno. This time, however, there was some evidence presented before the Corporation Commission that such service was needed. The incompleteness of the railroad's time schedule was a particular problem for travelers from Enid. Though the court noted that the evidence presented by both parties was "somewhat unsatisfactory, . . . rather meager, and consists principally of generalities,"<sup>69</sup> it nevertheless upheld the Commission's granting of the certificate. The court reviewed its proper role in examining decisions of the Commission. Article 9, Section 22 of the Oklahoma Constitution at that time required that an appeal from a Corporation Commission decision must overcome a *prima facie* presumption of the order's being "reasonable, just and correct." The court pointed out that even if it thought the order "unwise," that would not be sufficient reason to set it aside as "unjust, unreasonable, or arbitrary."<sup>70</sup> "There being some evidence reasonably tending to support the order of the Corporation Commission . . . we are unable to say that the *prima facie* presumption of the reasonableness and justness of the order . . . has been overcome."<sup>71</sup> This is a position from which the court seldom deviates in motor carrier operating rights cases, even though constitutional provisions regulating appeals from Corporation Commission decisions are no longer the same as in 1927.<sup>72</sup>

<sup>66</sup> *Id.* at 191-92, 252 P. at 851.

<sup>67</sup> *Id.* at 192, 252 P. at 851.

<sup>68</sup> *Chicago, R.I. & P. Ry. Co. v. State*, 126 Okla. 48, 258 P. 874 (1927).

<sup>69</sup> *Id.* at 50, 258 P. at 876.

<sup>70</sup> *Id.* at 52, 258 P. at 877.

<sup>71</sup> *Id.* at 53, 258 P. at 878.

<sup>72</sup> In 1941, the legislature exercised its constitutional authority to change certain provisions of the constitution relating to appeals from Corporation Commission decisions. The *prima facie* presumption of reasonableness was deleted from article 9, Section 22. A new Article 9, Section 20, directed the court to sustain Commission orders if they are supported by substantial evidence. Oddly enough, in a 1957 decision, the court referred to the old Article 9, Section 22, as though it were the current provision. *Mistletoe Express Service v. Corporation Commission*, 316 P.2d 865, 869 (Okla., 1957). Instances in which the Commission's granting of operating rights has been upheld in the face of appeals by competing carriers include, *Ibid.*; *Yellow Transit Co. v. State*, 198 Okla. 229, 178 P.2d 83 (1947); *Holzbielein v. State*, 197 Okla. 509, 172 P.2d 1007 (1946); *Oklahoma Transportation Co. v. State*, 198 Okla. 246, 177 P.2d 93 (1947); *Associated Motor Carriers, Household Division v. Corporation Commission*, 323 P.2d 337 (Okla. 1958); *Groendyke Transport, Inc. v. State*, 378 P.2d 311 (Okla. 1963); and *Lee Way Motor Freight, Inc. v. State*, 386 P.2d 1021 (Okla. 1963). A principal exception occurs in *Groendyke Transport v. State*, 258 P.2d 670 (Okla. 1953).

However, the court held that its 1926 definition of "necessity" of common carrier service was ambiguous and in need of revision. A new definition was presented.

As used in this connection, "necessity" means a public need, without which the public is inconvenienced to the extent of being handicapped in the pursuit of business or wholesome pleasure or both, without which the people generally of the community are denied, to their detriment, that which is enjoyed by other people generally, similarly situated.<sup>73</sup>

Although this is the definition which is still controlling, it is obvious that the 1927 court hardly overcame the problem of ambiguity. Criticizing the 1926 standard, the court argued that the first telephone would not have been a public necessity under such a definition. The court's later standard is subject to exactly the same criticism as its earlier one. Qualitative and quantitative improvements in Oklahoma's transportation network must involve development of service which is *superior* to that "enjoyed by other people generally, similarly situated." This might suggest that Oklahoma's public convenience and necessity requirement has tended to be applied on a case by case, pragmatic basis.

*Rules Defining the Scope of Class B Authority.*—The Oklahoma Class B intrastate motor carrier classification is a catch-all covering carriers that are neither private (Class C) nor regular route common (Class A). Two Corporation Commission orders issued in 1942 and still in effect with only slight modification clarify the techniques by which Class B permits are granted.<sup>74</sup> The orders split the "B" classification into "Class B Common" and "Class B Private (Contract)." In the first of the two orders, the Commission set forth some criteria by which it would judge whether or not to allow the various Class A and B services. The same standard of public convenience and necessity was apparently to be applied to both Class A and Class B Common carriers.<sup>75</sup> However, Class B contract carriers were specifically exempted from the need to show public convenience and necessity.<sup>76</sup> In 1961 the Commission set forth standards by which to evaluate applications for Class B contract permits. Such permits are now only to be issued if the applicant shows three conditions: "(1) the existence of a bona fide contract for furnishing service; (2) that the service

<sup>73</sup> *Chicago, R.I. & P. Ry. Co. v. State*, 126 Okla. 48, 50-51, 258 P. 874, 877 (1927).

<sup>74</sup> 1942 Okla. Corp. Comm'n. Ann. Rep. orders No. 15,639 and No. 15,684, at 259, 279. (These orders also appear in each of the Commission's annual reports since 1942.)

<sup>75</sup> "The Commission, in all such cases of applications to operate Class A or Class B intrastate common carrier service, after a public hearing, will issue said certificate or permit as prayed for, or refuse to issue the same, or issue it for the partial exercise only of said privilege sought, and will attach (*sic*) to the exercise of the rights granted by such certificate or permit such terms and conditions as in its judgment the public convenience and necessity may require . . ." 1942 Okla. Corp. Comm'n. Ann. Rep. Order No. 15,639, Rule 4 (c), at 261.

<sup>76</sup> *Id.*, Rule 4(e), at 262.

proposed is not such as could be reasonably furnished by existing common carrier service; and (3) that such a permit would not jeopardize the existing common carrier service."<sup>77</sup>

The second of the 1942 orders attempts to protect the property rights of Class A carriers by limiting the scope of those Class B Common operations between points served by Class A carriers to the hauling of goods on a specified list, and any other goods requiring special transport equipment or rapid shipment unavailable from Class A carriers.<sup>78</sup> As a matter of fact, many of the goods on the specified list require specialized transport equipment. Among the more important products on this list are livestock, sand and gravel, bulk petroleum, oil field equipment, household goods, and grain. There are no similar limitations placed on Class B carriage of goods between points not served by Class A carriers.

Class A and Class B Common carriers were to be required to file with the Commission tariffs showing actual rates; the contract carriers had to file copies of contracts showing minimum rates.<sup>79</sup> Neither Class A and B, nor contract and common shipments could be mixed in the same truck on a single trip.<sup>80</sup> Contract carriers except haulers of farm products were prohibited from handling shipments for more than three contracting shippers on a single truck-trip.<sup>81</sup> This helps explain why the great majority of Class B permits are for common rather than contract carriage. A highly specialized carrier can be relatively sure that being an irregular route common carrier involves a common carrier obligation that is more nominal than real; such a carrier does, however, gain flexibility which would enable him to solicit additional business when his primary shippers do not provide him with enough traffic to operate at full capacity.

*"Convenience and Necessity" in Practice.*—Table 1 presents a quantitative indication of the Corporation Commission's operating authority policy for selected years. Note that a much larger number of authorities have been granted for Class B than for Class A operations. Although the annual reports of the Corporation Commission cease distinguishing between Class B and A authorities after 1955, Commission staff advises that the more recent pattern would still consist primarily of Class B authorities. Supply-demand characteristics of the more specialized and less "common" Class B operations would tend to indicate why such authorities are so numerous in comparison to those of Class A. A small truck firm which

<sup>77</sup> 1961 Okla. Corp. Comm'n. Ann. Rep. Order No. 44,935, at 396, 398.

<sup>78</sup> 1942 Okla. Corp. Comm'n. Ann. Rep. Order No. 15,684, Rule 2, at 289-90. The 1942 order was worded in a manner such that it might have appeared that Class A Carriers had no priority regarding operating authority over Class B carriers in the case of goods requiring "extraordinarily expeditious and rapid transportation." *Id.*, at 290. In 1952 the Corporation Commission construed the original wording to give Class A carriers priority for goods requiring rapid shipment as well as for goods needing special equipment. 1952 Okla. Corp. Comm'n. Ann. Rep. Order No. 25,639, at 323.

<sup>79</sup> 1942 Okla. Corp. Comm'n. Ann. Rep. Order No. 15,684, Rule 3, at 290,

<sup>80</sup> *Id.*, Rules 27, 28, 30, at 294-295.

<sup>81</sup> *Id.*, Rule 29 at 295.

could not possibly provide service required of a regular route common carrier may nevertheless be able to fill adequately the specialized needs of particular shippers.

A marked trend increase in authorities granted in recent years is also shown in Table 1. This is evidently a result of the growth of Oklahoma's economy, combined with more vigorous law enforcement and the Commission's attempt to clear a previously jammed docket of applications.

TABLE 1

Decisions on Applications for Motor Carrier Permits Before the Corporation  
Commission of the State of Oklahoma for Selected Fiscal Years, 1925-60

| YEAR<br>(FISCAL)    | TOTAL              | CLASS<br>"A" | CLASS<br>"B"     | CLASS<br>"C"   |
|---------------------|--------------------|--------------|------------------|----------------|
| 1925                |                    |              |                  |                |
| Granted             | 210                | -----        | -----            | -----          |
| Dismissed or denied | 100                | -----        | -----            | -----          |
| 1930                |                    |              |                  |                |
| Granted             | 273                | -----        | -----            | -----          |
| Dismissed or denied | 50                 | -----        | -----            | -----          |
| 1935                |                    |              |                  |                |
| Granted             | 761                | 42           | 181              | 538            |
| Dismissed or denied | 10                 | 7            | 3                | 0 <sup>2</sup> |
| 1940                |                    |              |                  |                |
| Granted             | 225                | 12           | 213 <sup>1</sup> | -----          |
| Dismissed or denied | 1                  | 0            | 1                | -----          |
| 1945                |                    |              |                  |                |
| Granted             | 402                | 34           | 368 <sup>1</sup> | -----          |
| Dismissed or denied | 9                  | 4            | 5                | -----          |
| 1950                |                    |              |                  |                |
| Granted             | 272                | 19           | 253 <sup>1</sup> | -----          |
| Dismissed or denied | 10                 | 1            | 9                | -----          |
| 1953                |                    |              |                  |                |
| Granted             | 149                | 16           | 133 <sup>1</sup> | -----          |
| Dismissed or denied | 2                  | 1            | 1                | -----          |
| 1955                |                    |              |                  |                |
| Granted             | 174                | 13           | 161 <sup>1</sup> | -----          |
| Dismissed or denied | 13                 | 0            | 13               | -----          |
| 1956                |                    |              |                  |                |
| Granted             | 317 <sup>1 3</sup> | -----        | -----            | -----          |
| Dismissed or denied | 38                 | -----        | -----            | -----          |
| 1957                |                    |              |                  |                |
| Granted             | 288 <sup>1 3</sup> | -----        | -----            | -----          |
| Dismissed or denied | 36                 | -----        | -----            | -----          |
| 1958                |                    |              |                  |                |
| Granted             | 347 <sup>1 3</sup> | -----        | -----            | -----          |
| Dismissed or denied | 47                 | -----        | -----            | -----          |
| 1959                |                    |              |                  |                |
| Granted             | 473 <sup>1 3</sup> | -----        | -----            | -----          |
| Dismissed or denied | 82                 | -----        | -----            | -----          |
| 1960                |                    |              |                  |                |
| Granted             | 484 <sup>1 3</sup> | -----        | -----            | -----          |
| Dismissed or denied | 189                | -----        | -----            | -----          |

<sup>1</sup> Granted in part applications are included: 1950, 235; 1953, 51; 1955, 109; 1956, 95; 1957, 36; 1958, 18; 1959, 7; 1960, 8.

<sup>2</sup> Class "C" dropped from class classifications

<sup>3</sup> No class classification

Source: Corporation Commission of Oklahoma, Annual Report, selected years.

## RATES AND MILEAGE IN RELATION TO OPERATING RIGHTS

Pricing techniques to be used by Class A and B carriers are set forth in the Commission's Order No. 15,684 (1942).<sup>82</sup> The order includes a list of class rates applicable to Class A carriers and those Class B Common carriers hauling between points where there is no Class A service. Schedules of weights and rates for specific commodities hauled by Class B Common carriers are also presented.

*Rates.*—Order No. 15,684 does not make clear the extent to which minimum or actual rates were being prescribed. Rule 14 reads as though the Class A rate schedules present actual rates to be charged.<sup>83</sup> Rule 24 refers to the Class B Common carrier schedules as "specific minimum weights and rates."<sup>84</sup> There could, of course, be some doubt as to whether the adjective "minimum" was intended to modify "rates." In the context of the general economic conditions prevailing at the time Order No. 15,684 was handed down, it would appear that the Commission was dealing with actual rather than minimum rates. Worry over maintenance of minimum prices and the prevention of ruinous competition had passed from the American scene by the summer of 1942; the concern was rather one of general price control and the prevention of the inflationary byproducts of a wartime economy.<sup>85</sup>

Nevertheless, a 1959 Commission decision made clear the fact the 15,684 rate schedules are now being construed as minimum rates. Groendyke Transports, Inc., applied for permission to quote a Class B Common carrier rate on oil products which was below the rate listed in the 1942 order. A special case of high-volume, round trip shipments of petroleum products between Ardmore and Grandfield was involved, and the Commission permitted the rate to go into effect on a trial basis.<sup>86</sup> The Commission, however, exhibited general reluctance to permit further reductions by stating: "We are, however, of the opinion that the minimum rate established in 1942 is low enough when considering the increased cost of

<sup>82</sup> 1942 Okla. Corp. Comm'n. Ann. Rep. at 279.

<sup>83</sup> "The rates prescribed in Appendix A . . . shall be known and treated as the 1st class, or column 100 rates, and shall be applicable between origin and destination via the shortest route shown in any motor carrier's mileage tariff between points of said carrier's authorized route . . ." *Id.* at 292.

<sup>84</sup> *Id.* at 294.

<sup>85</sup> Three months after Order No. 15,684 was issued, the Commission authorized an increase in rates charged by Class B Common carriers of cottonseed, peanuts and soybeans. In this matter, the Commission stated that the original Order No. 15,684 rate schedule on these products was so low that "trucks could no longer transport these commodities." 1943 Okla. Corp. Comm'n. Ann. Rep.; Journal Entry No. 3758, at 426. Moreover, the petition for this increase came from cottonseed mills, rather than truckers. Such proceedings would scarcely have been necessary if the 15,684 rates had been merely minimum rates.

<sup>86</sup> 1960 Okla. Corp. Comm'n. Ann. Rep., Order No. 41,111, at 321. See also 1960 Okla. Corp. Comm'n. Ann. Rep., Journal Entry No. 6288, at 562.

operation applied in the normal pattern of petroleum products transportation."<sup>87</sup>

On the basis of the Grandfield rate case, it now appears that the Commission's general rate level policy—at least in regard to Class B Common carriers—involves some sort of a concept which might be labeled a "zone of reasonableness." The Commission took note of the fact that it had authorized three general increases on petroleum products since 1942, but that carriers had not always raised rates to the levels authorized. Thus it would appear that the 1942 order set forth minimum reasonable rates, and that maximum reasonable rates are to be found in the authorized increases since 1942. One apparent exception to this "zone" involves the Commission's prescription of actual rates for the movement of household goods.<sup>88</sup>

In June, 1962 the Corporation Commission approved on a trial basis a rather unique technique for quoting common carrier rates.<sup>89</sup> As in the Grandfield rate case, charges for hauling petroleum products by the Groendyke trucking firm were in issue. The rate-making concept used was that of so-called "dedicated service." In this particular arrangement, Groendyke held itself out to serve all customers, but published a tariff indicating that it stood willing to haul petroleum products anywhere in Oklahoma for a given customer utilizing a single truck for a period of six consecutive days. The charge for this six day "dedicated service" was set at \$720 plus 20 cents per mile for each mile in excess of 2400. The Commission took note of the erosion of the for-hire petroleum transport business to private carriage and the inability of carriers using existing rate structures to stimulate shippers to cooperate to achieve economical use of transport equipment. However, the Commission directed that the arrangement be cancelled in March, 1963.<sup>90</sup>

*Mileage.*—The rate and weight of the product carried must always be combined with distance of shipment in determining actual shipper charges. In 1942 the Commission directed that Class B carriers should calculate mileage on the basis of actual short-line highway distances.<sup>91</sup> However, Class A carrier mileage normally was to be identical to railroad mileage between origin and destination. Class A carriers could use actual highway mileage only when it was less than railroad mileage by 10 per cent or more.<sup>92</sup> The purpose of such Class A mileage calculation apparently was to permit Class A truckers to follow the price leadership of the railroads.

Although this technique of mileage calculation did not place Class

<sup>87</sup> 1960 Okla. Corp. Comm'n. Ann. Rep., Order No. 41,111, at 324.

<sup>88</sup> 1961 Okla. Corp. Comm'n. Ann. Rep., Order No. 43,016, at 304.

<sup>89</sup> Okla. Corp. Comm'n. Order No. 48,971, (typewritten copy).

<sup>90</sup> Okla. Corp. Comm'n. Order No. 51,047, (typewritten copy).

<sup>91</sup> 1942 Okla. Corp. Comm'n. Ann. Rep., Order No. 15,684, Rule 13(b) at 292.

<sup>92</sup> *Id.* Rule 13(a) at 292.

A carriers at an appreciable disadvantage relative to Class B carriers (whose ability to compete had been restricted via operating rights), it undoubtedly served to make private transportation more desirable for some shippers. When the private shipper calculates the actual or potential cost of operating his own vehicle, he never bases *his* mileage on that of the railroads. In September, 1958, at the request of the common carrier truckers, the Commission permitted Class A mileage to be calculated according to short-line highway distance.<sup>93</sup> Six months later the Commission gave temporary approval to the Class A carriers' use of a system of group rates for origins and destinations in the state.<sup>94</sup> This system later received permanent approval.<sup>95</sup>

### THE IMPACT OF PUBLIC POLICY: PROBLEMS AND POSSIBILITIES<sup>96</sup>

The preceding review of the history and administration of Oklahoma motor carrier regulation has indicated that taxation, the nature and scope of regulation of operating authority, and rate policy have played primary

<sup>93</sup> 1959 Okla. Corp. Comm'n. Ann. Rep., Order No. 38,035, at 327.

<sup>94</sup> 1959 Okla. Corp. Comm'n. Ann. Rep., Journal Entry No. 6079, at 520.

<sup>95</sup> 1960 Okla. Corp. Comm'n. Ann. Rep., Journal Entry No. 6191, at 535.

<sup>96</sup> The scope of this study has not included the internal operations of the Corporation Commission or other purely procedural aspects of Oklahoma motor carrier regulation. Nevertheless, several comments appear to be at least worthy of a footnote. Serious problems stem from the shortage of staff able to carry on the research which is a necessary complement to good transport regulation. If staff members are continuously tied up with day-to-day operating problems such as processing permit applications and insurance liability bonds, they can scarcely find time to consolidate and analyze information about the status of the Oklahoma motor carrier industry. Although the filing of annual financial reports and tariffs of all intrastate motor carriers is required by law, the Commission's files of these include considerably less than full industry coverage. Until August, 1964, when the Commission's Motor Carrier Division published unofficial lists of carriers and their authorities, such information was available only at the files of the Commission. The unhappy state of the Commission's annual reports makes it extremely difficult to identify the course which policy is taking. Consideration should be given to reorganizing the format of that document along topical rather than temporal lines. A little editing and consolidation might also permit the publishing of the general rules of the Corporation Commission regarding motor carriers in a form which truckers and shippers could easily understand. A step in the right direction is found in the Commission's publication in June, 1964 of a little booklet containing Order No. 15,639 and related orders and journal entries affecting motor carriers. Furthermore, it sometimes occurs that Commission orders, in a strict legal sense, do not become effective because lack of funds prevents their publication in an Oklahoma County newspaper once a week for at least four consecutive weeks. OKLA. CONST. ART. 9, § 18.

Rules of practice and procedure in motor carrier cases before the Commission recently drawn up by Mr. Charles Ham and proposed in Cause No. 22,847 represent a very desirable step toward developing an intelligible technique for dealing with complex and conflicting policy issues. It should always be remembered that the quality of economic regulation tends to vary directly with the quality of administration and administrative procedure. For an early, brief analysis of the functions of the Oklahoma Corporation Commission see *The Brookings Institution, Organization and Administration of Oklahoma*, 178-83 (1935).

roles affecting the relationship between private and for-hire intrastate motor freight transportation. As practice develops over the years, there also develops an understandable reluctance to change practice. Plenty of regulatory and judicial revision of a rather unclear statute has resulted in a framework of law and regulation which may be described as tolerably workable. Nevertheless, failure to evaluate carefully the sorts of measures consistent with the public interest, and indeed to identify what is the public interest, can lead to disastrous results in a field where regulated firms frequently face direct competition from firms free of regulation.

#### MOTOR CARRIER TAXATION

The Oklahoma vehicle-mile tax in effect from 1923 to 1939 probably stimulated private trucking because it automatically meant a cost differential between private and for-hire operations. At first it was not clear whether the tax applied at all to private carriers; later collection of the tax was implemented much more effectively against Class A than other trucks. However, it is difficult to see how Oklahoma's present motor vehicle tax system has any differential impact on private as compared with for-hire truckers. A flat, per-gallon fuel tax favors trucks which can produce high ton-miles per gallon of fuel. Shippers frequently use private trucking in situations where they can keep their equipment fully utilized, while they rely on for-hire carriers to provide additional service required during periods of peak traffic. On the other hand, private truckers prohibited from soliciting business of other shippers may be engaged in considerable empty back-hauling.

#### LIMITS ON OPERATING AUTHORITY

The blessing of protection of property rights in operating authority at times may turn into a bane because it reduces carriers' ability to provide flexible service needed by some shippers. Oklahoma manufacturing firms using private trucks surveyed by the author frequently noted inadequate service by for-hire carriers as a cause for their use of their own or leased trucks.<sup>97</sup> To the extent that they compete with more specialized

<sup>97</sup> A total of 140 questionnaires were sent to all Oklahoma manufacturing plants employing 50 or more workers listed in the State Dep't. of Commerce and Industry's *Directory of Oklahoma Manufacturers for 1959*. Shippers using private trucking were asked to identify causes for such use. A list of 10 commonly mentioned reasons for private trucking was provided, and the shippers checked reasons important to them. A shipper could check as many of the reasons on the list as he desired. Of the 81 replies received, 38 indicated some use of private trucking. The results were as follows:

| <i>Reason</i>                                       | <i>Number of Times Checked</i> |
|---|--------------------------------|
| Need for flexibility in your transportation service | 26                             |
| For-hire carrier rates too high                     | 23                             |
| Slow delivery by for-hire carriers                  | 19                             |
| Special equipment not available                     | 11                             |
| Irregularity of service by for-hire carriers        | 8                              |
| Control over drivers and labor problems             | 8                              |
| Carriers without necessary operating authority      | 7                              |
| Carrier indifference to your needs                  | 7                              |
| Loss and damage problems                            | 4                              |
| Inability to achieve loadable minimums              | 1                              |

Class B and private operations, Oklahoma Class A carriers may be faced with a major dilemma regarding their inability to provide tailor-made service for particular shippers.

On the other hand, the Commission's unwillingness to utilize the same standards of convenience and necessity in the case of Class B contract as for common carriers has deterred the growth of private trucking. High barriers to entry in Class B operations would probably result in greatly expanded private carriage in Oklahoma, because private carrier operations are much more similar to operations covered by Class B than Class A authorities. It is possible that the Commission's liberal policy toward the Class B authority may at times endanger the economic health of Class A carriers whose public responsibility is somewhat more clearly defined. Nevertheless, it should be remembered that there is a high degree of competition between Class B and private trucking, and that more restrictive policy toward Class B authority might not successfully protect the positions of existing Class A and B carriers. Awareness of this competitive relationship with private carriage may be more important than in the past, for there appears to be a tendency for applications for Class B authority to carry oil field equipment, petroleum products, and household goods to be hotly contested before the Commission.

There is need to revise portions of the Oklahoma Statutes dealing with motor carrier operating rights in order to make them consistent with existing practice. Particularly unclear are the provisions relating to the tests which the Corporation Commission is to use in judging whether or not to grant certificates and permits. The Commission has used the statute's Class B permits to handle both irregular route common carriers and contract operations. While the former are subject to a convenience and necessity test, the latter are not. Several other states and the federal government use a two-fold system of classification in which all regulated operations involve either contract or common carriage. Such a system might permit a more cogent statement of legislative intent regarding criteria for entry of new for-hire motor transport services. The 1961 Corporation Commission order stating standards to be used in judging applications for contract permits is a desirable policy clarification and indicates a possible direction for statutory revision.<sup>98</sup>

It might also be desirable to remove from the statutes any reference to the requirement that Class C carriers obtain permits from the Corporation Commission. Such provisions are part of the statutes only because they developed as adjuncts to the now-extinct vehicle-mile tax, and they have been dead letters for years.

#### RATE, ROUTE AND SERVICE POLICY

Too high rates and inadequate service of for-hire carriers are fre-

<sup>98</sup> 1961 Okla. Corp. Comm'n. Ann. Rep., Order No. 44,935, at 396.

quent causes for Oklahoma manufacturing firms using their own or leased trucks. Pressure arising from protection of for-hire carrier revenues through discriminatory non-competitive rate structures and limitation of entry is always regulated by the escape valve of private trucking. A further outlet is frequently offered by illegal for-hire operations. The availability of these shipper escapes from regulated for-hire transport means market forces pushing for-hire carrier rates close to average total costs for particular commodity flows. Although thorough law enforcement can prevent much illegal transport, considerable carrier freedom of action is necessary as long as private trucking is unregulated.<sup>99</sup> Complete freedom, however, disregards important conditions initially leading to regulation—particularly the provision of common carrier service so important to the shipping public. The regulatory authority must steer its rate and service policy on a careful course between the Scylla of restriction promoting the growth of uneconomical private or illegal trucking and the Charybdis of erosion of the legal responsibility of the common carrier. Hazardous though this course may be, its navigation can be facilitated by better knowledge and clarification of policy goals.

It is possible that the pressure necessary to activate the escape valve of private or illegal trucking is frequently misjudged by regulatory agencies and the for-hire carriers themselves. This is partially the inevitable result of the unfortunate status of quantitative knowledge concerning the extent and nature of for-hire and private trucking. Little information on such matters as costs, capacity, volume of business, and specific commodity flows is available relating to the for-hire segment of the Oklahoma motor carrier industry; virtually nothing is known about the private segment.<sup>100</sup> It is interesting to note that Oklahoma has frequently led the way for other oil producing states in the field of the regulation of the

<sup>99</sup> The argument over whether federal regulation should promote greater price competition among regulated carriers has generated considerable analysis and prescription. For a lengthy defense of detailed rate regulation see U. S. Senate, Comm. on Commerce, *op. cit. supra*. Recent reports flowing from the executive branch recommend greater reliance on the free market in setting transport prices. Presidential Advisory Committee on Transport Policy and Organization, *Revision of Federal Transportation Policy*, a Report of the President (1955); U. S. Dep't. of Commerce, *Federal Transportation Policy and Program*, (1960); U. S. House of Representatives, *Message from the President of the United States Relative to the Transportation System of Our Nation*, H. R. Doc. No. 384, 87th Cong., 2d Sess. (1962). Additional support for rate freedom may be found in Roberts, *The Regulation of Transport Price Competition*, 24 LAW & CONTEMP. PROB. 557 (1959); NELSON, RAILROAD TRANSPORTATION AND PUBLIC POLICY, The Brookings Institution (1959); and Meyer, *et al.*, THE ECONOMICS OF COMPETITION IN THE TRANSPORTATION INDUSTRIES, (1959).

<sup>100</sup> The 1963 Census of Transportation promises to disclose much hitherto unavailable data about all aspects of the transportation industries. Unfortunately, the area reports applying to Oklahoma have not been published at this writing. For an analysis of 1958 traffic patterns of Oklahoma Class A carriers see CONSTANTIN, THE CHARACTERISTICS OF FREIGHT MOVEMENTS BY GENERAL COMMODITY CARRIERS IN OKLAHOMA, Bureau of Business Research, University of Oklahoma (1963).

producing sector of the petroleum industry. This could scarcely be true if as little data were available about the structure of the Oklahoma oil industry as is the case in motor trucking.

The absence of current factual information automatically forces the regulatory body upon the undesirable course of relying upon criteria developed in the past. There is, for instance, no economic justification for a minimum rate policy based upon a set of rates determined twenty years ago. Yet that is exactly what the Corporation Commission has implied in its recent Grandfield rate decision.<sup>101</sup>

Clarification of policy goals should go hand in hand with the building of a firm factual foundation upon which to base policy decisions. The rapid relative growth of private trucking in recent years suggests the need to reconsider the nature of the legal obligations bound up in common carriage. It may be necessary for regulated carriers to offer more specialized services at rates more closely related to the costs which a private trucker would incur.<sup>102</sup> However, the "specialization" of "common" carriers is a contradiction in terms implying a possible undesirable impact upon the shipping public in general and the small shipper in particular. The horns of this dilemma are placed in bold relief by the recent "dedicated service" case.<sup>103</sup> The arrangement in that case was much more closely akin to contract carriage or equipment leasing than to common carriage. This was undoubtedly one factor leading the Commission to disallow it as Class B common carriage. Yet some such special arrangements may be absolutely necessary in order for for-hire carriers to stem the tide of private trucking.

### SUMMARY

A review of the history and administration of Oklahoma motor carrier law indicates conditions promoting as well as discouraging the growth of private and unregulated trucking. The net impact of regulation is difficult to evaluate. It is possible, however, that some clarification and revision of the framework of Oklahoma motor carrier regulation might have a beneficial effect on the organization of the state's motor transportation system. Important though the legal milieu may be, it must always be remembered that the basic responsibility for innovation in a privately-owned transportation system lies with those engaged in the business of transportation.

<sup>101</sup> 1960 Okla. Corp. Comm'n. Ann. Rep., Order No. 41,111, at 321, *supra* at 30.

<sup>102</sup> William H. Dodge and Richard Carll, after a painstaking study of carrier and shipper positions in a California general rate increase case, concluded that socially desirable California minimum rate regulation should permit rate differences reflecting differences in the specific cost of handling different commodities and shipments under varying traffic conditions. The influence of Proprietary Trucking upon Minimum Rate Policy in California, 11 VAND. L. REV. 1109 (1958).

<sup>103</sup> Okla. Corp. Comm'n. Order No. 48,971 (typewritten copy). See *supra* at 26.