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BEFORE THE

INTERSTATE COMMERCE COMMISSION

DOCKET: 23,400

COORDINATION OF MOTOR
TRANSPORTATION

BRIEF ON BEHALF OF THE NATIONAL
AUTOMOBILE CHAMBER OF COMMERCE

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“COORDINATION OF MOTOR
TRANSPORTATION”

**EXCEPTIONS TO THE PROPOSED
REPORT AND BRIEF OF THE NATIONAL
AUTOMOBILE CHAMBER OF COMMERCE**

I. INTRODUCTION

Intervenor excepts to the conclusions of the report numbered 1, 11, 15, 17-36, 39, 42, 46-48, inasmuch as these conclusions are intended to affect the carriage of property by motor vehicle.

It does not except to the recommendations of the Examiner with respect to the carriage of passengers, which, we understand, will be fully dealt with by other intervenors.

The difference in its attitude with regard to the two services arises from the difference in their character.

By business necessity, commercial motor bus operation must be a common carrier operation on definite routes with reliably fixed schedules and approximately stable and uniform rates. The field for individual service and bargaining is negligible. Since

the bus serves a public demand capable of at least rough calculation, the capacity and frequency of service needed to meet that demand efficiently can be predicted with reasonable approximation and the relatively fixed and regular character of the service makes the devising of a rate structure fair to the public and to the operator, at least theoretically practicable.

This record reflects the radically different situation attending motor truck operation. Few of the conditions which favor regulation exist and those which do exist are applicable only in greatly diminished degree. On the other hand, the difficulties, legal and practical, have complete and increasing application.

We therefore oppose such regulation. We believe it to be unwise from the point of view of the business itself, from that of the shipper and from that of the general public. We may add that we gravely doubt whether the railroad interests from whom the demand for such regulation proceeds would find in it a blessing which they anticipate.

II. THE MOTOR TRUCK IS SHOWN BY THE REPORT TO BE A MODERN, NECESSARY AND ECONOMICAL AGENCY OF TRANSPORTATION

It is plainly impossible to form any trustworthy opinion as to the value of the Examiner's conclusions without having a clear and reliable picture of the practical situation to which they are to be applied. It is unfortunate that the reader who desires to get from the proposed report an understanding of the true relation of the trucking industry to the economy of the nation's industry and to the vital need for

efficient distribution at lower cost is likely to find himself unable to see the forest for the trees. He will discover a mass of scattered and individual bits of information, a liberal sprinkling of unsupported opinions, some of the Examiner's own, some of "witnesses" whom for one reason or another the Examiner has selected for quotation, and a considerable body of general assertions, the degree of whose applicability it is impossible to appraise.

From this material, however, it is possible, at least for those who have some previous familiarity with the subject, to set down a few fundamental propositions.

1. During the past ten years, motor truck service has grown from small beginnings to a great nationwide transportation service upon which industry has become increasingly dependent.

2. This growth has resulted from the fact that the motor vehicle offers to the shipper very important advantages, including,

*a. Increased expedition of delivery, often a vital necessity in a period of small inventories and hand to mouth buying. (Sheets 16, 17.)

b. Marked simplification of service, elimination or liberalization of classification and packing requirements, and store door pickup and delivery. (Sheets 52, 82.)

c. A flexibility of service which gives the shipper the precise individual and often specialized service which he needs at the particular time at which he wants it. (Sheets 49, 50.)

d. Much greater efficiency and corresponding economy in the handling of certain commodities (Sheets 55, 60, 62, 64), often by special equipment, of which perishable foodstuffs offer an example.

* References to the report are to the mimeographed copy served upon Counsel.

e. The provision of rates which, while very often as high or higher than rail rates (Sheets 46-48) represent to the shipper a fair measure of the improved service which he receives.

3. The business has grown and developed to its present state without interstate regulation or the regulation of the private or contract carrier.

4. It is a business conducted by responsible business men whose business has developed because they keep faith with the public. This huge record contains no showing that the "irresponsible operator" exists in substantial numbers or has any substantial effect upon the situation.

5. The inference compelled by the constant and rapid development of motor truck service that the business, though unregulated, has upon the whole been conducted not only upon a compensatory basis but upon one of profit, is borne out by the report so far as it throws light upon this question. (Sheet 45; Appendix I.)

6. The charge so insistently made by railroad counsel and their allies that highway transportation is subsidized, to which volumes of "testimony" were directed during the hearings is not sustained. (Sheet 103.)

7. The existence and competition of motor carriers has been of the first importance to shippers, in that it appears to have been the principal exciting cause of a recently manifested inclination of railroad management to meet reasonable demands of shippers to which it has long turned a deaf ear. The reluctance with which the rails have been forced to inaugurate store-door pickup and delivery service is but one outstanding example. (Sheet 84.)

8. While a very considerable amount of less than carload traffic and some carload traffic has been diverted from rail to truck movements, for the adequate reasons of economics above referred to, no figures are presented to show what has been the actual effect upon *net* revenues. There is mention of the disproportionate terminal and other cost of short haul less than carload rail movements (Sheet 65); but even though estimates and approximations are liberally used with respect to the decline of gross revenues, no attempt is made to demonstrate to what extent, if any, there has been a decline in net revenues due to highway transportation. *A fortiori*, in view of the fact that a very large proportion of all highway transportation is in shipper owned trucks, there is no attempt to estimate the effect upon railroad revenues of motor carriage of property *for hire*.

One of the railroads whose decline in less-than-carload traffic is set out by the Examiner is the New York, New Haven and Hartford Railroad. (Sheet 22.) This example warrants some special consideration.

The New Haven Railroad is located in one of the most highly developed trucking areas in the country. Southern New England has long been supplied with adequate improved highways. The location of its mills, and particularly their proximity to the Sound ports offered an ideal situation for the development of highway transportation. The merchandise offered was that high class package freight now referred to wistfully by railroad counsel—and by the Examiner who echoes so many of their phrases—as “the cream of the traffic.” The congestion of the rail lines during the war favored the beginning of truck transportation. After the war the tendency to reduce inventories brought about both a reduction in the average

size of shipments and greater need for that speed and flexibility which only the truck can give. New England mills became increasingly dependent upon motor transportation.

Like most railroads, the New Haven officials watched the growth of motor transportation with little apparent interest, as it became one of the most significant factors in their territory. That growth proceeded without the hampering effect of regulation, either State or Federal, and the official representatives of New England industry came forward during this investigation as on other occasions to oppose its imposition. In time the New Haven itself, admitting by acts as well as words the superiority of highway transportation, itself entered that field.

New England is a field which has an unusually high percentage of interstate movement. The States are small in area and the movement is largely across their narrow dimensions to the Sound, or is a movement from the western part of New England into New York City.

Under these conditions if motor service contains such a threat to the maintenance of a "national system of transportation" as the Examiner thinks and therefore must be restricted and crippled by "regulation" to preserve that balance with existing rail facilities which the Examiner apparently believes to be required, it would normally be expected that the New Haven Railroad would furnish a striking example of the ruinous effect of highway competition. This is the more true because of its familiar financial history and the situation which confronted it in 1920.

This is not the place to attempt to appraise the relative effect of the current business depression but it is well known that long before 1929, the principal New England industries were having difficulties

which, up to that time, other lines of commercial endeavor had apparently escaped.

In the light of these conditions let us look at the annual report of the New Haven for 1931 just released. There appears to have been a balance after fixed charges, preferred dividends and guarantees of \$3.05 per share upon 1,571,179 shares of common stock and, says the financial writer from whom these figures are quoted, "with any material improvement in business this year, the New Haven is in excellent position to largely increase earnings."

This happy result in a year of depression is no doubt a tribute to the management of this railroad. But the thing which is important here is the light thrown upon the Examiner's apparent endorsement of the recurrent railroad assertion that the invasion by the trucks of the less-than-carload field is fraught with ruin for investors in railroad securities.

The motor truck is not, and can never be, a substitute for all other forms of transportation. It performed, however, an important and irreplaceable service and there is no evidence that it is materially encroaching upon territory which is beyond the sphere of its utility. Regardless of these facts, however, the restriction of trucks is being sought at the instance of those older and less efficient forms of transportation which in its special field it is superseding.

III. THE EXAMINER'S PROPOSALS ARE UNWISE AND UNDESIRABLE

A. No Substantial Need Or Demand For Truck Regulation Exists.

The most surprising thing in the report is the relative contempt with which the Examiner dismisses the protest against regulation by the National Industrial Traffic League, The Boston Chamber of Commerce, the Merchants Association in New York, The National Grange and many other representative organizations of users of transportation. (Sheets 108-109.) Their representative character is minimized, and their objections to regulation very sketchily indicated without any attempt at analysis or fair appraisal. They are turned off with the suggestion, made more than once in the report, that they are actuated by a limited and selfish interest rather than by the public need.

Many representatives of individual shippers are dismissed on the ground that they employ contract, not common, carriers. They are apparently regarded as disqualified because they represent "large organizations handling a considerable volume of traffic." (Sheet 108.) But it is these very shippers who are to be vitally affected by the proposed regulation of contract carriers, and who are able to operate their own trucks and thus render all regulation nugatory.

The Examiner having thus disposed of the opposition to truck regulation devotes a long paragraph to the support of it by a single organization in a single field. This paragraph merits a little special attention not so much for its intrinsic importance but for the light which the Examiner's emphasis upon a mere detail throws upon the unconscious bias which

underlies the whole report. Regulation is demanded by this organization, says Mr. Flynn, because "unexpected and irregular truck movements frequently demoralize values and market stability"; and because "much of the trucking duplicates service that could be performed better by railroads *if they would meet commercial requirements.*" (Sheet 109, italics ours.) The reference to the failure of the railroads to meet commercial requirements, is in itself significant and may be compared with their attitude toward store-door deliveries until forced by truck competitors to give the question of inaugurating this service serious consideration. (Sheet 84.)

What is more important, however, is that Mr. Flynn picks this language for express reference in the face of the fact that his own report is filled with proof that this field is peculiarly one in which the service cannot be performed as well, as quickly or as economically by the railroads. (Sheet 53, Appendix H.)

What is still more important is the light thrown by this emphasized example upon the real intentions of those who propose truck regulation. Manifestly, regulation cannot prevent the evil caused by "irregular and unexpected truck movements" unless it prevents them. It can prevent them only by preventing the shipper from hiring service when and as he wants to and upon such terms as suit him. If regulation does this, it simply is a device to "stifle and restrict" truck transportation "with a view to preserving and protecting long existent forms of transportation." (Sheet 11.) The Examiner disclaims a desire to do this which is precisely what the shippers, who have learned to appreciate the direct and indirect advantages to them of motor competition with the rail carriers, fear. No such general profession can obscure

the fact that if the Examiner has his way their fears will prove well founded.

In considering the question whether there is either public need or demand for motor truck regulation, it is significant to note that the Examiner neither points to any substantial present abuses in motor transportation (considered apart from its supposed effect on railroad revenues), nor ventures anything specific as to the growth of such abuses in the future. The report sets forth nothing calling for resort to the dangers and burdens of regulation, except something described as "undermining the stability of (railroad) rate structures." As to the future, the Examiner contents himself (Sheet 110) with some generalities about "the prosperity of all transportation agencies" and "dependable national transportation systems" and finds it convenient so to leave the subject.

So far as any attempt is made to argue in support of the proposed interference with the trucking industry, it is in the assertion that the railroads would have fared better had regulation come earlier. (Sheet 109.)

In 1927, the Baltimore & Ohio Railroad celebrated its one hundredth birthday. The Interstate Commerce Act was passed in 1887. It was not passed until there was a conclusive showing of abuses which could not otherwise be corrected. And the literature of the times testifies that the criterion by which the necessity for the correction of those abuses by regulation was judged was a widespread demand on the part of the shipper and consumer. The effect of railroad competition upon older and less efficient forms of transportation was not one of the evils complained of, nor was the fact that when the rails were added to these older forms of transportation, there resulted an excess of such facilities. In the Interstate Com-

merce Act no radical departures were made in the fundamental law. The railroads were common carriers. They were already forbidden to exact unreasonable rates or to discriminate as between shippers. What the Act did was to require the filing and publishing of tariffs specifying the rates adopted by the carriers themselves and transferring from the courts to the Commission the power to determine their reasonableness. (*Arizona Grocery Co. v. A. T. & S. F. R. Co.*, U. S. Sup. Ct., Jan. 4, 1932.) It is a far cry from this first step in the field of railroad regulation, taken so many years after the railroads had fully developed, to the radical change in our conception of the proper field of government suggested by the Examiner, which strains the doctrine of implied powers far beyond any previous application of that doctrine.

It is rather remarkable that in his attempted analogy to railroad regulation, the Examiner has apparently overlooked one very important difference between the motor and the railroad world. In the latter a very large shipper could exert a powerful influence upon carriers eager for business, by which he could often obtain a competitive advantage of a discriminatory character. *He could, however, obtain this advantage in no other way.* Private ownership of a railroad of any consequence for the owner's exclusive use was impossible. Regulation thus tended to protect the smaller shipper against unfair competition.

In the motor field the situation is reversed. If regulation operates effectively it must operate to restrict truck competition and diminish its flexibility; if the fixing of minimum rates, as desired by the Examiner, raises its cost, it is the small shipper and not the large who will suffer. The first must depend

upon the carrier for hire. The latter can buy or lease and operate his own trucks. The first, if he has motor service at all, gets it with decreased flexibility and economy. The latter gains all the advantages of motor service so frequently emphasized in this very report, without the disadvantages and superimposed cost of regulation.

The Examiner's proposal that private or contract carriers "carry liability insurance or file indemnity bond to secure the public in cases of personal injury or property damage" (Conclusion 27) is not clear.

If this means damage to third persons, it is a matter best left to the States which are amply able to deal with it. If this means damage to cargo, it is unnecessary. The record shows that there is no substantial evil warranting federal legislation. Practically every truckman of any importance already carries such insurance; every shipper of any consequence protects himself in this respect before selecting a carrier. The report shows nothing to support the Examiner's conclusion. Moreover, the requirement as to any but common carriers is, for reasons discussed elsewhere, unconstitutional.

It is respectfully but earnestly submitted that conclusions of the sort reached by the Examiner upon so negligible a demonstration of the public need have, in fact, no support other than the assertion that something must be done by the government to increase railroad revenue at whatever cost to those who use or provide motor transportation.

B. The Proposed Truck Regulation Is Impractical

In the last analysis, the Examiner proposes a course which, however the intention may be disguised or the result clouded by legal verbiage, is designed to

the end that the business of carriage by private contract shall, within the field of Congressional power, be destroyed. So as far as motor vehicle carriage of property is to continue, it is to be done by carriers subject to burdensome detailed regulation, of doubtful efficiency and set up under conditions conceived to foster the re-creation of transportation monopoly. With the constitutional aspects of this extraordinary proposal we shall deal a little later.

It is, however, in the interest of clear thinking to set down one or two practical considerations which the Examiner appears to ignore.

1. There are, according to Mr. Flynn, about 3,500,000 motor trucks in service in this country. (Sheet 10.) Not less than 600,000 of these trucks are now operating in common or contract carriage and the number is said to be increasing. A very substantial number of these trucks conduct some operations in interstate commerce. Any one of them may, upon occasion, cross a State line.

Such sporadic figures as the Examiner has elected to assemble (Sheet 45) indicate that the overwhelming proportion of these trucks are singly owned by individuals. If the Ohio proportion is typical, three-quarters of the common carrier operators own only one truck and the proportion would undoubtedly be higher in the case of contract carriers. Upon any basis of estimate, and in this as in most other matters only rough estimate is possible from the individual instances set out in the report, there are not less than 300,000 individual truck operators who would come within the purview of Mr. Flynn's modest proposal.

No proponent of truck regulation has ever been willing to venture a guess at the cost of enforcing such regulation. Nor is the Examiner.

2. The problems of isolating interstate trucks from the vastly greater number of intrastate trucks, and distinguishing carriers for hire from shipper-owned trucks and common from the contract carriers would present in themselves almost insurmountable obstacles before the problem of regulation proper even began. And these problems would constantly present themselves anew because of the ease with which the form of these almost innumerable truck operations may be changed. There is immediately involved a thorough investigation by the commission into a myriad different types of truck operations, from the irregular route "anywhere for hire" common carrier who will haul anything that is offered to him at any point, to the contract hauler who carries a single commodity for a single employer between two points selected by the fortuitous circumstances of some particular business transaction.

3. Regulation is not to "stifle or restrict" this new form of transportation. (Sheet 11.) Taking these fair words at face value, the Commission, if to its misfortune the task is imposed upon it, must deal with the motor industry upon its own merits and must not impose upon it rates higher than those at which it can profitably operate in order to protect railroad earnings. It must not seek to exclude or restrict truck operation simply because when you add together motor and railroad facilities, there is that excess of transportation which disturbs the Examiner. It must, of course, confine itself within its delegated field.

The provision as to rates is an acceptance and a paraphrase of the demand of railroad counsel that the government prevent the motor carriers from continuing to charge rates which are "too low." If "too low" means simply lower than the rail rates for the same line haul, it might not be impossible for a com-

mission to go through rate tariffs blue pencilling all items lower than corresponding items on the tariffs of competing railroads. As the report shows, this has been the prevalent method of intrastate rate fixing. (Sheets 46, 49.) If, however, the basis for rate regulation is to be the only justifiable one—a scheme of charges which will be fair and non-discriminatory toward the public, and which will at the same time enable the carrier to earn a fair return on his investment—it is submitted that the task confronting any commission charged with the duty of establishing and enforcing such a scheme would be an impossible one. The number of vehicles and the number of separate and dissimilar operations of any individual truck, the immense number of variable cost accounting factors arising out of varying routes and frequencies of operations, varying road and weather conditions, varying types and sizes of vehicles with varying upkeep expenditures and varying rates of depreciation, create a situation where an army of accountants would be needed to establish what must become a separate tariff of rates for each operator and operation. An army of police officers would be needed to enforce such a system once it had been evolved. And the task is complicated by the lack of reliable statistics as to truck operation costs (Sheet 51), and the uncertainty as to the existence and extent of the motor “subsidy” (Sheet 103). Since the rates of individual contracts between shipper and carrier are to be supervised, the Commission would have to decide such problems as what would be a fair charge for a subsidiary trucking corporation to charge its parent for services offered to the parent for any and all of its transportation needs but to no one else. Examples so multiply themselves on the briefest consideration that they need no elaboration.

In short, the regulation proposed can neither be established upon any rational basis, nor adequately enforced if attempted.

This conclusion is not based upon speculation, but upon actual experience. The legislation here advocated is so far as common carriers are concerned, plainly to be modelled upon that now in force in numerous states with respect to carriers of property in intrastate commerce. Regulation in a single state is of course upon a much smaller scale than would be the federal problem of regulating operations over the entire country, and, when confined to common carriers, might therefore be expected to have a better chance for practical success. That such has not been the case is confirmed by the vehement testimony of the very witnesses in this investigation who are advocating federal regulation. None of them had good words for the success of any state regulatory scheme for property carriers, and various railroad witnesses explicitly stated that regulation was a complete failure in the states in which they operated. Specific reference was made to Illinois, Michigan, Tennessee and other states, and the fact is that the same could be said in every jurisdiction where such legislation has been essayed.

Unless and until a satisfactory answer is made to these objections based upon the practical difficulties of the situation, it is submitted that Mr. Flynn's proposal that the federal government attempt to control the business of motor carriage does not deserve serious consideration.

C. The Examiner's Proposals Involve An Unprecedented Extension Of Bureaucratic Interference With Private Business.

The Examiner asks the Commission to recommend an experiment in governmental interference with private business without precedent in our history. Not only is the federal government to embark upon a nation-wide attempt at the regulation of common carriers by motor vehicle but the effort is to go so much farther as to be almost fantastic. All carriage of property by motor vehicle for hire, in interstate commerce is to become, by legislative fiat, "affected with a public interest." No person is hereafter to be permitted to follow what has heretofore been recognized by courts and business men alike as a private calling without the express permission of a governmental bureau. No longer may he sell shares in his enterprise or borrow money on its bonds without the agreement of a governmental bureau. No owner of a motor truck is hereafter to make such a bargain for a particular movement as its peculiar circumstances, and his own efficiency, permit. A government bureau is to fix his minimum rate for him. And since it is not the money rate alone which is important, since enforcement of compliance with the minima so to be established will be found to be impossible, and since certain evils discovered by the Examiner, but not by those who are now making these private contracts, cannot be prevented without controlling his commercial practices, these, too, must inevitably be regulated in detail by a governmental bureau. Furthermore, to be in any measure effective, this bureau must be saddled not only with the detailed regulation of interstate, but also of a large mass of intrastate trucking movements. Particularly is this true in the field of

contract carriage. A very large number of states now make no attempt to regulate the rates of such movements, and there is no guarantee that they will respond to the cultivated urge of which this report is an offspring. In these states, there will be no local commission, cooperation with which may prevent the clashes between interstate and intrastate transportation interests so prominent in the history of rail regulation. If it is true that intrastate regulation cannot be effective without like interstate supervision the reverse must be equally true. The logical result will be to require federal regulation of intrastate commerce to an extent as yet unknown, involving an expense as yet incalculable.

D. The Proposed Regulation Is Unconstitutional.

Apart from the controlling practical objections to the Examiner's proposal for the regulation of private or contract carriers, there is the further and sufficient objection that the legislation proposed would violate the Fifth Amendment of the Federal Constitution.

It seems unnecessary to repeat the exhaustive analysis of the controlling decisions and the constitutional issues involved which has been made in *Brown and Scott, Regulation of the Contract Motor Carrier under the Constitution*, (1931) 44 Harvard Law Review 530. It is respectfully requested that this article, which was made an exhibit in these proceedings, be read and considered as part of this brief.

It may, however, be helpful briefly to comment upon the effort made by the Examiner to escape the conclusions there presented.

The Examiner seems to predicate a portion of his argument upon the assertion that "the power of Congress to regulate interstate commerce is without limi-

tation.” (Sheet 120.) The idea that Congressional power to regulate interstate commerce under the Commerce Clause is without restriction is a fundamental misconception. On the contrary, that power is as firmly limited by the Fifth Amendment as the police power of the states is restricted by the Fourteenth. This was clearly pointed out by Chief Justice White, concurring in *The Pipe Line Cases*, 234 U. S. 548, 562-563 (1914):

“The facts are these: the company owns wells in one State from which it has pipe lines to its refinery in another State, and pumps its own oil through such pipe lines to its refinery and the product of course when reduced at the refinery passes into the markets of consumption. It seems to me that the business thus carried on is transportation in interstate commerce within the statute. But despite this I think that the company is not embraced by the statute because it would be impossible to make the statute applicable to it without violating the due process clause of the Fifth Amendment, since to apply it would necessarily amount to a taking of the property of the company without compensation.”

See also *Monongahela Navigation Co. v. United States*, 148 U. S. 312 (1893); *Adair v. United States*, 208 U. S. 161 (1908); *Tagg Bros. & Moorehead v. United States*, 280 U. S. 420 (1930).

Lack of confidence in this assertion is shown by the adoption in the report of the suggestion that “Congress should declare that the business of operating motor vehicles for hire in interstate business upon the public highways is affected with the public interest.” (Conclusion 15.)

No magic exists in such a legislative declaration: no such expression can, *ex proprio vigore*, conclude the question of constitutionality.

Such legislative fiat would have no more effect than the implied declarations attempted in *Michigan Public Utilities Comm. v. Duke*, 266 U. S. 570 (1925), *Frost v. Railroad Comm.*, 271 U. S. 583 (1926) or *Smith v. Cahoon*, 283 U. S. 553 (1931). Chief Justice Taft disposed of arguments like those implicit in the Examiner's proposal in *Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 552, 536, 539 (1923):

"It is manifest that the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public has come to have an interest are a subject of judicial inquiry.

* * * *

If, as, in effect, contended by counsel for the State, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. This will be running the public interest argument into the ground, to use a phrase of Mr. Justice Bradley when characterizing a similarly extreme contention. *Civil Rights Cases*, 109 U. S. 3, 24. It will be impossible to reconcile such result with the freedom of contract and of labor secured by the Fourteenth Amendment."

It is true that language tending to support the Examiner's contention was used by Hutcheson, Circuit Judge, in *Stephenson v. Binford*, 53 F. (2d) 509 (1931), upon which grateful reliance is placed in the report. That case has been appealed to the Supreme Court of the United States and it seems unnecessary to anticipate here the argument there to be made. We may remark, however, that the reason for our conviction that the decision will be reversed

by that court was succinctly indicated by Kennerly, District Judge, in his dissent (53 F. (2d) at 516):

"I cannot, however, see my way clear to concur . . . respecting those regulations in the Act which in no real sense concern traffic safety and highway protection, but are in fact a regulation of the business, and a restriction of the right of contract, of the Contract Carriers. I think there is no material difference in legal effect between the Michigan, Washington, California, and Florida Acts, and this Act, and that *Michigan v. Duke* (266 U. S. 571), *Buck v. Kuykendall* (267 U. S. 314), *Frost v. Commission* (271 U. S. 583), and *Smith v. Cahoon* (283 U. S. 553), are controlling."

Turning to the Examiner's specific recommendations for regulatory legislation, it will be noted that while contract carriers are not to be required to procure certificates of convenience and necessity, they are to obtain "permits" which are to be granted upon undertaking to comply with "such requirements as may be appropriate." (Conclusion 27.) In so far as the nature of the "appropriate" requirements is left to conjecture the matter is too vague to permit of discussion. There are, however, two specific proposals. Contract carriers are to be compelled to "carry liability insurance or file indemnity bond to secure the public in cases of personal injury or property damage." If this means liability to third persons, it is, as is elsewhere pointed out, an unwise and unnecessary invasion of the control of the highways by the States. If, on the other hand, it means freight or cargo insurance, it is not only unnecessary but it is also unconstitutional. Such a requirement is clearly a business regulation bearing "no relation to public safety or order in the use of motor vehicles upon the highways" (*Michigan Public Utilities Comm. v.*

Duke, 266 U. S. 570, 577), and, as such, is an unconstitutional interference with a private business within the meaning of the decisions already referred to and others. See *Clark v. Poor*, 274 U. S. 554 (1927); *Sprout v. South Bend*, 277 U. S. 163 (1928); *Red Ball Transit Co. v. Marshall*, 8 F. (2d) 635 (1925); *Louis v. Boynton*, 53 F. (2d) 471 (1931).

The second specific proposal is that the Commission shall have the power to prescribe the rates to be charged by contract carriers.

It has been argued with some plausibility that certain certification devices for private carriers might be justified as highway regulations. But it has never been seriously contended that the regulation of rates is anything other than a regulation of business. Nor does the Examiner so contend. Apparently either in the proposed legislative declaration already discussed, or in some other manner, the Examiner believes that he has found a means to avoid the condemnation with which previous attempts to regulate the business of contract carriage have been met.

What is in the Examiner's mind may be indicated by his quotation of the language from the *Frost* case regarding the regulation of contract carriers by "regulations appropriate to that kind of carrier." (Sheet 118.) He seems to think that since some kind of regulation was thought by the Supreme Court to be "appropriate," he can safely assume that rate fixing is within that category. It is unfortunate that he did not pursue his investigation of the use and apparent meaning of this language somewhat further. This very dictum was specifically called to the attention of the Supreme Court in *Smith v. Cahoon* (see Appellee's Brief, pages 11, 12). And in a passage in that opinion, which the Examiner apparently overlooked,

the court clarified this language from the *Frost* case. Chief Justice Hughes said (283 U. S. at 563):

“No separate scheme of regulation can be discerned in the terms of the act with respect to *those considerations of safety and proper operation affecting the use of the high-ways which may appropriately relate to private carriers as well as to common carriers.*”

In the Harvard Law Review article previously referred to, after remarking that the entire language and intendment of the opinions indicated that the sole inference, from the clothing of common carriers with the public interest is that other kinds of carriers are not so clothed, the authors remarked (44 Harv. L. Rev. at 552):

“If such were not the case, there would result an unprecedented anomaly in the law. Operating side by side would be two types of carriers, both affected with a public interest, both subject to identical drastic regulation, yet one allowed to pick and choose his customers, while the other was obliged to provide transportation for any member of the public who so desired it. Such a result is inconsistent with the whole spirit and application of the phrase ‘clothed with a public interest.’”

It is exactly this unprecedented anomaly that the Examiner proposes. The regulation of contract carriers and of “anywhere-for-hire” common carriers is essentially identical. Both are to be required to procure “permits,” but not certificates. (Conclusions 27, 30.) Both are to be subject to rate regulation, with the extraordinary provision that only the minimum rates of contract carriers are to be fixed. (Conclusions 25, 29.) Yet of these two types of carriers, one is to be allowed to pick and choose his customers while the other is obliged to serve all who apply.

We have spoken of the proposal that only the minimum rates of contract carriers be prescribed as

extraordinary. It is also most enlightening. It shows clearly that the public is suffering from no abuses at the hands of an actual or virtual monopoly and therefore requires no protection. And since it can hardly be contended that the regulation of minimum rates is necessary for the protection of private carriers who are wholeheartedly opposed to such restriction, it further shows that, despite the disclaimer in the early part of the report, the Examiner really desires to restrict the freedom of contract now existing between the shipper and the carrier in order to protect and benefit competing forms of transportation. The words with which Mr. Justice Sutherland condemned the California statute in the *Frost* case are peculiarly appropriate here (271 U. S. at 591) :

“It is the regulation of the business of those who are engaged in using them (the roads). Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions.”

It has been held that Congress could not by legislation assure a minimum living wage to those who were unable, by the process of free bargaining, to procure one for themselves. *Adkins v. Children's Hospital*, 261 U. S. 525 (1923). It is bold to assert that Congress can thus control the minimum rates of private carriers for the greater profit of their competitors.

The supposed “clothing with the public interest” by which the Examiner seeks to justify his disregard of the decision of the Supreme Court is not an original discovery. From the *Duke* to the *Cahoon* case this argument has been advanced and rejected. The reasons why contract or private carriage is not so clothed have been fully analyzed by the article incorporated in this brief. 44 Harv. L. Rev. 530, 550-558.

As is there pointed out, the broadest proposition which can be deduced from the cases following *Munn v. Illinois*, 94 U. S. 113 (1876) is stated by Mr. Justice Stone, dissenting, in *Tyson v. Banton*, 273 U. S. 418, 451-452 (1927):

“An examination of the decisions of this court in which price fixing has been upheld will disclose that the element common to all is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community.”

There is, of course, no such situation on the trucking industry. Rather the complaint seems to be that there is too much competition and that the shippers can make too easy terms.

Finally, however, it is contended that there is a further ground upon which to develop the necessary “public interest.” The contention is best stated by its authors, counsel for the Association of Railway Executives (Brief for Examiner, 1931, page 6):

“The power of unregulated carriers to break down the admittedly valid regulation by Congress of interstate commerce when moved by common carriers, demonstrates the fact that such unregulated carriers when engaging in interstate commerce are ‘clothed with the public interest.’”

If this is sound, if regulation can so beget regulation, the barriers are all down. The privately owned or leased truck now carries a very large amount of traffic formerly moving by rail. If drastic regulation designed to raise rates can be imposed upon private carriers, the freight carried by owner-operated trucks will rapidly increase. The only power of unregulated carriers to “break down” the regulation of common carriers lies in their existence as competitors. The

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privately owned and operated truck possesses this power in even greater degree, just as the privately owned automobile is the real cause of declining rail passenger revenues. It follows, then, that the privately owned and operated truck, which certainly uses the highways for purposes of industry and therefore of gain, may be regulated or, if necessary, excluded from the highways. Competitive fluctuations in the price of gasoline make scientific rate making for motor driven vehicles difficult. Therefore the price of gasoline can be regulated despite *Williams v. Standard Oil Co.*, 276 U. S. 235 (1929) specifically holding it cannot. In short, since every highway is an artery of interstate commerce, every user and every use which pertains to it become "clothed with the public interest." So far as it has hitherto protected the interests of a very large class of our people, the Fifth Amendment has disappeared.

If we examine this argument in the light of the essential cases cited in its support (*Stafford v. Wallace*, 258 U. S. 495 (1922); *Chicago Board of Trade v. Olsen*, 262 U. S. 1 (1923); *Tagg Bros. & Moorehead v. United States*, 280 U. S. 420 (1930); see Sheet 121), it is found that there existed in each that precise element of inequality of bargaining power, that element of monopoly referred to by Mr. Justice Stone in his dissent in the *Tyson* case. In those cases that element obstructed the flow of interstate commerce. In the trucking industry its absence is expediting that flow. The proposed regulation of trucks, by restricting their usefulness, will tend to produce the very evil which the regulation in those cases was designed to prevent.

Whatever else this report shows, it shows that there exists that regulatory force of competition which negatives the "public interest" necessary to justify

the regulation by government of businesses essentially private in character.

A final word may be said of the last decision upon the subject by the Supreme Court of the United States, *Smith v. Cahoon*, 283 U. S. 553 (1931). A Florida statute (Fla. Laws, 1929, c. 13,700), in terms broad enough to include all transportation for hire by motor vehicles, required both common and contract carriers to procure certificates of public convenience and necessity, and subjected both to the regulation of their rates. Contract carriers, however, were not required by the provisions of the act to become common carriers. It was argued before the Court that the business of contract carriage is not "affected with the public interest" for the reason that, to quote from the Brief for the Appellant, pages 30-31, "the demand for regulation by certification, or in fact, any regulation whatsoever, is not made by the shipper or by the business world, or by those with whom the contract or common carrier deals. The only apparent beneficiaries are the railroads." And the record in these proceedings was cited in support of this statement. The Court in the following language declared the act unconstitutional (283 U. S. at 562-563):

"The state commission was explicitly vested with authority to supervise 'every' auto transportation company that was embraced within the definition, to fix or approve its rates and charges, to regulate its service, to prescribe its method of keeping accounts which should set up adequate depreciation charges, and generally to make rules governing its operations. Schedules of rates of 'every such auto transportation company' were to be open to the public and all alterations in tariffs were to be subject to the commission's control. On the face of the statute, the scheme was obviously one for the supervision and control of those carriers which, by reason of the nature of their undertaking

or business were subject to regulation by public authority in relation to rates and service. No separate scheme of regulation can be discerned in the terms of the act with respect to those considerations of safety and proper operation affecting the use of highways which may appropriately relate to private carriers as well as to common carriers."

And the Court went on:

"It is true that the statute does not in express terms demand that a private carrier shall constitute itself a common carrier, but the statute purports to subject all the carriers which are within the terms of its definition to the same obligations. Such a scheme of regulation of the business of a private carrier, such as the appellant, is manifestly beyond the power of the state."

It is therefore plain that in this latest decision of the court of last resort the recommendations contained in the report relative to the regulation of contract carriers are condemned.

IV. CONCLUSION

With the recommendations of the Examiner that the railroads should progressively adapt the motor vehicle to their own service we completely agree. We think it probably impracticable to devise a single formula for such adaptation which can be applied universally. The form which it should take must be worked out by experiment with the particular and diversified conditions presented, as has been the development of motor carriage itself.

Such an adaptation constitutes "coordination"—a word freely used and seldom defined in these proceedings—of a sort which is undoubtedly in the line of transportation progress.

How much more the Examiner means by "coordination" and what he believes to be its "economic pos-

sibilities" (Conclusion 1) is not clear from his report. There are suggestions in the implications of his proposals for regulation, in his recommendation (Conclusion 11) that acquisition by rail carriers of competing motor lines be facilitated, and elsewhere in the report that desirable coordination means railroad control of motor vehicle transportation. It is significant that in Conclusions 19 and 20 the Examiner reverts to the old formula of railroad counsel, rejected by Congress when the "Parker" bus regulatory bill was under consideration, that the adequacy of railroad service and the effect upon it of motor competition is to be a factor of importance in determining whether a community shall have the advantages of highway transportation. As to the wisdom of such coordination many will disagree.

The Examiner's proposals for truck regulation are, in the opinion of this intervenor, economically unsound, impracticable, and, in important features, unconstitutional. For these reasons, they should not receive the approval of the Commission.

Respectfully submitted,

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