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CARRIERS — DISTINCTION BETWEEN COMMON CARRIERS AND CONTRACT CARRIERS — In the recent case of *Ace-High Dresses, Inc. v. J. C. Trucking Co.*,¹ the defendant was a corporation organized for the purpose of doing a general trucking business. At the time of the suit it was operating under separate contracts with five dressmaking establishments, one of which was the plaintiff. Under these contracts the defendant trucked dress goods every day except Sunday. The goods were taken on in New York, carried to New Haven, Hartford or Bridgeport, left there until processed, and then taken back to New York. The defendant's drivers had keys to the factories of the processors, entered the factories at night and picked up the dresses, which were delivered in New York in the morning. Four trucks were used, all of them equipped with racks for carrying the dresses. Until a year before the time of the suit, the defendant had had eight such contracts, but that number had fallen off to five, and the defendant had not solicited any more contracts. The defendant was paid weekly according to the number of dresses carried, the rate being fixed by a trucking association of which the defendant was a member.

Goods were lost when one of the trucks was robbed. The plaintiff sued on the theory that the defendant was a common carrier, and hence liable as an insurer. The lower court granted a nonsuit after the plaintiff had put in its evidence. On appeal it was *held* that the lower court had properly granted the nonsuit. The court said that under these circumstances the defendant was a contract carrier and not a common carrier. The appellate court described the common carrier as one who is "engaged in the business of carrying goods for others as a public employment and holds himself out as ready to engage in the transportation of goods for persons generally, as a business." In pointing out that the defendant did not fall in this category the court emphasized the limited number of contracts under which the defendant operated, and the recent decline in that number without any solicitation of the public by the defendant to replace those contracts lost. The particularization of service by calling at each factory was impliedly another factor leading to the court's decision that the defendant was "distinctly a contract carrier."

I.

The frequency with which the courts are being faced with the problem of distinguishing between common carriers and contract carriers is indicative of the significance of this question. It is important not only on the matter of liability for goods lost or damaged, the type of question involved in the principal case, but also on the matter

¹ 122 Conn. 578, 191 A. 536 (1937).

of whether a particular carrier is subject to the jurisdiction of the state public utilities commission. The general nature of the problem is clarified by a brief inspection of its historical background. At an early stage in the history of the common law a distinction was maintained between those occupations known as "private callings" and those which were identified by the term "common calling." Those engaged in private callings were those who were in the employ of particular individuals or those who served themselves alone. The essential feature of the common calling was that the person engaging in it served the public generally. Of course, the service was not rendered to the whole body politic but was directed to the needs of a particular class of consumers constituting a substantial proportion of the public. In concise terms, the common calling was an occupation carried on *as a business*.² It is in accordance with this concept of public dealing that we find the original definition of a common carrier as one who undertakes for hire to transport the goods of all persons indifferently.³ As a result of its nature the common calling affected the interests of large groups, and those groups were possessed of sufficient economic and political power to make effective demand for the imposition of unusual obligations and liabilities on those engaged in common callings.⁴

With the growth of *laissez faire* and its impatience with all forms of governmental restriction, the obligations of most of the common callings disappeared. But in some cases, notably in the case of the common carrier, the peculiar liabilities survived, and along with them the concepts by which those liabilities were determined. Hence today we find the common-law definition frequently referred to in the opinions of the courts. In the period when the steam railroad was the principal means of moving goods on land, the task of distinguishing between the common carrier and the private carrier was a relatively simple one, and the common-law definition was a fairly satisfactory guide. But with the development of modern motor transportation and the accompanying growth of regulatory problems, the task of distinction has grown correspondingly complex. Since the traditional definition is so broad and general in its terms it is not surprising to find that the courts have encountered difficulty in framing tests and standards which would indicate with accuracy whether a particular case fell into the category of common carrier or private carrier. As is often the case, courts sometimes restate the common-law definition in other terms and suppose

² Adler, "Business Jurisprudence," 28 HARV. L. REV. 135 (1914).

³ *Gisbourn v. Hurst*, 1 Salk. 249, 91 Eng. Rep. 220 (1710).

⁴ The origin of the liabilities of the common calling has been attributed to various factors. Wyman, "The Law of the Public Callings as a Solution of the Trust Problem," 17 HARV. L. REV. 156, 217 (1904); Burdick, "The Origin of the Peculiar Duties of Public Service Companies," 11 COL. L. REV. 514, 616 (1911).

that they have stated a test. Thus some courts have identified the common carrier by the fact that he must render his service to all who request it unless he has some legal excuse,⁵ whereas this is a result of the status rather than a test for determination of it.⁶ In many cases the opinion is concerned with the selection and emphasis of particular elements in the fact situation before the court, and no effort is made to develop an adequate legal theory founded on economic considerations. However, this is not to say that tests have not been suggested. They have been proposed in large numbers, and in striking variety.⁷ Among them the following are probably invoked most frequently. (1) The existence of a regular route, a fixed schedule, and uniform rates.⁸ (2) The method of solicitation of business, or "the manner of holding out."⁹ (3) The number of patrons served, or the number of contracts under which the carrier operates.¹⁰ But although these tests are in common use, the results of their application in different jurisdictions, and sometimes in the same jurisdiction, are discordant and confused. This is particularly true of the numerical test.¹¹ A review of the cases indicates that these tests, in and of themselves, are not

⁵ *Rutledge Cooperative Assn., Inc. v. Baughman*, 153 Md. 297, 138 A. 29 (1927); *Piedmont Mfg. Co. v. Columbia & Greenville R. R.*, 19 S. C. 353 (1882); *Michigan Public Utilities Comm. v. Krol*, 245 Mich. 297, 222 N. W. 718 (1929).

⁶ DOBIE, *BAILMENTS AND CARRIERS*, §§ 106, 107 (1914).

⁷ See *Lemon v. Pullman Palace Car Co.*, (C. C. Miss. 1887) 52 F. 262 (control of the goods as a test); *State ex rel. Silver Lake Ry. & Lumber Co. v. Public Service Comm.*, 117 Wash. 453, 201 P. 765 (1921) (power to use eminent domain considered as a factor); *Codd v. McGoldrick Lumber Co.*, 48 Idaho 1, 279 P. 298 (1929) (same); *Motor Freight Inc. v. Public Utilities Comm.*, 120 Ohio 1, 165 N. E. 355 (1929) (ownership of the means of transportation a "potent reason"); *Willibrand v. Falter*, P.U.R. 1927D 709 (Mo.) ("manner of conducting the business"); *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393 (1847) (frequency of the carriage); *McBurnie v. Stelsly*, 29 Ky. L. Rep. 1191, 97 S. W. 42 (1906) (same).

⁸ *Varble v. Bigley*, 77 Ky. 698 at 707 (1879); *The Neaffie*, 17 Fed. Cas. 1260 (1870); *Brown v. N. Y. Cent. & Hudson River R.R.*, 75 Hun 355 at 358, 27 N.Y.S. 69 (1894); *Ney v. Haun*, 131 Va. 557, 109 S. E. 438 (1921).

⁹ *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252, 36 S. Ct. 583 (1916); *Tracey v. Grand Concourse Service Co.*, 199 App. Div. 348, 192 N. Y. S. 88 (1922); *Cushing v. White*, 101 Wash. 172, 172 P. 229 (1918); *Lloyd v. Haugh*, 223 Pa. St. 148, 72 A. 516 (1909).

¹⁰ *Re Theobald*, P.U.R. 1932E 522 (Colo.); *Re Thome*, P.U.R. 1927A 860 (S.D.); *Michigan Public Utilities Comm. v. Krol*, 245 Mich. 297, 222 N. W. 718 (1929); *Re Elliott*, P.U.R. 1929D 485 (Colo.).

¹¹ In Wisconsin the commission has ruled that any more than three contracts makes the party presumptively a common carrier. *Re Auto Trans. Co.*, P.U.R. 1930C 54 (Wis.); *In Film Transp. Co. v. Michigan Public Utilities Comm.*, (D. C. Mich. 1927) 17 F. (2d) 857, the defendant had 150 contracts and was still held a contract carrier. Service of 11 individuals was sufficient to make the parties common carriers in *Wayne Transp. Co. v. Leopold*, P.U.R. 1924C 382 (Pa.).

satisfactory devices for solving the problem, nor does a reference to them completely explain the wide variation in the positions taken by the courts. The need is not for more tests but rather for a more adequate fundamental approach which takes cognizance of the economic basis of the problem. A moment's consideration of the question of distinguishing between a common and a contract carrier reveals that it is intimately related to the question of what constitutes a "public utility" or a "public service company" within the meaning of statutes conferring jurisdiction upon commissions to regulate such companies. For this reason, principles and methods which the courts and commissions have utilized in solving this related problem are applicable to our specific one.

2.

If we start from the historical premise that the common calling is one in which the individual offers his services indiscriminately and as a business to a numerically indefinite class of consumers among the public, it becomes apparent that in dealing with the particular case our problem is essentially one of determining and evaluating limitations. What limitations has this individual imposed upon his activities which would indicate that he does not fall within our classification of common calling? Are these limitations real in the sense that they actually restrict his services to a narrowly limited group, or are they illusory in the sense that they do not preclude him from doing business with substantially the same proportion of the class that he would serve without such limitations? Procedure along these lines necessitates that we scrutinize some of the types of limitation most commonly encountered, and examine their effectiveness.

We may immediately eliminate one type of limitation as not entitled to substantial weight in determining the party's status. Limitations included in this group are those which are attendant upon all forms of human activity, namely, limitations as to area,¹² as to time,¹³ as to capacity, or limitation to a particular service or commodity.¹⁴ The courts are agreed that such limitations are not controlling. All callings labor under them, and their existence is not helpful in distinguishing the individual. "No carrier serves all the public."¹⁵

The second group of limitations have an uncertain effect on the status of the party. They may be described as limitations based on a

¹² *Farley v. Lavary*, 107 Ky. 523, 54 S. W. 840 (1900).

¹³ *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252, 36 S. Ct. 583 (1916).

¹⁴ *Campbell v. A. B. C. Storage & Van Co.*, 187 Mo. App. 565, 174 S. W. 140 (1915); *Re Exhibitors Film Delivery & Serv. Co.*, P. U. R. 1928E 623 (Colo.).

¹⁵ Justice Holmes, in *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252 at 255, 36 S. Ct. 583 (1916).

particular legal relationship within the class of consumers. The service is confined to those who stand in that particular relationship. A few typical illustrations will serve to indicate the nature of this group of limitations. The relationship may be that of *employer and employee*, where the former is furnishing electricity, or telephone service, or water to houses in which its employees live,¹⁶ or to a "company town"¹⁷ most of which it owns. It is generally true that if the employer limits himself to service of only those who stand in this independent legal relationship, and does not include others outside the relationship, he will not be held to be a public utility.¹⁸ The limitation in this case is a real one since he does not undertake to serve the consumers as a class. But if he exceeds these limits, as in the case where he serves other residents in the community who are not his employees,¹⁹ or establishes a connection with an outside public utility such as a telephone system,²⁰ his status is changed. The purported limitation becomes illusory, for he is furnishing service to a whole class of consumers, or enough of the class to identify him as a public utility. The fact that many or most of those served are his employees will not preclude this result. In this sense the existence of the legal relationship is not conclusive. But if strictly observed, such an independent legal relationship does constitute an effective limitation. Another example of this type of limitation based on an independent legal relationship within the class of consumers is the case where the relationship is that of *vendor and purchaser*. Here the vendor undertakes to supply an essential commodity or service to all who purchase from him. Usually it is a land company or individual who has platted the lots as a subdivision. Again it is generally true that if the party remains within the limitation he is reasonably certain not to be held a public utility. In some cases slight excesses have been disregarded by the courts.²¹ But if the limits are not

¹⁶ Re Spaulding & Frost Co., 11 N. H. P. S. C. 143 (1927); Nevada C. & D. Teleph. & Teleg. Co. v. Red River Lumber Co., P. U. R. 1920E 625 (Cal.); Sandpoint Water & Light Co. v. Humbird Lumber Co., P. U. R. 1918B 535 (Idaho).

¹⁷ Wingrove v. Public Service Comm., 74 W. Va. 190, 81 S. E. 734, L. R. A. 1918A 210 at 213 (1914); In re Commonwealth Min. & Mill. Co., P. U. R. 1915B 536 (Ariz.).

¹⁸ Re Spaulding & Frost Co., 11 N. H. P. S. C. 143 (1927); Sandpoint Water & Light Co. v. Humbird Lumber Co., P. U. R. 1918B 535 (Idaho).

¹⁹ Wingrove v. Public Service Comm., 74 W. Va. 190, 81 S. E. 734 (1914). In re Commonwealth Min. & Mill. Co., P. U. R. 1915B 536 (Ariz.).

²⁰ Nevada, Calif. & Oregon Tel. & Tel. Co. v. Red River Lumber Co., P. U. R. 1920E 625 (Cal.).

²¹ Del Mar Water, Light & Power Co. v. Eshleman, 167 Cal. 666, 140 P. 591 (1914) (in addition to the purchasers, 17 others were served whose source of water supply had been destroyed by the company); Overlook Development Co. v. Public Service Comm., 306 Pa. 43, 158 A. 869 (1932) (four others besides purchasers allowed to tap water main owned by the development company).

observed, as where the vendor serves the tenants of the purchaser or sub-vendees, or "all of the residents"²² of the property, he will then be held to be a public utility. When the limitation applies to only a portion of his patrons it is illusory. If it is observed it is effective and usually controlling. A third limiting independent legal relationship in this group is that of *innkeeper and guest*, where the former furnishes telephone service. If the service furnished is purely intra-hotel service then it is clear that the hotel is not a public utility.²³ But if service outside the hotel is also furnished, through connection with the local telephone company lines, the limitation loses its effect. A series of decisions have held the hotel to be a public utility or at least an "extension of a public utility" and therefore subject to the commission regulations as to charges.²⁴ The case of the *landlord and tenant* relationship, which is somewhat related to that of employer-employee, is treated in a similar manner. If the landlord is supplying heat or light or water to his tenants in a particular building alone, it is relatively certain that this is sufficient limitation to preclude his being classed as a public utility.²⁵ But variations from the relationship which involve increase in the size of the class served have brought different results. Thus where one family group controlled a land company owning two buildings and also controlled a lighting company which furnished electricity to the tenants of the buildings, the commission held that the lighting company was a public utility in spite of the fact that this was the extent of its service.²⁶ The variation in the legal relationship occasioned by the corporate entity was sufficient to destroy the effect of the limitation. And where the landlord serves a substantial number of others besides his tenants, the limitation becomes illusory.²⁷

The third type of limitation of which we must take notice is similar to the type last mentioned in that it too is based on a particular legal relationship within the consuming class. But it has the additional factor that this legal relationship is based on a demand for the service. In this group we find cases where the service is rendered to the stockholders of a corporation,²⁸ or to the members of an unincorporated

²² Van Dyke v. Geary, 244 U. S. 39, 37 S. Ct. 483 (1917).

²³ Connolly v. Burleson, P. U. R. 1920C 243 at 246 (N. Y.).

²⁴ Hotel Pfister v. Wis. Teleph. Co., 203 Wis. 20, 233 N. W. 617 (1930); Re Hotel Marion Co., P. U. R. 1920D 466 (Ark.); Hotel Sherman Co. v. Chicago Tel. Co., P. U. R. 1915F 776 (Ill.); Re Hotel Telephone Service and Rates, P. U. R. 1919A 190 (Mass.).

²⁵ Cauker v. Meyer, 147 Wis. 320, 133 N. W. 157 (1911); Story v. Richardson, 186 Cal. 162, 198 P. 1057 (1921).

²⁶ Re Lawrence Park Heat, Light & Power Co., P. U. R. 1919C 31 (N. Y.).

²⁷ McConnell v. South Heights Water Co., 6 Pa. P. S. C. 194 (1923).

²⁸ Affiliated Service Corp. v. Public Utilities Comm., 127 Ohio St. 47, 186 N. E. 703 (1933); Mound Water Co. v. So. Cal. Edison Co., 184 Cal. 602, 194

association,²⁹ or of a cooperative,³⁰ and where one of the substantial motivating purposes of the organization is to furnish the members or stockholders with the service in question.³¹ Is the restriction of service to such members a sufficient limitation to justify holding that the individual is not engaged in a common calling? The courts have indicated that in itself it is not.³² If the association or corporation is unlimited as to membership, and the entrance fee is only nominal, the courts have been inclined to disregard the limitation, since in such cases it is an illusory one.³³ In the case of the corporation the possibility of abuse and evasion of the law has been stressed by some decisions.³⁴ Generally such relationships have been regarded suspiciously by the courts and commissions and they have not hesitated to denounce them as "subterfuges,"³⁵ which, in terms of our approach, is another way of announcing that the limitation is illusory, and that the individual is still serving a class of consumers as a business.

The final type of limitation, and the most common one, is the independent legal relationship within the class of consumers which

P. 1014 (1921); *Thayer v. California Development Co.*, 164 Cal. 117, 128 P. 21 (1912).

²⁹ *Jacksonville-Springfield Transp. Co. v. Beeley*, P. U. R. 1926E 742 (Ill.); *Davis v. People ex rel. Public Utilities Comm.*, P. U. R. 1926E 635, 79 Colo. 642, 247 P. 801 (1926).

³⁰ *Hissem v. Guran*, 112 Ohio St. 59, 146 N. E. 808 (1925); *Dairymen's Co-op. Sales Assn. v. Public Service Comm.*, 115 Pa. Super. 100 (1934), *affd.* 318 Pa. 381, 177 A. 770 (1935).

³¹ See cases cited in note 30, *supra*.

³² It is to be noted that in the case of the cooperative the individuals, in legal contemplation, are serving themselves and the element of "service for hire" is absent, thus in most cases precluding the common calling status. This seems to be the view taken even in those cases where the cooperative is incorporated under statutory authorization. See Packel, "Commission Jurisdiction Over Utility Cooperatives," 35 MICH. L. REV. 411 at 424-427 (1936).

³³ *Fort Lee Transp. Co. v. Edgewater*, 99 N. J. Eq. 850, 133 A. 424 (1926) (the members paid 10 cents per month dues plus service fares, and the membership was open to anyone residing or employed in the county); *Re Elliott*, P. U. R. 1929D 485 (Colo.).

³⁴ In *Affiliated Serv. Corp. v. Public Utilities Comm.*, 127 Ohio St. 47 at 53, 186 N. E. 703 (1933), the court said: "If such a device . . . were upheld, there would be nothing to prevent other companies, similarly organized, from peddling their shares of stock to the public thus securing public patronage limited only by the number of shares authorized by their charters. . . . [Transportation companies] could incorporate, and . . . use the highways of the state without any regulation by the Public Utilities Commission."

³⁵ *Re Elliott*, P. U. R. 1929D 485 (Colo.); *Davis v. People ex rel. Public Utilities Comm.*, P. U. R. 1926E 635, 79 Colo. 642, 247 P. 801 (1926); *Jacksonville-Springfield Transp. Co. v. Beeley*, P. U. R. 1926E 742 (Ill.); *Henneous*

²⁹ *Hissem v. Guran*, 112 Ohio St. 59, 146 N. E. 808 (1925); *Dairymen's Co-op. v. Flanger*, P. U. R. 1927A 649 (Pa.).

is based on contract with the party served. The defense most frequently relied on, and the one relied on in the principal case, is that the carrier makes special contracts with his patrons and is therefore a contract carrier. But again the effectiveness of the limitation depends not on itself alone, but on other factors.³⁶ Whether or not the contract prevents serving a class of consumers will depend first on the continuity of the service under the contract. If the service is of comparatively short duration and the rapid completion soon leaves the carrier free to make more contracts, there is strong reason for viewing the existence of the contract as an illusory limitation and no obstacle to public service as we have defined it. The courts and commissions have taken this viewpoint in the case of taxicabs,³⁷ delivery services,³⁸ charter buses,³⁹ and other well defined means of motor transportation.⁴⁰ On the other hand, if the service under the contract does involve lengthy and particularized activity, and necessarily implies that the carrier will be confined to only a few such contracts, the limitation is clearly a real one, and does take the carrier out of the class of common callings. This was the situation in the principal case, and was undoubtedly an important element influencing the court. However, even continuity of service does not necessarily mean that the limitation is not an illusory one. This brings us to our second factor to be considered in the case of an individual serving under a contract, namely, the extent to which he has expanded his equipment and facilities. In view of the huge accumulations of capital available under our modern industrial system, it is not at all impossible that despite the fact that he renders continuous and particularized service the carrier may still be in a position to offer such service to a whole class of consumers. In such

³⁶ *Michigan Public Utilities Comm. v. Krol*, 245 Mich. 297, 222 N. W. 718 (1929); *Weaver v. Public Service Comm.*, P. U. R. 1929D 625, 40 Wyo. 462, 278 P. 542 (1929); *Wayne Transp. Co. v. Leopold*, P. U. R. 1924C 382 (Pa.).

³⁷ *Anderson v. Yellow Cab Co.*, 179 Wis. 300, 191 N. W. 748, 31 A. L. R. 1197 at 1202 (1923); *Burke v. Shaw Transfer Co.*, 211 Mo. App. 353, 243 S. W. 449 (1922); *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252, 36 S. Ct. 583 (1916); *Re Yellow Cab & Baggage Co.*, P. U. R. 1932D 121 (Neb.).

³⁸ *United Parcel Service & Inter City Parcel Service*, P. U. R. 1927E 111 (Cal.); *Northern Ohio Power & Light Co. v. Motor Freight*, P. U. R. 1928E 609 (Ohio); *Johnson Express Co. v. City of Chicago*, 136 Ill. App. 368 (1907); *Contra*: when the service is narrowly limited, *State ex rel. Bd. of R. R. Commissioners v. Carlson*, 217 Iowa 854, 251 N. W. 160 (1934).

³⁹ *Re Bush*, P. U. R. 1925C 1 (Pa.); *Re University of Colorado*, P. U. R. 1932A 499 (Colo.).

⁴⁰ *Law v. Transcontinental Air Transp. Inc.*, U. S. Air Rep. 205 (P. C. Pa. 1931) (airplane); *State v. Ferry Line Auto Bus Co.*, 93 Wash. 614, 161 P. 467 (1916) (ferry); *Public Util. Comm. v. Garviloch*, 54 Utah 406, 181 P. 272 (1919) (automobile "stage line"); *Denny v. City of Muncie*, 197 Ind. 28, 149 N. E. 639 (1925) (jitney bus).

case it would seem proper to say that the making of separate contracts with each person is not such a limitation as can be made the basis of denoting him a contract carrier.

3.

The approach suggested, involving the determination of the limitations which the carrier has imposed on himself, and an evaluation of their effectiveness in limiting his service, falls far short of solving all of the problems connected with distinguishing the common carrier from the contract carrier. But such an analysis has value through the light in which it places the tests the courts are prone to use in solving the problem. It gives such tests a functional significance as criteria of limitation. The test of a regular route, fixed schedule and uniform rates acquires meaning as evidence of the absence of limitation on the carrier's activity and his willingness to deal with the whole class which demands such service. The existence of these elements will, in most cases, prevent a party from declaring himself to be a contract carrier. In some cases, where other evidence of limitation is present, the effect of having a regular route will be overcome. The instant case is in point. The carrier apparently had a well defined route and a regular time schedule as well as a uniform rate. Yet other preponderating evidence of limitation placed him in the contract carrier category. The test of solicitation of business is similarly affected by this approach. Standing alone, it is little more than a restatement of the common-law definition. If the party has solicited patronage publicly, then he has "undertaken to carry the goods of all persons indifferently." Viewed in the light of a measurement of limitation the test becomes more useful as evidence that the carrier is operating without restriction and that other apparent limitations are illusory. The test of number of people served, or number of contracts, results, as we have noted, in an atmosphere of confusion and disagreement in the findings of the courts. If we conceive of the common carrier as one who serves a particular class of consumers which has need for his particular type of service, the size of which varies greatly from one group to another, and then use the test of numbers as an indication of restriction, the holdings of the courts and commissions assume a greater degree of harmony. Stating the problem in terms of limitation affords a common denominator to all tests including those which have not been mentioned specifically herein.

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