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CARRIERS - FEDERAL REGULATION OF MOTOR TRANSPORTATION BROKERS

Charles E. Nadeau
University of Michigan Law School

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COMMENTS

CARRIERS — FEDERAL REGULATION OF MOTOR TRANSPORTATION BROKERS — A broker is, in general, an intermediary or "go-between" in the business of negotiating contracts for others. His economic function is that of bringing buyer and seller together.¹ A motor transportation broker is engaged in the business of arranging for contracts dealing with motor transportation service. His function is to bring together a prospective passenger or shipper seeking service and a carrier willing to provide the service demanded.² "Tourist agency," "travel bureau," and "share-the-expense agency" are familiar terms used to designate the passenger transportation broker. There is a larger, but not so well-known, group of brokers dealing in the hauling of motor freight. With few exceptions, the problems dealt with are applicable to both classes.

I.

The story of the motor transportation broker is very intimately linked to the history of commercial motor transportation and its attempted regulation in the public interest. State regulation of common carriers by motor bus was well established by 1925. Probably the outstanding feature of that regulation was the use of certificates of public convenience and necessity as a means of limiting competition and securing adequate service. State commissions had generally felt that this restriction was applicable to interstate as well as intrastate carriers. But in 1925 the United States Supreme Court held in the case of *Buck v. Kuykendall*³ that a certificate of public convenience and necessity is not merely a highway regulation but a regulation of interstate commerce beyond the power of the states. In the absence of federal regulation, this opened the field of interstate motor transportation to cut-throat competition. Almost overnight numerous small independent operators, known as "bootleg," "fly-by-night," or "wild-cat" operators, sprang up all over the country. Passenger carriers of this sort, while frequently posing as "share-expensers," actually made a business of selling transportation service.⁴ Since the operator had only

¹ A broker is deemed to be primarily the agent of the party engaging him. Theoretically the subject matter of the transaction is beyond his control. 1 BOUVIER, LAW DICTIONARY, 8th ed., 399 (1914).

² The carrier may be either a contract or common carrier. The only difference is that the former is under no duty to serve all alike. See *Hissem v. Guran*, 112 Ohio St. 59, 146 N. E. 808 (1925).

³ 267 U. S. 307, 45 S. Ct. 324, 38 A. L. R. 286 at 291 (1925). For a brief but complete history, see MCCOLLESTER and CLARK, FEDERAL MOTOR CARRIER REGULATION 7 (1935).

⁴ "Motor Bus and Motor Truck Regulation," 140 I.C.C. 685 at 703 (1928).

limited capital, and since keen competition caused grotesquely low rates, it was inevitable that the service rendered was unsatisfactory and that passengers found numerous causes for complaint. Where round trip tickets were sold, return carriage was seldom furnished by such operators.⁵ Because a driver had insufficient funds to repair a breakdown, or too small an equity to warrant the expenditure,⁶ or perhaps because he wished to "accommodate" a new load,⁷ passengers were often abandoned short of their destination. Even more unfortunate were the passengers who had their money and luggage "lifted" at the hands of unscrupulous drivers.⁸ Beyond this, the evasion of taxes, terminal expenses, insurance premiums,⁹ and general overhead permitted carriage for one-half or one-third the usual rate.¹⁰ Recoupment of damages was impossible against these irresponsible operators since their capital was limited and since they carried no insurance. While states have the power to prohibit and punish fraudulent and dishonest practices by interstate bus operators, the use of ordinary automobiles made it easy for these transient operators to evade the police.

In the field of motor freight it should be noticed that by far the largest part of the commercial trucking business has been conducted by owner-operated carriers, having no fixed routes, schedules, or rates.¹¹ The possibility of starting business on a "shoe string" and of making profits in a new enterprise enticed many adventurous men to enter the field.¹² During the depression, ambitious persons with a little capital, seeking to make a job for themselves and encouraged by overzealous salesmen, bought trucks and entered into a business the

⁵ "Motor Bus and Motor Truck Regulation," 140 I.C.C. 685 at 703 (1928).

⁶ Not infrequently have passengers been called on to contribute to repairs or for a new tire.

⁷ One driver boasted that on a transcontinental jaunt he had loaded and discharged seven loads of passengers. It has been estimated that for short hauls 90 to 95% of the passengers reach their destination, but only about 20% are so fortunate on long interstate hauls. "Fighting the Share-Expense Racket," 12 BUS TRANSPORTATION 205 (1933).

⁸ "Fighting the Share-Expense Racket," BUS TRANSPORTATION 205 (1933). Betts, "Some Motor Vehicle Regulation Problems," PUB. UTIL. FORT. 5 at 11 (Sept. 6, 1928), relates an incident of a young lady of apparent refinement who was sent out with four men she did not know.

⁹ The estimated cost of insurance for the Greyhound bus lines has been set at 2 cents per bus-mile. "Coordination of Motor Transportation," 182 I.C.C. 263 at 281 (1932).

¹⁰ "Fighting the Share-Expense Racket," 12 BUS TRANSPORTATION 205 (1933).

¹¹ It has been estimated that 80% of the trucking business was so conducted. Stecher, "Proposed Federal Regulation of Interstate Carriers by Motor Vehicle," 17 MINN. L. REV. 1 (1932).

¹² "Yesterday all you needed to start a truck line was \$200 and plenty of muscle

volume of which was greatly reduced by the economic situation.¹³ This excessive supply of truckers resulted in a ruinous cut-throat competition characterized by rate cutting, rebating, and racketeering such that no orderly concern could engage in business. Trucking became a no-profit business. Due to accidents, improper handling of goods, and racketeering, the shippers suffered frequent losses;¹⁴ but on bringing suit the carrier was found to be uncollectible, without insurance, and not even the full owner of the greatly depreciated vehicle he was operating. Furthermore, the accidents caused by defective equipment and drivers in need of sleep marked these truckers as menaces to public safety.¹⁵

Regulation of these irregular truckers presented a difficult problem. In so far as they were genuine contract carriers, they were believed to be constitutionally exempt from economic regulation imposed upon common carriers.¹⁶ This was true until the Supreme Court in *Stephenson v. Binford*,¹⁷ decided in 1932, held that the state's control of the highways was a sufficient constitutional basis for regulation of contract carriers designed to restrict competition and prevent unduly low rates. But in the light of the *Buck* case it was evident that interstate contract carriers could not be subject to effective regulation by the states. These constitutional difficulties, together with the administrative problems involved in attempting to police a business composed primarily of a number of small operators, discouraged state regulatory action. As a result, the irregular motor trucking business was substantially free from control.

The facts sketchily narrated above relative to the origin and practice of the irregular bus and truck operators point to the significant role of the transportation broker. Some means was necessary by which the car-

and guts." "Freight by Highway," 13 FORTUNE, No. 2, p. 47 (Feb. 1936), condensed in 28 READER'S DIGEST, No. 168, p. 54 (1936).

¹³ S. HEARINGS BEFORE SENATE COMMITTEE ON INTERSTATE COMMERCE ON S. 1629, 74th Cong., 1st sess. (1935), p. 98.

¹⁴ In Michigan an investigation showed that only 2 out of 404 operators had any experience. S. HEARINGS BEFORE SENATE COMMITTEE ON INTERSTATE COMMERCE ON S. 1629, 74th Cong., 1st sess. (1935), p. 155. Poor equipment, resulting in breakdowns, not uncommonly resulted in stranded freight.

¹⁵ Eighteen hours of steady driving is ordinary. Often drivers are on the road 48 hours or more. One estimate is that 70% of the accidents are at night and 70% of those involve owner-operated trucks. This is probably too high. See H. HEARINGS BEFORE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE ON H. R. 6836, 73d Cong., 2d sess. (1934), p. 88. For a recent attempt to correct the situation, see Mich. Pub. Acts (1937), No. 314. Another source of accidents is the inexperience of the drivers.

¹⁶ By economic regulation is meant all those regulations which tend to control the supply and demand in the particular field.

¹⁷ 287 U. S. 251, 53 S. Ct. 181 (1932).

riers could contact prospective customers, and by which customers could get in touch with the carriers offering the most advantageous rates. The transportation broker met the need of both groups.

With the development of the long haul in motor transportation, the practice arose whereby motor transportation service was sold by agencies which did not represent any particular concern.¹⁸ Because there were no prerequisites to entering business, these agents were often shiftless and irresponsible.¹⁹ The method employed by them was to advertise appreciably lower rates than those of the regular carriers and then to hire irregular operators to perform the contracts obtained.

As might be expected, the public suffered at the hands of unscrupulous brokers.²⁰ Often such a broker misrepresented his own status and the type of transportation to be furnished.²¹ The position of the broker enabled him to profit from the dishonest practices of irresponsible bus and truck operators. Tricks of his own, such as selling tickets to points where he had no possible means of providing transportation, netted him further profits.²² But broken contracts meant nothing to such agents as they were invariably uncollectible, had no property, and carried no bond. Because of fantastic rate juggling, merchants could not tell what allowances to make for transportation.²³ Yet, in order to meet competition, reputable concerns have been compelled to deal with these brokers. Even more serious was the racketeering which developed. Customers were coerced into giving their business to certain concerns; property of customers and competing carriers were destroyed; officials were attacked. It is little wonder that the motor carriers en-

¹⁸ "Coordination of Motor Transportation," 182 I.C.C. 263 at 279 (1932).

¹⁹ "We consider the wildcat operator, the broker-operator, a man who has an investment of \$25 in a desk, a new suit of clothes, an engraved card, and he is in the trucking business." J. J. Keeshin, H. HEARINGS BEFORE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE ON H. R. 6836, 73d Cong., 2d sess. (1934), p. 86. Keeshin, the head of a large trucking concern, gave very interesting, though probably biased, testimony at this hearing. The article "Freight by Highway," 13 FORTUNE, No. 2, p. 47 (Feb. 1936), deals mainly with his concern. On related matters, see Betts, "Some Motor Vehicle Regulation Problems," PUB. UTIL. FORT., 5 (Sept. 6, 1928).

²⁰ Eastman, "Regulation of Transportation Agencies," S. Doc. 152, 73d Cong., 2d sess. (1934), p. 226.

²¹ The carriers are often actual agents of the brokers. The representation is often made that the broker is paid to introduce travelers to a share-the-expense operator when in fact it is a commission for giving customers to a professional wild-cat operator.

²² H. HEARINGS BEFORE HOUSE SUBCOMMITTEE ON INTERSTATE AND FOREIGN COMMERCE ON H. R. 5262 and H. R. 6016, 74th Cong., 1st sess. (1935), p. 184.

²³ S. HEARINGS BEFORE SENATE COMMITTEE ON INTERSTATE COMMERCE ON S. 1629, 74th Cong., 1st sess. (1935), p. 98.

joyed such a notoriously bad reputation.²⁴ The carriers themselves have had grounds for distrusting brokers. The truckers especially have found themselves at the complete mercy of the brokers because they have had no place of business, have done no advertising, and have purchased specialized equipment.²⁵ By making the truckers bid against each other, the broker has had work done at ridiculously low prices while reaping a commission of thirty to forty per cent for himself.²⁶ Nor have some of these unscrupulous agents felt any qualms about "breaking" a trucker who did not have their sympathy. To remain in the good graces of the broker, the carrier often has had to purchase his supplies from him. This has gone so far as to include trucks.²⁷ These trucks have often been repossessed after defaults in payments caused by the broker's failing to give the trucker enough business to sustain him.²⁸

²⁴ "Fighting the Share-Expense Racket," 12 *BUS TRANSPORTATION* 205 (1933); "Freight by Highway," 13 *FORTUNE*, No. 2, p. 47 (Feb. 1936). St. Clair, "Traveling by Wildcat," 102 *SCRIBNERS*, No. 3, p. 55 (Sept. 1937), condensed in 31 *READER'S DIGEST*, No. 188, p. 88 (Dec. 1937).

²⁵ S. HEARINGS BEFORE SENATE COMMITTEE ON INTERSTATE COMMERCE ON S. 1629, 74th Cong., 1st sess. (1935), p. 98.

²⁶ In a seasonal sightseeing business it was held that 20% was a sufficient commission for agents. "Re Sightseeing Bus Operations," Pub. Util. Rep. 1930C (Colo.) 65. Regular carriers pay 10% commission. St. Clair, "Traveling Wildcat," 102 *SCRIBNER'S*, No. 3, p. 55 (Sept. 1937); "Coordination of Motor Transportation," 182 *I. C. C.* 263 at 377 (1932); *McCOLLESTER and CLARK, FEDERAL MOTOR CARRIER REGULATION* 29 (1935).

Brokers can strike their hardest bargains when a trucker may have to make a return trip empty. Such a trip is a total loss to the trucker, and he is willing to take almost anything. The whole problem of return trips has caused considerable difficulty for it is here that most of the cut-throat competition has started. But it is also here that the broker can perform a genuine economic service in preventing a complete loss. S. HEARINGS BEFORE SENATE COMMITTEE ON INTERSTATE COMMERCE ON S. 1629, 74th Cong., 1st sess. (1935), p. 98.

To illustrate the viciousness of these practices, Commissioner Dunn of the Michigan Public Utilities Commission claimed that not 2 in every 100 truckers made any profits. H. HEARINGS BEFORE HOUSE SUBCOMMITTEE ON INTERSTATE AND FOREIGN COMMERCE ON H. R. 5262 and H. R. 6016, 74th Cong., 1st sess. (1935), p. 54.

²⁷ 36 *COL. L. REV.* 945 at 946, note 10 (1936).

²⁸ Brokers often use the opportunity-for-man-with-capital ads. The capital is applied to a truck, perhaps at an advanced price. In time they are repossessed and made ready for the next sucker. S. HEARINGS BEFORE SENATE COMMITTEE ON INTERSTATE COMMERCE ON S. 1629, 74th Cong., 1st sess. (1935), p. 98. H. HEARINGS BEFORE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE ON H. R. 6836, 73d Cong., 2d sess. (1934), p. 86. Often the carrier is merely the dupe of the broker, who repossesses when the carrier fails to comply with the conditions laid down by him. Eastman, "Regulation of Transportation Agencies," S. Doc. 152, 73d Cong., 2d sess. (1934), p. 226. And see *MOHUNDRO, NOTES ON MOTOR CARRIER ACT*, 1935, p. 258 (1935).

Furthermore, the practices of dishonest brokers have resulted in injury to the carrier subject to regulation. Since the regulated carriers, especially the common carriers, are required to file tariffs, they are naturally at a disadvantage in competing with the unregulated operators who may be charging ruinously low rates due in part to the practices of the brokers at whose mercy they find themselves.²⁹

The picture given has been one of brokers who have abused their position. But in the past it has been difficult to carry on a brokerage business in an honest manner when in competition with brokers of the dishonest and unscrupulous type.³⁰

In light of the malodorous practices of some motor transportation brokers, it was inevitable that there should be a demand for regulation. California enacted a statute in 1931,³¹ followed by another in 1933,³² in which year Oklahoma³³ and Tennessee³⁴ also passed similar statutes. Since then a number of states have adopted regulations of this type.³⁵ The completeness of the regulation ranges from that provided for in the Oklahoma statute, which simply makes it a misdemeanor to arrange for transportation with an unlicensed carrier, to that contained in the California statute, which provides for the licensing of brokers, the furnishing of a bond, and the keeping of records. Convictions on the latter statute have been had in both state and federal courts.³⁶

However, the states can regulate brokers effectively only to the extent that they deal in intrastate transportation service.³⁷ Their free-

²⁹ The instability of these concerns is shown by the attitude of the Michigan Securities Commission. In 1935 it did not authorize the sale of securities of a single trucking concern. S. HEARINGS BEFORE SENATE COMMITTEE ON INTERSTATE COMMERCE ON S. 1629, 74th Cong., 1st sess. (1935), p. 156.

On the problem as to the extent which state regulation has been and may be carried, see Munsert, "Extent of State Regulation of Interstate Motor Freight Carriers," 14 CHI.-KENT L. REV. 240 (1936); Kauper, "State Regulation of Interstate Motor Carriers," 31 MICH. L. REV. 920, 1097 at 1111 (1933); Kauper, "Federal Regulation of Motor Carriers," 33 MICH. L. REV. 1 at 7 (1934); Fisher, "Regulation of Motor Carriers," 2 GEO. WASH. L. REV. 155 at 160 (1934). For a list of the various state laws, see MEIGHAN, MOTOR BUS LAWS AND REGULATIONS (1932).

³⁰ 79 CONG. REC. 5654 (1935).

³¹ 2 Cal. Gen. Laws (Deering, 1931), Act 5130b.

³² Cal. Gen. Laws (Deering, 1933 Supp.), Act 5130c.

³³ Okla. Sess. Laws (1933), c. 156, § 6.

³⁴ Tenn. Pub. Acts (1933), c. 119.

³⁵ For some of the most recent enactments, see N. Mex. Laws (1937), c. 228; N. C. Laws (1937), c. 403; Va. Laws (1936), c. 129.

³⁶ Finn v. California Railroad Comm., (D. C. Cal. 1933) 2 F. Supp. 891; People v. Henry, (Cal. App. 1933) 21 P. (2d) 672.

³⁷ Kauper, "Federal Regulation of Motor Carriers," 33 MICH. L. REV. 1 (1934); McGregor, "The Desirability of Federal Regulation of Motor Carriers Engaged in

dom from control in interstate commerce has caused agitation for federal regulation. Adherents for federal control of brokers won their first victory by way of the NIRA. Under that statute a code of fair competition for the Motor Bus Industry was adopted.³⁸ It was there provided that brokers were not to sell transportation furnished by a passenger carrier unless such carrier was registered with the code authority.³⁹ In 1935 a complete victory was won by way of the Federal Motor Carrier Act, which provided for regulation of brokers dealing in interstate commerce.⁴⁰

2.

The Federal Motor Carrier Act defines a "broker" as "any person not included in the term 'motor carrier' and not a bona fide employee or agent of such carrier, who or which, as principal or agent, sells or offers for sale any transportation subject to this chapter, or negotiates for, or holds himself or itself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts, or arranges such transportation."⁴¹ It will be noticed that this definition contains an apparent contradiction of terms. It is provided that one is not a broker who is a "bona fide employee or agent of any such carrier," yet a broker is one "who or which, as principal or agent, sells or offers for sale any transportation subject to this part." Bona fide agents of carriers often sell transportation, and practically every broker is, in legal theory at least, an agent to the carrier. "Agent" seems to be used in the two places with different connotations. As first used the meaning must be analogous to "employee" in the sense of one having a more or less continuous relationship with the carrier.⁴² As used the second time, the intention is probably to include only special agents, that is to say, persons who are agents to the carrier for the purposes of particular transactions only. There is no assurance that the courts will

Interstate Commerce," 1 J. MARSHALL L. Q. 328 (1936); McCormick, "The Regulation of Motor Transportation," 22 CAL. L. REV. 24 (1933); Peterson, "Motor Carrier Regulation and Its Economic Bases," 43 Q. J. ECON. 604 (1929).

³⁸ 2A CCH FEDERAL TRADE REGULATION SERVICE, 7th ed., par. 8564 (1933).

³⁹ 2A CCH FEDERAL TRADE REGULATION SERVICE, 7th ed., par. 8564, art. VII (4) (1933). For a discussion of the NIRA, see Kauper, "Federal Regulation of Motor Carriers," 33 MICH. L. REV. 1 at 27 (1934).

⁴⁰ "Federal Motor Carrier Act," 22 VA. L. REV. 695 (1936); Nelson, "The Motor Carrier Act of 1935," 44 J. POL. ECON. 464 (1936); 36 COL. L. REV. 945 (1936).

⁴¹ 49 Stat. L. 543, § 203 (1935), 49 U. S. C., § 303 (a) 18 (Supp. 1936). Sec. 311 (a) aids in the interpretation.

⁴² This explanation is not entirely satisfactory. One immediately asks why Congress used both terms.

so construe this statute, but the Interstate Commerce Commission has reached this result and it is probable that the courts will follow.⁴³ In view of history and the intentions of Congress, this would appear to be a sound result.⁴⁴

The wording of the statute clearly includes the agent of the person seeking transportation. Practically, this is a sound approach. From the position of a broker it is difficult to determine for whom he is considered to be the agent. On this basis the Commission has correctly held that travel bureaus⁴⁵ and those planning all expense tours which include motor carriage⁴⁶ are brokers within the act.⁴⁷

Licenses are granted by the Commission as a prerequisite to a broker doing business. Before granting the license the Commission must make two findings: (1) "that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this charter and the requirements, rules and regulations of the Commission thereunder,"⁴⁸ and (2) that the granting of the license is consistent with the public policy set out in the statute, the general effect of which is to limit competition for the public good.⁴⁹ Under such provisions the Commission is given a discretion as to what conditions will warrant the issue of a license.⁵⁰ Further control is given through the right of revocation to be exercised after a notice and hearing held either on complaint or at the initiative of the Commission.⁵¹

⁴³ 5 U. S. LAW WEEK 21 (Sept. 14, 1937).

⁴⁴ In view of previous statements to the effect that much of the difficulty arises from the brokers being screens for the carrier, this may be questioned. But under the present regulations, there is nothing to be gained by the broker's pretending that he has no connection with the carrier.

⁴⁵ CCH PUBLIC UTILITIES AND CARRIERS SERVICE (Federal), par. 6026 (1936).

⁴⁶ 5 U. S. LAW WEEK 21 (Sept. 14, 1937).

⁴⁷ Those opposed to regulation of brokers contended that this would put an end to all friendly "get-together" tours or information bureaus used by colleges during vacations. The statutory definition of brokers requires that they deal with "transportation subject to this chapter." Sec. 304 (a) 19 defines brokers to include "all vehicles operated by, for or in the interest of any motor carrier." "Motor carrier" is defined in sec. 304 (a) 14 to mean "any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation." By defining "general public" and "for compensation" a well directed court can find an excellent "out" for such situations. All citations are to 49 U. S. C. (Supp. 1936), § 304.

⁴⁸ 49 U. S. C. (Supp. 1936), § 311 (b).

⁴⁹ 49 U. S. C. (Supp. 1936), § 302 (a).

⁵⁰ It is a wise sentiment that developed at the time of the passage of the act to leave much to the discretion of the Commission. Peterson, "Motor Carrier Regulation and Its Economic Bases," 43 Q. J. Econ. 604 (1929).

⁵¹ 49-U. S. C. A., § 312. Rehearings may be granted and the proper district courts

Common carriers and contract carriers must obtain certificates and permits respectively before engaging in business. Such carriers are not required to obtain licenses before performing the functions of a broker.⁵² But a broker with a license has no right to engage in the transportation business by virtue of his license. Furthermore, he has authority to deal only with the lawful holders of certificates and permits.⁵³ This provision eliminates any dealings with irregular carriers, which was the point around which brokers had built up all their prior abuses. The statute does more than prohibit such dealings; it puts the burden on the broker to discover whether or not the carriers with which he is dealing are in good standing with the Commission. Herein would seem to be the heart of the entire regulation.

Among the more discretionary powers of the Commission is the right to "prescribe reasonable rules and regulations for the protection of travelers and shippers" to be observed by the brokers.⁵⁴ This covers a minutia of details which cannot be properly covered by statute. Shippers and travelers are further protected by the requirement that brokers furnish bonds satisfactory to the Commission.⁵⁵ The control of the Commission over reports, records, and accounts is now of minor concern, but will some day be the source of statistics which will permit a more scientific approach for future legislation.⁵⁶

Like other persons subject to the act, a broker is guilty of a misdemeanor if he participates in giving discriminatory rates or rebates or aids in the evasion of the statute.⁵⁷

In keeping with the general policy of the Motor Carrier Act, much of the regulation of brokers will be administered by "joint boards" where not more than three states are involved. These boards, made up of a member from each state involved, give a local element to the control which it is hoped will meet the widely divergent conditions under which they operate.⁵⁸ But the Commission retains control so that uniformity, where desirable, will not be lost.⁵⁹

may be reverted to after final order of the Commission. §§ 304 (e), 305 (h). "Federal Motor Carrier Act," 22 VA. L. REV. 695 (1936).

⁵² As shown above, the statutory definition of brokers excludes carriers and their employees.

⁵³ 49 U. S. C. (Supp. 1936), § 311 (a).

⁵⁴ 49 U. S. C. (Supp. 1936), § 311 (c).

⁵⁵ 49 U. S. C. (Supp. 1936), § 311 (c).

⁵⁶ Lack of adequate information was a general characteristic of the congressional debates over the Motor Carrier Act. WAGNER, A LEGISLATIVE HISTORY OF THE MOTOR CARRIER ACT, 1935, p. 3 (1935).

⁵⁷ 49 U. S. C. (Supp. 1936), § 322.

⁵⁸ 49 U. S. C. (Supp. 1936), § 305 (b).

⁵⁹ Kauper, "Utilization of State Commissioners in the Administration of the

3.

The Federal Motor Carrier Act is based on the authority of Congress to regulate interstate commerce. The principal problems are whether the function of brokers comes within the term "interstate commerce," and, if so, whether the regulations imposed are consistent with "due process."

That the transportation brokerage business bears such a close and direct relation to interstate commerce, where interstate transportation is involved, as to come within the scope of federal power seems quite clear.⁶⁰ However, the question still remains whether the type of regulation Congress has imposed upon motor transportation brokers violates the due process clause of the Fifth Amendment.⁶¹ Do the regulations constitute an unwarranted interference with the broker's business? In considering this question, it must be borne in mind how intimate a relation the broker's business bears to motor transportation, and it is in the light of this relationship that the validity must be considered. Since common carriers by bus and truck are admittedly subject to regulation, there can be no difficulty in saying that brokers dealing in common carrier service are subject to regulation designed to effectuate regulation and control of the carriers themselves.⁶² If unlicensed and unrestricted brokerage activities are likely to injure common carriers by unlawful means, it is certainly proper for Congress to require them to obtain a license and to deal only with carriers engaged in lawful operation.

Where the broker deals in the service of contract carriers, the same intimate relation between the brokerage business and the carrier exists. However, it is still an unsettled question whether Congress can

Federal Motor Carrier Act," 34 MICH. L. REV. 37 (1935). The *raison d'être* for this administrative set-up is the economic organization of the industry, there being thousands of carriers doing different types of work and scattered all over the country. Nelson, "The Motor Carrier Act of 1935," 44 J. POL. ECON. 464 at 495 (1936).

⁶⁰ This is justified on the basis that control of those engaged in commerce is impossible if those with whom they deal remain unregulated. GAVIT, THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION 89 (1932); George, "The Federal Motor Carrier Act of 1935," 21 CORN. L. Q. 249 at 273 (1936). For pertinent cases, see *McCall v. California*, 136 U. S. 104, 34 L. Ed. 391 (1890); *Di Santo v. Pennsylvania*, 273 U. S. 34, 47 S. Ct. 267 (1927); *Texas Trans. & Terminal Co. v. New Orleans*, 264 U. S. 150, 44 S. Ct. 242 (1923).

⁶¹ For general discussions, see MCCOLLESTER and CLARK, FEDERAL MOTOR CARRIER REGULATION 203 (1935), dealing specifically with brokers; Scott and Brown, "Regulation of the Contract Motor Carrier under the Constitution," 44 HARV. L. REV. 530 (1931).

⁶² The regulation of common carriers has been carried through from the old common law as being a public calling.

lawfully regulate interstate contract carriers to the extent found in the Federal Motor Carrier Act. Assuming, however, that federal regulation of the contract carrier will be upheld either on the doctrine that the business is affected with a public interest as set out in *Munn v. Illinois*,⁶³ or that it is a reasonable and proper method of control as set forth in the *Nebbia* case⁶⁴ in light of the position of the contract carrier in the whole transportation field, in either event the regulation of brokers would seem really necessary to effectuate the control of the carriers themselves. In the end, therefore, the validity of brokerage regulation depends upon the validity of the regulation of the carriers themselves.⁶⁵

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⁶³ 94 U. S. 113, 24 L. Ed. 77 (1877). See comment in 31 MICH. L. REV. 395 at 402 (1933).

⁶⁴ *Nebbia v. New York*, 291 U. S. 502, 54 S. Ct. 505 (1934).

⁶⁵ The states have been given a fair amount of control over contract carriers on the basis of control over the highways, but this argument does not aid federal control. *Stephenson v. Binford*, 287 U. S. 251, 53 S. Ct. 181 (1932). *Stafford v. Wallace*, 258 U. S. 495, 42 S. Ct. 397 (1922), allowed the secretary of agriculture to regulate dealers in cattle at the stockyards, and has much language that would be applicable to transportation brokers. See Kauper, "Federal Regulation of Motor Carriers," 33 MICH. L. REV. 1 at 21 (1934).

Another ground for attack has been the unwarranted delegation of authority to the Commission. For a discussion of this phase, see McCOLLESTER and CLARK, FEDERAL MOTOR CARRIER REGULATION 205 (1935).