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WHAT CONSTITUTES A COMMON CARRIER?

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THE difficult problem of distinguishing between a common and contract carrier has arisen since the coming of state regulation. The various state commissions and courts have attempted to lay down various definitions for determining this distinction. These definitions have varied greatly to the most extent due to the fact that the stress was laid on the particular facts of the case to be determined rather than upon the general problem. With this in mind it has been the purpose of the author in preparing this article to show the evolution of this subject from its inception to date.

The problem is, What are the factors to be considered in determining when a carrier who is carrying goods or persons under contract ceases to be a private contract carrier and becomes a common carrier?

In the first place we must recognize a well settled rule that a state commission can exercise no control over a private carrier. And if a carrier is in fact a private contract carrier a state commission cannot label him a common carrier and thus exercise control over him. This doctrine was laid down conclusively by the U. S. Supreme Court in the case of *Michigan Commission* vs. *Duke,* 266 U. S. 570, where it was held that such procedure contravened the "due process" clause in the 14th amendment.

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In the Duke case, the carrier there involved was carrying automobile bodies from Detroit to Toledo under three separate contracts with automobile manufacturers. He was engaged exclusively in carrying under these three contracts and the Supreme Court held that he was a private and not a common carrier.

The fact that he was carrying under *three* contracts, has caused much confusion and has led some State Commissions to seemingly adopt an arbitrary rule and say that any carrier operating under three or less contracts, is a private contract carrier and therefore, not subject to regulation and control by the State Commissions.

The language of the court in the above case was as follows: P. 576:

"Plaintiff is not a common carrier. His sole business is interstate commerce, and it is limited to the transportation covered by three contracts. He has no power of eminent domain or franchise under the State, and no greater use of the highways than any other member of the public body. He does not undertake to carry for the public and does not devote his property to any public use. He has done nothing to give rise to a duty to carry for others. The public is not dependent on him or the use of his property for service, and has no right to call on him for transportation."

On page 577:

"One bound to furnish transportation to the public as a common carrier must serve all, up to the capacity of his facilities, without discrimination and for reasonable pay."

This last quotation seems to have given rise to the idea that if a carrier limits his patrons in any manner, i.e., if he puts any restriction on the persons or goods which he carries or for whom he carries that he is thus holding himself out of the class of common carriers. The idea seems clearly erroneous for it is not necessary that any common carrier serve the whole public. Mr. Justice Holmes said in the *Terminal Taxi Cab Co.* vs. *District of Columbia,* 241 U. S. 252,

"No carrier serves all the public. His customers are limited by place, requirements, ability to pay, and other facts."

Again it is clearly not the manner in which carrier is actually hauling goods which determines his status, but the manner in which he offers to haul goods. It seems clear that a carrier might well be willing to serve anyone who came along, but if only one person happens along to engage him, and the carrier serves this one person under a contract, can anyone say that the carrier is any less a common carrier because he happened to get only one customer?

Then, too, even the fact that a carrier will not serve every person who wishes service may not be a controling factor in determining his status as a common or private carrier, for if by his previous actions he has established his position as a common carrier, a subsequent

refusal to serve certain persons might be a violation of his duty as a common carrier and not a determining factor in determining his status.

The fact that a carrier is carrying under contracts is by no means determining as to his status. In the case of *Frost Trucking Co.* vs. *R. R. Commission,* 271, U. S. 583 1926), the Supreme Court of U. S. held that the defendant who was carrying citrous fruit over a regular route between fixed termini, under a single contract and doing no other trucking business could not be subject to control by the R. R. Commission of Cal. under State Statute. But the Court said in conclusion on page 599-600:

"The Court below seemed to think that, if the state may not subject the defendants in error to the provisions of the act in respect of common carriers, it will be within the power of any carrier, by the simple device of making the private contracts to an unlimited number, to secure all the privileges afforded a common carrier without assuming any of their duties or obligations. It is enough to say that no such case is presented here; and we are not to be understood as challenging the power of the State, or of the R. R. Commission under the present Statute, whenever it shall appear that a carrier posing as a private carrier, is in substance and reality a common carrier, to so declare and regulate his or its operations accordingly."

In the case of *Film Transport Co.* vs. *Michigan Pub. Util. Commission,* 17 Fed. 2nd 857 (1927), the plaintiff was engaged in transporting moving picture films for theatres under special contracts, operating over fixed routes, but not holding themselves out to transport for the public indiscriminately. The Court here held the plaintiff to be a private carrier within the rule of the Duke case, even though he was carrying under a large number of contracts.

This seems to be perhaps the farthest that any Court has gone and the decision and reasoning in the case is quite inadequate.

Sanger vs. *Luzens, Sec. of State of Idaho,* 24 Fed. 2nd 226, (1927). Plaintiff was hauling nondescript freight for various persons under written contracts. Page 428:

"It will thus be seen that the plaintiff holds himself out to the public and transports upon the highways all property for anyone, and by so doing he becomes a common carrier, and cannot escape liability as such by insisting upon private contracts with the shippers, and securing at the same time all the privileges afforded common carriers, without assuming any of their obligations or duties. A common carrier is "one who, by virtue of his calling and as a regular business, undertakes to transport persons or commodities from place to place, offering his services to such as may choose to employ him and pay his charges. *McCoy* vs. *Pacific Spruce Corporation,* 1 Fed. 2nd 853; 10 C. J. 39. While a private carrier is one who, without being engaged in the busi-

ness of carrying as a public employment undertakes to deliver goods in a particular case for hire or reward; 10 C. J. 38, *Mich. Com.* vs. *Duke,* 266 U. S. 570 36 A. L. R. 1105, *Producers Transport Line* vs. *Railroad Commissioners,* 251 U. S. 228."

In the very recent case of *Bruner* vs. *Public Utilities Commission of Ohio,* 170 N. E. 184, (Decided March, 1930), the Court held that in defendant was a common carrier, saying: page 184:

"There is no evidence in the record which in any way proves that Bruner rejected any business or contracted with reference thereto as a private carrier.

We think the evidence was sufficient to sustain the judgment of the Court below and we further note the fact that Bruner was merely enjoined from business as a common carrier, and this injunction did not relate in any way to the private contracts which Bruner may have had."

The decision in this case is very short, with practically no general reasoning as to what facts constituted the defendant a common carrier.

Stoner vs. *Underspeth,* (Mont. 1929) 277 Pac. 437, is a very well written and reasoned opinion covering this field very well, and the court points out on page 440:

"It may be true that all of defendant's hauling was done under the special contract, but even if so, the fact would not necessarily place them in the category of private carriers every time you secure a bill of lading, or purchase a ticket entitling you to ride on a state coach or a railroad train, you enter into a contract for transportation, the obligation to carry you or your goods is a contractual obligation."

"A special undertaking for one man or a definite number does not render a person a common carrier (State ex rel Pub. Util. Com. of Utah vs. Nelson, 238 Pac. 237, 42 A. L. R. 849, Fish vs. Chapman, 2 Ga. 349, 46 Am. Dec. 393) nor does a general hiring for a single purpose (Big Bend Auto Freight vs. Ogers, 148 Wash. 521, 269 P. 802; Purple Truck Co. vs. Campbell, 119 Oregon; 848, 250, P. 213, 51 A. L. R. 816; Mich. Pub. Util. Com. vs. Duke, 266 U. S. 570) and such private carrier might on occasion, accommodate outsiders in an emergency and accept compensation therefor without acquiring the character of a common carrier; the question of good faith in such a case is controling Big Bend Auto Freight vs. Ogers, supra).

Page 441:

The class to which a carrier is to be assigned depends upon the nature of his business, the character in which he hold himself out to the public, the terms of his contract, and his relation generally to the parties with whom he deals and the public.

Holding oneself out to the public does not necessarily consist of public declarations or advertisements; the undertaking may be evidenced by the carrier's own notice, or, practically, by a series of acts,

by his known habitual continuance in the line of business; one who follows carrying for a livelihood, or who gives out to the world in any intelligible way that he will take goods, chattels or persons for transportation for hire, is a common carrier. _____, and this is so although the carrier has no fixed schedule of charges, does not operate over a definite route, does not always load his vehicle to capacity, and refuses on occasion, to accept freight or passengers whether his vehicle is engaged or not (Cushing vs. White, 101 Wash. 172, P. 229 L. R. A. 1918 F. 463).

In *Haynes* vs. *MacFarlane* (Cal. 1929), 279 Pac. 436, the defendant carrier was hauling freight under special contracts with seven customers. The Court held him to be a common carrier and after commenting on the *Frost* case, 271, U. S. 583, and the *Holmes* case, 240 Pac. 26, says on page 437:

"Whether the status of a freight auto truck operator is public or private in character is primarily a question of fact in each case."
and on page 438:
"The fact that the defendant in his contract called himself a private Carrier" could not make him such in the light of undisputed facts to the contrary._____. If such a studied attempt to evade the provision of the statute should prove availing, the law would become a nullity, and the primary purpose of the act to regulate auto truck transportation companies would come to naught."

In the case of *Independent Truck Company* vs *Wright,* (Wash. 1929), 275 Pac. 726, the defendant was hauling under special contracts for about sixty patrons. The court held him to be a common carrier. The defendant relied on the following cases to support his contention that he was a private contract carrier:

Carlsen vs. *Cooney,* 123 Wash. 441, 212 P. 575
Davis and Banker vs. *Megcalf,* 121 Wash. 141, 229 P. 2
Spokane Northwest Freight vs. *Tedrow,* 144 Wash. 481, 258, Pac. 31.

The court in respect to these cases, said on page 728:

"These opinions hold that transporting of merchandise under special contract and casual transportation under special contract, when indulged in in good faith, and without any intention to, under pretense or subterfuge, engage in business as a common carrier, will not be enjoined at the instance of the holder of a certificate of necessity the volume of whose business may be somewhat decreased by such transportation. _____. In our opinion the situation now before us is more nearly analagous to that which was presented in following cases: Davis & Banker vs. Nickel, 126 Wash. 421, 218 P. 198; Davis vs. Clevinger, 127 Wash. 136, 219 Pac. 845; Barbour vs. Walker, 126 Okla, 227, 259 P. 552, A. L. R. 1049_____

Appellants argue that if such a contract may lawfully be made to haul one lote of goods for one particular shipper, why cannot any number of such contracts be made? The answer to this query is that the occasional and casual transportation of goods does not make the transporter a common carrier within the legal definition of the term, while the more frequent carriage of goods does make the transporter a common carrier. It is impossible to lay down a fixed rule which will definitely apply in all cases as to just when the transporter ceases to be a private carrier and becomes a common carrier, but the general principle may easily be comprehended and where it clearly appears_____ _____that the business sought to be enjoined is that of a common carrier _____ the further operation of the unlicensed business will be enjoined."

Re: *Fay Elliot*-1929 D.P.U.R. 485 (Colo.)

On page 492-493 quotes from a decision in *Wayne Trans. Co.* vs. *Leopold,* P.U.R. 1924 C. 382:

"Courts and commissions have repeatedly held that the distinction between common and private carriage does not necessarily depend upon whether written or oral contracts have been entered into, but rather upon the nature and character of the carriage, or service rendered and upon actual conditions of service as disclosed by testimony _____ There are numerous acts which tend to establish common carriage; that all of them must exist in a particular case in order to establish common as distinguished from private carriage, is not the law."

page 494-495:

"We believe, as have said before, that in determining whether or not a given carrier is operating as a common carrier, the test is to what extent he is serving the public in his field of operations _____. Michigan Pub. U. Commission vs. Duke, 266 U. S. 570, it was stated that the operator was serving three customers. It is true that they were being served under written contract. But the important point was not that the customers being served had written contracts; it was that the customers were limited to three._____ One hauling for a sufficiently large portion of the public cannot, by the simple expedient of having his customers sign a uniform written contract, convert himself into a private carrier."

Commission goes on to point that the doctrine that "if a carrier is employed by one or more definite persons by special contract _____ he is is only a private carrier", as laid down in *Hissem* vs. *Guran,* 112 Ohio State 59, 146 N. E. 808, is out of line with the authorities. *Michigan Pub. Util. Commission* vs. *Krol.,* Mich. 222 N. W. 718.

On page 720:

"The effects of the defendant's operation are identical with those of common carriers. If he may, by entering into these contracts and conducting his business in the manner testified to by him, relieve him-

self from being placed in the class of common carriers, it will furnish an easy way to escape liability. He was engaged in the same business now conducted by him at the time the law became effective. He recognizd its application and twice applied for a permit thereunder. He should not be permitted to evade the requirement of the statutes as he is now doing.
page 719:

"The element of public service, the serving of all persons indifferently who apply for service, is recognized in all the cases. It is the character of the business carrier that is determinative of its nature. It is a mixed question of law and fact. What constitutes a common carrier is a question of law."

"Whether the service rendered comes within that meaning is question of fact." Accord-Breuer vs. Ohio Public Utilities Commission. 118 Ohio St. 95, 160 N. E. 623.

Re: *Jack Hirons*—P. U. R. 1929 C, 279 (Cal. R. R. Commission)

Respondent contends that he is not a common carrier because he is operating under a single contract and does not hold himself out to serve others.

On page 283, the Commission says:

"A public or common carrier has been defined as one who undertakes for hire to transport from place to place the property of others who may choose to employ him. Some courts have said that a common carrier is one who holds himself out to carry goods of all persons indifferently. But the holding out which was so important a factor in earlier definitions seems to imply no more than the existence of a transportation business which may serve such persons as choose to employ it. It is obviously not a prerequisite that, to be classed as a common carrier, one must undertake to serve all persons without limitations of any kind as to the place where his services are given or the class of goods which he professes to haul. Neither does a limitation imposed regarding the number of shippers served, or the requirement of an express contract in each case, prior to the rendition of the service, necessarily fix a carrier's operations as purely private. In other words, if the particular service rendered by a carrier is offered to all those members of the public who can use that particular service, the public is in fact served, and the business is affected with a public interest, though the actual number of persons served is limited."

Weaver vs. *Pub. Service Comm.* (Wyo. 1929) 278 Pac. 542,
Page 544:

"The making of such contracts is only one of the facts to be considered in determining whether or not a person is a private or public carrier.

The main criterion as to whether he is the latter depends upon whether he holds himself out as ready to serve every one of the public alike to the limit of his capacity, and within the sphere of business carried on by him."

Court then goes on to say that in determining the defendant's status, it cannot assume that the contracts for transportation in the individual cases were merely for purpose of subterfuge and pretense.

In the very recent case of *Jones* vs. *Ferguson,* Sup. Ct. of Ark. decided Apr. 7, 1930, and as yet unreported, the defendant had applied to the commission for a license to operate and had been refused. Ten merchants in a town then contracted with him to haul freight exclusively for them and the court found that he was not a common carrier.

This is almost directly contrary to a recent holding of the Minn. Railroad and Warehouse Commission against *Madden Bros.* and *Wahl*-McDonald Co. decided Feb. 17th, 1930. The Commission says:

"In the case before us the customers of respondents were limited to the automobile distributors and dealers in cars which were manufactured at or near eastern lake ports. The "whole public" in this case consists of the dealers and distributors of automobiles referred to _____. The fact that the respondents have limited their business to the transportation of automobiles is not of importance in this proceeding for the reason that it is well accepted in the law of common carriers that a carrier can be a common carrier of one commodity only. (Campbell vs. A. B. C. Storage and Van Co., 174 S. W. 140)."

The Commission further said:

"The statement which respondent has made about itself cannot make it a private carrier, nor could it make itself a common carrier by failing to make such a statement. It is as most a declaration of intent. The number of customers dealt with and occupation of the entire field of the transportation referred to are the important facts to be considered in determining the status of the carrier.

" In considering the business of the respondent it is significant that the so-called contractual relationship through which respondent regards itself as a private carrier contains none of the provisions which one would expect to find if respondent were in fact a private carrier. It has not agreed to transport all the automobiles for any concern for a definite period of time. The price is not made upon a time basis, nor for any blanket amount, but is a price or common rate to all customers predicated upon the wheel base of the car or some similar factor. Each shipment is made a separate contractual obligation."

The above report was quoted and discussed in the Magazine "Motor Freight" Vol. 2, No. 4, page 23, dated April, 1930.

Similar to the Minnesota Commission's holding above, and directly contra to the decision in the Arkansas Case of *Jones* vs. *Ferguson,* supra, was a decision by the Pennsylvania Commission handed down on Feb. 27, 1930, in which the defendant, Harry R. Robertson, who had entered into an agreement with a group of merchants to haul their freight, was restrained from further operation under the agreement,

on the ground that he was in fact operating as a common carrier. This order is as yet unreported in the Public Utilities Reports, but like the Minnesota ruling, was published and discussed in the magazine "Motor Freight", Vol. 2, No. 3, March issue, 1930.

From this group of foregoing cases we may enumerate a number of principles which are at least important to be considered in determining a carrier's status.

1. The good faith of the carrier in question.
2. Is the carrier in question engaged in the business of transportation as a regular vocation, or merely temporarily, as a convenience, etc.
3. The proportionate size of the field in which the carrier assumes to operate in comparison to the portion of field which carrier offers service, rather than the number of contracts under which the carrier is operating.
4. The manner in which a carrier holds himself out, rather than the specific number of patrons being served at any particular time.
5. The nature of the carrier's business and the character of the contracts under which he operates.

In deciding any case, the five factors mentioned above should be used but in addition thereto, the individual merit of the case should be considered. The definition of a common carrier or a private carrier is a matter of law, but the question of whether or not a particular operation is a common or private carrier is a matter of fact and as such each individual case should be decided.

It is our belief that the trend of future decision will be to gradually include as common carriers more of the so called contract carriers. This will come about for the reason that regulation of common carriers is stabilizing the industry and the lack of regulation of contract carriers is tearing down the industry. Therefore the public will itself demand more regulation and the various regulatory bodies will, in keeping with this demand, attempt by regulation to include more and more operators.

This subject is yet in its infancy for the famous "Duke" case was only decided in 1924. It is an interesting and important subject, one that demands the best efforts of all operators interested in the advancement of the bus and truck industries.