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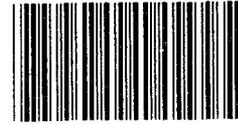
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B-187797

JUNE 15, 1979

The Honorable Marty Russo
Chairman, Subcommittee on Special
Small Business Problems
Committee on Small Business
House of Representatives

Use 05312



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Dear Mr. Chairman:

In your January 9, 1979, letter you asked that we (1) study the Interstate Commerce Commission's (ICC's) single source leasing rule to advise you of possible administrative or legislative remedies which would allow independent truckers to lease to private fleets without giving up their independent status and (2) meet with officials of various private fleets to discuss this issue. In our subsequent discussions with your office, we agreed that a letter rendering our legal opinion on the questions asked would satisfy your request.

Drawn A.

AGC 00072

Stated simply, the Interstate Commerce Act requires that all carriers engaged in transportation for compensation or hire obtain operating authority from ICC. In order to allow independent operators to haul for private fleets and maintain their independent status, the act would have to be amended. A brief discussion of this issue follows.

ICC regulates interstate motor common carriage, and anyone engaged in the motor vehicle transportation business must obtain operating authority from it. The law provides:

"Except as provided in section 302(c) of this title * * * no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person." 49 U.S.C. §303(c) (1970).

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Dated 6/15/79
T. J. ...*

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Operating rights are based upon both the routes the trucking company plans to serve and the commodities it plans to carry. The carriage of certain commodities is exempt by statute from regulation. (49 U.S.C. §303(b) (1970).) Exempt commodities include, for example, many nonprocessed agricultural goods. In addition, the private carriage of goods by an industry not engaged in the transportation business is exempt from regulation. (See 49 U.S.C. §303(c) (1970), quoted above.) A private carrier is defined by statute as

*such as
emphasize to
regulations*

"any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle,' who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise." 49 U.S.C. §303(a) (17) (1970).

Without operating authority, a private fleet may conduct motor carriage within the scope of its business and in furtherance of its primary business.

An independent owner-operator is a person who owns and operates one, or a few, trucks for hire without holding ICC operating authority. by The independent operator avoids regulation either by (1) leasing his equipment and services to an ICC regulated carrier or (2) hauling statutorily exempt commodities. The House Subcommittee on Special Small Business Problems has recognized the serious financial problems faced by independent operators which stem largely from their dependence upon "leasing" a regulated carrier's operating rights. (See Regulatory Problems of the Independent Owner-Operator in the Nation's Trucking Industry (Part 3): Hearings Before the Subcommittee on Special Small Business Problems, 95th Cong., 1st Sess. (1977) (Hearings).)

The subcommittee has focused on ICC's single source leasing rule as the impediment to independent operators' hauling for private fleets. The single source leasing rule, contained in 49 C.F.R. §1057.6, forbids regulated carriers from leasing equipment with drivers to private carriers unless such service is specifically permitted in their operating authorities. The rule states

"(a) Rental of equipment with drivers. Unless such service is specified in their operating authorities, authorized carriers shall not rent equipment with

drivers to private carriers or shippers, except where the vehicle so rented is to be used for transportation which may be performed for compensation within the exemption provisions of section 203(b) (7) or (8) of the Interstate Commerce Act."

This regulation deals with private fleets using regulated carriers, not independent owner-operators. Private carriers are not prevented from using independent owner-operators by the single source leasing rule, but by the fact that the independent owner-operators would be holding themselves out "for hire," and would therefore be required by the act to obtain operating authority from ICC. If these operators were to acquire operating rights, they would not maintain their independent status.

The Chairman of the ICC has stated that the single source leasing rule is not what prevents private fleets from using independent operators, but rather it is the act's requirement that all "for hire" motor vehicle transportation be certificated. He stated:

"The impediment to an owner-operator's leasing his equipment to a shipper is grounded not in the Commission's regulations but in the Interstate Commerce Act itself. The Commission has for many years interpreted the Act as requiring a finding that an independent owner-operator who serves a private shipper by furnishing a vehicle which he drives himself, even if some form of lease is executed, is himself a for-hire motor carrier requiring operating authority from the Commission * * *.

" * * * the impediment to owner-operators' dealings with private fleets would not be removed by amendment of the Commission's single-source leasing rule. Thus, a petition to exempt owner-operators from these regulations would be to no avail." Hearings pp. 175, 177.

At times, private fleets do use owner-operators, but in a manner which totally erodes their independence. As stated in House report 95-1812, 95th Congress, 2nd Session 22 (1978):

"In order to do it legally, the owner-operator leases his rig to the fleet. He then goes on the payroll as

an employee driving his own rig. The company totally controls the operation of the vehicle which, in some cases, extends to furnishing insurance, fuel, taxes, and even taking title to the rig under a trustee arrangement."

ICC examines each case to determine whether a particular arrangement is actually transportation for compensation or hire, which is subject to regulation, or whether it is, in fact private carriage. The line is not easy to draw ^{between}. The Supreme Court addressed this issue in United States v. Drum, 368 U.S. 370, 375-75 (1961).

"The statutory requirement that a certificate or permit be issued before any new for-hire carriage may be undertaken bespeaks congressional concern over diversions of traffic which may harm existing carriers upon whom the bulk of shippers must depend for access to market. Accordingly, the statutory definitions, while confirming that a shipper is free to transport his own goods without utilizing a regulated instrumentality, at the same time deny him the use of 'for compensation' or 'for-hire' transportation purchased from a person not licensed by the Interstate Commerce Commission. Because the definitions must, if they are to serve their purpose, impose practical limitations upon unregulated competition in a regulated industry, they are to be interpreted in a manner which transcends the merely formal. From the outset the Commission has correctly interpreted them as importing that a purported private carrier who hires the instrumentalities of transportation from another must--if he is not to utilize a licensed carrier--assume in significant measure the characteristic burdens of the transportation business. The problem is one of determining--by reference to the clear but broad remedial purpose of a regulatory statute committed to agency administration--the applicability to a narrow fact situation of imprecise definitional language which delineates the coverage of the measure. Private carriers are defined simply as transporters of property who are neither common nor contract carriers; and the statute will yield up no better verbal guide to the reach of its licensing provisions than transportation 'for compensation' or 'for-hire'."

The Court found that the operators were actually "for-hire" carriers even though the drivers were paid both salary and rental on a mileage-basis and they received nothing when their equipment was idle. Although the shipper controlled the physical operations, the Court held that it did not sufficiently shoulder the characteristic burdens of transportation. In that situation, the truckers were required to obtain operating authority from ICC.

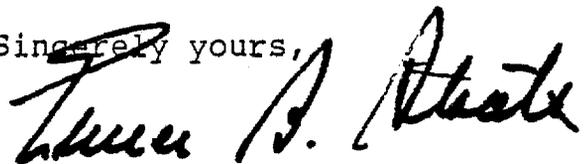
There are numerous cases in which the courts have discussed the distinctions between private and for-hire carriage. It is not necessary to address these cases here because you do not seem to be asking that a new line be drawn. Instead, you apparently want to create a separate category for independent owner-operators, allowing them to be "for-hire" carriers without requiring them to obtain operating authority from ICC. This is clearly inconsistent with the act as it now reads.

Therefore, in order to allow private fleets to use independent operators and have them maintain their independent status, the act would have to be amended. In our opinion, this problem cannot be solved by a regulatory change.

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As arranged with your office, we are also sending copies of this report to the Chairman, House Committee on Public Works and Transportation, and the Chairman, Interstate Commerce Commission. Copies will also be available to other interested parties who request them.

Sincerely yours,



Comptroller General
of the United States