Opinion No. 51-5329

January 16, 1951

BY: JOE L. MARTINEZ, Attorney General

TO: Motor Transportation Department State Corporation Commission Santa Fe, New Mexico

*{*3}* In reply to your letter of January 5, 1951, in which you ask about the proper wording to be used in describing authority granted in certain certificates of public convenience and necessity.

It is my understanding that it was the practice of the Commission for a considerable time to state in certain certificates of public convenience and necessity, authorizing the transportation of property, that the authority was subject to the following: "Not in competition in whole, or in part, with regular route and scheduled common carriers." As a result of the ambiguous wording, a considerable number of protests have been made by regular route, regular schedule carriers. For example, a general commodity carrier with an authority between Albuquerque and Santa Fe could, under the above wording, properly question the operation of an irregular route, irregular scheduled carrier operating between Albuquerque and Santa Fe because there is only one road between the two communities. Of necessity, there must be competition in whole, or in part. As will be pointed out hereinafter such objection while technically right has little substantive value.

The phrase "Not in competition in whole, or in part, with Common Carriers" appeared first in the so called Contract Motor Carrier permits issued prior to the 1947 Amendment (Chapter 140, Session Laws 1947), and upon reissue the phrases were carried over into the in lieu Certificates issued pursuant to Sec. 2, Chapter 140, Session Laws 1947 (Sec. 68-1308 New Mexico Statutes Annotated, 1941).

Prior to the 1947 Amendment, a **Common Motor Carrier** could operate only over regular routes. Sec. 2, Chapter 154, Session Laws 1933. A Contract Motor Carrier was defined to be any for hire motor carrier of property, "not included in the term, 'Common Motor Carrier of Property'". Sec. 14, Chapter 154, Session Laws 1933.

Thus prior to the effective date of the 1947 Amendment, the character of the operating authority issuable under the 1933 Act, regardless of the actual operations was, (1) Regular-route Common Carrier, and, (2) Contract Carrier -- irregular route.

As a result a Certificate of Public Convenience and Necessity authorizing transportation of property, was issued only to a Common Motor Carrier upon proof of regular route operations, a permit for the transportation of property, was issued in all other cases.

As motor carrier for hire operations increased, the problems of fair and sound regulations became more complex and with the passage of the National Transportation Act of 1940, by the Congress of the United States bringing uniformity in interstate operations, the New Mexico Legislature redefined Common and Contract Motor Carriers, to conform, for all practicable purposes of regulation, with the Federal Act, intending thereby to aid the ideal of uniformity of regulation in all semi-public-transportation. To this end the Legislature recognized the distinction between Common Carriers and Contract Carriers. It provided for regulation of regular route and scheduled service as well as over irregular route under non-scheduled service and provided, under the rules laid down, for the issuance of an in lieu Certificate of irregular route non-scheduled service operators, who or which, had a permit under previous law and was in good faith actually operating as a Motor Common Carrier over irregular routes under non-scheduled service. Sec. 2, Chapter 140, Session Laws 1947.

*{*4}* The foregoing history is deemed necessary to a proper understanding of the problem posed by your inquiry and equally material to and decisive of the importance such phraseology bears to the operating rights wherein the phrases appear and just what restriction is imposed.

Competition is defined to mean, and is generally understood to be the contest for some prize or advantage. New Century Dictionary Vol. 1.

Thus, competition between motor common carriers could be well defined as the contest between carriers for traffic to transport at fair prices. The rates for that transportation being uniform in the public interest by adoption by the Commission, no competitive advantage or disadvantage could flow from this situation. Surely no contest could there arise between carriers.

A contest between carriers for traffic certainly can and does arise out of service. Regular routes, scheduled v. irregular route nonscheduled service. The former requires regular schedules over the same highways, whether a pound of freight is available or not, with definite and large out of pocket costs. Whereas the latter requires only a holding out to perform, usually in truck load quantities, an on call, over any highway service within the authorized territory. The former seeks to win its contest for the available traffic through regular, dependable and on time service, the latter through the willingness to have service available to transport authorized commodities at any time to any place, within a known territory. Both types of service have been found to be responsive to a public need. So long as each performs that service appropriate to the class. There is no contest between the carriers except within the class.

In **Falwell et al v. U.S. et al., 69 F. Supp. 71;** Affirmed, per curiam, 330 U.S. 807 the distinction between regular-route and irregular-route operations under the National Transportation Act and the regulations of the Interstate Commerce Commission was discussed and in deciding the proposition the Court said:

"This argument, as we understand it amounts in the end to this: That a certificate for irregular-route operations over a specified territory carries no restrictions as to the highways (or routes) over which the carrier may operate within the territory or between the points specified in his certificate; and that the carrier is likewise under no prescription or restriction as to schedules of service or quantity or quality of service. And that, therefore, the holder of a certificate for irregular-route operations may, if he chooses, utilize his rights or any part thereof to establish regular scheduled operations over any highway within his territory -- or in other words, to conduct his operations in the form of regular-route operations between any points covered by his certificate. And this, even if by so doing he parallels the service rendered by any number of other carriers holding regular-route certificates for operations between the same points.

"With this contention we cannot agree. To do so would grant to holders of irregular route certificates a free hand to operate as they choose; to operate irregularly over such parts of the territory as they might choose and to establish regular-route operations where they so desired. An irregular route certificate would be authority to conduct either or both forms of operation at the carrier's choice. It would nullify the distinction between regular and irregular route carriers and would nullify the power of the Commission to establish and maintain comprehensive and efficient service adjusted to the public need and free from destructive *{*5}* competition between carriers.

"The Act itself, Sec. 204 (b) (49 U.S.C.A., 304 (b)), empowers the Commission to establish classifications of motor carriers, and pursuant to this authority the Commission has adapted definitions of the several classes of service, including:

"'An irregular-route radial service carrier is any person who or which undertakes to transport property * * * over irregular routes from a fixed base point or points to points or places located within such radial area as shall have been fixed and authorized by the Interstate Commerce Commission in a certificate of public convenience and necessity * * * * or from any point within such radial area to such carrier's fixed base point or points..' "

"The Commission has also defined regular-route service as being that 'which undertakes to transport property * * * * between fixed termini and over a regular route or routes.' This is further classified as being a scheduled or a non-scheduled service, dependent upon whether the service is upon a fixed schedule or at intermittent intervals. But the essential feature of any regular route operations is that it shall be between fixed termini and over a regular route."

This proposition has not been passed upon by the New Mexico courts of record.

With the foregoing distinction under the New Mexico Law in mind, it is at once apparent that to prohibit an irregular route nonscheduled Common Carrier to operate in competition, either in whole or in part, with a regular route scheduled service Common Motor Carrier, means in my opinion, that such irregular route non-scheduled Common Carrier shall not operate over regular routes as distinguished from irregular routes; nor

shall he operate on regular schedules at dependable intervals as distinguished from an on call or demand service.

It is my further opinion, due to the widespread misunderstanding among carriers, counsel and other interested parties, that the Commission should at its earliest convenience, adopt and publish an appropriate rule defining the restriction above mentioned.

It is suggested that the Commission issue an order substantively as follows:

"That all outstanding certificates which read 'not in competition in whole, or in part, with common carriers' are amended to read: 'over irregular routes and under nonscheduled service.'"

In order to effectuate this, the Commission should issue its order and serve such order on each carrier who has such a certificate and each common carrier operating over regular routes with regular schedules, who might feel adversely effected by such order.