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## Shipping Act: Contract Vs. Common Carriage

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law action of deceit. This, too, would have required numerous suits because the defendants were from different states.<sup>39</sup>

In conclusion, it seems that in the securities field strong but general regulations against fraud are a necessity. The judiciary must continue to construe the provisions of X-10B-5 broadly, as was done in *Hooper*.<sup>40</sup> The alternative is to enact more complex fraud sections into both acts. Judging from the history of common law fraud and deceit, as it applied to securities transactions, this result seems undesirable. Allowing more discretion in the courts and the SEC to combat technicalities presented by the swindler, as does the general wording of X-10B-5, appears to be the most satisfactory method to guard against future fraud in the purchase or sale of securities.

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### SHIPPING ACT: CONTRACT VS. COMMON CARRIAGE

In *Grace Line, Inc. v. Federal Maritime Bd.*,<sup>1</sup> the Court of Appeals for the Second Circuit upheld an order by the Federal Maritime Board<sup>2</sup> that a common carrier by water cannot be at the same time, as to one commodity, a contract carrier within the meaning of the 1916 Shipping Act.<sup>3</sup>

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<sup>39</sup>In *Hooper*, the trustee in bankruptcy was a citizen of Alabama. Cage, the originator of the fraudulent scheme, was a Texas resident who was presently in South America and was a fugitive from Texas justice. Mountain States Securities Corporation was incorporated in Colorado, the stock transfer agent was in New York City and another of the defendants lived in Pennsylvania.

<sup>40</sup>Query: Would the court have reached the same result if the defrauded corporation had not been in bankruptcy? If the corporation had continued as a going concern, could the rights of the original shareholders have been preserved by any method other than rescinding or nullifying the fraudulent issuance of an additional 700,000 shares of stock?

<sup>1</sup>280 F.2d 790 (2d Cir. 1960).

<sup>2</sup>The Federal Maritime Board is the agency of the Department of Commerce which is presently vested with the power to enforce the regulations issued under the authority of the Shipping Act of 1916. The Act of 1916 created the United States Shipping Board. The Merchant Marine Act of 1936 established the United States Maritime Commission and gave it the duties of the old Shipping Board. Finally, the Maritime Commission was abolished by Reorganization Plan 21, 64 Stat. 1273 (1950), which created the Federal Maritime Board. Morse, *A Study of American Merchant Marine Legislation*, 25 *Law & Contemp. Prob.* 57 (1960); 64 *Yale L.J.* 569 (1955).

<sup>3</sup>The power of Congress to adopt regulations concerning maritime subjects is derived both from the Admiralty and Maritime jurisdiction of the federal judi-

The principal case grew out of complaints filed with the Board by two shippers,<sup>4</sup> who alleged that Grace Line was violating sections 812 (fourth) and 815 (first) of the Shipping Act<sup>5</sup> by unjustly discriminating against them as to cargo space. The plaintiff is the only United States flag operator<sup>6</sup> offering common carrier service<sup>7</sup> on a route<sup>8</sup> between ports on the Pacific coast of South America and the United States Atlantic coast.<sup>9</sup> In 1934 Grace Line installed on its ships<sup>10</sup> expensive refrigeration compartments, called "reefers," for the carriage of bananas from Guayaquil, Ecuador to New York.<sup>11</sup> From the beginning of its banana carriage, Grace Line offered its limited "reefer" space on a *contract carriage basis only* to no more than three shippers at a time.<sup>12</sup> Grace Line contended that it was not a common carrier

ciary and the Interstate and Foreign Commerce Clause of the Federal Constitution. *The Hamilton*, 207 U.S. 398, 404 (1907).

It would appear that the federal authority used for the justification of the Shipping Act of 1916 is the narrower Foreign and Interstate Commerce Power. *Robinson*, Admiralty § 67 (1939); 48 Am. Jur. Shipping §§ 3-8 (1943).

<sup>4</sup>The two complainants were Banana Distributors, Inc. and one Arthur Schwartz. Five parties intervened in the proceeding before the Board, two of whom favored the complainants' position. It also appeared that 31 other persons had been refused banana carriage space in the past. Schwartz had been offered "reefer" space on Grace Line's fortnightly cargo vessels, which he refused. *Grace Line, Inc. v. FMB* 280 F.2d 790, 793-94 (2d Cir. 1960); *Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F.M.B. 615 (1959) (supplemental report and order of the Board); *Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F.M.B. 278 (1957).

<sup>5</sup>United States Shipping Act, 46 U.S.C. §§ 812(fourth), 815(first) 1958. "Under section 14 Fourth a common carrier by water may not unjustly discriminate against any shipper in the matter of cargo space accommodations or other facilities, and under 16 First such carrier may not give any undue or unreasonable preference to any particular person or subject any particular person to any undue or unreasonable prejudice or disadvantage." 5 F.M.B. at 624; see also *Robinson*, Admiralty § 67 (1939). Complainants also alleged a violation of sections 1 and 2 of the Sherman Antitrust Act. However, this allegation was subsequently dropped. 5 F.M.B. at 616.

<sup>6</sup>Grace Line receives operating-differential subsidy aid. 5 F.M.B. at 280 and 617.

<sup>7</sup>Grace Line carries over 150 items of general cargo as a common carrier. This may indicate that its desire to carry only one item—bananas—on a contract basis is made in good faith. However, Grace Line does carry certain Chilean fruit as a common carrier. 5 F.M.B. at 617-19.

<sup>8</sup>Trade Route No. 2. *Id.* at 617.

<sup>9</sup>United Fruit Co. and Standard Fruit Co. have ships engaged on this route, but they carry bananas as an "exclusive proprietary cargo." Grancolombiana Line and Chilean Line, both foreign-flag operators, have "reefer" space vessels in this trade, but because of destinations and infrequent or irregular service, they are not considered satisfactory banana carriers. *Id.* at 618.

<sup>10</sup>Grace Line operates on this route three freighters with approximately fortnightly sailings and six combination passenger-cargo vessels with weekly sailings, all of which have banana "reefer" facilities. *Id.* at 617-18.

<sup>11</sup>280 F.2d at 791.

<sup>12</sup>*Ibid.* See also 5 F.M.B. at 618. It is interesting to note that Grace Line has consistently limited its banana contracts to three. This is the magic number of

of bananas *as it had never held itself out as such*—always carrying bananas on a contract basis;<sup>13</sup> and hence, it had not violated the Act.<sup>14</sup> Also, Grace Line felt that bananas are a “specialty” not capable of common carriage<sup>15</sup> because they are an unusual fruit that ripen rapidly<sup>16</sup> and require careful handling, speedy transportation and, above all, coordination in growing, shipping and marketing to bring them to the consumer.<sup>17</sup> Upon a hearing of the dispute the Board decided that because bananas are “susceptible” of common carriage,<sup>18</sup> Grace Line was a common carrier of the product and had thus violated the Act. It then ordered Grace Line to cancel its old contracts and offer space to complainants and others on two-year forward-booking arrangements.<sup>19</sup> The Court of Appeals for the Second Circuit reversed the Board.<sup>20</sup> It felt that the “susceptibility test” was erroneous as it would eliminate almost all contract carriage.<sup>21</sup> The Board reconsidered the case on remand and without further hearing reached the same conclusion as before.<sup>22</sup>

On a second appeal to the Second Circuit, the court speaking through Learned Hand, affirmed the Board’s holding.<sup>23</sup> In a brief

permissive contracts allowed a contract carrier under the so-called “number of contracts” factor for determining contract or common carriage. Mich. Pub. Util. Comm’n v. Duke, 266 U.S. 570 (1925); 43 Cornell L.Q. 96 (1957); 36 Mich. L. Rev. 802 (1938); 91 U. Pa. L. Rev. 481 (1943). See note 29 *infra*.

<sup>13</sup>280 F.2d at 791; 5 F.M.B. at 617, 619.

<sup>14</sup>The court stated that “sections [812(fourth) and 815(first)] gave the Board no jurisdiction to regulate its banana business.” 280 F.2d at 791-92. Here it appears there is confusion between a jurisdictional question and a legal question. Grace Line is not contending that the Board has no power to hear the case, but some other agency has such power—a jurisdictional argument; but Grace contends it has committed no wrong under the Act and hence there is no cause of action—a legal argument.

<sup>15</sup>5 F.M.B. at 620.

<sup>16</sup>280 F.2d at 795-96.

<sup>17</sup>“Growing, shipping and marketing of bananas, due to the nature of the commodity itself, requires a carefully synchronized operation.” 5 F.M.B. at 618. The situation is made more difficult because there are no shoreside refrigerated warehouses in Guayaquil, and the loading operation must be performed offshore by barge. As temperature control is important in route, and as each shipper has his own views as to the correct temperature for his fruit, Grace Line argued that the required individual attention indicated the need for contract carriage in this field. 5 F.M.B. at 618.

<sup>18</sup>5 F.M.B. at 283.

<sup>19</sup>*Id.* at 287-88. The case was first heard by an examiner who found that Grace Line was a common carrier of bananas and recommended the two-year forward-booking arrangements. 5 F.M.B. at 282 and 616.

<sup>20</sup>Grace Line, Inc. v. FMB, 263 F.2d 709 (2d Cir. 1959).

<sup>21</sup>*Id.* at 711.

<sup>22</sup>5 F.M.B. 615 (1959).

<sup>23</sup>Grace Line, Inc. v. FMB, 280 F.2d 790 (2d Cir. 1960).

opinion Judge Hand conceded that at common law the *holding out test* of common carriage was used. He also felt that at common law a carrier could be both a common and a contract carrier. Indeed, Judge Hand admitted, at least by implication, that at common law Grace Line could have carried bananas on a contract basis; however, he felt that the Shipping Act had changed the common law. It was held that under the Shipping Act a common carrier by water is precluded from carrying particular items as a contract carrier on the same ship. Grace Line, an admitted common carrier by water within the Act, could not carry bananas on a contract basis even though it had never held itself out to the public as a banana carrier. Carrying bananas on a contractual basis constitutes an undue preference and unjust discrimination under the Act. In other words, once a common carrier—always a common carrier. Judge Hand's reasoning was based upon his interpretation of the intention, purpose and language of the Act. Judge Moore, writing a persuasive dissent, indicated that he would have reversed the Board on both the law and facts of the case.<sup>24</sup>

At common law a common carrier of goods is defined as one who holds himself out indifferently<sup>25</sup> to the general public as being engaged in the business of transporting goods from place to place for hire.<sup>26</sup> Ships holding themselves out to carry goods for all persons indifferently are called common carriers by water.<sup>27</sup> A contract or private carrier is one who transports for certain shippers on a private contract basis and who does not make a public profession that he will carry for all who apply for carriage.<sup>28</sup> The primary test of a common

<sup>24</sup>Id. at 793-99.

<sup>25</sup>"Indifferently" means in this context without discrimination among or preference to members of the general public, i.e., offering to treat all shippers similarly situated equally. See note 26 infra.

<sup>26</sup>The Propeller Niagara v. Cordes, 62 U.S. (21 How.) 7 (1858); Georgia Life Ins. Co. v. Easter, 189 Ala. 472, 66 So. 514 (1914); Rathbun v. Ocean Acc. & Guar. Corp., 299 Ill. 562, 132 N.E. 754 (1921); Carlton v. Boudar, 118 Va. 521, 88 S.E. 174 (1916); Cushing v. White, 101 Wash. 172, 172 Pac. 229 (1918); 43 Cornell L.Q. 96 (1957); 36 Mich. L. Rev. 802 (1938). See also 48 Am. Jur. Shipping § 373 (1943); 9 Am. Jur. Carriers §§ 1, 4, 14 (1937); Black, Law Dictionary 269 (4th ed. 1951).

<sup>27</sup>Liverpool & G.W. Steam Co. v. Phenix Ins. Co., 129 U.S. 397 (1889); The Lady Pike, 88 U.S. (21 Wall.) 1 (1874); The Propeller Niagara v. Cordes, 62 U.S. (21 How.) 7 (1858); Alexander Eccles & Co. v. Strachan Shipping Co., 21 F.2d 653 (S.D. Ga. 1924); Boon & Co. v. Steamboat Belfast, 40 Ala. 184 (1886); Hale v. New Jersey Steam Nav. Co., 15 Conn. 539 (1843); Robinson, Admiralty § 67 (1939). See also 48 Am. Jur. Shipping § 373 (1943). A common carrier by water is frequently called a general ship.

<sup>28</sup>Rathbun v. Ocean Acc. & Guar. Corp., 299 Ill. 562, 132 N.E. 754 (1921); McGregor v. Gill, 114 Tenn. 521, 86 S.W. 318 (1905); Cushing v. White, 101 Wash. 172, 172 Pac. 229 (1918); Cannon, What Constitutes a Common Carrier?, 15

carrier is the "holding out" to the public to carry indifferently.<sup>20</sup>

A common carrier was not liable as such at common law as to items it never "commonly" held itself out to carry. This is shown by *Citizens' Bank v. Nantucket Steamboat Co.*<sup>30</sup> decided by Mr. Justice Story in 1811, wherein the plaintiff had entrusted to the master of defendant's ship a large sum of bank bills for transportation. Mr. Justice Story affirmed the lower court's decision for the defendant by holding that even though defendant was an admitted carrier of goods and merchandise, it was not a common carrier of bank bills as it had neither held itself out as a common carrier nor received compensation for bank bill carriage.<sup>31</sup> Numerous other common law decisions such as *Georgia Life Ins. Co. v. Easter*<sup>32</sup> indicate that an undisputed common carrier could also be a private contract carrier as to particular items of business.<sup>33</sup>

Marq. L. Rev. 67 (1931); 43 Cornell L.Q. 96 (1957). See also Black, Law Dictionary 269 (4th ed. 1951); 9 Am. Jur. Carriers §§ 10, 37 (1937). A contract or private carrier by water is frequently referred to as a charter-party.

<sup>20</sup>*United States v. Contract Steel Carriers, Inc.*, 350 U.S. 409 (1956); Michigan Pub. Util. Comm'n v. Duke, 266 U.S. 570 (1925); *Citizens' Bank v. Nantucket S.S. Co.*, 5 Fed. Cas. 719 (No. 2,730) (C.C.D. Mass. 1811); *Georgia Life Ins. Co. v. Easter*, 189 Ala. 472, 66 So. 514 (1914); *Steele v. McTyer's Adm'r*, 31 Ala. 667 (1858); *Rathbun v. Ocean Acc. & Guar. Corp.* 299 Ill. 562, 132 N.E. 754 (1921); *Lake Shore & Mich. So. R.R. v. Perkins*, 25 Mich. 329 (1872); *Faucher v. Wilson*, 68 N.H. 338, 38 Atl. 1002 (1895); *Cushing v. White*, 101 Wash. 172, 172 Pac. 229 (1918).

Several factors are used in applying the "holding out" test to determine whether a particular carrier is a contract or common carrier: (1) the number of contracts under which the carrier operates; (2) duration of the contracts; (3) the right of the carrier to select and reject shippers; (4) the good faith of the carrier in his supposed "holding out"; (5) the character and nature of the business; (6) the degree of specialization of the service and equipment used by the carrier. *United States v. Contract Steel Carriers, Inc.*, 350 U.S. 409 (1956); Michigan Pub. Util. Comm'n v. Duke, 266 U.S. 570 (1925); *Cushing v. White*, 101 Wash. 172, 172 Pac. 229 (1918); Cannon, What Constitutes a Common Carrier?, 15 Marq. L. Rev. 67 (1931); 43 Cornell L.Q. 96 (1957); 36 Mich. L. Rev. 802 (1938); 91 U. Pa. L. Rev. 481 (1943). Recently, the problem of common versus contract carriage has come up frequently in the motor transportation industry.

<sup>25</sup>5 Fed. Cas. 719 (No. 2,730) (C.C.D. Mass. 1811).

<sup>31</sup>For cases similar to *Citizens' Bank*, see *Knox v. Rives, Battle & Co.*, 14 Ala. 249 (1848); *Farmers & Mechanics' Bank v. Champlain Transp. Co.*, 23 Vt. 186 (1851).

<sup>32</sup>189 Ala. 472, 66 So. 514 (1914). "The mere fact that a liveryman may be engaged in one line of business as a common carrier does not render him a common carrier as to his livery business. His hack when hauling passengers from a station may be a common carrier, and that same hack when it is carrying a traveling man from one town to another town may not be a common carrier." 66 So. at 517.

<sup>33</sup>*Baltimore & Ohio S.W. Ry. v. Voigt*, 176 U.S. 498 (1900); *Express Cases*, 117 U.S. 1 (1886); *New Jersey Steam Nav. Co. v. Merchants' Bank*, 47 U.S. (6 How.) 344 (1847); *Coup v. Wabash St. L. & P. Ry.*, 56 Mich. 111, 22 N.W. 215 (1885); *Lake Shore & Mich. So. R.R. v. Perkins*, 25 Mich. 329 (1872). In both the *Coup* and *Perkins* cases Michigan held that a railroad common carrier can be a contract

*Terminal Taxicab Co., Inc. v. Kutz*<sup>34</sup> shows that the Supreme Court of the United States has followed this view in cases of carrier regulation in areas other than shipper discrimination. In that case, the Court was presented with the problem of whether a taxicab company which also operated a private car rental agency was completely subject to the regulatory jurisdiction of the Public Utilities Commission of the District of Columbia. Under the D. C. Public Utility Act of 1913, the Commission was allowed to exercise jurisdiction over all common carriers as public utilities. The Court, speaking through Justice Holmes, held that the taxicab company was a common carrier within the Act as to its taxi business *but not as to its private garage business* which the Commission lacked jurisdiction to regulate.

How was the common law privilege allowing a common carrier to remain a contract carrier as to specific goods affected by the Interstate Commerce Act and similar state legislation? The Interstate Commerce Act of 1887<sup>35</sup>—now Part I, Chapter 1 of the Act—was passed to regulate commerce so as to prevent undue preference and unjust discrimination.<sup>36</sup> From an early date it was held by the federal courts

carrier as to unusually difficult items of carriage: "livestock" in the Perkins case and a "circus" in the Coup case. In the Coup case, the court expressly said that the railroad could be a contract carrier of a circus elephant because of the difficulties of such carriage. It is submitted that a banana to a ship is like an elephant to a train.

<sup>34</sup>241 U.S. 252 (1916).

<sup>35</sup>Now, Interstate Commerce Act, Part I; General Provisions and Railroads and Pipe Line Carriers, 49 U.S.C. § 1 (1958).

<sup>36</sup>Texas & Pac. Ry. v. ICC, 162 U.S. 197 (1896); ICC v. Baltimore & Ohio R.R., 145 U.S. 263 (1892); United States v. Hanley, 71 Fed. 672 (N.D. Ill. 1896); 2 Owsley, Chitwood and Nixon, A Short History of the American People 243, 405 (2d ed. 1952); 8 Encyc. Soc. Sci., Interstate Commerce Commission 229 (1935). Sec. 1 of Part 1 of the Interstate Commerce Act does not define common carrier but merely says it covers common carriers for hire. Both section 2 and section 3(1) of Part I of the Act prevent undue preference and unjust discrimination. Section 2 appears to be limited to rate discrimination, while section 3(1) is sufficiently comprehensive to cover all forms of discrimination. United States ex rel. Morris v. Delaware, L. & W. R.R., 40 Fed. 101 (C.C.N.D. N.Y. 1889); 45 Yale L.J. 692 (1936); 17 U. Cinc. L. Rev. 70 (1948).

The Federal Motor Carriers Act, 49 U.S.C. § 303(a)(14) (1958) (Interstate Commerce Act, Part II) defines common carrier in common law "holding out" test terms. United States v. Contract Steel Carriers, Inc., 350 U.S. 409 (1956); 43 Cornell L.Q. 96 (1957).

Even under the old Interstate Commerce Act, now Part I, Chapter 1, the Interstate Commerce Commission had regulatory power over certain types of water carriers, i.e., where water carrier regulation was necessary to the regulation of rail carriers in a continuous carriage of commodities over rail and water. 49 U.S.C. § 1(1)(2) (1958); Robinson, Admiralty § 67 (1939); Hull, The Regulation of Water Carriers, 66 U. Pa. L. Rev. 95 (1918). By the Transportation Act of 1940, Interstate Commerce Act, Part III—Water Carriers, the regulatory powers of the ICC are

that the Interstate Commerce Act of 1887 was merely declaratory of the common law.<sup>37</sup> In addition state courts have also held that their unjust discrimination acts, similar to the Interstate Commerce Act, are declaratory of the common law.<sup>38</sup> In *Atlantic Exp. Co. v. Wilmington & W. R.R.*,<sup>39</sup> the Supreme Court of North Carolina decided that its Railroad Commission Act did not enlarge the duty imposed on railroads by the common law. The Act did not require railroads to

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greatly extended over water carriers to cover all such carriers in interstate and contiguous foreign trade. Morse, *A Study of American Merchant Marine Legislation*, 25 *Law & Contemp. Prob.* 57 (1960); Comment, *Regulation of Water Carriers by the Interstate Commerce Commission*, 50 *Yale L.J.* 654 (1941).

Part III of the Interstate Commerce Act does not apply to Grace Line in this case because it is engaged in American foreign or non-contiguous domestic trade. Hence, Grace Line comes under the regulations of the Federal Maritime Board pursuant to the Shipping Act. Therefore, there is no possibility of applying § 910 "dual operations under certificate and permit" of Part of III of the Interstate Commerce Act to Grace Line. Section 910 prevents a person with a certificate as a common carrier from also acquiring a certificate as a contract carrier. As § 910 is in derogation of the common law, it should be strictly construed to apply only to the granting of certificates and not mean that a common carrier cannot also act as a contract carrier. The intent of Congress in passing the Transportation Act of 1940 was primarily to protect common carriers from contract carrier competition, rather than to protect shippers from common carriers acting as contract carriers; hence, it does not appear Congress intended it to apply to a situation such as the one in the Grace Line case. Also, § 902 of Part III of the Interstate Commerce Act defines common carrier in common law "holding out" test terms. This is an additional reason for holding that Congress did not intend to change the common law as to such carriers. Neither the Shipping Act, Merchant Marine Act of 1936, nor any other maritime act has a section similar to § 910.

<sup>37</sup>*ICC v. Chicago, Great W. Ry.*, 209 U.S. 108 (1908); *Southern Pac. Co. v. ICC*, 200 U.S. 536 (1906); *ICC v. Alabama Midland Ry.*, 168 U.S. 144 (1897); *Texas & Pac. Ry. v. ICC*, 162 U.S. 197 (1896); *ICC v. Baltimore & Ohio R.R.*, 145 U.S. 263 (1892); *Gamble-Robinson Comm'n Co. v. Chicago & N.W. Ry.*, 168 Fed. 161 (8th Cir. 1909); *Tift v. Southern Ry.*, 123 Fed. 789 (C.C.S.D. Ga. 1903); *United States v. Hanley*, 71 Fed. 672 (N.D. Ill. 1896); *ICC v. Baltimore & Ohio R.R.*, 43 Fed. 37 (C.C.S.D. Ohio 1890); *Hilton Lumber Co. v. Atlantic Coast Line Ry.*, 141 N.C. 171, 53 S.E. 823 (1906); *Fitzgerald v. Grand Trunk R.R.*, 63 Vt. 169, 22 Atl. 76 (1891). See also 9 *Am. Jur. Carriers* §§ 43, 208-09 (1937). The Interstate Commerce Act is said to be a remedial act. It appears the common law also prevented unjust discrimination and undue influence. *Tift v. Southern Ry.*, 123 Fed. 789 (C.C.S.D. Ga. 1903); *Cowden v. Pacific Coast S.S. Co.*, 94 Cal. 470, 29 Pac. 873 (1892); *Johnson v. Pensacola & Perdido R.R.*, 16 Fla. 623 (1878); *Chicago & Alton R.R. v. People ex rel. Koerner*, 67 Ill. 11 (1873); *Messenger v. Pennsylvania R.R.*, 37 N.J.L. 531 (Sup. Ct. 1874); *Kline, The Origin of the Rule Against Unjust Discrimination*, 66 *U. Pa. L. Rev.* 123 (1918).

<sup>38</sup>*Atchison, T. & S. R.R. v. Denver & New Orleans R.R.*, 110 U.S. 667 (1884) (Supreme Court interpreting the Colorado Constitution); *Cowden v. Pacific Coast S.S. Co.*, 94 Cal. 470, 29 Pac. 873 (1892); *Chicago & Alton R.R. v. People ex rel. Koerner*, 67 Ill. 11 (1873); *Hilton Lumber Co. v. Atlantic Coast Line Ry.*, 141 N.C. 171, 53 S.E. 823 (1906); *Atlantic Exp. Co. v. Wilmington & W. R.R.*, 111 N.C. 463, 16 S.E. 393 (1892).

<sup>39</sup>111 N.C. 463, 16 S.E. 393 (1892).



become common carriers as to express companies when they had always handled express companies on a contract basis. That this view would be followed in a federal court is shown by *United States v. Louisville & Nashville Ry.*<sup>40</sup> where the Court of Appeals for the Sixth Circuit held the government liable on a private contract with a railroad for the carriage of electrical equipment which the railroad was not required to carry as a common carrier by Commerce Commission regulations. Therefore, it would certainly appear that the Interstate Commerce Act of 1887 did not change the common law right of a common carrier to transport goods for which it had made no public offer on a contract basis.

The Shipping Act of 1916<sup>41</sup> was modeled after and had the same purpose as the Interstate Commerce Act of 1887.<sup>42</sup> In numerous cases the federal courts have held that the Shipping Act should be interpreted in the same way as the Interstate Commerce Act and have used railroad discrimination cases in reaching a Shipping Act decision.<sup>43</sup> For example, in *United States Nav. Co. v. Cunard S.S. Co.*,<sup>44</sup> the Supreme Court of the United States said:

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<sup>40</sup>221 F.2d 698 (6th Cir. 1955).

<sup>41</sup>Now, the United States Shipping Act, 46 U.S.C. § 801 (1958). The Shipping Act's discrimination regulations are completely operative today and were not changed or materially affected by the Merchant Marine Act of 1936. Morse, A Study of American Merchant Marine Legislation, 25 Law & Contemp. Prob. 57 (1960); 25 Geo. L.J. 416 (1937). See generally Knauth, Characteristics of United States Maritime Law, 13 Md. L. Rev. 1 (1953); Robinson, Admiralty § 67 (1939).

<sup>42</sup>Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297 (1937); United States Nav. Co., Inc. v. Cunard S.S. Co., 284 U.S. 474 (1932); Compagnie Generale Transatlantique v. American Tobacco Co., 31 F.2d 663 (2d Cir. 1929) (Judge Learned Hand participated in the decision); Robinson, Admiralty §§ 67, 68 (1939); 44 Harv. L. Rev. 955 (1931); 48 Am. Jur. Shipping § 345 (1943).

Sections 812 (fourth) and 815 (first) of the Shipping Act on discrimination are quite similar in both the wording and obvious purpose to section 3(1) of the Interstate Commerce Act. Section 801 of the Shipping Act is similar to section 1 of the Interstate Commerce Act in that both cover common carriers, but neither defines the term. "The term 'common carrier' is not defined in the Act [Shipping Act], but the legislative history of the Act indicates that the person to be regulated is the common carrier at common law." *Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F.M.B. 615, 620 (1959).

<sup>43</sup>*California v. United States*, 320 U.S. 577 (1944); *United States Nav. Co. v. Cunard S.S. Co., Ltd.* 284 U.S. 474 (1932); *Compagnie Generale Transatlantique v. American Tobacco Co.*, 31 F.2d 663 (2d Cir. 1929) (Judge Learned Hand participated in the decision); *Shepherd & Co. v. Agwilines, Inc.*, 39 F. Supp. 528 (E.D.S.C. 1941); *Roberto Hernandez, Inc. c. Arnold Bernstein Schiffahrtsge-Sellschaft, M. B. H.*, 31 F. Supp. 76 (S.D.N.Y. 1940); *McCormick S.S. Co. v. United States*, 16 F. Supp. 45 (N.D. Cal. 1936); Robinson, Admiralty §§ 67, 68 (1939); 44 Harv. L. Rev. 955 (1931). "It has further been held that the Shipping Act is a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land, and that the settled construction in respect of the earlier Act must be applied to the later

"In its general scope and purpose, as well as in its terms, that Act [the Shipping Act of 1916] closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have *like interpretation, application and effect*. It follows that the settled construction in respect of the earlier act must be applied to the later one. . . ."<sup>45</sup>

It would appear that the majority's decision in *Grace Line* has limited foundation in law. In reaching a decision under the Shipping Act, the court should have consulted the Interstate Commerce Act, Part I, Chapter 1. The Act is declaratory of the common law, and as the common law allowed a common carrier to be a contract carrier in areas in which it had made no holding out of common carriage, it should be allowed the same privilege under the Shipping Act.<sup>46</sup>

The facts of the principal case present an additional reason why *Grace Line* should not be held to be a common carrier of bananas. *Bananas are an unusual subject of carriage* having rapid ripening and spoiling traits and requiring speed in transportation as well as care in handling.<sup>47</sup> An analogy can be drawn to the *Express Cases*<sup>48</sup> in which the Supreme Court of the United States held that a railroad was not a common carrier as to express companies it had always handled on a contract basis. A major factor in that decision was the *unusual nature of express business* which requires speed, reasonable certainty in arrival time and careful custody.<sup>49</sup> This view has been applied to

one." *Shepard & Co. v. Agwilines, Inc.*, 39 F. Supp. 528, 531 (E.D.S.C. 1941). A typical case of the application of the Shipping Act to discrimination is *Roberto Hernandez, Inc. v. Arnold Bernstein Schiffahrtsge-Sellschaft, M.B.H.*, 31 F. Supp. 76 (S.D.N.Y. 1940), reversed in 116 F.2d 849 (2d Cir. 1941). The discrimination problem has frequently come up in recent dual rate shipping contracts cases. *FMB v. Isbrandtsen Co.*, 356 U.S. 481 (1958); 43 Va. L. Rev. 267 (1957); 64 Yale L.J. 569 (1955).

<sup>45</sup>284 U.S. 474 (1932). See generally 1 Geo. Wash. L. Rev. 153 (1932).

<sup>46</sup>284 U.S. at 481. (Emphasis added.) The quote continues, "unless, in particular instances, there be something peculiar in the question under consideration, or dissimilarity in the terms of the Act relating thereto, requiring a different conclusion." It is submitted there is nothing peculiar in the *Grace Line* question. It was a frequent question at common law and could be under the Interstate Commerce Act as shown by this comment. Also, the two acts are similar as to discrimination.

<sup>47</sup>The principal case assumes and accepts the privilege at common law, and it is submitted that the court should have stopped at that point.

<sup>48</sup>See notes 15 and 16 *supra*.

<sup>49</sup>117 U.S. 1 (1886).

<sup>50</sup>The reason is obvious why special contracts in reference to this business are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at any one time. . . . As the business

other unusual items of carriage,<sup>50</sup> and it appears should have been followed with respect to bananas.

The futility of a decision rendering Grace Line a common carrier of bananas can only be fully realized by viewing its application to the facts of the company's business. First, the decision is difficult to enforce. There appears to be no legal way to require Grace Line to increase its facilities, either as to number of ships or banana "reefer" compartments.<sup>51</sup> Also, there appears to be no legal way to prevent Grace Line from discontinuing its banana service.<sup>52</sup> Courts are usually loath to render decisions which can be easily avoided by the defendant. It would appear that the Maritime Board and the Court of Appeals for the Second Circuit should have been reluctant to do so in this case.

Second, the *application* of the decision clearly indicates that Grace Line should have been held to be a *contract carrier* in the first instance. As a common carrier, Grace Line by definition must be prepared to transport bananas in the order tendered<sup>53</sup> to the limit of its limited facilities.<sup>54</sup> That the Board recognized the ensuing havoc of common carriage here is shown by the fact that it merely rewrote the previous contracts for the benefit of the complainants.<sup>55</sup> The ap-

to be done is 'express' it implies access to the trains for loading at the latest, and for unloading at the earliest, convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers." 117 U.S. at 23. This view respecting the express business has been followed in other cases. *Baltimore & Ohio S.W. Ry. v. Voigt*, 176 U.S. 498 (1900); *Atlantic Exp. Co. v. Wilmington & W.R.R.*, 111 N.C. 463, 16 S.E. 393 (1892). Judge Moore approved this approach in his dissenting opinion in *Grace Line*. 280 F.2d at 798.

<sup>50</sup>*Lake Shore & Mich. So. R.R. v. Perkins*, 25 Mich. 329 (1872) (livestock); *Knox v. Rives, Battle & Co.*, 14 Ala. 249 (1848) (money, jewels and documents).

<sup>51</sup>*Ocean S.S. Co. v. Savannah Locomotive Works & Supply Co.*, 131 Ga. 831, 63 S.E. 577 (1909); *Robinson, Admiralty* § 68 (1939); 48 Am. Jur. Shipping § 378 (1943). A railroad common carrier can usually be required to increase its facilities. *Norfolk & W. Ry. v. Public Serv. Comm'n*, 265 U.S. 70 (1924); 9 Am. Jur. Carriers § 325 (1943).

<sup>52</sup>*Lucking v. Detroit & Cleveland Nav. Co.*, 265 U.S. 346 (1924); *McCormick S.S. Co. v. United States*, 16 F. Supp. 45 (N.D. Cal. 1936); *Robinson, Admiralty* § 68 (1939); 48 Am. Jur. Shipping § 348 (1943).

<sup>53</sup>See note 26 supra. *Ocean S.S. Co. v. Savannah Locomotive Works & Supply Co.*, 131 Ga. 831, 63 S.E. 577 (1909).

<sup>54</sup>280 F.2d at 796.

<sup>55</sup>Courts in general are loath to rewrite and make new contracts for people because such action conflicts with fundamental principles of freedom of contract. See 280 F.2d at 793. "Clearly this cannot be afforded by keeping the contracts in force, for both parties have agreed that they may be terminated at any time by either party on notice; nor by making new contracts, because that is not within the scope of judicial power." *Express Cases*, 117 U.S. 1, 26 (1886). It appears, however, that a court may void a public service common carrier's contract if it

plication logically proves Grace Line to be a contract carrier of bananas as shown by Judge Moore in his dissent:

"The Board would solve the problem by what it terms a 'two-year forward-booking' plan. This is in reality nothing but a continuation of the very contract system which the Board has declared to be illegal. If the Board's pronouncement has any validity, namely, that contract carriage cannot exist on the same vessel as common carriage, this principle should apply to complainant's contracts as well as those of the present shippers."<sup>56</sup>

The majority further bases its decision on the policy of recent maritime legislation to encourage the development and maintenance of our merchant marine.<sup>57</sup> However, it appears this decision promotes the welfare of no one. It does not help the banana shippers because of the limited possibility of continued carriage for any shipper.<sup>58</sup> It does not help Grace Line, a representative of the shipping industry, because under the decision Grace Line is a common carrier, and its potential liability is increased by making it an insurer of a very perishable product.<sup>59</sup> The inability of Grace Line to handle its banana carriage according to its own business judgment may cause the service<sup>60</sup> to be discontinued, thus taking American ships from the sea and putting American seamen out of work. It is difficult to see how this decision will attract more private capital into the shipping business and promote our merchant marine.<sup>61</sup> Moreover, since

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conflicts with a public duty. *Baltimore & Ohio R.R. v. Public Serv. Comm'n*, 81 W. Va. 457, 94 S.E. 545 (1917); 9 Am. Jur. Carriers § 42 (1937). But there may be a possible "due process" argument. *Michigan Pub. Util. Comm'n v. Duke*, 266 U.S. 570 (1925); *Atlantic Coast Line R.R. v. North Carolina Corp. Comm'n*, 206 U.S. 1 (1906).

<sup>56</sup>280 F.2d at 796. "To admit, as does the Board, that Grace Line could carry bananas on a separate ship devoted to contract carriage but could not construct special compartments on one of its present ships for this purpose is to create an artificial principle devoid of logic or reason." 280 F.2d at 795.

<sup>57</sup>*Id.* at 792. The policy of the Merchant Marine Act of 1936 is stated in 46 U.S.C. § 1101 (1958). See also Robinson, Admiralty § 68 (1939) (policy of maritime legislation); Morse, *A Study of American Merchant Marine Legislation*, 25 *Law & Contemp. Prob.* 57 (1937).

<sup>58</sup>280 F.2d at 797. The fact that the two year forward-booking contract system would not provide certainty as to growing and marketing times as new shippers enter the field and thus delay the period when a former shipper's turn for a new two year contract would arrive is recognized by the Board. 5 F.M.B. at 285 and 626.

<sup>59</sup>*The Propeller Niagara v. Cordes*, 62 U.S. (21 How.) 7 (1858); *The Lady Pike*, 88 U.S. (21 Wall.) 1 (1874); Robinson, Admiralty § 69 (1939); 9 Am. Jur. Carriers §§ 4, 10, 661-69, 705 (1943).

<sup>60</sup>See notes 51 and 52 *supra*.

<sup>61</sup>Additional governmental capital through subsidies might be required, thus leading to a policy of increased socialism.