rx WI WILLIAMS, E.C. The jurisprudence of national rail routes.

EVAN CHRISTOPHER WILLIAMS

THE JURISPRUDENCE OF NOTIONAL RAIL ROUTES

- the courts and s.110 of the Transport Act 1962.

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All references in this paper to "the Act" are to the Transport Act 1962; unless otherwise indicated references to sections are to provisions of this Act. Similarly, references to Regulations are to the provisions of The Transport Licensing Regulations 1963.

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I. INTRODUCTION

This paper focusses on the legal parameters of the restriction on competition with rail transport. This restriction is commonly known as the "rail restriction" or, in times past, "the 40-mile limit" We shall be concerned to look first at the policies behind the restriction. Then we shall examine the actual legal parameters of the restriction and their operation. We shall then move on to postulate a theoretical model by which we might evaluate the legal parameters and the courts' role in interpreting and applying them. This model throws up three aspects of decision-making inputs - policy, principles and rules. We wish to analyse and evaluate the legal parameters of the restriction in these terms. In so doing we are attempting to illustrate the nature of the guide-lines for decision which the restriction lays down. This illustration highlights in turn the nature of the various decision-making process.

II. POLICY ELEMENTS IN TRANSPORT LICENSING

A. Introduction

As the title indicates, in this section we shall examine the policy elements of transport legislation. The scope of this paper embraces neither an evaluation of transport economic policies nor a general treatise upon transport policy. Thus the economic merits of the rail restriction are not our concern. Our task is two-fold. First, we shall identify the overall purpose of transport policy and seek to outline the various forms of transport co-ordination and assistance to individual modes of transport. Secondly, we shall discuss the need to provide assistance to public transport operations (with particular reference to New Zealand Railways) together with the regulatory restriction on competition with rail.

Some understanding of New Zealand transport policy may stem from an appreciation of the importance of transport to this country. Distribution is intimately tied to virtually every manufacturing process. To give but one example, one writer has stated that "any economist would explain that the function of the economic system in a modern society is to create value, and that value is created by moving things from where they are not wanted to where they are wanted. Without a transport system a huge quantity of the production of New Zealand would be worthless. It has value only because it can be carried to markets where it can be sold." Yet transport also brings environmental and social problems in large proportion. Furthermore, the different modes of transport do not co-exist in total harmony. The over-riding question for

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1. J. Child in Policy and Transport New Zealand Institute of Public Administration, Wellington 1973 p.68. Furthermore, one estimate (by another New Zealand economist) quoted in Dr Child's paper, is that the labour content of the transport industry is 14% of the total work force and the capital content constitutes 31% of our capital.

transport policy was well put by M.R. Palmer:

> "Just how can this benevolent but clumsy giant be controlled and set to work usefully and efficiently, yet without smashing the environment or tripping over the economic snags?"[2]

B. The Purpose of Transport Policy

If a government wishes to have a hand in the direction of transport within its domain it must decide what its aims are.

In presenting the "New Zealand Transport Policy Study"[3] to the government in 1974, Wilbur Smith stated that "The basic purpose of the study was to determine the most effective means of co-ordinating the use and development of various modes of transport in the country so that resources devoted to transport can be used in the most efficient manner."[4] The two primary concepts of policy envisaged were thus co-ordination (the means) and efficiency (the end).

Co-ordination. The Study considered that "Basic efficiency issues arise primarily from the availability of alternative technological modes in combination with dissimilar transportation requirements imposed on the /transport/ system by different commodities and shippers in New Zealand."[5] Thus effective policies were seen as establishing "complementary relationships"[6] which entail "co-ordination among the modes."[7] Co-ordination was seen in physical, functional and economic terms. The

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2. ibid p.8

3. by Wilbur Smith and Associates, prepared for The Ministry of Transport, Government of New Zealand, 1973 2 Vols. The most extensive study of its kind in New Zealand.

4. ibid. Letter of 8th April 1974. This objective was the central feature of the terms of reference laid down for the Study.

5. idib. Part V Chap.1 p.1-6.

6. ibid

7. ibid

important point for our purposes is that co-ordination is seen in terms of co-ordination among modes as well as within modes. Therefore rail transport is not the sole concern of transport policy. It is only one of several modes of transport. In addition to co-ordination within transport, the whole transport sector itself has to be co-ordinated with the country's overall social and economic activities and objectives. Accordingly transport itself is a subject of co-ordination.

Efficiency. This concept primarily connotes minimisation of resources expended in satisfying transport needs. It calls for a very broad analysis of resources, mainly in relation to economic factors. In addition transport policy must be measured against environmental and social policies.

The main points which we wish to draw from this brief outline are first, the overall purpose in policy is lateral modal co-ordination together with co-ordination within modes with the aim of achieving efficiency; secondly, this purpose is very broad and must be broken down into specific policies to be of sense and use; thirdly, the questions involved are extremely broad, difficult and are social, environmental and economic in nature.

C. Forms of Transport Co-ordination

The Study identified four main policy sectors as essential to any nation-wide transport policy.[8] These were: pricing, regulation, investment and fiscal policies. The Study described transport policy as "essentially a seamless web" [8a] and was careful to point the "complex inter-relationships involved in even a policy sub-sector." [9]

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8. ibid Part II Chap.1 p 1-1.

8a. ibid Part V Chap.1 p 1-12

9. ibid

Nevertheless, it saw the four policy sectors mentioned above as providing the most meaningful distinctions in the policy field.[10] These four sectors or mechanisms were said to influence fundamentally "transport efficiency both generally and in terms of intermodal relationships".[11] Overall the Study proposed a more competitive approach to the provision of transport services. It suggested the easing of regulatory restrictions in deference to regulation based on market variables. Thus it proposed a move away from the rail restriction and licensing systems. The primary judgment which the Study was making on the rail restriction was that it did not allow enough flexibility to achieve the most efficient allocation of traffic.[12]

We wish to make two points regarding the forms of transport co-ordination. The first is that the rail restriction constitutes only one of the available forms of co-ordination. Secondly, the restriction is clearly a policy mechanism and thus reflects and represents transport policy. As such it is a specific part of the "seamless web" of transport policy.

D. The Need to Assist New Zealand Railways (NZR) in its Operation within the Transport Sector

NZR is a very large operation. In 1976 it employed 21,658 people and showed fixed assets (at book value) of $407,126,000. Thus it is a significant financial entity

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10. A useful summary of the functions of these four sectors in respect of efficiency and co-ordination can be found at pp 5-9 of the Summary contained in Vol.1 of the Study.

11. Supra Part V Chap 1 p 1-13

12. It should be noted that there has been some disagreement with the findings of the Study and over the question of how co-ordination is best achieved. As we noted before we are not engaged in an evaluation of the policies and accordingly will not pursue this question.

in its own right and it may be argued that simply by virtue of being a public utility of this size it deserves protection. On the other hand it may be that one is protecting an inefficient organisation, or giving a form of assistance that is not needed. The 1976 [13] and 1977 [14] Annual Reports of the Department provide interesting comparisons:-

	Net Loss	Gross Revenue	Gross Expenditure
1976	$66,500,000	Up 10.6% on previous year	Up 17.1% on previous year
1977	$17,200,000	Up 45.7% on previous year	Up 11.5% on previous year

In introducing the 1977 report to Parliament the Minister stated that the increased revenue in that year resulted from buoyant freight traffic and increases in charges effected in 1976. [15] We are not in a position to assess these results and simply wish to note that the Government's policy in increasing rail charges was stated to be one of reducing the burden on taxpayers and making NZR a commercially viable organisation. While recognising that increased traffic contributed to a proportion of this dramatic recovery it is interesting to observe the significant effect of pricing on the Department's economic viability.

But the need for assistance to NZR is not established by its size, public nature or internal viability per se. These are naturally factors to be taken into account but the true nature of the answer lies outside the Railways Department itself. We have shown that transport policy serves the wider purpose of overall efficiency through lateral transport co-ordination. Rail is but one mode.

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13. Report of the Railways Department for the year ended 31st March 1976.

14. Report of the Railways Department for the year ended 31st March 1977.

15. ibid p. 3

However that does not mean that NZR should be treated in exactly the same way as all other transport operations. By way of example, inasmuch as it is a public operation it is significantly different from a private operation in regard to pricing alone. The Study notes that in the case of private enterprise

> "financial costs must be employed as the pricing reference in deference to profitability requirements. In public operations represented by New Zealand Railways (NZR) and the National Airways Corporation (NAC), profitability is a consideration secondary to maintaining traffic allocations among the modes to minimise costs.
>
> NZR rates are a particularly effective instrument for promoting market conditions under which shipper freedom of choice results in allocative efficiency. Accepting private enterprise rates as a datum, NZR rates can be used to compensate for private sector differences between financial and economic costs which run counter to allocative efficiency."16

This statement reflects the preference of the Study for market variables as the means of regulation of shippers' choices of modes. It also illustrates the way in which a public utility can be used to achieve an efficient allocation of traffic between modes. As stated previously pricing is but one way in which to preserve traffic for, or divert traffic from one particular mode. However, the point which we wish to stress is that a policy of preference (or non-preference) for a mode results from a very difficult and wide-ranging assessment of that mode in relation to other modes and of all the modes in relation to each other.

The regulations restricting competition with rail represents just such a wide-ranging comparative modal assessment. It is therefore appropriate to identify the particular policy reasons for the restriction.

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16. (supra) Summary, Vol I p.6

When transport licensing was introduced in 1931 it was intended to fulfil three purposes: to protect Railway Department revenue, to reduce wear on roads and to create stable conditions in the industry.[17] The question with which the Study was confronted was whether the restriction should be retained. The arguments in favour of retention identified by the Study, together with its comments were:

"(1) It protects railway investment - A large proportion of rail expenditure cannot be avoided in the short term even if traffic reduces; some costs are fixed and others such as wagon and locomotive costs, where the equipment has a long life, can only be adjusted gradually.

A regulation, such as the 40 mile limit, may have application as a short-term measure to avoid a rapid erosion of rail traffic. However, in the long term such a measure is likely to result in over-investment and inefficient utilization of investment.

(2) It protects roads - On some roads, particularly those with high traffic volumes, any substantial increase in traffic will require road widening. A rail restriction may have application, at least in the short run, in protecting heavily trafficked roads and avoiding road widening.

(3) It enables NZR to cross subsidise unprofitable services - Restrictions on road traffic enable rail rates to recover, from profitable traffic, losses incurred on unprofitable social services and fixed costs. However, such a method of subsidy forces non-optimal resource use throughout the transport system and if thus an inefficient way of maintaining subsidised services. "

(The unprofitable services referred to here fall under the heading of "social services." These services are a burden on the remainder of the system and call for abnormally high rates on profitable services.)

"(4) It enables NZR to apply differential rail rates - The present rail rate structure retains many of the discriminatory features from the days when rail had a monopoly. If competition is to be allowed, rail

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17. ibid Part VLL Chap 1 p.1-7

18. Quotations utilised in this section are to be found at pp 74-76 of the Summary to the Study. A more detailed outline of these arguments occupies pp 1-14 - 1-23 of Part VII Chap 1.

rates will need to be adjusted to ensure that rail retains that component of highly rated traffic for which it is the most efficient mode. It is clear that the present rail schedules could not be revised overnight because of the impact it would have on industries located in relation to the present structure. This alone does not justify retnetion but argues for a change-over period.

(5) It avoids competition in a thin market - Free competition may not produce the best allocation of resources if "thin market" conditions apply. This is the case where total fixed and variable costs could be reduced if all traffic moved by the same mode. However, since roads are required for general access, such a situation seems unlikely.

(6) It allows imperfections in prices and taxes - The 40 mile limit over-rides prices as a determinant of modal choice, and whether prices are related to economic costs has no significance. "

(This point requires enlargement. It concerns inefficient pricing mechanisms. The primary point is that under the present system the limit does play a part in reducing the social cost of transport - particularly in terms of cost structure, direct social cost and utility [19])

"(7) It allows for imperfect shipper knowledge - One problem of leaving the choice to the user is that the shipper may not have sufficient information available to him or he may perceive the information incorrectly. It seems likely that any easing of the restriction on road use will cause an over-reaction by shippers and an excessive switch to road. However, the retention of the 40 mile restriction could not be justified by shippers' imperfect knowledge, although it does argue for care in its dismantling.

(8) It allows for market imperfections - The most obvious of these, and one which could form a justification for retaining the limit, is producer monopolies. Since a company operating under monopoly or oligopoly circumstances is often able to pass on costs to the consumer, the financial cost of different modes becomes less important in modal choice decisions by the shipper. In general, attempts should be made to attack the market imperfections at their source rather than seeking a panacea in an all-embracing regulation. "

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19. The particular arguments under this head are outlined at pp 1-16 - 1-21, Part VII Chap 1 of the Study.

E. Summary

We have identified the overall purpose of policy in transport, mentioned the various forms of co-ordination and outlined the specific policies behind the rail restriction. As we have mentioned we have not been concerned to evaluate the substance of the policies. Some of the policy assessments made by the Transport Policy Study have been mentioned but as we note in the next section of this paper the rail restriction lives on.

III. THE LEGAL PARAMETERS OF THE RAIL RESTRICTION

We have noted that there are a number of ways of regulating and co-ordinating the transport of goods and passengers. We have also referred to the multiplicity of factors bearing upon transport policy and the size and complexity of the questions involved.

In this section of the paper we shall consider the legal parameters of the restriction. In so doing we hope to fulfil two purposes. The first - to describe the nature and ambit of the parameters provided by the legislation. The second - to comment upon the process of application of the restriction; to illustrate the role of the courts in applying the legislation and to show the operation of the restriction on actual situations and routes.

In very brief outline the restriction operates in the following way. Part VII of the Act controls road transport services. Virtually every conceivable journey on which goods might be sent within New Zealand can be accomplished by road. Not all journeys can be accomplished by rail - rail routes are not as extensive as road routes. Nor is it always as quick, as cheap (overall), as safe, or as practicable to send goods by rail. Therefore it is generally assumed that consignors would very often prefer to send their goods by road rather than rail. The function which the rail restriction performs is that of preserving a certain amount of this overall traffic for carriage by rail. It does so by requiring (in broad terms) that if there is a route available for the carriage of goods which includes at least 40 miles of rail then all goods must be carried on that route rather than solely by road.

A. The Statutory Framework

The purpose of this section of the discussion is to outline the framework of the restrictions as found in the sections and regulations. We are therefore seeking to

define the parameters of the net which catches goods services and subjects them to the restriction.

The provisions of the Act which constitute this net are Sections 2, 108-112, and Regulation 24:-

> Section 2. "Goods Service" means the carriage of goods for hire or reward by means of a motor vehicle; but,..subject to the provisions of sections 109 and 114 of this Act, does not include the carriage of goods by the owner thereof (whether for hire or reward or not) by means of a motor vehicle:"
>
> "Goods" means all kinds of moveable personal property, including animals and mails:"

These definitions describe the action - carriage, the object - goods; the means - motor vehicle (defined subsequently in Section 2 in broad terms), and state that this action must be done for hire or reward to be called a goods service. It is important to note that the definition brings almost all carriage of all goods by all motor vehicles within the statutory net. On the other hand it excludes carriage of goods by their owner while also excluding carriage that is not for hire or reward (the latter exclusion being achieved by requiring hire or reward as a positive element).[1] Thus to s.109

Section 109. This section constitutes that part of the framework which broadens the net beyond the definition contained in s.2 to include the carriage of goods, whether for hire or reward or not, by heavy goods-service vehicles

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1. For further clarification of the meaning of goods-service, and in particular carriage for hire or reward see the discussion at pp3-5 to 3-6 of Graham's Law of Transportation, P.W. Graham, Brooker and Friend Publishing, Wellington. See also Dixon's Road Traffic Laws , 5th ed. Butterworth & Co (New Zealand) Limited, Wellington ppl24-7

in competition with specified lengths of open railway. As the "owner" exception in the s.2 definition is expressly subject to s.109 the latter includes carriage of goods by the owner of such goods. At first glance this may not appear significant. However, the prospect of all of New Zealand's major (and minor) manufacturers and producers being entirely free from licensing in respect of goods which they own (whether raw materials or finished products) makes it apparent that s.109 is of primary importance to the rail restriction and to transport licensing generally.

The important parts of the section are:-

"(1) Subject to the provisions of this section and without limiting the meaning of the expression "goods service" in subsection (1) of section 2 of this Act, the carriage of any goods (whether for hire or reward or not) by any goods-service vehicle the weight of which exceeds 2,500 kilograms shall be deemed for the purposes of this Part of this Act to be a goods service within the meaning thereof, if there is available for their carriage -

(a) A route that includes not less than -

(i)

(ii)

(iii)

(these paragraphs outline varied lengths of rail in relation to various products)

(iv) Except where paragraph (b) of this section applies, 40 miles of open Government railway in any other case:"

(Subsection 2 contains slightly different weight and rail length provisions in the case of farmers)

"(3) The foregoing provisions of this section shall not apply -

(a) Where the route that includes the railway is longer by more than one-third than the shortest road route available for the carriage of goods; "

In short the section deems a service to be a goods service if there is a route available which includes (generally) a minimum of 40 miles of open railway. Consequent upon the 1977 Budget decision the Transport Amendment Bill (No.2) 1977 is currently before the House.

If passed in its present form the bill will repeal the present s.109 and substitute a new section raising the basic 40 mile limit to 150 km. The 40 mile limit constitutes the primary restraint on increases in the amount of goods which may be carried by road. The amendment more than doubles the 40 mile limit and will therefore provide a great deal more freedom for road transport operators. Previously a 40 mile length of rail would require carriage by rail instead of road - now it must be at least 150 km.

Paragraph (a) of subs. (3) establishes an outer limit on the statutory preference for rail by excluding the operation of the rail restriction (together with operation of the licensing requirements where goods are not being carried for hire or reward) where the preference would involve a route that is more than one third longer than the shortest road route.

Thus ss.2 and 109 prescribe the services which are defined as or deemed to be goods services. (In passing it is worth noting that s.113 exempts certain kinds of carriage from licensing and that s.114 gives the Minister power to declare certain services for the carriage of goods to be goods-services within the meaning of the Act.)

Section 108. This section states that:-

> (1) Except as provided in this Part of this Act, it shall not be lawful for any person to carry on any passenger service or taxicab service or rental service or goods service or, within a harbour-ferry service district, any harbour-ferry service, otherwise than pursuant to the authority and in conformity with the terms of a passenger-service licence or a taxicab-service licence or a rental-service licence, as the case may be, granted under this Part of this Act.
>
> (2) Every person commits an offence who does any act in any capacity as agent for any transport service that may be lawfully carried on only pursuant to a licence under this Part of this Act, if at the time of his doing that act such a licence is not in force in respect of the service.

Clearly the purpose of s.108 is to provide for the licensing of goods services. When coupled with s.112 those licensing provisions are not without effective control.

Nevertheless it is appropriate to comment on the way in which s.108 is drafted. Subs. (1) provides that "it shall not be lawful" for anyone to carry on a service otherwise than pursuant to, and in conformity with a licence. Subs. 2 states that "Every person commits an offence who does any act in any capacity as agent for a transport service ...." It might be said subs. (1) does not create an offence of carrying on a service in that it only provides that it shall be unlawful to carry on a service. This formula is in marked contrast to that used in subs. (2) where agents are clearly said to commit offences. At all events the courts have never questioned the wording, s.107 of the Crimes Act 1961 provides an answer in any case, and it is probably a bit difficult to argue that committing an unlawful act under subs. (1) is not an offence.[2] But the difference in formulae does point to an apparently mindless adoption of earlier provisions with little regard to the context within which they are to function.

Regulation 24: Given that a transport operator has to obtain a licence if he wishes to operate a service within the meaning of ss.2 or 109, Reg.24 makes the rail restriction a condition of the licence -

> "unless the licence expressly states that the restriction shall not apply or shall be modified, namely:
>
> Restriction
>
> If there is an available route for the carriage of goods which includes at least 40 miles of open Government railway, or in the case of logs the Murupara-Kawerau Railway, or, in the case of goods

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2. See also s.112(a) which refers to "an offence of carrying on a goods-service"

of the classes described in subclause (2) hereof, such other length of open Government railway as is specified therein, goods shall be carried only as far as is necessary to permit of their carriage by railway.

(2).....

(3) The provisions of this regulation shall not apply -

(a) Where the route that includes the railway is longer by more than one third than the shortest road route available for the carriage of the goods:

(b) Where the goods are carried on a route or between terminal points as expressly authorised in the licence:...."

The implication contained in para (3)(b) is that a point to point or route licence for a route which is subject to the restriction contains an exemption from the restriction.[3]

This regulation will shortly be amended to conform to the new 150 km limit announced in the budget. We understand from the Ministry of Transport that the regulation is being drafted to effect the change in much the same way as the amendment to s.109.

The substance of the grounds on which applications for exemptions from Reg.24 are made, together with the way in which the Licensing Authority and Licensing Appeal Authority determine such applications, are briefly considered in Part IV of this paper. However, regard should be had for two important aspects of the exemptions to the legal parameters: first, the exemption mechanism constitutes part of the legal parameters of the rail restriction in the sense that it sets limits on the situations in which an exemption will be granted; secondly, the exemption mechanism is a different kind of parameter than those discussed thus far - it provides a relatively flexible

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3. It is perhaps worth noting again the insertion of the outer limit on the preference for rail - that it not demand a route that is more than one third longer than the shortest road route.

decision making process rather than the simple statement of fixed rules covering defined situations.

Section 111 This section prohibits circumvention of the restriction by the use of linked-up services. The mischief which it seeks to prevent is the carriage of goods by a series of stages, each one of which does not infringe the restriction but which, when added together, constitute an infringement.

The Section provides:

(1) Where -

(a) In the course of the carriage of goods the goods are carried in stages from one place to another by 1 or more persons; and

(b) The total carriage of those goods between those places by any one of those persons would have been unlawful by reason of section 109 of this Act or of any regulations made or continuing and having effect under this Act (being regulations relating to the carriage of goods by road where there is an available route for the carriage of goods by road where there is an available route for the carriage of goods that includes not less than a specified length of open Government railway), -

every person who carries the goods over any one of those stages or is a party to that carriage shall, subject to the provisions of this section, be deemed to have carried on a goods service over the whole of the route over which the goods are carried.

(2) This section shall apply notwithstanding that but for this section the carriage of the goods by road over each of the said stages may have been lawful.

These provisions raise several problems which could be explored further. The approach of this paper has involved the selection of certain areas for detailed analysis. Evaluation of s.111 showed that the concept of "available route" contained a greater range of interesting material. Therefore, a detailed analysis of s.111 will not be proceeded with.

Having considered the major parts of the 'net' provided by the parameters of the restriction we now come to the concept of an "available route"

B. The Concept of an "Available Route".

We have seen that the substance of the restriction lies in s.109 and Reg.24 and that these provisions set the restriction into operation where there is an "available route" which includes a minimum specified length of railway. Section 110 defines an "available route" and is crucial to any understanding of the parameters of the rail restriction.

Section 110 is in the following terms:-

"110. "Available route" defined - (1) For the purposes of section 109 of this Act and of any regulations made or continuing and having effect under this Act (being regulations relating to the carriage of goods by road if there is available for their carriage a route that includes not less than a specified length of open Government railway) the following provisions of this subsection shall apply:

(a) A route which includes not less than the specified length of open Government railway or, in the case of logs, includes the Murupara-Kawerau Railway shall be deemed to be available for the carriage of the goods, notwithstanding that in order to permit of their carriage by the railway part of the route it is necessary to carry the goods by road at either end or both ends of the railway part, whether in any direction or for any distance:

(b) The length of the railway shall be computed according to the distance between places as set out in the Government Railways working timetables, which places shall be deemed to include all railways sidings in the vicinity thereof.

/- (2) For the purposes of section 109 of this Act and of any regulations made or continuing and having effect under this Act (being regulations relating to the carriage of goods by road if there is a route available for their carriage that includes not less than a specified length of open Government railway), where a route that includes not less than the specified length of open Government railway is available for the carriage of goods, then, subject to subsections (2A) and (2B) of this section, any part of the railway portion of that route that is not less than that specified length shall also be deemed to be part of a route available for the carriage of goods, whether or not the stations at the terminal points of that part are the railway stations nearest to the place where the carriage of the goods (whether by rail or by road if

the carriage is to be by rail and road combined) actually commences or ends, and whether or not, if the goods were carried by rail, their carriage would normally begin or end at some other railway station.

(2A) Where a route is available as aforesaid, a length of railway shall be deemed not to be part of that route if the distance by rail between the nearest railway station on that length to the place where the carriage of the goods begins and the nearest railway station on that length to the place where their carriage ends is less than the length so specified.

(2B) Where pursuant to subsection (2) of this section part of the railway portion of a route is also deemed to be part of a route available for the carriage of goods, the provisions of subsections (1) and (2) of section 109 of this Act and of any such regulations as aforesaid shall not apply where that last-mentioned route is longer by more than one-third than the shortest road route available for the carriage of the goods./

(3) For the purposes of any proceedings for an offence under this Part of this Act or under any such regulations, being an offence relating to the carriage of goods by road where there is an available route for the carriage of goods that includes not less than a specified length of open Government railway, the road route over which the goods were actually carried shall be deemed to be the shortest road route available for their carriage."

It is evident that the function of these provisions is to describe the circumstances in which a route is available, to prescribe the means of selection of routes for computation under the restriction and to lay down the rules by which the length of such routes is to be reckoned. While it describes some of the circumstances in which a route is or is not, available, s.110 does not specifically deal with the meaning of the word "available". Thus this initial definitional question has been put to the courts on numerous occasions. Therefore discussion of this provision will be broken into two parts:

(a) The meaning of 'available' in s.110

(b) The substance of s.110.

(a) The meaning of available in s.110.

First, the courts have made it very clear that the question of whether or not a route is available is always a question of fact in the particular case.[4] However it is equally clear that the courts have the task of interpreting the statutory language and deciding upon the meaning of the word 'available'.

Secondly, the frequency of the service operated along the rail route in question will not normally be a factor to be taken into account in deciding whether the route is available - Dobbin v West Otago Transport Ltd[5] Donovan v Cockburn.[6] In Dobbin's case there were two grounds on which infrequency of service did not constitute lack of an available route: first, the timetable was only unsuitable to the particular consignor; secondly, the extent of the unsuitability was only minimal in that it only prevented him from taking advantage of a limited and unusual market. Henry J. did not specifically separate these two elements however it is suggested that they go to different points and have different consequences. Donovan v Cockburn involved inconvenience to a larger group of persons. The service in question ran only once every twenty-four hours to the town in question and then only at night. However, Woodhouse J. drew a clear distinction between availability of the route and the provision of a service which suited the convenience of individuals. He had no hesitation in saying that this case fell into the latter of the two categories. In both cases it was observed that at some stage infrequency of service might mean that a route would not be 'available' and that the restriction would not apply. These observations introduce a theme which will be taken up more fully in the immediately succeeding paragraphs.

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4. e.g. Transport Ministry v Vibrapac Ltd /1973/ 1 NZLR 500 per Turner P at p504;
   Donovan v ATW Transport Limited /1963/ NZLR 88, 91

5. /1961/ NZLR 295

6. /1963/ NZLR 322.

The third consideration which we shall examine in discussing when a route is available concerns the influence of economic factors, difficulties in loading the goods concerned and inconvenience caused by use of the rail. A relatively clear line of authority flowed from the decision of Finlay J. in Hanna v Garland [7] to the effect that such factors should not be taken into account when determining the availability of a route. Yet two subsequent decisions have pointed to the possibility that such factors might go to availability. We shall be concerned to see when and why this might be so.

Counsel for the defendant in Hanna v Garland contended that the word 'available' meant "reasonably available" and that the route in question was not capable of economic use because it involved a multiplicity of handlings. The thrust of the submission was that economic factors are relevant to the meaning of 'available'. In rejecting this submission Finlay J. said:

> "Consideration convinces me that the word 'available' as used in s.96 inherently means 'capable of use in fact' or 'open and usable'. It is to the characteristic of the road from the point of view of fitness for use that the word 'reasonably', if introduced, would relate. In other words, I am not disposed to think that the word 'available' in the subsection has any relation to the economic incidents of user of a road. If this were not so, then whether routes were available or not might have to be determined in the light of questions of extra cost involved in their use by reason of their steepness or other characteristics involving increased running costs. Nothing of that sort was, I am satisfied, intended by the legislature which, when it used the word 'available', meant no more than 'susceptible of use'. " [8]

Two points can be made about this decision. First, the finding of the court as to the meaning of 'available' under s.96 of the Transport Act 1949 is not invalidated by any changes in the 1962 Act.

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7. /1954/ NZLR 945

8. Supra, p.947

Secondly, this statement has been approved in all the subsequent decisions and forms the basis of a clear line of authority on this point.[9] It is also worth noting that it has formed a clear bar to the defendant in these cases and no case has yet been won on the basis of economic factors alone. The test has therefore become that of whether the route is open or capable of use in fact. Even so, this question leaves room for doubt about the factors which go to availability. The doubts are raised in two cases - McVicar Timber Ltd v Transport Department[10] and Transport Ministry v Vibrapac (Southland) Limited.[11]

In McVicar's case the court was concerned to see whether the fact that particular goods might not be able to be handled and loaded at a railway station at one end of the rail part of a route meant that that route was not available. The evidence clearly showed that the particular logs being carried on the day in question could have been loaded onto rail wagons at the station in question. Therefore Macarthur J. found that the route was in fact open and usable in respect of that load notwithstanding some extra costs and inconvenience to defendant. But he also approved of the concession made by counsel for the Transport Department that "under certain circumstances a particular railway station may not be 'open and usable', for example because of the peculiar nature and loading requirements of certain goods ..." [12]

A similar situation arose in the Vibrapac case where the defendant submitted that the lack of facilities at a station by which two ton pallets of concrete blocks might be transferred from trucks to railway wagons meant that the station was not available and accordingly that the route

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9. Birrell v Dugdale /1961/ NZLR 433, Donovan v Knight & Dickey Limited /1965/ NZLR 99, McVicar Timber Ltd v Transport Department /1967/ NZLR 694, Colville Transport Limited v Transport Department /1971/ NZLR 606, Transport Ministry v Vibrapac (Southland) Limited /1973/ 1 NZLR 500.

10. Supra.

11. Supra.

12. Supra p.696

was not available. The case was disposed of by the Court of Appeal on the basis that there was a crane capable of lifting the pallets on the back of the very truck which was used to take the blocks to the station in question. However, all three judges made observations as to the test for availability and the line of authority stemming from Hanna v Garland. These observations were occasioned by the fact that in the Supreme Court White J. had decided that the route was not available as the Railways Department had not provided loading facilities at the particular station - even though the Railways Department had no obligation to supply loading facilities. White J. felt that the fact that the defendent was able to arrange loading at that point made no difference. In light of the fact that the Department is not obliged to provide loading facilities the ultimate effect of White J's decision was to say that inconvenience and cost to the defendant in arranging loading meant that the route was not available. Hence the issue faced by the Court of Appeal was quite directly that of the effect of economic and other such factors upon the question of availability.

Wild C.J. outlined the "settled line of authority" [13] flowing from Hanna v Garland and stated that against that "the concession approved on the facts of McVicar's case, which was the foundation of White J's judgment in the present case, should not be taken as of general application." [14] He went on to say that the question of availability is a question of fact in each case and - "Depending on the circumstances the extent of loading facilities at railway stations on the route may have a bearing on the determination of that question /i.e. availability/ "[15]

Turner P. felt that the case before him was not completely covered by what was said in Hanna v Garland. He stated his agreement with the view that factors of

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13. ibid p.502

14. ibid

15. ibid p.503

convenience, efficiency and cost are not to be taken into account yet also approved the approach of Henry J. in Dobbin's case (in relation to frequency of services). He went on to say:

> "I am of the opinion that the decision of Finlay J. in Hanna v Garland (supra) and those of this Court in Donovan v Knight & Dickey Ltd (supra) and Colville Transport Ltd v Transport Department /1971/ NZLR 606, still leave open in every case the question as to whether it is reasonably practicable to use the railway route which the Department offers. Mere economic disadvantage will not lead to the conclusion that the railway route is not available; but I wish to guard myself against the proposition that, in viewing the question, as I view it, always as one of fact and degree, economic considerations may not in a given case accumulate to the point where it may be held that the route is no longer reasonably available as a practical proposition." [16]
>
> (emphases added)

In similar vein Richmond J. agreed that at a certain point the absence of any loading facilities could mean that the route was no longer available. He too agreed with Henry J's approach in Dobbin. He also referred to his own judgment in Colville in which he had left open the question of the effect of a complete lack of means of carrying the goods by the road portion of a composite road-rail route.

The question which we must now decide is that of where this leaves us.

The authorities clearly establish that the test for the meaning of the word 'available' is whether the route is open and usable in fact. It is equally certain that in determining this question the court will refuse to take into account mere inconvenience and the particular requirements of an individual consignor. [17]

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16. supra, p.505

17. Dobbin v West Otago Transport Ltd (supra)
Colville Transport Limited v Transport Department (supra).

Nor will the court regard economic considerations, difficulties in loading and infrequency of services as relevant unless their presence in a particular case means that the route cannot be considered open and usable. However, it must be remembered that this proposition is not firmly established as there is no case in which a route has been held to be unavailable for this reason. On the other hand there is dicta to this effect over 12 years and 5 cases, one of which contained firm indications to this end from all three judges of the Court of Appeal. The point can also be made that in none of the cases in which the court refused to take account of these factors did these considerations appear to be present to a very significant degree and thereby call upon the court to answer an acute form of the question. The argument is therefore open that the point is not yet covered.[18] Indications are that if the more acute case does arise a court would be prepared to say that a route is unavailable on the basis of one or more of these factors.

But the question still remains as to when this might be. All of the judges who have discussed this point frame their observations in terms of the degree or extent to which one of these factors is present. Some are more clear about this point than others.[19] However, all envisage an accumulation of such a factor to such a point, or stage, that the route is no longer open or usable. It might be argued that this is a difference in kind rather than degree in that it then goes to the question of whether the route is open or not. Two points may be made in rebuttal of this contention. One, the basic test is clearly 'open and usable' and therefore the factor (economic loading or frequency of service) is measured against this stick from the ground upwards i.e. from inconvenience upwards. A difference in

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18. e.g. Turner P. in Vibrapac, (supra) p.503 lines 46-47

19. e.g. Turner P. in Vibrapac (supra) p.505

kind cannot be found here - the differences in degree of presence of the factor are measured against the same standard all the time. The other argument in favour of a difference of degree rather than kind is this. The difference in kind which results when a factor accumulates to a point where a route is said to be no longer open goes only to the consequence of the factor and not to the factor itself. The route which was open becomes not open - a consequence only. The presence of the factor remains a matter of degree.

We might well ask at this point whether application of these factors would represent a departure from the view expressed in Hanna v Garland. In so far as economic incidents of user are applied the answer must be yes. Finlay J. did not appear to be admitting the possibility that economic considerations could be relevant at all. Therefore a difference in degree of presence would make no difference. Application of loading and service frequency considerations would probably fall within the scope of Finlay J's analysis only to the extent that they went to the physical characteristics of the route.

However, assuming that economic, loading and service considerations may be applied by the courts, when are they present to a sufficient degree to establish a case that a route is not open and usable? The judicial observations contain no clearly worked out indication of when this might be. Notwithstanding this it is probably safe to say that if it is clearly impossible to use the route by virtue of one of the factors then the route will not be considered usable. In the Vibrapac case Turner P. suggested that it is enough that it be simply in relation to the goods involved in the particular case. Support for this view can also be found in McVicar's case. In regard to this point it may be that the difference in wording of s.109 and Reg.24 introduces a distinction between situations under s.109 and situations under Reg.24. Section 109 refers to the "carriage of any goods" and a route "available for their carriage" whilst Reg. 24 refers to "an available route for the carriage of goods" / It is possible to argue that under

s.109 the decision is left to the court in relation to the particular goods while Reg. 24 puts the decision as to the particular goods a stage further back into the hands of the Licensing Authority and its decision as to the terms of the license and the grant of an exemption from Reg. 24./ However, if the loading consideration is to make any sense at all then it will have to be in relation to the particular goods in question.

At the other end of the scale it is clear that mere inconvenience caused by one of the factors will not be enough to affect the route's availability. But the difficult problem is in the middle of the scale, particularly the high end of the middle. One might well ask what the standard will be.

It will not be enough to simply say that when the factor shows that the route is no longer capable of use it is present to a sufficient degree. Such a proposition begs the question in cases to which the answer is not clearly yes or no. Turner P. in Vibrapac provided two examples of when a route might not be available - if the goods were in the form of irreducible unitary loads, or if there had been no crane available in that region. The second of these two examples raises the more difficult point: supposing a crane is available but is 100 miles away, or 200 miles, or 300 miles, or 60 miles - when can it be said that loading and economic factors go to availability? Turner P. suggested that the test was "whether it is reasonably practicable to use the railway route which the Department offers." [20] Tests of reasonableness are well known for their potential uncertainty - especially in the initial stages of development of such a test. However they do have the advantage of flexibility of reasoning and result. Given that the 'available route' question forms only a small (albeit significant) part of the statutory net it may not be unreasonable for the legislature to live with this uncertainty.

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20. Vibrapac p.505

In many ways this in turn would depend on the courts' ability to retain their fairly cautious and restrictive view of the tests for ascertaining availability.

For this reason it may be appropriate for the courts to move towards a rather more overtly 'exceptional' test. By this we mean a test that emphasises the special circumstances of the case - circumstances which make the carriage of these goods in the particular circumstances different from the carriage of other goods. Given that the function of the courts in looking at the statute is to interpret and apply the provisions of the Act, and assuming that the word 'available' does indeed pose difficult questions then a primary aim of the judicial function should be to promote fairness and equality of treatment of those subject to the Act. Therefore it is submitted that it is appropriate that the courts do engage in the limited comparative task suggested above.

Three points emerge from the foregoing consideration of availability:

(i) It lies in an important area and has attracted a significant amount of judicial attention

(ii) The line of authority is not entirely clear or consistent, certainly its future direction leaves room for discussion. An attempt has been made to outline the law on this point, point to its difficulties and speculate thereon.

(iii) It illustrates in rather a neat fashion the role of the judiciary in the area of transport licensing. Furthermore it points to some of the difficulties of co-ordinating and controlling transport by means of rules and restrictions. (However, that is not to say that the criticism is necessarily fatal.) The legislative provisions outline the framework of a restriction which regulates the substance of a very significant area of transport policy. We have seen that even a definitional question is likely to call upon the courts to decide the substance of transport

policy. Economic, loading and service considerations directly concern transport efficiency. Thus far the courts have not been faced with a difficult question. But they have been deciding these questions; so far the answer has always been yes, the route is available. However the possibility that it might not be available seems to loom large. The lines which have been drawn and which will be drawn appear uncertain and possibly arbitrary. The import of the questions is certainly large, albeit in relation to a small area. It might be that the task which the legislature is asking the deciding bodies to do is too difficult, it may be that it would be better to have a rather less detailed way of regulating transport activity. These questions will be taken up again in the closing part of this section and in the next section.

(b) The substance of s.110

Certain parts of this section are relatively clear. Other parts are extraordinarily difficult to understand.

First, the parts which are reasonably straight forward:

(i) Subsection (1)(a) provides that a route including a length of rail specified in the restriction (hereafter '40 miles' - for convenience and clarity) is deemed to be an available route notwithstanding the fact that the goods have to be carried by road at either or both ends of the railway part of the route, whether for any distance or in any direction. This provision is self-explanatory. It was inserted to meet objections that such deviations meant that a route was no longer available.

(ii) An outer limit on the length of journey which might be demanded by the rail restriction is provided by subs.(2B). In the interests of overall transport efficiency this subsection provides that the restriction does not operate if it would require a journey by the composite rail-road route that is more than one-third longer than the shortest road route. As the purpose of s.110 is merely to serve s.109 and Reg.24, both of which contain this outer

limit, one wonders at the necessity for including this provision here. It seems to be an unwarranted duplication. Nevertheless this limit should be borne in mind throughout our discussion of these provisions.

(iii) The length of the railway portion of a potentially available route is to be measured by the Government Railways timetable - subsection (1) (b)

Subsections (2) and (2A)

The search for the meaning of these subsections raises some very difficult questions indeed. These two subsections must also be read with subs. (2B) however as we have mentioned that provision does not cause much difficulty. All three provisions were substituted for the original subs. (2)by s.110 of the Transport Amendment Act 1965. We wish to outline the pattern of events leading to the 1965 amendment and to then attempt to explain the provisions.

The original subs. (2) of s.110 of the 1962 Act read as follows:

> "(2) Notwithstanding anything in subsection (1) of this section, the provisions of section 109 of this Act and of any regulations made or continuing and having effect under this Act (being regulations relating to the carriage of goods by road if there is a route available for their carriage that includes not less than a specified length of open Government railway) shall not apply where the length of the railway from the railway station nearest to the place where their carriage begins to the railway station nearest to the place where their carriage ends is less than is specified in relation to their carriage by that section or by those regulations. "

It is important to note that the subsection used the nearest railway stations to where the carriage began and ended as the points by which to measure the rail length. Thus if goods were being shipped from a factory which was 5 miles from railway station A and 6 miles from railway station B, subs.(2) required that railway station A be used as one terminal point of the length of measured railway.

A reasonably common-sense approach one would think (a point to which we shall return).

In Donovan v Knight & Dickey Ltd [21] the Court of Appeal was faced with a question upon which subs. (2) was silent. In that case there were two rail routes between the same two 'nearest' stations. One route was under 40 miles, the other was over 40 miles. Naturally a choice of the shorter route would have meant that the restriction did not operate, choosing the longer would have meant that it did. By a majority of 2 to 1 the court chose the shorter route. In doing so the majority referred to a "common-sense" approach to the question. In addition North P. referred to the 40 mile limit as a compromise between opposing interests. It is worth noting his approach to the choice; he felt that it would be "contrary to the spirit of the Act to give the Railway Department this advantage" - namely, of nominating the longer route and in fact using the shorter of the two.

A similar observation - but in much stronger terms - was made by Woodhouse J. in Transport Department v Paterson[22] That case centred around the problem of selection of one of several rail lengths and accordingly, composite road-rail routes which in turn depended on selection of the appropriate terminal point (only the finishing terminal point was in issue here.) Counsel for the Railway Department put forward an argument that appeared to require:

(i) the selection of a fictional terminal point that was not the station nearest to the final destination of the goods. Woodhouse J. called it a 'fictional' point because it would not in fact be used. The terminal point which would in fact be used, if the goods were carried by rail, and which was the 'nearest' station involved a route which was longer by more than one-third than the shortest

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21. (supra)

22. /1966/ NZLR 62. Although reported in 1966 the decision was handed down in August 1965. It seems that the 1965 amendment is the statutory rejoinder to this case: Graham's Law of Transportation (supra) p.12-16, Dixon - Road Traffic Laws (supra) p.132 fn. (oa)

road route. Regulation 24(3)(a) (which is in the same terms as the new subs. (2B)) explicitly states that such a route operates to exclude the rail restriction and thus the Railway Department could not say that this route was an available route.

The argument then required the Court to:

(ii) for the purposes of the 'nearest' station rule discard the fictional terminal point and assume the real terminal point - which was in fact 'nearest'

while all the while

(iii) for the purposes of the one-third rule retaining the fictional terminal point mentioned in (i)

The tautology is obvious.

Woodhouse J. made short work of this argument. His comments highlight the debate between the legislature and the judiciary as well as illustrating the import of the 1965 amendments:

> "Despite the interest created by these exchanges, I managed to recall, as they were developed before me, that they were related to the movement of real loads of timber. ....This is an Act designed to regulate the carriage of real goods over real journeys. It cannot have been intended that the legitimate claims of the Railways Department should suddenly be enlarged by the random introduction of railway stations quite unrelated to the 'available route' chosen by it; and I so hold. ..... I prefer to be guided by the principal expressly relied on by North P. /in Donovan v Knight & Dickey Ltd/ to the general effect that a strictly literal application of these sections should be tested against the spirit of the enactment. In my opinion s.110 (2)) was not intended to give to the Railways Department the arbitrary and capricious selection of data which the submissions before me claim for it. " [23]

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23. ibid pp 63-64

Thus, in applying the nearest station rule he looked strictly at the actual points at which the carriage began and ended, the actual routes over which the goods would be carried, thereby refusing the Railways Department the right of selection of random, notional (or fictional) stations and routes.

Amendment of subsection (2) followed immediately. The new subsections (2) and (2A) have not yet been the subject of comprehensive judicial scrutiny. Therefore the task is that of direct interpretation of the provisions.

As noted before subss. (2) and (2A) provide:

> "/-(2) For the purposes of section 109 of this Act and of any regulations made or continuing and having effect under this Act (being regulations relating to the carriage of goods by road if there is a route available for their carriage that includes not less than a specified length of open Government railway), where a route that includes not less than the specified length of open Government railway is available for the carriage of goods, then, subject to subsections (2A) and (2B) of this section, any part of the railway portion if that route that is not less than that specified length shall also be deemed to be part of a route available for the carriage of goods, whether or not the stations at the terminal points of that part are the railway stations nearest to the place where the carriage of the goods (whether by rail or by road if the carriage is to be by rail and road combined) actually commences or ends, and whether or not, if the goods were carried by rail, their carriage would normally begin or end at some other railway station.
>
> (2A) Where a route is available as aforesaid, a length of railway shall be deemed not to be part of that route if the distance by rail between the nearest railway station on that length to the place where the carriage of the goods begins and the nearest railway station on that length to the place where their carriage ends is less than the length so specified./"

These provisions appear to defy comprehension. Unless the intention was to confuse, and that is hardly a tenable proposition, one must conclude that they are very poorly drafted.

Subsection (2) may be broken down into the following structure (which contains several abbreviations, additions and deletions to highlight and explain certain features):

1. For the purposes of s.109 (and Reg.24) ....

2. Where a route (of 40 miles or more) is available

3. Then (subject to (2A) and (2B))

4. Any part of the railway portion of that route (i.e. the route mentioned above with more than 40 miles of railway) that is not less than (40 miles)

5. shall also be deemed to be a part of an available route

6. whether or not the stations at the terminal points of that part are the nearest stations to the place (i.e. original starting point and destination - whether by rail or road/rail) where the carriage of the goods actually commences or ends and,

whether or not if the goods were carried by rail their carriage would normally begin or end at some other station

The effect of this subsection is to deem any part of the railway part of an available route that is 40 miles or more to be a part of an available route in spite of the fact that the stations at each end of that length of rail are not the nearest stations and in spite of the fact that if the goods were carried by rail their carriage would normally begin and end at other stations.

So far so good. The effect of the provision is to allow random selection of stations that are not the nearest stations. Thus the 40 mile rail length can be moved up and down the whole length of rail available and found at any point (provided of course it does not call for a route which infringes the one-third rule). It also allows the Railway

Department to insist on a particular length of rail as the rail part of the available route even though a longer or different rail length would in fact be used. Thus the two propositions in Paterson fall to the ground.

However we now have to consider the effect of subs. (2A).

Broken down into its various parts subs. (2A) provides:

1. Where a route is available as aforesaid (i.e. having found a route with (say) 40 miles or more of rail in it under subsection (2))

2. a length of railway shall be deemed not to be part of that route

if

3. the distance by rail between the nearest railway station on that length to the place where the carriage of the goods begins and the nearest railway station on that length to the place where the carriage ends is less than (say) 40 miles

To repeat part of the wording of the subsection, its effect is that "a length of railway" is "deemed not to be part" of the route found available under the whole of subs. (2) if the distance between the nearest station "on that length" to where (total) carriage of the goods begins and the nearest station "on that length" to where carriage ends is less than 40 miles. An easy point can be disposed of quickly. If there are two rail lengths available, depending on the circumstances one might be cut out under subs. (2A) (if it contains less than 40 miles between nearest stations) and the longer route might remain under subs. (2).

However the difficult question is that in regard to a route with only one rail route in it. We must consider which "length of railway" is deemed not to be a part of

the route under subs. (2A). There are two alternatives; the whole length of the railway found available under subs. (2), or the under-40-mile length between the nearest stations. Under the latter of these two alternatives there may still be an available rail length comprising the whole length found under subs. (2) minus the under-40-mile length. The first of these alternatives seems to be the correct one. The distance to be measured is that between the nearest stations "on that length". In their ordinary meaning these words appear to refer to a length that is longer than the distance between the two stations. The stations simply have to be on that length and it is that length which is deemed not to be part of an available route. Furthermore this wording is in marked contrast to that adopted in subs.(2) where the stations concerned are explicitly referred to as "at the terminal points of that part". One might therefore support the natural construction with the argument that if the legislature had intended the stations in subs. (2A) to be terminal points stations it would have expressly said so. An even stronger indication that this is indeed the case is provided by the relationship between the two subsections: subs. (2) - subject to subs. (2A) - provides that a length will be counted as part of an available route whether or not the stations at the terminal points of that route are the nearest stations; subs. (2A) provides a counter and a safeguard to that random selection by providing that nevertheless that length will be deemed not to be part of an available route if in fact the distance between the stations nearest the commencement and ending of the carriage of the goods is less than 40 miles.

In this way the problem of the conflicting approaches in the two subsections to the nearest station principle is solved. The approaches do in fact conflict and accordingly the second approach operates as a limit on the first. Subsection (2A) limits, rather than totally conflicts with subs. (2) because lengths of rail deemed to be part of a route under subs.(2) will not always be struck down by

subs. (2A) e.g. Paterson, where the distance between the two nearest stations was more than 40 miles but where the Railway Department had to nominate a not-nearest terminal point because that distance infringed the one-third rule. Under subs. (2) that fictional nomination can now be made and it will not be struck down by subs. (2A).

The desirability of this capacity to nominate fictional not-nearest terminal points is another question altogether. One wonders how this will aid overall transport efficiency. The rail restriction was originally circumscribed by real limits. The licensing provisions of the Act were designed to regulate transport efficiency by a comparison of real alternatives - in this case carriage of goods by road or by rail. To reject the comparison of real routes seems to run counter to the object of the Act. It also creates real anomalies, obfuscates the task of those who administer the Act and obscures the policy behind the restriction.

Some of these points are instanced by the two latest reported decisions on s.110. Our aim is to discuss these cases by way of examples of the operation of the restriction - thus concluding the substantive discussion of s.110 and the chronology of its course.

Transport Department v Reeves Transport Ltd [24]

This decision is an example of the way in which one of two possible rail lengths is selected under s.110. The defendant was charged (presumably under s.108(1)) with the offence of carrying goods otherwise than in conformity with the terms of its licence. The term of the license which was at issue was of course Reg.24. The central issue was whether there was an available route so that Reg.24 could be said to apply in this case. It was clear that if the restriction did apply the defendant had contravened it by carrying the goods by road. There were two possible

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24. /1970/ NZLR 155

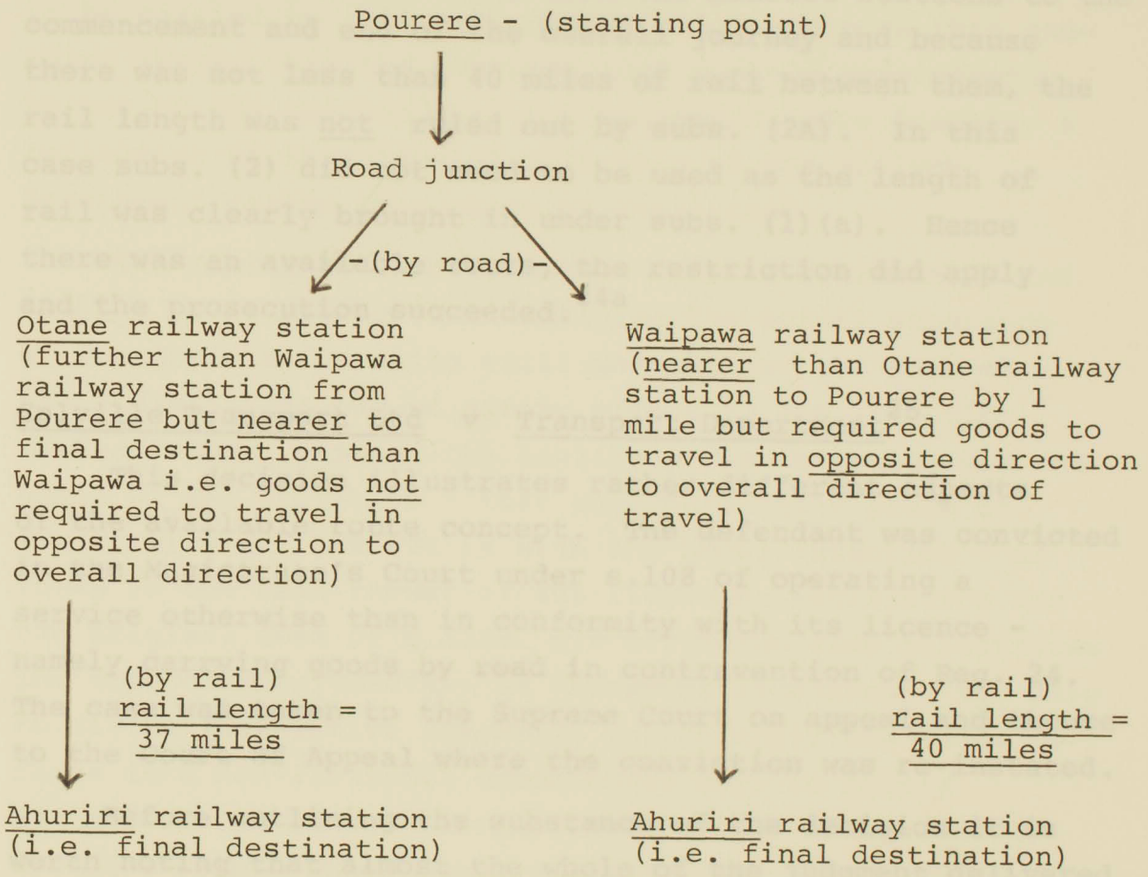
composite road-rail routes, one brought the restriction into operation, the other did not. The question was which route was selected by s.110.

The composite road-rail routes and the road route are outlined in Diagram One.

Diagram One

1. Road Route - Pourere - Ahuriri (61 miles)

2. Composite road-rail routes. (These routes initially follow the same road but then diverge).



Neither of the two composite road-rail lengths were ruled out by the one-third rule. However the prosecution would have failed if the Pourere-Otane-Ahuriri route was the route to be applied in determining whether there was an available route; the length of rail on this route was too short (37 miles) to set the restriction into operation: but this was not the route selected by s.110.

Beattie J. determined that the Pourere-Waipawa-Ahuriri route was the relevant route under s.110. There were two reasons for this choice. First, this route was deemed to be available under s.110 (i)(a) as it included more than 40 miles of rail - and that paragraph provides that it is irrelevant that the goods have to travel by road in the wrong direction (or for any distance) to get to the station. (As noted in the report the one-third rule is the outer limit on the distance involved.) Secondly, because Waipawa and Ahuriri were the nearest stations to the commencement and end of the overall journey and because there was not less than 40 miles of rail between them, the rail length was not ruled out by subs. (2A). In this case subs. (2) did not need to be used as the length of rail was clearly brought in under subs. (1)(a). Hence there was an available route, the restriction did apply and the prosecution succeeded.[24a]

Colville Transport Ltd v Transport Department[25]

This decision illustrates rather different aspects of the available route concept. The defendant was convicted in the Magistrate's Court under s.108 of operating a service otherwise than in conformity with its licence - namely carrying goods by road in contravention of Reg. 24. The case was taken to the Supreme Court on appeal and thence to the Court of Appeal where the conviction was re-instated.

Before outlining the substance of the decision it is worth noting that almost the whole of the judgment delivered

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24a. Before leaving this case it is worth mentioning the reference by counsel for the defendant to the constant amendments to the legislation to nullify various judicial interpretations of the available route concept. Counsel also noted that his client had used the road route for many years in the belief that he was not infringing the restriction. It is interesting to speculate how many other persons operate under a similar misapprehension.

25. /1971/ NZLR 606

by North P. consitiutes a criticism of the past history and present state of s.110. The comments which he offered are interesting in their own right and as pointers to the actual and perceived role of the judiciary vis a vis the legislation. The substance of his criticism was that measured against the spirit and intention of the Act, the amendments to s.110 left him with the 'uneasy feeling' that the Railway's preference had been pushed too far. This comment was primarily directed at the current fictional character of the section - by virtue of which goods appear to be carried by rail over routes which are more than one-third longer than the shortest road route. Consequently he was of the opinion that the amendments were probably a reflection of the views of officials of the Railway Department rather than those of Parliament.

The making of these comments shows a willingness and ability to stand back and criticise the actual substance of the legislation while still maintaining the role of the judiciary as one of giving effect to the intention of Parliament. Indeed the Legislature's intention was the basis of the criticism - that this particular piece of legislation did not fit in with the broad intention - as found in the main thrust of the licensing legislation and the original form of s.110. His criticism also illustrates the role of the judiciary in transport licensing; not only to divine legislative intention but to apply the rules to facts in a non-fictional commonsense way, to fairly administer the balance between the various interests, to secure a result which appears reasonable, and to guide the Licensing Authorities in their application of the Act. The inter-play of legislative amendment and judicial interpretation is itself evidence that the courts are indeed actively engaged in the substance of licensing.

The facts of this case were that Colville Transport Ltd carried goods by road from Otahuhu to Coromandel. Both these points were within one Licensing District - the No. 2 District and Colville's licence extended to the No.2 District only. There were three possible composite road-rail routes

between Otahuhu and Coromandel:

(1) From Otahuhu to Thames by rail and then by road to Coromandel.

However this route was more than one-third longer than the shortest road route from Otahuhu to Coromandel and therefore did not serve to operate the restriction - Reg.24 (3)(a).

(2) From Otahuhu to Pokeno (Pokeno was in the No. 2 District) by rail and then to Coromandel by road.

But this route did not set the restriction into operation either because the rail length from Otahuhu to Pokeno was less than 40 miles.

(3) From Otahuhu to Te Kauwhata (which was outside the No. 2 District and in the No. 3 District) by rail and then to by road via back roads to Coromandel.

This route had just over 40 miles of rail length in it but because of the back roads contained in the road portion it was not, and would not be used in practice.

Thus the only route which the Railway Department could nominate as an available route was the third of three routes. However counsel for Colville argued that this route was not available for two reasons:

(i) It was not in fact used

(ii) Colville had no licence for the No. 3 District and therefore could not use the nominated route.

Both these arguments failed. The first argument was covered by that part of subs. (2A) which provides that it does not matter that the goods would normally be carried solely between the stations nominated. North P. and Turner J. disposed of the argument on this basis (albeit rather more in passing than directly)[26] and Turner J.

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26. p.609 lines 21-39, p.617 lines 37-44 respectively

dismissed the argument as irrelevant because the route actually used was a matter within the discretion of the consignor.[27] The second argument failed on two grounds:

first, Reg.24 states that there need only be "an available route for the carriage of goods" and not a route available to this licensee;

secondly, the defendant was not on the horns of a dilemna on account of the need to accept goods under Reg.23 while being prohibited from going outside his own licensing district to carry them (Reg.24). Counsel for Colville had argued that it was obliged to accept all goods under Reg.23; that it was therefore obliged to accept the goods in question in this case; that if the third composite route is the route it must comply with to satisfy Reg.24 it must go outside its own licensing district to pick the goods up at Te Kauwhata; and therefore that it was on the horns of a dilemna - it must either refuse the goods - and thus commit an offence - or accept the goods and go outside its own Licensing District - thereby also committing an offence; the only solution to this dilemna was to say that the route was not available. The simple answer to this, readily provided by the court, was that Reg.23 only obliged carriers to accept goods "as authorised" by their licences. Thus Colville was not obliged to accept the goods at Te Kauwhata and was not in the dilemna envisaged.[28] Thus the composite route was deemed to be an "available route".

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27. p. 613 lines 39-49

28. This contention had been accepted in Donovan v ATW Transport Ltd (supra). The Court of Appeal in Colville therefore disapproved that decision. In any case Reg.24 had been amended (by the addition of para (4)) following the ATW case to make it clear that the composite route could require that the goods be taken to a different Licensing District. Given the correct interpretation of Reg.23 that amendment was probably superfluous.

IV. THE COURTS AND SECTION 110 - A JURISPRUDENTIAL ANALYSIS

A. Introduction

Thus far we have considered the nature and content of the policies behind the restriction, the framework of the restriction and the process of interpretation and application of s.110 by the courts. In this section of the paper we shall be seeking to identify the proper role of the courts in dealing with the statutory framework of the restriction. We shall do this by examining the context within which the courts are operating. This context does not simply refer to the organisational structure of the licensing provisions. It also refers to the nature of the processes of decision-making required at various points of the structure. The major aim of this section is to evaluate the courts' approach to s.110 and to comment upon the section itself. Our first concern will be to establish a methodological framework within which we may attempt this analysis.

B. Policy, Principles, Rules

We have seen that the courts have been making decisions under s.110. The method by which we propose to analyse those decisions focusses upon two inter-related facets of decision-making: the degree of discretion which the decision-maker has, and the nature of the guide-line (if any) fettering his discretion.

Discretion and Guide-lines. Discretion is referred to by Jowell[1] as "the room for decisional manoeuvre possessed by a decision-maker." It is clear that the degree of discretion possessed by the decision-maker depends upon the degree of constraint imposed upon his room for decisional manoeuvre. Most often these constraints are in the form

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1. Jowell J. The Legal Control of Administrative Discretion /1973/ Public Law 178, 179.

of specific guide-lines of which the decision-maker must take cognisance. Of course there are different kinds of guide-lines. We wish to consider two - rules and principles. However, before moving to discuss these it is appropriate that we identify and discuss the first part of the triumvirate - policy.

1. Policy.

Jowell defined policies as "broad statements of general objectives."[2] Dworkin[3] said that "I call a 'policy' that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community (though some goals are negative), in that they stipulate that some present feature is to be protected from adverse change)." Thus a policy exists at a more fundamental level than do principles and rules; furthermore it makes a more general statement. In so far as policies express aims they are the source of any principles and rules that are created in their service. One might therefore expect such principles and rules to reflect the policy from which they stem. It is therefore appropriate at this point to briefly reiterate the policies which lie behind the rail restriction.

We saw earlier[4] that the overall purpose of transport policy is to develop (in very broad terms) an efficient transport system. We also discovered that questions under this head are wide-ranging and extremely complex. We noted[5] that the Transport Policy study described transport policy as a "seamless web" with a high degree of inter-relationship between the various parts of the overall policy. Transport policy questions can be described in Fuller's terms as "polycentric problems."[6] A polycentric problem is one with many centres. Fuller chose to illustrate

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2. ibid p.183

3. R.M. Dworkin The Model of Rules (1967) 35 Un. of Chi L.R. 14, 23.

4. Part II (supra)

5. supra p.5.

6. Lon L. Fuller, Collective Bargaining /1963/ Wisconsin Law Review, 3, 33.

the essential idea of the term by using the analogy of a spider's web: "Pull a strand here, and a complex pattern of adjustments runs through the whole web. Pull another strand from a different angle and another complex pattern emerges."[7] The point which both Fuller and Jowell make about polycentric problems is that they are normally inherently unsuited to decision by adjudication. However that is to anticipate our argument. The only point which we wish to make at this stage is that transport policy problems are polycentric, that specific policies spring from this base and thus contain polycentric elements. For instance decisions as to when a licence or exemption will be granted require an understanding of the background to the problem together with an appreciation of the import of the policy. The policy itself springs from a highly complicated inter-model assessment with many centres of analysis, choice and consequence.

We concluded that the rail restriction reflects a policy of protecting and promoting the Railways Department by preserving for it a certain proportion of goods haulage.[8] As we noted this policy not only stems from a policy of pure protection but from decisions about overall transport efficiency, namely: that overall efficiency and the interests of users and providers of transport call for a restriction on competition with rail transport.

All of the policy statements relating to the restriction which we have referred to or sighted have expressed these aims in broad terms. We now wish to examine the way in which this policy has been put into operation. Thus we turn to principles and rules and the structure within which they exist.

2. Principles

Before discussing the substance of this part of our

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7. ibid.
8. supra pp 6-12

model for analysis we wish to mention briefly the reasons why we are embarking upon this discussion. Principles are, of course, part of the analytical model which we have adopted. By this discussion we aim to distinguish principles from rules; to show that the rail restriction does provide one sphere within which decisions are made on the basis of principles; and in this fashion to begin to illustrate the proper role of the courts.

Principles are different from rules in that they provide the decision-maker with a more general direction. While setting forward a particular policy they provide for far more flexibility of application than rules do. Hence they leave the decision-maker with more discretion than a rule does. One example will suffice[9]: A policy objective may be "To prevent unsafe driving." One example of a rule made under this policy would be a 50 k.p.h. speed limit. It is a rule because all we have to do to determine its application is to determine whether the prescribed event actually happened i.e. was the driver exceeding 50 k.p.h? However a principle would require "a qualitative appraisal of the fact, in terms of its probable consequences or moral justification."[10] An example can be given in the principle requiring drivers to exercise "due care".[11]

As Jowell notes a principle can be made more precise by the use of criteria specifying certain factors which may or may not be taken into account in making a judgment on the basis of the principle. A principle may also be made more specific by subsequent elaboration by the decision-maker applying the principle. This capacity for elaboration constitutes another way in which principles are more flexible

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9. This example is drawn from Jowell (supra) pp 201-203. For a more complete discussion see pp 200-206. We note that, along with Dworkin and others we have subsumed principles and standards under the one head for the purposes of our treatment.

10. ibid

11. For an excellent discussion of the nature of principles (and rules and policy) see Jowell, Dworkin and Fuller (supra) together with H. Hart and A. Sacks The Legal Process (10th ed) 1959.

than rules: they may be developed on a case-by-case basis thereby changing and developing over time.

We note four limits on the use of principles as factors by which decisions may be governed:[12]

(i) The reference to a standard or principle must be meaningful e.g. a principle may refer to a community consensus which does not exist or cannot be ascertained or is in an extreme state of flux. A decision on such a basis is highly vulnerable to well-founded criticism.

(ii) Where principles are to be applied "by comparing the situation in question with other like-situationed situations, either those that are directly competing (as in a licence application) or existing in the community, the situations being compared must be capable of being placed in a similar class or category."[13] i.e. like must be judged against like.

(iii) Principles are not generally appropriate tools by which to evaluate unique or non-recurring situations.

(iv) Polycentric problems may be unsuited to evaluation in terms of principles. If a principle is expressed in broad terms (e.g. "public interest") the parties to a dispute or application may not know what to direct their arguments to. On the other hand a precise set of principles governing a decision-maker may make a decision on a truly polycentric problem impossible.[14]

We now turn to identify that sphere of the rail restriction within which principles are the governing factors for decision-making. That sphere is the process of granting exemptions from the restriction.

We noted earlier[15] that the statutory framework is set

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12. ibid

13. Jowell (supra) p.205

14. We shall not discuss these limits in detail as the principal focus of this paper is not upon principles. However we note that the principles laid down for the Transport Licensing Authorities may be susceptible to justifiable criticism on some of these grounds.

15. supra p.17

up in such a way that a person who falls within the ambit of the restriction cannot carry goods in contravention of the restriction unless he obtains an exemption from the restriction. The bodies which have jurisdiction to determine an application for exemption are the Transport Licensing Authorities (together with the Transport Licensing Appeal Authority on appeal). Their decisions as to the grant or refusal of applications for exemption (which are usually made at the same time as an application for a licence - or amendment to a licence) are governed by principles imposed by the Act.

The relevant section is s.123 which relates to applications for goods - service licenses and provides that in determining such applications:

(1) the Licensing Authority "shall have regard to"
  (a) the interests of the public generally,
    - primarily those of persons requiring transportation facilities
    - secondarily those of persons providing transportation facilities; and
  (b) the needs of the district(s)

(2) the Licensing Authority "shall further have regard to - "
  (a) applicant's financial ability; and
  (b) likelihood of his carrying on the service satisfactorily

(3) "If, having regard to the matters mentioned in subsections (1) and (2)... the Licensing Authority is satisfied that - "
  (a) the proposed service is desirable in the public interest; and
  (b) "The proposed service would not operate adversely to the public interest where the application involves exemption from the provisions of any regulations..."(protecting the railways) -
  the Licensing Authority shall grant the application... unless it decides the grant

of the application would - "injure materially the economic stability of the transport services of any kind.."
- or - "would prejudice the provision of or maintenance of a reasonable standard of living and satisfactory working conditions in the transport industry."

We are specifically concerned with subs (3). (However we would point out the tiered order in which the Authority is to look at various aspects of an application). Subsection (3) requires the Authority to be satisfied that a service based on an exemption from the rail restriction "would not operate adversely to the public interest." In the terms mentioned above this is clearly a principle. The consequences do not automatically flow from the application of the principle to a given set of facts. The principle points in a certain direction but still calls upon the Authority to make a qualitative assessment of the implications of the facts. Moreover the principle is very vague. It requires elaboration in substance as well as in application to real situations. Therefore it leaves a high degree of discretion with the decision-maker.

We shall cite but one example of the nature of the decision-making process undertaken by the Appeal Authority. Our purpose in doing so is to highlight certain features of the process of application of the principle.

Appeal Decision 2407[16] A road haulage firm, by name Car Haulaways (N.Z.) Ltd, made a series of applications for extension of its licenses and exemption from the rail restriction.[17] Naturally enough in each case the granting of the extensions would have meant that the company would have had greater freedom to set its particular form of road transport in competition against New Zealand Railways.

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16. Butterworths Road Transport Licensing Appeals, Volume 5, p.588.

17. Appeal Decisions 1936, 1990, 2063, 2199 preceded A.D.2407. It is appropriate to note that there were various issues and facts determined in these former cases which can be seen to have fallen somewhere between res judicata and precedent in their effect on subsequent decisions.

The applications were therefore opposed by N.Z.R. In disposing of the appeal the Appeal Authority made several observations which are pertinent to our discussion:

(i) "The decisions of the Appeal Authorities enunciate certain principles which it is a Licensing Authority's duty to apply to the particular facts before him."[18] These principles were clearly envisaged as something in addition to the plain wording of s.123. It is worth commenting that the Appeal Authority has a profound dislike for hard and fast rules and attempts to ensure that it only develops principles as time and the cases flow by. Indeed the Appeal Authority was careful to note that he was not constrained or fettered by the previous Car Haulaways' decisions and that his task in relation to those decisions was to apply to the facts before him the principles which were to be gathered from those decisions.[19] Furthermore at the conclusion of his decision he again pointed out "that there must never be any question of laying down a rule that may fetter the exercise of the discretions which are reposed in the Licensing Authorities under the Act."[20] These comments stand in an interesting juxtaposition with that made by Haslam J. in the Court of Appeal when determining the final appeal from this application. Haslam J. was focussing upon the flexibility of the statutory test (or principle) alone when he said that "with the same material before different tribunals, opposite decisions could well be pronounced in the application of such a test to the evidence in a contest of this kind."[21]

Thus we observe that in this example the public interest test was seen as providing flexibility and discretion to the tribunals. Moreover this example is consistent with the general tenor of the Appeal Authority's decisions. It shows that the Appeal Authority considers that it has gone further than simply applying the broad public interest to every situation before it.

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18. supra p.599.
19. ibid p. 589.
20. ibid. p.599
21. A-G v Car Haulaways (NZ) Ltd /1974/2 NZLR 331, 339.

(ii) One might therefore ask what purpose is served by the enunciation of these principles. The Appeal Authority observed that "this enables would-be applicants to assess how their applications are likely to be dealt with and assists consistency of decisions"[22] Thus such principles outline more clearly the case which a party to a hearing has to meet. Such elaboration was certainly required in the case of the test provided by s.123. A test of 'public interest' is broad enough at any time let alone in regard to issues of transport licensing and the rail restriction (the complexity of which we have already referred to).

(iii) The transcript of evidence before the Licensing Authority[23] together with the decisions of the Licensing Authority and the Appeal Authority show reference to the following factors in determining the public interest: capacity for back-loading on journeys, damage to goods in transit, overall cost to consignors, overall efficiency, suitability of goods for carriage by rail, amount of inconvenience or hardship caused by requiring carriage by rail, time in transit, national aspects of N.Z.R., future business for N.Z.R., profitability of carriage of particular goods for N.Z.R., loss to N.Z.R. if goods not carried.

In many ways the Car Haulaways' cases[24] have given rise to the most comprehensive and sophisticated argument yet on an application for exemption from the restriction. Most of the previous cases do not reveal such a comprehensive inter-model assessment of road and rail transport. In many cases it seems that the public interest means simply protecting N.Z.R. from loss of traffic. Protection is of course the policy behind the restriction but the statute also allows for exemptions from the restriction. Thus it does not help very much to simply say that "the purpose is protection and protect we shall." The question of

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22. supra, p.599

23. A massive 432 pages.

24. One should include Appeal Decision 2580 in this list.

when an exemption is appropriate is left untouched by such a reply. Thus the development of a set of principles to which applicants might address their arguments and with reference to which the Authorities may determine such applications.

We do not propose to engage in a protracted debate about the finer points of the status of these factors. It may be that they are more appropriately called 'standards' than 'principles'. We have already noted that for our purposes we have subsumed both under the one head and concentrated upon the nature of the guide-line and the amount of discretion it leaves. These factors represent an elaboration on the statutory principle, constitute guide-lines for the Authorities' decisions, are intended to be flexible and do not dictate a particular answer.

The primary points which we wish to draw from this brief discussion of principles are these:-

- principles are more flexible than rules and accordingly give a decision-maker more room for decisional manoeuvre.
- the Transport Licensing and Licensing Appeal Authorities are governed in their decision-making by a broad principle upon which they have elaborated.
- the Authorities are specialist tribunals who inevitably build up a certain amount of expertise in the task of determining exemptions from the rail restriction.
- therefore, there is a flexible specialist body which may be approached by persons who are caught by the net of the legal parameters of the rail restriction and who wish to obtain a substantive exemption from the restriction.

3. Rules

First, we wish to define what we mean when we refer to a 'rule'. Roscoe Pound declared that "Rule or rule of law is often used for every type of legal precept."[25] Obviously this would introduce the very kind of confusion which we are seeking to avoid. He went on to define the

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25. R. Pound, Jurisprudence (1959). Vol II at p.124

term more closely - "it means a legal precept attaching a definite detailed legal consequence to a definite detailed state of fact."[26] Dworkin has supplied a useful elaboration:

> "The difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in given circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision."[27]

While this statement usefully illustrates the distinction we wish to point to Jowell's reservation about Dworkin's all-or-nothing approach:[28]

> "It should not be assumed however that because rules are concrete guides for decision addressing themselves to specific fact-situations that their application can always be mechanical. As we have seen, a parking meter, for example, may simply register the end of a maximum time limit. But since rules are purposive devices (they are techniques to effect a broader policy) and because language is largely uncertain in its application to situations that cannot be foreseen, the applier of a rule will frequently be possessed of some degree of discretion to interpret its scope. In doing so he will go beyond the wording of the rule in order to discover and weigh controlling principles and policies. He will not be a passive "applier" but will himself be an agent in the rule's elaboration."[29]

Thus a rule is the most precise form of general direction of those in the model which we have adopted. In Jowell's terms it is the most precise form because "it requires for its application nothing more or less than the

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26. ibid

27. supra, at p.25

28. It is not entirely apparent from this quotation but Dworkin views a decision-maker applying a rule as one who is simply carried in the main-stream of the rule and does not have a hand in its direction. He appears to envisage decision-making on the basis of rules as a quite mechanical process of compliance with the rule in application. With respect we do not agree with this approach.

29. supra, pp. 201-202.

happening or non-happening of a physical event."[30] Depending upon the precision with which it is drafted a rule will normally leave very little discretion indeed in the hands of the decision maker. Naturally the more vague and uncertain a rule is the more discretion it provides - and vice versa. Although we do not wish to make a rigid distinction we submit that this discretion to interpret the scope of a rule has two main aspects: one - interpretation of the meaning of the rule; two - application of the meaning to a given set of facts. We reiterate that we do not see these as mutually exclusive; indeed there is a definite interdependence and dialectic between the two.

Before departing from our definitional task we shall outline two examples of a rule. One example which we have already discussed is that of a 50 k.p.h. speed limit (supra) which we called as a rule because the pre-condition of its application is simply a finding of fact that Driver A was exceeding 50 k.p.h. On the assumption that the rule in the example creates an offence we see that the rule attaches "a definite legal consequence to a detailed state of fact."[31] We also see that this technique of direction is different from that utilised by the principle that drivers must take "due care". To take a different example, a rule may provide that it is an offence for any person to appear in a public place without any clothes on. A principle concerning the same kind of behaviour might make it an offence to "indecently expose" ones-self in a public place. The rule simply asks whether X was found in a public place with no clothes on. The principle calls for a qualitative appraisal of that fact in terms of current standard standards of morality, decency, dress etc. In such an instance the policy would be one of attaining decorum and good conduct.

We are now finally in a position to assess the role of the courts in interpreting and applying s.110.

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30. ibid p. 201.

31. R. Pound, supra.

C. Section 110 - A Rule?

We submit that s.110 constitutes a rule in terms of the definition which we have adopted. It goes to considerable lengths to outline, in Pound's terms, "a definite detailed state of fact" to which it is to apply. Although paradoxically it is just this attempt which makes the section quite unclear and leaves some doubt indeed about the situations which it covers.[32] The section also attempts to attach "a definite detailed legal consequence" to the situations which it is found to apply to. Here too, the attempt at precision has created more uncertainty than it has eliminated.[33]

Furthermore s.110 attempts to leave very little discretion indeed to persons applying it. The tenor of the section is highly mathematical - if x then y - without a qualitative appraisal of the implications of x. The one part of the section which appears to have in fact left room for some discretion (even though the legislature probably did not intend to) is found in the lack of a qualitative definition of the word 'available'. As we noted above[34] the primary concern of the provisions is to quantitatively compute and select a route as available. No other attempt to define the meaning of the word is made within the section itself. Thus the task of interpreting has been left to the courts. Nevertheless the section remains a rule.

D. The Courts and Section 110 - An Evaluation

We might observe at this point that although s.110 gives detailed coverage to the question of 'available route' its content is very broad. It is broad in the sense that there is an enormous variety of combinations of road and rail routes which might be said to be available. The section attempts to cover this variety and select certain routes only. We noted in Part II the difficulty which it encounters in achieving this. We also referred to the difficulties which the courts have had in interpreting and applying the rule. In evaluating these difficulties

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32. supra, pp. 30-38.

33. ibid

34. supra pp. 19-20 et seq.

we wish to adopt the same two heads of analysis as we did in Part II:

(a) the meaning of available in s.110
(b) the substance of s.110

(a) the meaning of 'available' in s.110

We saw that in interpreting and applying the concept of an 'available route' the courts elaborated upon the rule in the sense that they said what they felt the words meant, and outlined the factors which they would, or would not, take account of in reaching their decisions. In Jowell's terms the courts have indeed been reasonably active "appliers" of the rule, looking beyond the wording "to discover and weigh controlling principles and policies" (supra).

We have noted the courts' anticipation of a difficulty in deciding, as a question of degree, that a route is not available on the basis of economic, loading or frequency of service factors. However on the basis of our finding that s.110 is a rule we would question the degree of discretion which the court in McVicar[35] and Vibrapac[36] (supra) seemed to wish to reserve for themselves.

As we mentioned earlier Regulation 24 simply requires that there be an "available route for the carriage of goods". Thus in a prosecution on a charge of infringing s.108 and this regulation it should not be open to the courts to decide that a route is not available because it is not available to these particular goods. The regulation does not appear to give the courts the discretion which they wish to assume for themselves. The discretion to determine whether it is economically reasonable for a transport operator to use the rail to transport particular goods is vested in the specialist tribunals - the Licensing and Licensing Appeal Authorities. An operator is free to apply to the Licensing Authority for a substantive exemption from the restriction at any time. We have seen that the tribunals are accustomed to considering difficult issues of economic and loading considerations, have built up a

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35. supra
36. supra

certain expertise in the area and elaborated principles by which it will decide such issues. It is therefore more appropriate that such a discretion be exercised by the tribunals and not the courts.

But the discretion of the tribunals only appertains to the substance of an exemption and not to a decision as to whether a route is available. However, the existence of this discretion does help us say that there is no real need for the courts to attempt to stretch the rule in the interests of justice and reasonableness. This may be achieved by another means - a substantive exemption.

The tribunals' discretion on the basis of principles copes rather better with the same kinds of questions that the courts have been grappling with at the outer edges of the "available route" concept. Moreover the words of the rule have not changed over the course of time whereas transport technology has. In particular, the increasing trend to unitisation of loads has meant that there is a far greater possibility that a rail route may be a completely impracticable mode of carriage for particular kinds of goods. Indeed this argument has formed a major part of many applications for substantive exemptions. Principles are more able to cope with changes over time because they are more flexible. Therefore it may be the case that a principle which supplied guide-lines of a more fundamental nature may be a more appropriate way in which to guide decisions on availability.

This same argument applies to decisions on cases brought under s.109. It seems that the court may ask whether the route is available for the carriage of the particular goods in question.[37] Yet this only serves to open up the can of worms. The courts must then come to grips with a rule which provides little fundamental guidance as to the nature of availability but which overtly leaves little room for decisional-manoeuvre. Over the course of time the courts have envisaged the possibility that the rule will encounter situations which it will not clearly meet. The courts have envisaged the exercise

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37. supra, p.27

of an enlargement of their discretion to apply and interpret. Without the provision of more fundamental guidelines such forays are likely to be somewhat schizophrenic, definitely uncertain. Thus it seems that a principle may be a more suitable technique by which to guide decisions on the meaning of availability.

(b) the substance of s.110

We have noted the detailed nature of the provisions of s.110. An attempt has been made to define the situations to which the section applies (together with the consequences of application) in quite some detail indeed. Yet different sets of circumstances have cropped up under the rule which have not been provided for in its provisions. Thus the courts elaborated on the rule by attempting to ascertain the policy behind it (legislative intention) and to apply it in a common-sense, real, consistent and equal way.[38] Thus the courts elaborated on the rule in their interpretation and application of it. In doing so they exercised discretion in the way in which they perceived it and related it to actual situations. Even at this point the rule showed some strain in that it could not do what it attempted to do - lay down detailed consequences attaching to a detailed state of fact.[39]

The strain becomes more apparent in the new subsections (2) and (2A). In its search for detail and rigidity of application (thus attempting to limit the courts' discretion) the language and structure of the rule have become tortuous and unclear. Paradoxically the section now calls for an even greater search for its meaning. We would guess that the debate between the courts and the legislature over this section is not yet over. The nature of the debate is quite close to the heart of the courts. They are interested in applying the rule in a common-sense and practical way. The legislature has attempted to curb that tendency by allowing

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38. e.g. Donovan v Knight & Dickey Ltd (supra), Transport Department v Paterson (supra).

39. Although we too would join with North P. Vibrapac (supra) in his call for an examination of the content and direction of the present rule.

the Railway Department to select notional (or, fictional) routes at random. In doing so it has made the rule more difficult to apply. In so far as the rule leaves some uncertainty the courts may well approach the uncertainty in a common-sense way.

In any case one suspects that there will soon be a fresh combination of facts which will not quite fit the rule. The past history of the rule certainly suggests that this may be the case. The nature of the problem itself also suggests that this will happen. The rule attempts to select one among a number of combinations of routes. The very nature of combinations is to produce new and different combinations. Therefore the present rule may soon confront a situation which it does not quite cover and again call upon the courts to exercise their discretion. In our opinion this situation calls more for a principle than it does for a rule. A principle would be flexible enough to cope with the changing and varied combinations of routes. Yet it would also be a more meaningful direction. It would (hopefully) not obscure the policy as much as the present rule in that it would point more directly, at a more fundamental level, to the reasons for particular decisions. The courts would then have a discretion to elaborate upon the principle on a case-by-case basis always bearing in mind the first principle of justice - the requirement of consistency, uniformity and equal treatment of those to whom the principle is to be applied.

V APPRAISAL

We have looked at the policies which lie behind the rail restriction. We have identified and discussed the legal parameters of the restriction, which is hopefully of use in its own right. Moreover we have seen something of the way in which a policy is transformed into a rule. In our discussion of the jurisprudential model which we chose as our tool of analysis we noted that rules are not the only way in which policies may be put into operation. Principles may be used instead. Indeed we noted that the transport licensing tribunals are guided by, and even create, principles as guide-lines for decision. We have found the model of policy, principles and rules to be useful to our analysis of the nature of s.110 and the role of the Court in interpreting and applying the section. For our purposes the most significant feature of this model was the way in which it illustrates the nature of the decision-making process. We found the identification and analysis of discretion to be singularly helpful in this regard. Thus the mode of analysis is perhaps noteworthy in its own right.

In part IV of the paper we outlined our conclusions as to the nature of s.110, the role of the Courts in interpreting and applying it and the dialectic between the two. At this point we wish to re-iterate our suggestion that the Courts may be laying claim to too much discretion in defining the word available. We would also point again to the unsatisfactory state of s.110. We believe that this section would be better cast in terms of a principle which would secure flexibility while providing a clearer, more fundamental and more meaningful set of guidelines. In any event, if s.110 is to remain a rule it should be a better one. It should be easier to understand, clearer in structure and language. We doubt whether this can be achieved without resort to principles.

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The jurisprudence of national rail routes.

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