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# State Regulations Affecting Interstate Commerce

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# MICHIGAN LAW REVIEW

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## NOTE AND COMMENT.

STATE REGULATIONS AFFECTING INTERSTATE COMMERCE.—The line between regulations of intrastate and interstate commerce is difficult to draw and hard to maintain. This is well illustrated in the recent case of *St. Louis Southwestern Railway Company* v. *Arkansas*, decided by the Supreme Court of the United States April 4, 1910, Advance Sheets, May 1, 1910, p. 476, 30 Sup. Ct. 476.

This was an action by the prosecuting attorney against the railway company to recover penalties for alleged violation of the rules of the railroad commission of Arkansas and certain statutory provisions, making it the duty of railroad companies to furnish shippers with cars upon proper demand, and subjecting them to a penalty for failure.

One Reinsch had made written demand of the company for cars to ship hay between places in the state from October 30, 1905 to January 20, 1906, and was furnished 51 less than he demanded. He complained to the railroad commission who found the company had violated the rule and the statute and directed the prosecuting attorney to sue for the penalty. The company defended on the ground that it was engaged in interstate shipments of freight over its lines in Arkansas, Illinois, Louisiana and Missouri, and by connect-

ing lines throughout the United States; that its equipment was ample for its freight traffic both state and interstate; that in anticipation of greater demand it had made an effort to buy 2000 more cars but had been unable to get them, and had therefore begun to construct shops of its own to build its cars; that at the time of the alleged default there was an extraordinary demand for cars for both interstate and local traffic upon its own and connecting lines; that it had equally distributed its cars to shippers along its line giving no preference to interstate over local shippers; and that "it would have been impossible to comply with the rule without discrimination against its interstate commerce shippers, and therefore obedience to the rule would have resulted in a direct burden upon interstate commerce," and the rule and statute were therefore in conflict with the Constitution of the United States conferring power to regulate commerce among the states upon Congress. This defense was insisted upon in various ways but overruled by the trial court, and a verdict of $1,350, with judgment thereon was rendered against the company. This was affirmed by the Supreme Court of the state, 85 Ark. 311, 107 S. W. 1180, 122 Am. St. Rep. 33.

The facts as stated in the opinion of the State Supreme Court were that 70 per cent of the freight traffic of the road originated on its own line; that it had 9517 freight cars; 3982 of these were in daily use upon its own line, and 5525 off its line, while only 2519 foreign cars were upon its line, with a daily balance of exchange of 1473 cars, and a daily shortage of about 650 cars; that the number of cars owned was larger than the average freight carrying road had, and sufficient to meet the demands of its own traffic, if its cars could be kept at home; and that "its failure to furnish cars was wholly due to an inability to regain its cars which were sent to other roads carrying freight from its own line." Also that the company was a member of the American Railway Association (as were 90 per cent of the railways of the United States) which makes rules for the interchange of cars; that such association is lawful, and a system of interchange of loaded cars, instead of reloading and reshipping, is essential to the public convenience and conforms to the policy of both Federal and state legislation, and that "for one railroad company to be an Ishmaelite among its associates would operate disastrously to its shippers"; but further that the rules made by the railway association for the return of cars,—a charge of 25 to 50 cents per day per car,—were totally inadequate to secure their prompt return in case of congested traffic, and that prior to 1905 the company had lost control of its cars, knowing that the rules of the association were insufficient to secure their return within a reasonable time.

The State Supreme Court therefore by HILL, C. J., ruled, that although it may be better for the company "to suffer these ills than to sail under a black flag and refuse to send its cars beyond its lines," yet until it "shows reasonable rules and regulations for the interchange of cars, it cannot avail itself of these rules of interchange as causing and excusing its default to the public, for the rules here shown have proved unreasonable and inefficient before this default occurred."

Mr. Justice WHITE in reversing the decision of the state court says: The

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company "was powerless, of its own motion, to change the rules thus generally prevailing, and therefore was necessarily either compelled to desist from the interchange of cars with connecting carriers for the purpose of the movement of interstate commerce, or to conduct such business with the certainty of being subjected to the penalties which the state statute provided for. * * * It needs but statement to demonstrate that the ruling of the court below involved necessarily the assertion of power in the state to absolutely forbid the efficacious carrying on of interstate commerce, or, what is equivalent thereto, to cause the right to efficiently conduct such commerce to depend upon the willingness of the company to be subjected to enormous pecuniary penalties as a condition of the exercise of the right. * * * If the rules of the railway association governing 90 per cent of the railroads and a vast proportion of the interstate commerce of the country are inefficient to secure just dealing as to cars moved by the carriers engaged in interstate commerce, that fact affords no ground for conceding that such subject was within the final cognizance of the court below, and could by it be made the basis of prohibiting interstate commerce or unlawfully burdening the right to carry it on. In the nature of things, as the rules and regulations of the association concern matters of interstate commerce inherently within Federal control, the power to determine their sufficiency, we think was primarily vested in the body upon whom Congress has conferred authority in that regard." Chief Justice FULLER dissents.

Mr. Justice WHITE cites no authority for his ruling, and no reliance is placed upon the rule that the subject has been regulated by Federal legislation, or by any rule of the Interstate Commerce Commission, nor upon the rule that, because Congress has not acted upon the matter, it is to be assumed that the subject is to be left free and untrammeled by any state regulations. Neither is there any finding of facts as to the proportion of interstate and intrastate traffic,—only that 70 per cent of the traffic originates on its line, and 30 per cen off, but how much of either is interstate traffic is not stated. The lower court ruled that the statute only imposed a penalty for negligently failing to perform the common law duty to furnish cars promptly upon demand, whether for state or interstate shipments, and the known inadequacy of the association rules to enable the company to comply with this duty was negligence. The association rules for return of cars necessarily directly affected both state and interstate shipments. If they were inadequate, and had been known to be so generally, does the supreme court mean to hold that conformity to them would not be negligent, just because 90 per cent of the roads are parties to them?

In *Missouri P. R. Co.* v. *Larabee Flour Mills Co.* (1909), 211 U. S. 612, 29 Sup. Ct. 214, Mr. Justice BREWER says: "The roads are engaged in both interstate commerce and that within the state. In the former, they are subject to the regulation of Congress; in the latter, to that of the state; and to enforce the proper relation between Congress and the state, the full control of each over the commerce subject to its dominion must be preserved," and Mr. Justice MOODY, dissenting, says: "The commerce clause vests the power to regulate interstate commerce exclusively in the Congress, and leaves the power

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to regulate intrastate commerce exclusively in the states. Both powers being exclusive, neither can be directly exercised except by the government in which it is vested." If these statements are correct, and the same regulation had been made by Congress or the Interstate Commerce Commission as to an *interstate* shipment, and the company had pleaded that it would have been impossible to comply without discrimination against its state traffic, because its cars were negligently allowed to be away from home so that it could not adequately supply either its interstate or state shippers, would the Federal regulation have been held *unconstitutional,* as beyond the Federal power, because directly affecting *state* commerce, or would the company have been held liable because of its negligence, when the only case before the court was one of *interstate* commerce, and not state commerce? Or to put the matter in another way, is it possible that where a railway association makes ineffective rules relating to the return of cars to one of its members, which knows they are notoriously inadequate, and shippers, therefore cannot get cars promptly, the state can not impose a penalty for not furnishing the cars to a state shipper, because that would directly affect interstate commerce, and the Federal government cannot impose a penalty for not furnishing cars to an *interstate* shipper, because that would directly affect state traffic? Such certainly cannot be the rule.

In *Houston and T. C. R. Co.* v. *Mayes* (1906), 201 U. S. 321, 26 Sup. Ct. 491, plaintiff sued to recover a penalty for failing to furnish him cars for an *interstate* shipment, contrary to a statutory provision penalizing the company for its failure to furnish cars within a specified time after demand, and making the duty an absolute one, admitting of no excuse whatever. This was held, Mr. Justice BROWN, delivering the opinion (Chief Justice FULLER, Mr. Justice HARLAN, and Mr. Justice MCKENNA, dissenting) "as applied to *interstate* commerce," to be unconstitutional. In *McNeil* v. *Southern R. Co.* (1906), 202 U. S. 543, 26 Sup. Ct. 722, a state railway commission ordered cars containing *interstate* shipments to be delivered beyond its right of way to a private siding. The suit was to enjoin the collection of the statutory penalties for violating the orders of the commission. This order the court by Mr. Justice WHITE, held to be an unlawful interference with interstate commerce, whether considered as a general power to regulate carriers engaged in interstate commerce, or to make an order in a particular case.

On the other hand in the *Larabee case* supra the plaintiff brought mandamus to compel the railroad company to resume the transfer of cars loaded and unloaded from the line of a connecting carrier to his flour mill upon payment of the customary charges. Three-fifths of plaintiff's shipments were *interstate,* the defendant was a member of a car service association which regulated the interchange of cars; plaintiff refused to pay a demurrage charge on certain cars furnished by the defendant, because the delay was caused by it instead of by the plaintiff; the car service association demanded payment, and upon refusal directed the defendant to discontinue furnishing cars to plaintiff as before; it was found that the delay for which the demurrage charge was made was due to the fault of the company. There was

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no state regulation involved,—only common law duties. The defendant claimed that it was subject to the control of Congress only, since the shipments were partly or mostly interstate. The court, by Mr. Justice BREWER (MOODY and WHITE, dissenting) held that the state court could enforce the common law duty not to discriminate between shippers in such a case,—"at least until Congress or the Interstate Commerce Commission takes action, although both carriers are engaged in interstate commerce, and three-fifths of the output of the mill is shipped out of the state," and the mere delegation by Congress to the Interstate Commerce Commission of power over 'interstate commerce" is not equivalent to specific action by Congress in respect to the matter involved which prevents a state from making regulations conducive to the welfare and convenience of its citizens that may indirectly affect commerce." This case reviews the cases upholding state regulations. Compare also *Atlantic C. L. R. Co.* v. *Mazursky* (1910), 216 U. S. 122, 30 Sup. Ct. 378.

In *Mississippi Railroad Commission* v. *Illinois Cent. R. Co.* (1906), 203 U. S. 335, 27 Sup. Ct. 90, after reviewing the cases the court by Mr. Justice PECKHAM, says: "A state railroad commission, under a state statute, may order the stoppage of trains if the company does not otherwise furnish proper and adequate accommodation to a particular locality, and in such cases the order may embrace a through *interstate* train actually running, and compel it to stop at the locality named. In such case, in the absence of Congressional legislation covering the subject, there is no illegal or improper interference with the interstate commerce right"; but if reasonable accommodation is otherwise furnished, a regulation requiring interstate trains to stop would be void. See also *Missouri P. R. Co.* v. *Kans.* (1910), 216 U. S. 262, 30 Sup. Ct. 330.

In view of these decisions, it seems that the case under review ought to have passed upon the point of the negligence of the company, rather than held the statute (which made no absolute requirement as the state court held to furnish cars at all events, without reference to its effect upon interstate commerce) to be an unconstitutional and direct interference with interstate commerce. It seems fair under all the facts of the case to hold, contrary to what the lower court held, that the railroad company, considering its duties to both its state and interstate shippers was not negligent, and therefore not liable for any damages or penalty; and because the question of negligence in such cases of apportioning cars necessarily involves the relative duties to state and interstate shippers, and therefore raises a question under the *federal* law, the federal courts would have jurisdiction to determine whether there had been negligence or not, and if such court found there was negligence in the performance of the common law duty to a *state* shipper, then should not the state law imposing the penalty be upheld? H. L. W.

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