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Constitutional Law--Taxation of Interstate Commerce--Railroad Loop Traffic

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lative barriers, National Labor Relations Act, 49 STAT. 449 (1935), as amended, 29 U.S.C. § 151 (1952). But there seems to be no valid reason for giving immunity to labor organizers, although it is true that some of their activities are in their very nature within the guaranty of freedom of speech as being a concrete expression of a social ideal, namely unionism. Even so, it is well to remember that unionism is also big business. Then too, the activities of a union organizer are not always above reproach and may create a vital community concern. For example he may use force or threats of force against employees who refuse to join the union, or he might commit acts of violence, or cause such acts to be committed in an otherwise peaceful picket line. See *NLRB v. Local 140, United Furniture Workers, CIO,* 233 F.2d 539 (2d Cir. 1956). Perhaps if the organizer were required to make his presence known through a reasonable registration requirement then such activities would be curtailed or at least be less frequent because the notoriety given to his presence would lessen the effects of his actions.

It is submitted that a state does have a substantial interest in the protection of its citizens inasmuch as it has the right to protect them from being defrauded or otherwise harmed by any form of solicitation; and a requirement of registration of labor organizers, absent any discretionary feature which does not prohibit the expression of social ideas whether they be unionism or whatever, should be allowed without objection. It is sincerely felt that our concept of free speech will lose nothing for such regulation, but on the contrary a valuable function of the state police power will not be thwarted.

J. L. R.

CONSTITUTIONAL LAW—TAXATION OF INTERSTATE COMMERCE—RAILROAD LOOP TRAFFIC.—*P* railroad originates in Virginia and passes through West Virginia, with two loop deviations into Virginia and Kentucky totaling six miles. *P* is taxed for the privilege of doing business in West Virginia on the basis of a percentage of its property within the state, as well as on a percentage of its net income earned within the state. W. VA. CODE c. 11, art. 12a, § § 2 and 5b (Michie 1955). In a declaratory judgment action, *P* contended that the loop traffic should be considered in determining whether such tax constituted a direct burden upon the interstate business of *P*. *D* de-

murred in part. Sustained. Upon certification to the Supreme Court of Appeals, *held,* in part, that *P* did not allege sufficient facts from which it could be determined whether the tax, imposed in part on *P's* loop traffic, constituted a direct burden on interstate commerce. *Norfolk & Western Ry. v. Field,* 100 S.E.2d 796 (W. Va. 1957).

The general rule is that no state can tax the privilege of engaging in interstate commerce. *Spector Motor Service v. O'Connor,* 340 U.S. 602 (1951); *Allen v. Pullman's Palace Car Co.,* 191 U.S. 171 (1903); *Leloup v. Port of Mobile,* 127 U.S. 640 (1888). A tax on the privilege has been held to be a direct burden on the commerce itself. *Western Union Telegraph Co. v. Kansas,* 216 U.S. 1 (1910); but see *Interstate Oil Pipe Line Co. v. Stone,* 337 U.S. 362 (1949); *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U.S. 33 (1940); *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250 (1938) (cases following the cumulative burden dichotomy).

On the other hand, interstate commerce is expected to pay its own way. See *Freeman v. Hewit,* 329 U.S. 249 (1946). Therefore a given state may tax the local incidents, activities or privileges of commerce, interstate in nature. *Illinois Cent. R.R. v. Minnesota,* 309 U.S. 157 (1940); *Ford Motor Co. v. Beauchamp,* 308 U.S. 331 (1939); *Underwood Typewriter Co. v. Chamberlain,* 254 U.S. 113 (1920).

It cannot be denied that the loop traffic in the principal case constituted commerce among the several states. See *Central Greyhound Lines v. Mealey,* 334 U.S. 653 (1948); *Hanley v. Kansas City So. Ry.,* 187 U.S. 617 (1903). Nevertheless, transactions involving more than one state are not necessarily interstate commerce for taxing purposes, when the involvement of more than one state is purely voluntary and not really required. *Wiloil Corp. v. Pennsylvania,* 294 U.S. 169 (1935); *cf. International Harvester Co. v. Dep't. of Treasury,* 322 U.S. 340 (1944).

An early case, *Lehigh Valley Ry. v. Pennsylvania,* 145 U.S. 192 (1891), presented a situation somewhat analogous to the principal case. Here the Court denied that continuous railway traffic between two points in Pennsylvania was interstate commerce, even though passing for a short distance through New Jersey. In upholding a tax imposed by Pennsylvania on the railroad's intrastate traffic, the Court concluded that loop deviations caused by engineering diffi-

culties, such as the interposition of a mountain or stream, will not impress upon intrastate intercourse an interstate nature.

Undoubtedly, the Court, in the *Lehigh Valley* decision, erred in denying that such loop traffic did not constitute interstate commerce, but as pointed out by Justice Holmes when later citing the case, the tax itself was probably valid since it was determined in respect of receipts for that portion of the transportation within Pennsylvania. *Hanley v. Kansas City So. Ry., supra;* see also *United States Express Co. v. Minnesota,* 223 U.S. 335 (1912).

A later decision, *Central Greyhound Lines v. Mealey, supra,* found the Court invalidating a New York tax on the gross receipts from transportation of passengers between two points in New York, but over a route forty percent of which traversed New Jersey and Pennsylvania. The surprising feature of the case was not the holding itself, but the trend of the Court's reasoning as revealed by dictum to the effect that the tax on interstate commerce would be valid if apportioned as to the receipts attributable to the mileage within New York.

If the rationale of the *Central Greyhound* case were applied to the loop traffic in the instant case, it would seem that a state tax aimed at the purely intrastate activities of *P* railroad would necessarily have to take into consideration *P*'s loop traffic and apportion the tax accordingly. Such reasoning may be theoretically sound, but the taxation of commerce is a very practical rather than a theoretical concept, and the trend of the Court in recent years, with some notable exceptions, has been to apply practical tests rather than technical concepts when questioning a tax which is alleged to unreasonably burden interstate commerce. See *e.g., Interstate Oil Pipe Line Co. v. Stone, supra; Ott v. Mississippi Valley Barge Line Co.,* 336 U.S. 169 (1949).

As pointed out by Justice Frankfurter in *Central Greyhound Lines v. Mealey, supra,* it is not so much a question of whether a particular state tax is directed at interstate commerce, but whether the state is merely exacting a constitutionally fair demand for that aspect of interstate commerce to which the state bears a special relationship. In short, is the degree of burden imposed reasonable or unreasonable under the circumstances in any given case? See *e.g., Norton Co. v. Dep't of Revenue of Illinois,* 340 U.S. 534 (1951); *Nelson v. Sears Roebuck & Co.,* 312 U.S. 359 (1941).

From a practical standpoint, taxation of the loop deviation in the *Central Greyhound* case, covering over forty percent of the entire route, would understandably burden interstate commerce to an unreasonable degree, whereas the degree of burden imposed in the instant case through taxation of the loop would appear to be so insignificant as to invoke the *de minimis* rule. See Brown, *State Taxation of Interstate Commerce--What Now?*, 48 MICH. L. REV. 899 (1950).

In any case, the past decisions of the courts would bear out a conclusion that in a situation involving an inconsequential loop deviation, caused by geographical conditions, and closely related to the intrastate traffic, the deviation itself becomes constitutionally insignificant for taxing purposes. Therefore the taxing state need not apportion its tax in consideration of a minor detour, but may consider it as business carried on entirely within the state. See *e. g., Central Greyhound Lines v. Mealey, supra; Lehigh Valley Ry. v. Pennsylvania, supra; American Barge Lines v. Koontz,* 136 W. Va. 747, 68 S.E.2d 56 (1951).

D. L. McC.

CONSTITUTIONAL LAW — WITNESSES — PRIVILEGE AGAINST SELF-INCRIMINATION.—*A,* secretary-treasurer of a labor union, was issued a personal subpoena *ad testificandum* and a subpoena *duces tecum* addressed to him in his official capacity as a union officer, for appearance before a federal grand jury investigation. He failed to produce the demanded books and records, and refused, on the ground of self-incrimination, to answer questions pertaining to their whereabouts; he was adjudged guilty of criminal contempt upon his repeated refusal to answer. This conviction was upheld by the United States Circuit Court of Appeals for the Second Circuit. *Held,* on certiorari, that despite the fact that a custodian of records voluntarily assumes a duty which overrides his claim of privilege as to the records themselves, he does not thereby waive the fifth amendment privilege against self-incrimination as to oral testimony concerning his failure to produce the records. *Curcio v. United States,* 354 U.S. 118 (1957).

The much discussed and often maligned portion of the Constitution of the United States which gives rise to the principal case