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Jurisdiction of the Interstate Commerce Commission--Abandonment of Road Entirely Within a State

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JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION—ABANDONMENT OF ROAD ENTIRELY WITHIN A STATE.

The Interstate Commerce Act subjects those common carriers by railroad which engage in the transportation of passengers or property from one state to another to the jurisdiction of the Interstate Commerce Commission.[1] A railroad becomes subject to the Transportation Act by participating in a through interstate movement of traffic, although its own service is performed entirely within one state. It is therefore firmly established that a road need not cross state lines to bring itself within the Commission's jurisdiction.[2] In such a case the jurisdiction of the Commission conflicts with the right of each state to regulate those common carriers whose lines lie entirely within state borders. This conflict in jurisdiction becomes of special importance where a road, the lines of which are within a single state, seeks to abandon those lines either wholly or in part.

The Interstate Commerce Act provides that no railroad subject to the Act " * * * shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that present or future public convenience and necessity permit of such abandonment," [3] and the Commission is vested with power to issue such certificate.[4] The jurisdiction to authorize abandonment of "roads subject to this act," was intended to include and does include a road lying entirely within a state and engaged in interstate commerce. The problem, however, arises as to whether the jurisdiction so conferred on the Commission may be exercised to the prejudice and exclusion of the rights of a state.

The leading case on the question of conflict of jurisdiction and powers is *Colorado* v. *United States*.[5] In that case a Colorado corporation, engaged in both intrastate and interstate commerce, operated a railway system located partly in Colorado and partly in other states. Because of great losses in operation, it sought to abandon a branch located entirely within the state of Colorado. This branch had been constructed and acquired by the company under authority of the state. Application for a certificate that public convenience and necessity permitted abandonment of the branch was made to the Commission and, after a hearing, a certificate was issued. In opposing the issuance of the certificate, the state argued that the charter of the

[1] Interstate Commerce Act, §1, par. (1), U. S. C. tit. 49, §1, par. (1), 41 Stat. L. 474.

[2] Baer Bros. Mercantile Co. v. Missouri Pac. Ry. Co., 13 I. C. C. 329 (1908); order sustained, Baer Bros. Mercantile Co. v. Denver & R. G. R. R. Co., 233 U. S. 479, 34 Sup. Ct. 614 (1913), which reversed Denver & R. G. R. R. Co. v. Baer Bros. Mercantile Co., 187 Fed. 485 (1911).

[3] Interstate Commerce Act, §1, par. 18.

[4] Interstate Commerce Act, §1, par. 20.

[5] 271 U. S. 153, 40 Sup. Ct. 452 (1925).

railroad corporation was a contract with the state in which the railway assumed the obligation of providing intrastate service on its lines within the state; that the extent and character of this service was subject to the regulation of the state and, therefore, the Commission had no power to release the railroad corporation chartered by the state from its obligation to furnish service.

In answer to the grounds urged by the state, Justice Brandeis, in a clear opinion, said for the Court:

> "* * * The certificate issues not primarily to protect the railroad but to protect interstate commerce from undue burdens. * * * Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce * * *. *Such depletion of the common resources in the local interest may conceivably be effected by continued operation of an intrastate branch in intrastate commerce at a loss.*
>
> "* * * The obligation assumed by the corporation under its charter of providing intrastate service on every part of its line within the state is subordinate to the performance by it of its federal duty, also assumed, efficiently to render transportation services in interstate commerce. * * * *Because the same instrumentality serves both, Congress has power to assume, not only some control, but paramount control in so far as interstate commerce is involved. It may determine to what extent and in what manner intrastate service must be subordinate in order that interstate service may be adequately rendered.*[6] *The power to make the determination inheres in the United States as an incident of its power over interstate commerce.* * * *"

The lines of the railway involved in the foregoing case extended into other states and complete abandonment was only allowed of a branch wholly within the state of Colorado. Suppose the *entire* railroad were within a single state could the Commission authorize

[6] On the same theory it was decided that the Commission may prohibit the establishment of intrastate commerce rates which are so low as will result in unjust discrimination or undue prejudice to interstate commerce. Houston East & West Texas R. R. v. U. S., 234 U. S. 342, 34 Sup. Ct. 833 (1913); Railway Comm. of Wisconsin v. Chicago, B. & Q. R. R., 257 U. S. 563, 42 Sup. Ct. 232 (1921); Nashville, C. & St. L. Ry. v. Tennessee, 262 U. S. 318, 43 Sup. Ct. 583 (1922); Alabama v. U. S., 279 U. S. 229, 49 Sup. Ct. 266 (1928); Georgia Comm. v. U. S., 283 U. S. 765, 51 Sup. Ct. 619 (1930).

complete abandonment of the road? The Supreme Court, in *Texas* v. *Eastern Texas R. R. Co.*, answered this question in the negative.[7]

The Eastern Texas Railway Company owned and operated a road thirty miles in length, located entirely within the state of Texas, and engaged in interstate commerce. For a number of years the road had been operated at a loss. When application was made to the Interstate Commerce Commission for a certificate that public convenience and necessity permitted *absolute abandonment of the entire road,* the state refused to recognize the jurisdiction of the Commission. Its protest against any such action by the Commission was on the theory that although the Commission is given power to authorize abandonment of lines engaged in interstate commerce, the exercise of such power is illegal when it deprives the state of its right to regulate intrastate commerce on a line *entirely* within its jurisdiction. Upon appeal the Court decided in favor of the state of Texas, and held that while the Commission could in its discretion authorize discontinuance as an interstate carrier, it had no authority in this case to authorize discontinuance as an intrastate carrier.

Paragraphs 18, 19 and 20 of the Interstate Commerce Act were intended to regulate interstate and foreign commerce only. Its purpose was to allow abandonment where the forced continued operation of a road would burden interstate commerce. Intrastate traffic was to be affected only as was necessarily incident to the regulation and protection of interstate commerce. Would the continued operation of this road solely as an intrastate carrier burden or prejudice interstate commerce? Clearly not. Any shortage of earnings caused by continued operation would be borne by the railroad alone, as an intrastate carrier. This road was not a branch or extension, as in the Colorado case, where the continued unprofitable operation might burden the main line of a large interstate carrier, and thereby affect its utility in interstate commerce. Its losses as an intrastate carrier was a matter of local concern [8] and in no manner affected interstate commerce.

The Texas case held that complete abandonment of the *entire system* of a road within the single state cannot be authorized by the Commission. That case, however, did not determine whether the Commission had power to authorize the abandonment of a *part* of

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[7] 258 U. S. 402, 42 Sup. Ct. 28 (1921).

[8] In a later case in which the same Texas Railway Company was involved the Supreme Court recognized that the state of Texas alone could authorize discontinuance of this road as an intrastate carrier. The case, however, further held that the state could not compel the road to continue operation in intrastate commerce at a loss. Such action would deprive the road of its property without due process of law. Railroad Commission of Texas v. Eastern Texas Railroad Co., 264 U. S. 79, 44 Sup. Ct. 247, *aff'g*, 283 Fed. 584 (1923). Also see Brooks, Scanlon v. Railroad Comm. of La., 251 U. S. 396, 40 Sup. Ct. 183 (1919); Bulloch v. Florida, 254 U. S. 513, 41 Sup. Ct. 193 (1920); Brownwood, N. & S. Ry. Co. v. Railroad Comm. of Texas, 16 F. (2d) 297 (D. C. W. D. Texas 1926).

such road. In determining this question the test would seem to be whether the continued operation in intrastate commerce of the *part sought to be abandoned* would burden a carrier which engages in interstate commerce. If the losses of that part would be borne by a road that continues to carry interstate traffic, the Commission has jurisdiction to authorize complete abandonment. Had the Texas Railway Company applied to discontinue operation of only part of their road, the remainder of the railroad to continue in interstate commerce, the cases hold that the Commission would have had power to order discontinuance of both interstate and intrastate commerce on the part operating at a loss.[9] In such case the continued operation at a loss of the part sought to be abandoned would burden that portion of the road which continued in interstate commerce.[10]

However, it was not the intention of Congress to vest power in the Commission to authorize complete abandonment of a road without consideration of the damage caused to local interests. The Act authorizes the issuance of a certificate only where "public convenience and necessity permit of such abandonment." [11] Such public convenience and necessity include the public convenience and necessity of the local communities involved. Thus in the Colorado case the Court said:

> "The sole test prescribed is that abandonment be consistent with public necessity and convenience. In determining whether it is, the Commission must have regards to the needs of both intrastate and interstate commerce. For it was the purpose of Transportation Act, 1920, to establish and maintain adequate service for both. * * * The benefit of the abandonment must be weighed against the inconvenience and loss

[9] United States Feldspar Corporation v. United States, 38 F. (2d) 91 (D. C. N. D. N. Y. 1930); Transit Commission v. United States, 284 U. S. 360, 52 Sup. Ct. 157 (1931).

[10] A question of jurisdiction similar to that in the abandonment cases arose in a line of cases involving jurisdiction of the Commission to authorize constructon of a road. Under the same section of the Interstate Commerce Act, which empowers the Commission to authorize abandonment, the Commission is granted power to issue a certificate that public convenience and necessity permit the construction of a line of railway and no road subject to the act may construct a line before such certificate is obtained. Following the holdings in the abandonment cases it has been held that the Commission has no jurisdiction where an independent road is constructed whose purpose is to engage in intrastate commerce; Texas and New Orleans R. R. v. Northside Belt R. R. Co., 276 U. S. 475, 48 Sup. Ct. 361 (1927); but where the traffic would be purely interstate in character a certificate must be obtained from the Commission; see Missouri, K. T. R. R. Co. v. Northern Oklahoma R. R., 25 F. (2d) 689 (C. C. A. 8th, 1928); *certiorari* denied 278 U. S. 610, 49 Sup. Ct. 13 (1928). "The mere fact that a road is entirely within one state does not prevent the application of paragraphs 18-20. If it undertakes to engage in interstate commerce its operation becomes a matter of national concern and it comes within the purview of the section." Missouri, K. T. R. R. Co. v. Northern Oklahoma R. R., *supra*.

[11] *Supra* note 3.

> to which the other will thereby be subjected. Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce. * * * The results of this weighing—the judgment of the Commission is expressed by its order granting or denying the certificate."

This rule is vague and indefinite, and difficulty is encountered in its application. The recent case of *Transit Commission* v. *United States*[12] illustrates the problems which it presents to the Commission. The Long Island Railroad lies entirely within the state of New York. Though it is engaged in interstate commerce, only sixteen per cent of its gross revenue comes from such traffic. Its main source of income is from carrying commuters, residing in Long Island, to New York City. The Transit Commission of the state of New York ordered the Long Island Railroad Company to construct twelve grade crossings on its Whitestone Branch. This branch was 4.7 miles long, on which five passenger stations were situated—Flushing, by far the largest one, and four others beyond. In 1928 the city of New York connected Flushing with Manhattan through its rapid transit system. This caused a thirty-three per cent decrease in passenger traffic on the Whitestone Branch. The operating loss for this branch in 1928 was $125,000 and it was estimated that this loss would increase to $150,000 in 1929. The company applied to the Interstate Commerce Commission for a certificate that public convenience and necessity permitted abandonment of this branch.

As indicated above, the Commission possessed the necessary power to act on this application, but the problem confronting the Commission was whether public convenience and necessity permitted the proposed abandonment. The railway contended that the expenditure of approximately $2,000,000 for twelve grade crossings, as required by the state, on a branch 4.7 miles long which was already operating at a loss, would unduly burden its ability to engage in interstate commerce. The Transit Commission of the state of New York pointed out that the local passenger traffic on the Long Island Railway constituted by far the greater portion of its profitable business. Its interstate commerce was unprofitable and constituted but sixteen per cent of its gross revenue. The Transit Commission argued that, under the circumstance, the damage to interstate commerce would be slight when weighed against the damage to be caused to those communities above Flushing if their only direct rail connection to New York City was abandoned. The proposed bus service would manifestly be inadequate to serve these communities. At the first hearing two of the three Commissioners found that public convenience and necessity permitted the abandonment, one Commis-

[12] *Supra* note 9.

sioner dissenting.[13] Upon reargument before the full Commission this finding was affirmed, but there were four Commissioners dissenting.[14] On appeal the Supreme Court, in affirming the judgment of the Interstate Commerce Commission, said:

> "That body professed to follow the decision in the Colorado case and we think it did so. The court there held that in the issuance of a certificate the public convenience and necessity the Commission need not determine with mathematical exactness the extent of the burden imposed upon interstate commerce by the operation of a branch line; that such burden might involve various elements, and if upon the whole proof the conclusion was warranted that continued operation would in fact unreasonably burden the interstate commerce of the carrier the Commission was justified in authorizing abandonment."

The question as to whether public convenience and necessity permit an abandonment therefore appears to be one of fact. The discretion of the Commission accordingly would play a great part in the determination of this question. The writer feels that in the Long Island case the Commission may well have refused to issue the certificate In that event there can be little doubt that a finding that public convenience and necessity did not permit abandonment would have not been disturbed by the Supreme Court.

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INJUNCTION—BY ONE STATE AGAINST MUNICIPAL CORPORATION IN ANOTHER STATE—ENFORCEMENT.

The state of New Jersey seeks a decree *in personam* praying for an injunction restraining the city of New York from dumping garbage into the ocean off the coast of New Jersey.[1] This resulted in interference with the fishing industry of New Jersey, destroying and tearing nets. The garbage carried in suspension by the sea made bathing unpleasant, and that of greater bulk, carried upon the surface, was washed up on the beaches, necessitating its removal. The action is brought in a court of equity. The injuries are continuing. There is no adequate remedy at law. The federal courts have jurisdiction.[2]

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[13] Long Island Railway Co. abandonment, 162 Interstate Commerce Rep. 363 (1930).

[14] 166 Interstate Commerce Rep. 671 (1930).

[1] New Jersey v. City of New York, 283 U. S. 473, 51 Sup. Ct. 519 (1931).

[2] U. S. Const., Art. III, Sec. 2: "The judicial power shall extend to all Cases, in Law and Equity, to all Cases of Admiralty and Maritime Jurisdiction; to controversies between a state and citizens of another state."