University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published by the University of Pennsylvania Law School, at 236 Chestnut Street, Philadelphia, Pa., and 34th and Chestnut Streets, Philadelphia, Pa.

VOLUME 66 February, 1918. NUMBERS 3 AND 4

THE REGULATION OF WATER CARRIERS.

The act creating the Shipping Board has placed upon that body two main functions, first, the creation by purchase or building of a merchant marine and, second, the regulation of water carriers. The board has not yet undertaken to exercise to any real extent its regulatory powers over water carriers. But when it does, it will become apparent that water carrier regulation has been vested to a considerable degree in the Interstate Commerce Commission.

Section 33 of the act creating the Shipping Board provides:

"That this act shall not be construed to affect the power or jurisdiction of the Interstate Commerce Commission, nor to confer upon the board concurrent power or jurisdiction over any matter within the power or jurisdiction of such commission: Nor shall this act be construed to apply to intrastate commerce."

As this proviso leaves intact all of the regulatory authority over water carriers heretofore granted the Interstate Commerce Commission, and places in the Shipping Board a residue, it is necessary to find how far the Interstate Commerce Commission's power of regulation extends.

COMMISSION'S JURISDICTION OVER WATER CARRIERS.

1. Section 1: Under section 1 of the act to regulate commerce, the commission has jurisdiction over common carriers "engaged in the transportation of passengers or property . . . (. . . partly by railroad and partly by water when both are

used under a common control, management, or arrangement for a continuous carriage or shipment),"

(a) from a state or territory of the United States, or the District of Columbia, to another state or territory, or the District of Columbia,
(b) from one place in a territory to another place in the same territory,
(c) from the United States to an adjacent foreign country,
(d) from the United States through a foreign country to any place in the United States,
(e) from a place in the United States to a port of transshipment to a foreign country,
(f) from a port of entry to any place in the United States (when the shipment originated in a foreign country), and
(g) from an adjacent foreign country to any place in the United States.

Under this section, the first requirement for the commission's jurisdiction, over a water carrier, is the common control, management, or arrangement (with a rail carrier) for a continuous carriage or shipment.

The proper construction of the phrase "common control, management, or arrangement," presents some difficulty.

In the act to regulate commerce, as originally passed, the provisions of the act applied to

"any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment," . . .

The commission held that the words "under a common control, management, or arrangement," applied only to shipments partly by water and partly by railroad, and did not apply to shipments wholly by railroad. But the decisions of the Supreme Court were to the effect that these words applied to a route composed wholly of railroads, as well as to one which was partly by railroad and partly by water.[1]

[1] Int. Com. Com. v. Cincinnati, N. O. & T. P. Ry. Co., 162 U. S. 184; Parsons v. Chicago & N. W. Ry. Co., 167 U. S. 447; and Louisville & N. R. Co. v. Behlmer, 175 U. S. 648.

By the Hepburn amendment of 1906, section 1 was amended so that the provisions of the act applied to

"any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one state or territory of the United States" . . .

As said by the commission in *Leonard* v. *Kansas City Southern Ry. Co. et al.*:[2]

"The words 'common control, management, or arrangement' now plainly apply only to transportation which is partly by railroad and partly by water. With respect, therefore, to transportation entirely by rail the words in parenthesis may be eliminated from the statute. The terms of the act now apply to 'any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad from one state or territory in the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia.' Under the present act the test of jurisdiction is not the arrangement under which the freight is handled, but rather the character of the transportation itself. The plain language of the act subjects any carrier which engaged in the movement of freight by rail from a point in one state to a point in another state to its provisions."

This is a distinction of far-reaching effect. In transportation wholly by railroad, the character of the transportation is the test of the jurisdiction of the commission over the instrumentality. Thus, any intrastate railroad that engaged in interstate transportation would come under the commission's regulatory power.[3]

But a different test must be applied to water carriers. The condition precedent to the commission's jurisdiction over these instrumentalities (under section 1) is "the common control, management, or arrangement (with a rail carrier) for a continuous carriage or shipment." There may be transportation over rail and water lines that is interstate. But the water line does not

[2] 13 I. C. C. 573, 578, 579.

[3] Texas & N. O. R. Co. v. Sabine Tram Co., 227 U. S. 111, 124, 126; Louisiana R. Com. v. Texas & P. Ry. Co., 229 U. S. 336, 341; Southern Pacific Terminal Co. v. Int. Com. Com., 219 U. S. 498, 527; Illinois Central R. Co. v. Fuentes et al., 236 U. S. 157, 163; Gulf, C. & S. F. Ry. Co. v. Texas, 204 U. S. 403, 412; and Ohio R. Com. v. Worthington, 225 U. S. 101, 108, 109.

come under the provisions of the act unless there exists a common control or arrangement with a rail line.

The commission and the federal courts have construed the phrase "common arrangement" in several cases. In *Railroad Commission of Georgia* v. *Clyde Steamship Co. et al.*,[4] the commission said:

"The phrase 'common control, management or arrangement for continuous carriage or shipment' in the first section was intended to cover all interstate traffic carried through over all rail, or part water and part rail lines. The 'arrangement' for continuous carriage or shipment is complete whenever the carriers have arranged for delivering and receiving through traffic to and from each other and such an arrangement is necessarily 'common.'"

It is to be noted in this case, however, that the shipment moved on through bills of lading.

In *Phelps* v. *Texas & P. Ry. Co.*,[5] the commission said:

"But the commission has repeatedly held that the receipt, forwarding, and delivery of traffic by connecting carriers clearly establishes the existence of a common arrangement between the carriers for continuous carriage or shipment."

In this case, also, however, the shipment moved on a through bill of lading.

In *Flour City Steamship Co. et al.* v. *Lehigh Valley R. Co. et al.*,[6] the commission said:

"In this case there was no common control or management, but the publication of proportional rates by the western carriers and by the Flour City Line is in itself evidence of a *common arrangement* for a continuous carriage, and this is fortified by the movement of the traffic on through bills of lading. It is true these bills of lading were not honored by the eastern carriers beyond Buffalo, but this in no wise detracts from the continuity of the movement of the traffic from Minneapolis to Buffalo. Again, the prepayment of the charges, in some instances through and in others to Buffalo, is further evidence of the common arrangement contemplated by section one, and we therefore hold that the Flour City Line was a common carrier within the meaning of section one of the act, and as such common carrier was subject to the jurisdiction of this

[4] 5 I. C. C. 324, 369.
[5] 6 I. C. C. 36, 48.
[6] 24 I. C. C. 179, 186.

commission and capable of forming a part of a through route within the meaning of section one and section fifteen."

In *Mutual Transit Co.* v. *United States*,[7] the court said:

"The phrase, 'common arrangement,' in view of its context, evidently means an agreement or understanding between connecting carriers with respect to the transportation of merchandise and the charges and division of the charges to be made therefor. A mere agreement by an independent water carrier to accept freight from a connecting railroad, and to transport it for its own particular rate, might be an 'arrangement' for continuous carriage, but would not be a 'common arrangement.'"

This construction practically makes common arrangement synonymous with joint control.

In *Goodrich Transit Co.* v. *Int. Com. Com.*,[8] the court quoted with approval *Ex parte Koehler*,[9] wherein it was said:

"The mere fact that a railway wholly within a state and a vessel running between said state and another meet at a point within the railway state and thus form a continuous line of transportation between the two states by the one taking up the goods delivered by the other at its terminus and carrying them thence to their destination, does not bring the carriers who so use the railway and steamer within the act. So long as the railway and steamer are each operated under a separate and distinct control, making its own rates and only liable for the carriage and safe delivery of the goods at the end of its own route, the act does not apply to the transaction. To make these carriers subject to the act, the railway and vessel must, as therein provided, be operated or used under a 'common control'—a control to which each is alike subject, and by which rates are prescribed and bills of lading given for the carriage of goods over both routes as one."

In *United States* v. *Seaboard Ry. Co.*,[10] the court said:

"In the case cited there was a through bill of lading. In the case now under consideration there is no evidence of a through bill of lading. But for that fact, the two cases would be almost identical. The Supreme Court, however, say that they must not be understood to imply that a 'common arrangement' might not be otherwise manifested than by a through bill of lading. Of course, it may be shown by an express agreement to that effect. In this case there

[7] 178 Fed. 664, 666, 667.
[8] 190 Fed. 943, 961.
[9] 30 Fed. 867.
[10] 82 Fed. 563, 564.

is no evidence of any express agreement. But I think such an arrangement may be manifested by circumstances, such, for instance, as when a carrier, in the usual course of business, enters into the carriage of foreign freight by agreeing to receive and ship goods from a point in one state to a point in another, and to participate in through rates and charges, under a conventional division of the same; that is, a division of the same, expressly or impliedly agreed to."

And see *In the Matter of Transportation by the Chesapeake & Ohio Railway Company et al.*[11]

The mere fact of continuous shipment or carriage is not in itself sufficient to establish a common arrangement. Something more is necessary. The Supreme Court, in *Gulf, C. & S. F. Ry. Co.* v. *Texas,*[12] said:

"Whatever obligations may rest upon the carrier at the terminus of its transportation to deliver to some further carrier, in obedience to the instructions of the owner, it is acting not as carrier, but simply as a forwarder."

In construing the phrase "common arrangement," the congressional intent should be considered.

Water carriers were not generally placed under the jurisdiction of the commission. It is only when they enter into a "common control, management, or arrangement" with a rail line that they come under the commission's regulatory power. When they enter into this relation, their regulation becomes necessary as an incident to the regulation of the rail carrier.

It is obvious a rail carrier's charges could not be properly regulated if by a common control or arrangement with a water carrier, the water carrier's charges were free from regulation and all restrictions. In such a case, a rail line might make any kind of a rate to a port, and by a division of the water rate, obtain a rate for the rail haul vastly in excess of what was reasonable, or grossly discriminatory. It was to prevent such an evasion of regulation that water carriers were put under the commission's authority, when their transportation was mingled with or merged into the transportation of the rail carrier.

When the rail and water hauls are separate and distinct, no

[11] 21 I. C. C. 207, 208.
[12] 204 U. S. 403, 412.

necessity for the commission's regulation of the water transportation arises.

The word "arrangement," considered alone, may cover any process that permits a continuous shipment. It must be construed by its context. It is preceded by the words "common control, management, or." These preceding words limit the scope of arrangement. The three must be construed together. Control, management, or arrangement conveys the idea of an agreement between the rail and water carrier for the transportation of property as a continuous shipment. The agreement is not to be unilateral, as pointed out in *Mutual Transit Co.* v. *United States, supra.* It carries with it the sense of interdependent obligations and liabilities. The two carriers, when jointly interested in the transportation over each other's lines, have entered into such an arrangement. The two hauls are then not separate and distinct.

The test is whether the commission could adequately regulate the transportation by the rail carrier without regulating the transportation by the water carrier.

A further question arises as to whether or not a common arrangement between an intrastate rail carrier and a water carrier, when the combined transportation is interstate, brings the two instrumentalities under the provisions of the act to regulate commerce.

Inasmuch as the regulation of water carriers is ancillary to the regulation of rail carriers, it would seem not to have been the intent of Congress to regulate two instrumentalities under a common arrangement, when the two separately were not regulated. In *Ex parte Koehler, supra,* and *United States* v. *Seaboard Ry. Co., supra,* the rail hauls were intrastate, and it was assumed that if the common arrangement existed, the provisions of the act would apply. The same assumptions occur in *In the Matter of Transportation by the Chesapeake & Ohio Railway Company et al., supra; Tampa Fuel Co.* v. *Atlantic Coast Line R. Co. et al.,*[13] and *Mutual Wheel Co.* v. *Nashville, C. & St. L. Ry. et al.*[14] The question is expressly left open by the Supreme Court in *Ohio R. Com.* v. *Worthington, supra.*

[13] 43 I. C. C. 231, 233.
[14] 40 I. C. C. 612.

If there has been a common control, management or arrangement, the commission's jurisdiction over water carriers is then determined and limited by the geographical character of the transportation. These geographical classifications are as follows:

(a) From a state or territory in the United States to another state or territory would include all interstate rail and water transportation in the United States, and would also include rail transportation in the United States, and water transportation (under common arrangement) to the Philippines, Porto Rico, Hawaii and Alaska. The Supreme Court has specifically ruled upon the transportation to Alaska, terming it a territory of the United States in *Humboldt Steamship Co.* v. *Int. Com. Com.*[15] The Philippine Islands have been construed to be a territory.[16] Porto Rico has been construed to be a territory.[17] Hawaii has been construed to be a territory.[18]

If the rail transportation is in these islands, and the water transportation (under common arrangement with the island rail carrier) is from the islands to the United States, different results arise.

The act providing civil government for the Philippine Islands of July 1, 1902, declared that "the provisions of section 1891 of the Revised Statutes of 1878 shall not apply to the Philippine Islands." Section 1891 of the Revised Statutes declares:

"The constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories and in every territory hereafter organized as elsewhere within the United States."

Under section 74 of the Philippine Act the internal government is empowered to "provide for the effective regulation of the charges" of public service corporations. This legislation clearly excepts from the Philippine Islands the act to regulate commerce,

[15] 224 U. S. 474.

[16] Fourteen Diamond Rings v. United States, 183 U. S. 176, 178, 179; United States v. Heinszen & Co., 206 U. S. 370, 380; and in Faber v. United States, 221 U. S. 649, 658.

[17] De Lima v. Bidwell, 182 U. S. 1, 196; Downs v. Bidwell, 182 U. S. 244, 248; American Railroad of Porto Rico v. Didricksen, 227 U. S. 145; In the Matter of Safety Appliances on Equipment of Railroads in Porto Rico, 37 I. C. C. 470, 472; American Railroad Co. v. Burch, 224 U. S. 547.

[18] Hawaii v. Mankichi, 190 U. S. 197.

and, therefore, rail carriers in these islands are not under the jurisdiction of the commission.

The Porto Rico Act of March 2, 1917, declares that the act to regulate commerce shall not apply to Porto Rico.

Transportation by such rail carriers, without the jurisdiction of the commission, and water carriers, generally without the jurisdiction of the commission, when there is a common control or arrangement, would not be within the intent of the act. There would be interstate transportation, partly by rail and partly by water, under a common control or arrangement. But the reason for the commission's jurisdiction would not exist. The rail carrier primarily to be regulated, and to which the water carrier regulation is ancillary, is itself without the jurisdiction of the commission.

If a common control or arrangement exists between a rail carrier in Alaska or Hawaii, and a water line from either of those places to the United States, or its territories, the commission would have jurisdiction, inasmuch as it already has jurisdiction of the rail carrier.

(b) The intra-territorial transportation is under the commission's jurisdiction, except in the case of the Philippines and Porto Rico.

(c) A rail carrier in the United States having a common arrangement with a water line running from a port in the United States to a port in Canada or Mexico, brings the water line under the commission's jurisdiction.

(d) and (g) Rail and water transportation under common arrangement, from the United States through an adjacent foreign country to a place in the United States, or from an adjacent foreign country to any place in the United States, would bring the water carrier under the jurisdiction of the commission, if the water haul, and any of the rail haul, were within the United States.[19]

(e) and (f) The inland portion of export and import traffic is specifically put under the commission by section 1, even when it is an intrastate rail movement.[20]

[19] Lake and Rail Cancellations, 44 I. C. C. 745, and cases cited.
[20] Texas & N. O. R. Co. v. Sabine Tram Co., 227 U. S. 111.

Rail and water transportation under a common arrangement from a place in the United States to a port for export to a foreign country, or rail and water transportation under a common arrangement, of traffic from a foreign country, from a port of entry to a place in the United States, would also bring the water carrier under the jurisdiction of the commission.

Once a water carrier comes under the jurisdiction of the commission, by reason of section 1, it comes under it for all purposes of regulation, so far as the act to regulate commerce may be applied to water carriers.[21]

In *Goodrich Transit Co.* v. *Int. Com. Com.*,[21] it was held that the provisions of section 20 of the act to regulate commerce would apply to a water carrier that had entered into a common arrangement with a rail carrier for interstate transportation. It should be pointed out, however, that only those provisions of the act to regulate commerce will apply to a water carrier that has entered into a common arrangement with a rail carrier which are necessary to enable the commission to regulate the water carrier's business which it has placed under a common control, management or arrangement with a rail carrier.

A water carrier's port-to-port business, not under a common control, management or arrangement with a rail carrier, would not be subject to the commission's regulation.[22]

Under section 1 of the act, the term "railroad" is defined to include ferries "used or operated in connection with any railroad." In *New York Central & H. R. R. Co.* v. *Board of Chosen Freeholders of Hudson County*,[23] the Supreme Court held that the power of the commission to regulate such ferries was the same as its power to regulate rail carriers.

2. Section 5. Section 5 of the act prohibits the ownership or control by a rail carrier of a competitive water carrier. But the commission is given a discretionary power to permit a continuation of such ownership or control if the public interests will be served. And during such continuation of ownership or control by the rail carrier, the water carrier comes under the regu-

[21] Goodrich Transit Co. v. Int. Com. Com., 224 U. S. 194.
[22] In the Matter of Jurisdiction over Water Carriers, 15 I. C. C. 208.
[23] 227 U. S. 248.

latory power of the commission, "to the same extent as is the railroad . . . controlling such water carrier."

Under section 5, there are no geographical limitations, nor any limitations as to transportation partly by rail and partly by water, under common control, management or arrangement. The only water lines affected are those owned, leased, operated or controlled by a rail carrier subject to the act.

It is obvious that a water line owned by a rail carrier in the Philippines or Porto Rico would not come under the provisions, because the owning rail carrier is not subject to the act. And it is difficult to see how water lines from the United States to the Philippines, Hawaii or Porto Rico could come under the provisions, because their traffic could hardly be competitive with the owning rail carrier. The competitive traffic, which is a condition precedent to the commission's jurisdiction over a water line under this section, practically limits it to water lines operating from ports to ports in the United States, ports to ports in Hawaii, and ports to ports in Alaska.

3. Section 6. "When property may be or is transported from point to point in the United States by rail and water . . . by . . . common . . . carriers, . . . not . . . within the limits of a single state, . . .," the commission shall have jurisdiction of the rail and water carriers "in the following particulars":

(a) To establish physical connection between the rails and docks;
(b) To establish through routes and maximum joint rates;
(c) To establish maximum proportional rates by rail to and from ports; and
(d) If a rail carrier subject to the act enters into arrangements with a water carrier operating from a port of the United States to a foreign country for handling through business from and to interior points of the United States, the commission may require the rail carrier to enter into similar arrangements with water carriers to the same foreign country.

Under this provision the character of the transportation is made the test of the commission's jurisdiction over the instrumentality.

When there is interstate transportation by rail and water by common carriers from point to point in the United States, the carriers so engaging come under the commission's jurisdiction

for specific purposes. No general jurisdiction for regulation is given under this section of the act.

This section is limited in its scope to the United States, so the island possessions are not affected by its provisions. Its purpose seems to have been to give the commission power to prescribe and regulate through routes and joint rates over all rail and water carriers in the United States, irrespective of common control or arrangement between them.[24]

It is to be noted that while section 6 will apply to all rail and water carriers, whose combined transportation is interstate, they come under the jurisdiction of the commission only for the four specific purposes set out in section 6.

It is, therefore, evident that the commission will have the regulating authority over a great proportion of the rates of water carriers that engage in interstate commerce. The port-to-port business of such carriers, when not a part of through rates with rail carriers, is left to the regulatory power of the Shipping Board. There will be some difficulty in having one tribunal regulate a carrier's through rates, and another tribunal regulating its port-to-port rates. It may also be noted that the commission has the power to require water carriers, when they engage in through joint rates with rail carriers, to adopt the commission's forms of accounts, and the accounting reports of the whole business must be made to the commission. Of course, the Shipping Board may require duplicate reports, and by adopting the commission's forms, avoid placing additional labor upon the water carrier.

The jurisdiction of the two regulating bodies should be more clearly distinguished. The powers delegated to the Interstate Commerce Commission were delegated when no other regulation of water carriers existed. If the commission were shorn of all its powers over water carriers, the Shipping Board's powers would automatically increase, and it is probable that better results would follow.

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[24] Augusta & Sav. Steamship Co. v. Ocean Steamship Co., 26 I. C. C. 380; Truckers Transfer Co. v. C. & W. C. R. R. Co., 27 I. C. C. 275.