LEGISLATION*

Motor Carrier Regulation Under Pennsylvania's 1937 Public Utility Law

The mushroom like growth of the trucking industry has led to numerous legislative efforts to control this new medium of transportation.[1] At the last session of the legislature Pennsylvania joined the ranks of those states supervising the industry by enacting, as a part of its new public utility law,[2] a comprehensive regulatory program[3] patterned after recent federal legislation.[4] Indicative of the rise of this transportation group is the fact that twenty years ago the railroads let pass unnoticed its efforts to establish itself. Today they are frankly fearful of their lusty young rival.[5] So phenomenal was its growth that the lawmakers had a problem on their hands before they were aware of it. Complicating the situation was the fact that this new development did not follow traditional carrier lines. Although a considerable portion of the industry fell into the common carrier class, a great part of it was a new type, the contract carrier. With the common carrier by motor vehicle the legislatures had little difficulty; they had had sufficient practice in regulating the railroads[6] to accomplish the change from rails to roads with comparative ease.

The contract carrier, however, presented a different problem. This group did not hold itself out to serve the public as did the common carriers, but rather served relatively few customers under individual contracts.[7] The traditional incidents raising the right to control in the case of the common carrier were not characteristic of the contract carrier. Thus, it is not surprising that the states experienced difficulty in their efforts to control the latter. Accordingly, the future course of Pennsylvania's regulation of contract carriers may well be forecast by an examination of the judicial treatment accorded similar legislative attempts in other states.

Constitutionality of Regulation

In any question involving this type of regulation there are two problems: first, the right to regulate at all,[8] and second, the mode of effectuating such regu-

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* The Legislation on the Pennsylvania Mortgage Deficiency Act, published in 86 U. OF PA. L. REV. 295 (1938), was written by Howard A. Reid.

1. See for example the following statutes: ALA. CODE (Michie, Supp. 1936) § 6270 (1)-6270 (115); ARIZ. CODE (Struckmeyer, Supp. 1936) § 1680; ARK. DIG. STAT. (Crawford & Moses, Supp. 1931) § 7440a; COLO. STAT. ANN. (Courtright's Mills, 1930) § 5933a; GA. CODE (1933) §§ 68-501-526, 68-601-634; KY. STAT. (Carroll, 1936) 2739j-1; MINN. STAT. ANN. (Mason, Supp. 1936) § 5015-1; TENN. CODE ANN. (Michie, 1932) §§ 5471, 5533 *et seq.*; TEX. STAT. ANN. (Vernon, 1934) art. 911b; WASH. REV. STAT. ANN. (Remington, 1932) § 6382; WIS. STAT. (1931) § 194.01.

2. Pa. Laws 1937, no. 286.

3. Pa. Laws 1937, no. 286, art. VIII. This article deals only with contract carriers and affiliates. Common carriers by motor vehicle are regulated elsewhere in the new Act. The common carrier group was controlled under prior utility legislation [PA. STAT. ANN. (Purdon, 1930) § 1 *et seq.*], the new Act being in this respect basically a reenactment of the old. For a comprehensive discussion of the other portions of the Act, see Ballard, *Recent Public Utility Legislation*, Phila. Legal Intelligencer, Dec. 18, 1937, p. 1, col. 2.

4. Motor Carrier Act, 49 STAT. 543 (1935), 49 U. S. C. A. § 301 (Supp. 1937).

5. See Coordination of Motor Transportation, 182 I. C. C. 263, 285 (1932).

6. Chicago, B. & Q. R. R. v. Iowa, 94 U. S. 155 (1876); Shields v. Ohio, 95 U. S. 319 (1877); MOSHER & CRAWFORD, PUBLIC UTILITY REGULATION (1933) 14 *et seq.*

7. However, the number of contracts is not controlling. Denver & R. G. Ry. v. Linck, 56 F. (2d) 957 (C. C. A. 10th, 1932); Haynes v. MacFarlane, 207 Cal. 529, 279 Pac. 436 (1929). Brown and Scott, *Regulation of the Contract Motor Carrier Under the Constitution* (1931) 44 HARV. L. REV. 530, 536.

8. 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 1223; WILLIS, CONSTITUTIONAL LAW (1936) 721; Brown, *Due Process of Law, Police Power, and the Supreme Court* (1927) 40 HARV. L. REV. 943.

lation once the initial right to regulate has been established.[9] In both problems the question of constitutional limitations is important.[10] However, it is the first of these problems only, the initial right to regulate, which is involved in the immediate discussion.[11] At the outset it must be noted that the state's initial right to regulate emanates from one source, the residuary police power,[12] while the authority of the federal government is derived from another source, an express or implied constitutional grant.[13] Furthermore, it must be observed that in the case of state regulation the Fourteenth Amendment not only circumscribes the police power from which the initial regulatory authority is derived,[14] but likewise the mode of effectuating such regulation.[15] In the case of federal control the Constitution generates the initial regulatory authority,[16] and the Fifth Amendment delimits the mode of effectuating it.[17] Failure to observe these distinctions may result in a confused analysis of the constitutional problems involved in this type of regulation.[18]

In an effort to establish their right to regulate contract carriers, some states, mindful of their recognized authority over common carriers, simply legislated contract carriers into the common carrier category.[19] However, when such a statute was brought before the Supreme Court in the *Duke* case,[20] it ran afoul of the Fourteenth Amendment, the court making this pronouncement:

> "Moreover, it is beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility for that would be taking property for public use without just compensation which no state can do consistently with the due process clause of the Fourteenth Amendment." [21]

Thus, this attempt of some states at regulating contract carriers on the basis of the familiar right to control common carriers failed.

California passed a statute which, while not expressly stating that contract carriers might not retain their private status, nevertheless imposed upon both common and contract carriers identical regulations.[22] The statute was held invalid by the Supreme Court in the *Frost* case,[23] upon the authority of the *Duke* case.[24]

The proponents of the statute in the *Frost* case, however, advanced a new theory to sustain the act, namely, that the state could legitimately condition its

9. Ohio Bell Tel. Co. v. Public Util. Comm., 301 U. S. 292 (1937); Edison Light & Power Co. v. Driscoll, 5 U. S. L. WEEK 160 (M. D. Pa. 1937), 86 U. OF PA. L. REV. 314; Pennsylvania Power & Light Co. v. Public Serv. Comm., 128 Pa. Super. 195, 193 Atl. 427 (1937); Willis, *loc. cit. supra* note 8; Denny, *The Growth and Development of the Police Power of the State* (1921) 20 MICH. L. REV. 173.

10. See *supra* notes 8 and 9.

11. See *infra* p. 408, for discussion of the constitutionality of devices used to effectuate regulation.

12. WILLIS, *op. cit. supra* note 8, at 727; Brown, *supra* note 8, at 952 *et seq.;* Denny, *supra* note 9.

13. WILLIS, *op. cit. supra* note 8, at 721.

14. See *supra* notes 8 and 9.

15. See *supra* note 9.

16. WILLIS, *op. cit. supra* note 8, at 721.

17. Monongahela Nav. Co. v. United States, 148 U. S. 312 (1893); Railroad Retirement Board v. Alton R. R., 295 U. S. 330 (1935), 35 COL. L. REV. 932; see *In re* American States Public Service Co., 12 F. Supp. 667, 706 (D. Md. 1935).

18. See Legis. (1936) 36 COL. L. REV. 945, 966.

19. ALA. CODE (Michie, 1928) § 6270 (1); Kans. Laws 1929, c. 222; Mich. Acts 1923, no. 209, §§ 1-3; Mo. Laws 1927, p. 402; VA. CODE ANN. (Michie, 1936) § 4097m.

20. Michigan Pub. Util. Comm. v. Duke, 266 U. S. 570 (1925), 38 HARV. L. REV. 980.

21. *Id.* at 577.

22. CAL. GEN. LAWS (Deering, 1923) no. 5129.

23. Frost v. Railroad Comm., 271 U. S. 583 (1926), 40 HARV. L. REV. 131.

24. Michigan Pub. Util. Comm. v. Duke, 266 U. S. 570 (1925).

grant of the privilege to use the highways as a place of business.[25] This theory was based in part on the right of the state in the exercise of its broad police power to place limitations on the use of the highways in the interest of their conservation and public safety.[26] The theory was also based upon the fact that the state can completely exclude carriers for hire from its highways [27] inasmuch as they use them for profit not as a matter of right but by way of privilege.[28] Accordingly, it was thought that if the state had this power of exclusion, it could condition its grant of privilege as it saw fit, whether by regulation of business or otherwise. Even though the Supreme Court of California upheld the provision requiring a contract carrier to secure a certificate of public convenience and necessity,[29] it felt called upon to construe the whole act and in doing so asserted that the result of it was to convert contract carriers into common carriers.[30] The United States Supreme Court declared that, accepting this construction of the act, it was an unconstitutional condition,[31] and hence, could not be affixed to the grant of the privilege.[32]

The legislature of one state has been successful in sustaining its regulatory program. Texas in 1931 passed an act regulating the business of contract carriers by requiring permits and fixing minimum rates.[33] The system of regulation of contract carriers was set up entirely apart from the regulatory measures prescribed for common carriers, although many of them were practically identical.[34] The entire act was prefaced by a broad declaration of policy wherein the Texas legislature stated that the "hazards on public highways . . . make it imperative that more stringent regulations should be employed, to the end that the highways may be rendered safer for the use of the general public; that the wear on such highways may be reduced. . . ." [35]

The act was attacked in the *Stephenson* case [36] by certain contract carriers who denied the constitutional right of the state to regulate their business. The lower federal court sustained the act, frankly recognizing that it regulated business.[37] The Supreme Court, however, while affirming the decision of the

25. Frost v. Railroad Comm., 271 U. S. 583, 587 (1926).

26. Packard v. Banton, 264 U. S. 140 (1924); Buck v. Kuykendall, 267 U. S. 307 (1925); Continental Baking Co. v. Woodring, 286 U. S. 352 (1932); Rosenbaum & Lilienthal, *Motor Carrier Regulation: Federal, State, and Municipal* (1926) 26 COL. L. REV. 954; Note (1932) 11 N. C. L. REV. 355, 357.

27. "That the state may altogether exclude hauling by carrier, common or contract intrastate, from its roads, is generally taken for granted." Stephenson v. Binford, 53 F. (2d) 509, 514 (S. D. Tex. 1931).

28. Packard v. Banton, 264 U. S. 140 (1924); Weksler v. Collins, 317 Ill. 132, 147 N. E. 797 (1925); Railroad Comm. v. McDonald, 90 S. W. (2d) 581 (Tex. Civ. App. 1936); State *ex rel.* Sikeston v. Missouri Util. Co., 331 Mo. 337, 53 S. W. (2d) 394 (1932).

29. CAL. GEN. LAWS (Deering, 1923) no. 5129.

30. Frost v. Railroad Comm., 197 Cal. 230, 240 Pac. 26 (1925).

31. Frost v. Railroad Comm., 271 U. S. 583 (1926). ". . . as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. . . . It is inconceivable that guarantees imbedded in the Constitution of the United States may thus be manipulated out of existence." *Id.* at 593.

32. The extension of this doctrine has been severely criticized. See Merrill, *Unconstitutional Conditions* (1929) 77 U. OF PA. L. REV. 879; Note (1931) 40 YALE L. J. 469, 471.

33. TEX. STAT. ANN. (Vernon, 1934) art. 911b.

34. *Ibid.*

35. *Id.* § 22b.

36. Stephenson v. Binford, 287 U. S. 251 (1932), 27 ILL. L. REV. 942, 8 IND. L. J. 552 (1933); Notes (1933) 31 MICH. L. REV. 395, 11 N. C. L. REV. 355.

37. Stephenson v. Binford, 53 F. (2d) 509 (S. D. Tex. 1931).

lower court, based its decision on another ground.[38] Taking as its premise the right of the state to enact measures in conservation of its highways, the Court found that the regulatory devices were "means to the legitimate end of conserving the highways".[39] In this way the Court avoided the consequences of the unconstitutional condition doctrine which it had employed in the *Frost* case,[40] and held the regulation not violative of the Fourteenth Amendment.[41]

In view of the foregoing decisions the present position of the Supreme Court may be established with reasonable certainty. A state may not by legislative fiat, either expressly [42] or in effect,[43] convert a contract carrier into a common carrier with its attendant obligations. However, a state may, in the exercise of its constitutional control over highways, regulate the business of a contract carrier, if such regulation bears a conceivably reasonable relation to highway conservation.[44]

With the position of the Supreme Court thus outlined, the question of the constitutionality of the Pennsylvania Act, as regards the initial right to regulate may be considered. Inasmuch as the Act provides for permits rather than certificates of public convenience,[45] distinguishes a contract carrier from a common carrier,[46] and sets up separate regulatory measures for the former, it should avoid the stigma of conversion of contract carriers into common carriers by legislative fiat. However, while this much of the constitutional question may be settled in favor of the Act, the declaration of policy [47] leaves unsettled a considerable part of it.

In view of the decisions of the Supreme Court in the *Stephenson* case one would expect the declaration of policy in the Pennsylvania Act to parallel that of the Texas statute.[48] Instead, it is declared to be the legislative intent to regulate common carriers "to develop and preserve a safe highway transportation system properly adapted to the needs of the commerce of the Commonwealth. . . ." It is further stated that because of the interrelation between common carriers and contract carriers and brokers, it is necessary to regulate contract carriers and brokers.[49] It seems shortsighted on the part of the drafters to omit provisions similar to that portion of the Texas statute which was so

38. "In view of the conclusions to which we shall come, it is not necessary to determine whether the operation of trucks . . . under private contracts . . . is a business impressed with a public interest." Stephenson v. Binford, 287 U. S. 251, 269 (1932).

39. Stephenson v. Binford, 287 U. S. 251, 272 (1932). In establishing its position the court said: "The extent to which they [regulatory measures] as means, conduce to that end [highway conservation], the degree of their efficiency, the closeness of their relation to the end sought to be attained, are matters addressed to the judgment of the legislature, and not to that of the courts. It is enough if it can be seen that in any degree, or under any reasonably conceived circumstances, there is an actual relation between the means and the end." *Id.* at 272.

40. Frost v. Railroad Comm., 271 U. S. 583 (1926).

41. Notwithstanding the Supreme Court's pronouncement to the contrary, it has been sufficiently demonstrated that such measures are not in fact conducive to the conservation of the highways. See Notes (1933) 31 MICH. L. REV. 395, 405, 11 N. C. L. REV. 355, 358; (1933) 8 IND. L. REV. 552.

42. Michigan Pub. Util. Comm. v. Duke, 266 U. S. 570 (1925).

43. Frost v. Railroad Comm., 271 U. S. 583 (1926). The Florida court in construing the statute of that state, seeking to avoid the error of the California court, expressly declared that the Florida statute did not convert contract carriers into common carriers. Cahoon v. Smith, 99 Fla. 1174, 128 So. 632 (1930). The Supreme Court, however, in Smith v. Cahoon, 283 U. S. 553 (1931), viewed the provisions of the act and stated that their effect was to convert contract carriers into common carriers, which could not be done, as had been previously decided.

44. Stephenson v. Binford, 287 U. S. 251 (1932). See *supra* note 38.

45. Pa. Laws 1937, no. 286, art. VIII, § 804.

46. *Id.* art. I, § 2 (7).

47. *Id.* art. VIII, § 801.

48. TEX. STAT. ANN. (Vernon, 1934) art. 911b, § 22b. See *supra* p. 405.

49. Pa. Laws 1937, no. 286, art. VIII, § 801.

expressly relied on by the Supreme Court in the *Stephenson* case, namely, the declaration concerning the reduction of wear and tear on the highways.[50] Should a constitutional test arise, the proponents of the Act will have deprived themselves of their most effective defensive weapon, a case on all fours with *Stephenson v. Binford.*

However, this omission from the declaration of policy does not necessarily force the conclusion that the Act will not survive a constitutional attack. Another and perhaps firmer ground of support may be found in the recognized authority of a state to regulate directly through its police power certain businesses as such.[51] In order to demonstrate the applicability of this direct regulatory authority it will be necessary to examine briefly certain antecedents of the present right to control. At early common law nearly every calling was subject to the demands of the entire public, the rejected customer having his action for a refusal to serve him.[52] However, with the increase in business competition the laissez-faire theory appeared on the economic horizon with the pronouncement that it was not sound economics to regulate business.[53] Thus, the regulatory power of the state changed from an ordinary to an extraordinary power that was to be used sparingly. Upon the adoption of the Fourteenth Amendment this power became more and more circumscribed by due process requirements.[54]

An approximation of the area of valid state regulation has resulted from judicial interpretation of the Fourteenth Amendment, but it has been a trial and error method, progress being made by the individual case.[55] For present purposes, however, it is sufficient to indicate the results of this progress. Until quite recently it was the accepted dogma that a "business affected with a public interest" was subject to state regulation,[56] while one not so affected was beyond the reach of the state's regulatory arm. A steady progression of businesses has been forced into the former sphere but the characteristics of a "business affected with a public interest" are still incapable of definition.[57] However, one of those characteristics, devotion to a public use, which among others has come to be accepted as one of the incidents of a business subject to state control,[58] sufficiently shows that a contract carrier does not fit into the category of businesses traditionally thought to be affected with a public interest. Nevertheless, in 1934 the Supreme Court in the *Nebbia* case[59] indicated that it no longer proposed to follow the rigid standards which it had prescribed in prior decisions, stating,

> "It is clear that there is no closed class or category of businesses affected with a public interest. . . . So far as the requirement of due

50. It should be noted that the Pennsylvania Act in the declaration of policy states that the Act is designed, *inter alia*, "to promote safe . . . service" and "to develop . . . a safe highway transportation system". While this bears a certain similarity to the Texas declaration, it is not quite the same since there the regulation is employed "to the end that the *highways* may be rendered safer for the *use of the general public*".

51. See *supra* note 12.

52. 1 WYMAN, PUBLIC SERVICE CORPORATIONS (1911) §§ 2, 7. For example the surgeon, the tailor, the smith, the victualer, the baker, and the miller were subject to the demands of the public. See Ballard, *supra* note 2, at p. 1, col. 2.

53. *Id.* § 27; Ballard, *supra* note 2, at p. 1, col. 2.

54. WILLIS, *op. cit. supra* note 8, at 728.

55. See Hale, *The Constitution and the Price System: Some Reflections on Nebbia v. New York* (1934) 34 COL. L. REV. 401, for an excellent discussion showing the trend of the cases.

56. MOSHER & CRAWFORD, *op. cit. supra* note 6, at 4; 1 WYMAN, *op. cit. supra* note 55, § 19. The leading case enunciating this dogma is Munn v. Illinois, 94 U. S. 113 (1876).

57. MOSHER & CRAWFORD, *op. cit. supra* note 6, at 5.

58. Munn v. Illinois, 94 U. S. 113 (1876); Michigan Pub. Util. Comm. v. Duke, 266 U. S. 570 (1925); Tyson v. Banton, 273 U. S. 418 (1927). See Robinson, *Public Utility Concept in American Law* (1928) 41 HARV. L. REV. 277, 293.

59. Nebbia v. New York, 291 U. S. 502 (1934).

> process is concerned, and in the absence of other constitutional restrictions, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare. . . ." [60]

Certainly the contract carrier viewed both absolutely and in connection with the common carrier reasonably requires regulation.[61] It would seem, then, that disregarding the shibboleth "affected with a public interest", a state may legitimately regulate the contract carrier industry as such without infringing Fourteenth Amendment guarantees. This is not such a radical departure as it might at first appear. In the last analysis the need for regulation is the reason for it. Stripped of slogans this is the rationale of utility control. Accordingly, it would appear that the *Nebbia* case has simply enunciated fundamentals without resort to traditional devices.

Additional support for the constitutionality of the Pennsylvania Act may be found in a relatively broad statement made by the Supreme Court in the *Sproles* case [62] involving the validity of weight restrictions on trucks. In that case the Court said:

> ". . . we perceive no constitutional ground for denying to the State the right to foster a fair distribution of traffic to the end that all necessary facilities should be maintained and that the public should not be inconvenienced by inordinate uses of its highways for purposes of gain." [63]

This statement supports the theory expressed in the declaration of policy of the Act that correlation of all motor carriers and affiliates is necessary to the maintenance of an adequate transportation system.

Still another theory may be employed to support the constitutionality of the Pennsylvania Act. Since the declaration of policy states as one of the purposes of the Act the regulation of common carriers, the entire regulation of *contract* carriers may be viewed as one of the devices employed to effectuate the regulation of *common* carriers. Under this theory only the second of the two constitutional problems is important, namely, whether such regulation of contract carriers is a reasonable regulatory device. Since the operation of one group of necessity affects that of the other, at least from an economic standpoint, it is possible that a court will hold the relation is such that regulation of the business of one group may be considered a reasonable mode of effectuating the regulation of the other.

Therefore, in view of this additional ground, and in view of the advanced position of the Supreme Court in the *Nebbia* case coupled with its earlier statement in the *Sproles* case, it would seem that a constitutional basis for the Pennsylvania Act can be worked out without resorting to the highway conservation theory enunciated in the *Stephenson* case.

Analysis of Provisions of Act

Inasmuch as the Pennsylvania Act was fashioned after the federal Motor Carrier Act [64] and because the Texas statute has had the approval of the Supreme Court,[65] the present analysis will include references to and comparisons with the other two statutes. Attention must be directed to the fact that throughout this entire section it is the second of the two constitutional problems which will be considered, namely, the mode of effectuating regulation once the initial

60. *Id.* at 536.

61. See Coordination of Motor Transportation System, 182 I. C. C. 263 (1932).

62. Sproles v. Binford, 286 U. S. 374 (1932).

63. *Id.* at 394.

64. 49 STAT. 543 (1935), 49 U. S. C. A. § 301 (Supp. 1937).

65. Stephenson v. Binford, 287 U. S. 251 (1932).

right to regulate has been established.[66] Following federal as well as Pennsylvania precedent, the legislature adopted a recognized definition of a common carrier.[67] A contract carrier is defined, in effect, as a motor carrier which does not hold itself out to serve the public at large and which operates intrastate for compensation.[68] Added to the definition is a statement aimed at preventing leasing subterfuges in an effort to escape the operation of the Act.[69] This definition is in substantial accord with the definition in the federal act [70] and in the Texas statute.[71] The federal statute defines and prescribes regulations for another class, private carriers, the distinguishing feature of this class being the fact that it does not carry for compensation.[72] This type is not defined in the Pennsylvania statute and accordingly, no attempt is made to regulate it.

It is enacted that it shall be the commission's duty, generally, to regulate contract carriers by prescribing minimum rates, requirements with respect to uniform systems of accounts, requirements with respect to safety of service and equipment, and insurance requirements.[73] There are serious doubts as to the validity of the requirement of shipper insurance,[74] presumably because it has no relation to highway safety and hence, is not a proper exercise of the police power. Accordingly, the commission in prescribing insurance requirements would do well to bear in mind this constitutional objection.

The same section provides that the commission shall be empowered to regulate brokers,[75] by prescribing regulations as to licensing, financial responsibility and accounts. The provisions of this section are the same as the corresponding section in the federal act,[76] and would not appear to be unreasonable or arbitrary, but within the bounds of the Fourteenth Amendment inasmuch as control of this group seems necessary to effectuate the general regulatory policy.

Section 803 [77] which allows the commission to make such classifications of contract carriers and brokers as it deems "necessary or desirable in the public interest", and to prescribe regulations for such classifications, while harmless as it stands, unless cautiously administered by the commission, may give rise to such discrimination that it will not survive constitutional attacks. However, since it is accepted that the mere possibility of arbitrary action will not support a constitutional objection, and that the complaining party must show injury be-

66. Although it be admitted that the right to regulate exists, nevertheless, the devices employed to render operative that regulation must be reasonable and not arbitrary. If they are found to be unreasonable, such regulations then are unconstitutional as taking property without due process of law in violation of the Fourteenth Amendment. See *supra* p. .

67. A common carrier is defined as any person or corporation "holding out, offering, or undertaking, directly or indirectly, service for compensation to the public for the transportation of passengers or property. . . ." Pa. Laws 1937, no. 286, art. I, § 2 (6). Producer's Trans. Co. v. Railroad Comm., 251 U. S. 228 (1920); Bay v. Merrill & Ring Lumber Co., 211 Fed. 717 (1914); Southern Ry. v. Taylor, 16 F. (2d) 517 (App. D. C. 1926); Gordon v. Hutchinson, 1 W. & S. 285 (Pa. 1841); Lloyd v. Haugh, 223 Pa. 148, 72 Atl. 516 (1909); Philips v. Public Serv. Comm., 127 Pa. Super. 341, 191 Atl. 641 (1937).

68. Pa. Laws 1937, no. 286, art. I, § 2 (7).

69. Any person or corporation "who or which provides or furnishes, with or without drivers, any motor vehicle in such transportation. . . ." *Ibid.*

70. 49 STAT. 544 (1935), 49 U. S. C. A. § 303 (15) (Supp. 1937).

71. TEX. STAT. ANN. (Vernon, 1934) art. 911b, § 1 (h).

72. 49 STAT. 544 (1935), 49 U. S. C. A. § 303 (17) (Supp. 1937).

73. Pa. Laws 1937, no. 286, art. VIII, § 802 (a). See also *Id.* art. IX, § 915.

74. Shipper insurance has also been held to constitute an unreasonable interference with the right to contract. Public Serv. Comm. v. Grimshaw, 49 Wyo. 158, 53 P. (2d) 1 (1935); see Sprout v. South Bend, 277 U. S. 163, 171 (1928). *Cf.* Deppman v. Murray, 5 F. Supp. 661, 669 (W. D. Wash. 1934). See also Legis. (1936) 22 VA. L. REV. 695, 699.

75. Broker is defined as any person or corporation not included in the term "motor carrier" who sells transportation or procures facilities therefor. Pa. Laws 1937, no. 286, art. I, § 2 (2). Brokers are not regulated by the Texas statute.

76. 49 STAT. 546 (1935), 49 U. S. C. A. § 304 (4) (Supp. 1937).

77. There is no similar provision in the federal statute.

cause of arbitrary action,[78] it lies within the power of the commission to forestall any such attacks by carefully avoiding an arbitrary course of action. Squarely upon the administrative wisdom of the commission rests the effectiveness of this section.

Meeting, on the surface at least, the constitutional objection found in those statutes which required contract carriers to take out certificates of public convenience and necessity,[79] the Act provides for a "permit" as a condition precedent to the operation of a contract carrier.[80] This is practically identical with the corresponding section in the federal act,[81] and likewise finds its counterpart in the Texas statute.[82] There is included a "grandfather clause" whereby a carrier operating on or before a specified date is entitled to a permit as of right upon application. This view that existing operators have such a vested right as will support the exemption is generally conceded and has been upheld by the courts.[83] To any carrier who cannot bring himself within the "grandfather clause", a permit is to be issued only upon a showing that he is "fit, willing, and able" to serve, and that the "proposed service . . . will be consistent with the public interest and the policy declared in . . . this act." [84] Following identically the provisions of the federal act,[85] and quite similar to those of the Texas statute,[86] this section would appear to be valid as a reasonable regulatory requirement.

In the following three sections the Act prohibits a contract carrier from simultaneously operating as a common carrier, except by leave of the commission;[87] provides for the licensing of brokers;[88] and for a limited transfer of permits.[89]

By section 808 contract carriers in the issuance or assumption of securities and the transfer of property are made subject to certain other provisions of the Act.[90] Inasmuch as these other sections refer to "public utilities" there is at least some doubt as to their validity when applied to contract carriers. However, the mere fact that the latter are subjected to identical regulations with public utilities in this respect does not of itself invalidate the provision. If it can be demonstrated that such similar regulation is reasonable and not arbitrary, the constitutional objection will be overcome.[91]

Section 809 imposes the duty upon every contract carrier to reduce to writing and file with the commission all contracts, or copies thereof, and to file rate schedules as the commission may require. Furthermore, no carrier may operate unless it shall have filed either its contracts or a minimum rate schedule with the commission. These provisions may present a practical obstruction to the

78. Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50 (1926); Utah Power & Light Co. v. Pfost, 286 U. S. 165 (1932); First Nat. Bank v. Louisiana Tax Comm., 289 U. S. 60 (1933).

79. See *supra* notes 19 and 22.

80. Pa. Laws 1937, no. 286, art. VIII, § 804 (a).

81. 49 STAT. 552 (1935), 49 U. S. C. A. § 309 (a) (Supp. 1937).

82. TEX. STAT. ANN. (Vernon, 1934) art. 911b, § 6 (a).

83. Stanley v. Public Util. Comm., 295 U. S. 76 (1935); Cincinnati Traction Co. v. Public Util. Comm., 111 Ohio 681, 146 N. E. 84 (1924). But see Mayflower Farms v. Ten Eyck, 297 U. S. 266, 274 (1936).

84. Pa. Laws 1937, no. 286, art. VIII, § 804 (b).

85. 49 STAT. 552 (1935), 49 U. S. C. A. § 309 (b) (Supp. 1937).

86. TEX. STAT. ANN. (Vernon, 1934) art. 911b, § 6 (c).

87. Pa. Laws 1937, no. 286, art. VIII, § 805.

88. *Id.* § 806.

89. *Id.* § 807. The Pennsylvania act contains no power of revocation of permit such as is expressed in the federal act. 49 STAT. 555 (1935), 49 U. S. C. A. § 312 (a) (Supp. 1937).

90. Pa. Laws 1937, no. 286, art. VI (issuance and assumption of securities); *id.* art. II, § 202 (acquisition and transfer of tangible property); *id.* art. IX, § 915 (surety bonds and insurance).

91. Stephenson v. Binford, 287 U. S. 251 (1932). *Supra* note 38.

successful operation of the Act. In defining a contract carrier, the Pennsylvania Act makes no mention of operation under contracts or agreements, whereas the federal act includes in the definition the words "under special and individual contracts or agreements". Pursuant to the broad provisions of section 204(6) in the federal act authorizing general administrative requirements, the Interstate Commerce Commission has required contract carriers so defined to file written contracts setting out all arrangements and terms with great particularity.[92] There are, however, certain carriers who are unable, as a practical matter, to write contracts that meet these standards of definiteness.[93] The question then immediately arises as to what disposition will be made of these carriers. By the commission's own order they cannot come within the regulations prescribed for contract carriers, yet by definition they are not common carriers. Hence, the practical result might be to let this group go unregulated.[94] Possibly the change in definition in the Pennsylvania Act was purposely made to avoid a difficulty similar to that arising under the Interstate Commerce Commission's interpretation of the federal act. However, this effort would seem to be nullified by Section 809 which requires the filing of contracts. If the Public Utility Commission, in the light of the federal ruling, requires the same degree of particularity in the contracts as the Interstate Commerce Commission, certain contract carriers will not be able to comply, because they will be unable to write contracts with the required particularity. Since they cannot be converted into common carriers, a strict contract requirement would result in their operating without regulation. On the other hand, if the Commission is liberal in its contract requirements,[95] this possible difficulty will be obviated, since all contract carriers will then be able to conform to the Act. It seems that it would have been wiser draftsmanship, in view of the experience of the administration under the federal act, to omit the contract requirement from section 809.

In the following section,[96] which is substantially similar to the federal act,[97] the time when and the means whereby the commission shall fix the minimum rates authorized by a prior section [98] are set forth. Whenever the commission finds that the rate of a contract carrier contravenes the policy declared in the Act, it may prescribe minimum rates to be charged by such carrier. In establishing these minimum rates the commission is to consider: (1) cost of service of such carriers, (2) effect of such minimum rates on transportation, and (3)

92. *Ex parte* M. C. 12, C. C. H. Fed. Car. Serv. ¶ 7066 (1937); *Ex parte* M. C. 9, C. C. H. Fed. Car. Serv. ¶ 7088 (1937).

93. Some carriers operate under general agreements whereby they consent to do all the hauling which a shipper may require over the course of a certain period. Since the requirements at the time of making the contract are indefinite, the service and the price thereof cannot be set out in advance with particularity.

94. "If the term 'contract carrier' in the act means only those private carriers for hire who operate under contracts of the character required by the majority, does it not necessarily follow that private carriers for hire, who operate under contracts, which are not in writing, are not 'bilateral', do not impose specific obligations on both parties, or do not 'cover a series of shipments during a stated period of time', are either (1) not subjected to regulation by the act, (2) are included in the group designated as 'common carrier(s)' in section 203 (2) (14), or (3) are included in the group designated as 'private carriers(s)' in section 203 (a) (17)? They cannot be classed as common carriers, for the reason that they do not undertake to serve the general public. If they are not subjected to regulation by the act, they may continue their operations free from any regulation whatever by us, as there is no prohibition in the act or elsewhere against their continuing to operate." Commissioner Lee dissenting in *Ex parte* M. C. 12, C. C. H. Fed. Car. Serv. ¶ 7066 (1937).

95. A memorandum setting out the general terms of the agreement should be enough to serve the regulatory purposes, inasmuch as a schedule of rates may also be required.

96. Pa. Laws 1937, no. 286, art. VIII, § 810.

97. 49 STAT. 561 (1935), 49 U. S. C. A. § 318 (Supp. 1937).

98. Pa. Laws 1937, no. 286, art. VIII, § 802 (a).

diversion of the business of any common carrier by motor vehicle to other forms of transportation. The minimum rate provision of the Texas statute which was upheld by the Supreme Court in the *Stephenson* case provides that the rates of contract carriers shall not be less than those of common carriers.[99] Inasmuch as a consideration of the diversion of common carrier traffic to other forms of transportation will, as a practical matter, approximate the Texas requirement, the *Stephenson* case, validating minimum rates, must be regarded as controlling.[100]

The commission is further authorized to prescribe forms for accounts,[101] to require contract carriers to designate an agent for service of notice and process,[102] and to issue temporary permits and licenses without hearing,[103] this section expressly stating that no application may be denied without hearing. In a subsequent article the penalties for violation of any of the provisions of the article are set forth.[104]

Supersedure

Finally, the question may arise as to the effect of the federal act on the Pennsylvania Act. The generally accepted dogma in those cases where state and federal regulations cover approximately the same field is that the federal legislation supersedes the state act.[105] However, in view of the definition of the type of carrier that is being regulated by the Pennsylvania Act, it is only the exceptional case that will give rise to the supersedure problem. Admittedly there can be an interstate carrier that for some portion of its operation may become wholly intrastate in character.[106] In this situation the question would not be present because for that portion of its journey wholly intrastate the carrier would be outside the jurisdiction of the Motor Carrier Act.[107] On the other hand, the clearly interstate carrier would not be subject to the Pennsylvania Act since it does not transport between points within the state. This leaves, then, only the situation where a contract carrier operating wholly within the boundaries of one state is, nevertheless, classed as engaged in interstate commerce.[108] The wording of the Pennsylvania Act would cover the carrier in question, yet he would be engaged in interstate commerce and so within the purview of the Motor Carrier Act. No such case has arisen, but it is believed that in this extreme situation the traditional doctrine would be invoked to the advantage of the federal legislation.

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99. TEX. STAT. ANN. (Vernon, 1934) art. 911 b, § 6 (aa).

100. ". . . this [fixing minimum rates] interferes with the freedom of the parties to contract, but it is not such an interference as the Fourteenth Amendment forbids. While freedom of contract is the general rule, it is nevertheless not absolute. . . . When the exercise of that freedom conflicts with the power and duty of the state to safeguard its property from injury and preserve it for those uses for which it was primarily designed, such freedom may be regulated and limited to the extent which reasonably may be necessary to carry the power and duty into effect." Stephenson v. Binford, 287 U. S. 251, 274 (1932).

101. Pa. Laws 1937, no. 286, art. VIII, § 811.

102. *Id.* § 812.

103. *Id.* § 813.

104. *Id.* art. XIII, § 1311.

105. Northern Pac. Ry. v. Washington, 222 U. S. 370 (1912); Oregon-Washington R. R. & Nav. Co. v. Washington, 270 U. S. 87 (1926).

106. New York Cent. R. R. v. Mohney, 252 U. S. 152 (1920); Baltimore & O. S. W. R. R. v. Settle, 260 U. S. 166, 170 (1922). See also GAVIT, THE COMMERCE CLAUSE (1932) § 64; WILLIS, *op. cit. supra* note 8, at 292.

107. 49 STAT. 543 (1935), 49 U. S. C. A. § 302 (c) (Supp. 1937).

108. Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282 (1921); Real Silk Hosiery Mills v. Portland, 268 U. S. 325 (1925). See also GAVIT, *op. cit. supra* note 106, § 60; WILLIS, *op. cit. supra* note 8, at 290. It is not within the scope of this discussion to examine in detail the question of when one may be operating in interstate or intrastate commerce.