Michigan Law Review

Volume 39 | Issue 2

1940

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Recommended Citation

Kenneth J. Nordstrom, *RAILROADS - REORGANIZATION - VALIDITY OF CONDITIONING APPROVAL OF A CONSOLIDATION BY REFERENCE TO PROPER TREATMENT OF EMPLOYEES*, 39 MICH. L. REV. 337 (1940).
Available at: https://repository.law.umich.edu/mlr/vol39/iss2/23

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RAILROADS — REORGANIZATION — VALIDITY OF CONDITIONING APPROVAL OF A CONSOLIDATION BY REFERENCE TO PROPER TREATMENT OF EMPLOYEES — A railroad made application to the Interstate Commerce Commission to obtain authorization to lease the lines of another railroad. The relevant federal statute provided that the commission should authorize consolidations and leases subject to such terms and conditions as it should find just and reasonable and as would promote the public interest.[1] Accordingly, the commission conditioned approval of the lease by requiring that employees dismissed as a result of the lease be paid monthly allowances for fixed periods, or until securing re-employment; that those not dismissed be protected against any decrease in wages for five years, and reimbursed for expenses of moving necessitated by the lease. Evidence was introduced to show that the cost of the employee protection plan would amount to about one-half of the savings to be obtained by the railroad during the period of labor adjustment. *Held*, that under the existing statute authorizing the commission to impose conditions that will promote the "public interest," the commission had authority to impose conditions regarding the interest of affected employees. Also this construction of the statute was ruled constitutional as within the scope of congressional power to regulate interstate commerce, and as not a denial of due process. *United States v. Lowden*, 308 U. S. 225, 60 S. Ct. 248 (1939).

The most serious contention against the exercise of this authority by the commission would appear to be that employee-protection powers are not expressly given to the commission, and that such conditions as imposed in the instant case can have no relationship to maintenance of an adequate transportation system and in consequence cannot be said to promote the "public interest" in the statutory sense. While not explicit, it is true that the wording of the

[1] Interstate Commerce Act, as amended, 48 Stat. L. 217 (1933), 49 U. S. C. (1934), § 5 (4) (b). This section provides that the commission on application by the carrier or carriers concerned may, after hearing, authorize such consolidation or lease, and directs that "If after such hearing the Commission finds that, subject to such terms and conditions . . . as it shall find to be just and reasonable, the proposed consolidation . . . [or] lease . . . will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving . . . such consolidation . . . [or] lease . . . upon the terms and conditions and with the modifications so found to be just and reasonable." The Transportation Act of 1940 passed subsequent to this case, and referred to in note 12, infra, superseded this act.

Interstate Commerce Act, section 5 (4) (b) [2] is sufficiently broad to authorize the Court's construction, although the conditions imposed by the commission under an almost identical earlier section had never related to matters of employment.[3] Still, the question of labor displacement by railroad consolidation cannot be regarded as a new problem,—the need for making some provision for employees adversely affected by consolidation has long been recognized by labor organizations as well as carrier executives.[4] Congress may well have had this possibility in mind when conferring upon the Interstate Commerce Commission the broad power to impose conditions that may appear just and reasonable and in the "public interest," for consolidation and its concomitant labor displacement problems had been brought to its attention before this enactment.[5] Congress had passed several measures for arbitration of labor disputes between railroad employees and employers, all aimed at the prevention of interruption of railroad service through such disputes, and culminating in the Railway Labor Act of 1926.[6] Also the Safety Appliance Act,[7] the Hours of Service Act,[8] and the Federal Employees Liability Act [9] were designed to insure the safety and welfare of railroad employees. The constitutionality of these measures has been sustained on the ground that they fostered the commerce in which the employees were engaged. Again, it would appear that the chief benefits of an extensive program of consolidation are not to be at the expense of labor, as has been clearly indicated by Congress in the "labor freezing" and other employee protection provisions of the Emergency Railroad Transportation Act of 1933.[10] In

[2] Id.

[3] See note in 52 HARV. L. REV. 694 at 695 (1939). This article was written before the decision handed down in the principal case, and suggests doubt as to the commission's authority.

[4] Doak, "Consolidation from the Railroad Employees' Viewpoint," 13 PROC. ACAD. POL. SCI., No. 3, p. 80 (1929); Willard, "The Status of Railroad Consolidation," id., 119 at 122. On May 21, 1936, in Washington, D. C., representatives of 219 railroads and 21 labor organizations reached an agreement providing for payment of dismissal compensation, expenses of transfer, and protection against loss in sale of home. 57 TRAFFIC WORLD 995 (1936).

[5] The Railroad Labor Board in 1929 arbitrated the dispute of the Texas and Pacific Railroad Company with its employees, arising out of consolidation of plant facilities. The board awarded the employees compensation for depreciation in the value of their homes. The board found that such a requirement was reasonable in view of the fact that railroads themselves had on several prior occasions compensated the employees affected. 28 MONTHLY LAB. REV. No. 3, p. 49 (1929). See also, 43 MONTHLY LAB. REV. 867 (1936), where dismissal compensation was agreed upon in similar circumstances under threat of strike.

[6] 44 Stat. L. 577 (1926), 45 U. S. C. (1934), § 151 et seq. See Texas & New Orleans R. R. v. Brotherhood of Railway & Steamship Clerks, 281 U. S. 548, 50 S. Ct. 427 (1930).

[7] 27 Stat. L. 531 (1893), 45 U. S. C. (1934), § 1 et seq. See Southern R. R. v. United States, 222 U. S. 20, 32 S. Ct. 2 (1911).

[8] 34 Stat. L. 1415 (1907), 45 U. S. C. (1934), § 61 et seq. See Baltimore & Ohio R. R. v. Interstate Commerce Commission, 221 U. S. 612, 31 S. Ct. 621 (1911).

[9] 35 Stat. L. 65 (1909), 45 U. S. C. (1934), § 51 et seq.

[10] 48 Stat. L. 214 (1933), 49 U. S. C. (1934), § 257(b). See discussion of this

the light of the foregoing record of congressional recognition of railroad labor problems as a matter of public concern, it would seem clear that Congress, by its choice of the broad language in section 5 (4) (b),[11] intended that labor problems arising from consolidations and leases should be considered a matter of "public interest" when, as here, these conditions are closely related to the public policy of the Transportation Act to facilitate railroad consolidation and thereby promote the adequacy and efficiency of the railroad transportation system. However, whatever doubts as to the interpretation of the statute that have existed heretofore are now put at rest, for very recently and subsequent to the principal case, Congress has enacted the Transportation Act of 1940 [12] in which provision is expressly made for labor protection. A question remains as to whether the former statute as construed in the principal case and the present act with its express wording come within the bounds of congressional power to regulate interstate commerce. It is true that in *Railroad Retirement Board v. Alton R. R.*,[13] the Railroad Retirement Act [14] was declared not to be a valid regulation of interestate commerce, on the ground that a compulsory retirement system for railroad employees can have no relation to the promotion of efficiency, economy, or safety of railroad operation. Yet it would appear that the *Alton* case can be distinguished by a showing that the particular measure is reasonably calculated to improve interstate commerce,[15] as here, or it may be suggested that the Supreme Court has of late been more willing to accept the legislature's definition as to what factors affect interstate commerce in lieu of its own judgment thereon.[16] In answer to due process clause objections, it has been held that

point in 39 COL. L. REV. 514 (1939), in connection with this case. The Interstate Commerce Commission has estimated that consolidation of the country's railroads into a limited number of large systems would result in savings, 75% of which would be at the expense of labor. Consolidation of Railroads, 159 I. C. C. 522 (1929), 185 I. C. C. 403 (1932).

[11] See note 1, supra.

[12] Transportation Act of 1940, Pub. Act No. 785, approved Sept. 16, 1940, reported in 9 U. S. LAW WEEK no. 13 (Sept. 24, 1940). Title I, § 7(f) provides "As a condition of its approval . . . of any transaction involving a carrier or carriers by a railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval, the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position in respect to their employment, except that the protection afforded to any employee . . . shall not be required to continue for a longer period, following the date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order."

[13] 295 U. S. 330, 55 S. Ct. 758 (1935).

[14] 48 Stat. L. 1283 (1934), 45 U. S. C. (1934), § 201 et seq.

[15] See Virginia Ry. v. System Federation No. 40, 300 U. S. 515, 57 S. Ct. 592 (1937); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615 (1937).

[16] National Labor Relations Board v. Fainblatt, 306 U. S. 601 at 604, 59 S. Ct. 668 (1939); National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615 (1937).

a business may be required to carry the burden of employee wastage, incident to its operation, without a denial of due process; [17] moreover, the due process objections fatal to the railroad retirement plan in the *Alton* case, which seems analogous to a plan of dismissal compensation, have apparently been repudiated by the Supreme Court.[18] Thus, by virtue of the decision herein principally discussed, the principles embodied in the labor protection provisions of the Transportation Act of 1940 are grounded in a history of successful litigation and should enjoy immunity from constitutional attack.

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[17] In Dayton-Goose Creek Ry. v. United States, 263 U. S. 456, 44 S. Ct. 169 (1924), it was held that the Fifth Amendment does not forbid the compulsory application of incomes as the result of commission action to specified purposes in the furtherance of the public interest in railway transportation. See also, Second Employer's Liability Cases, 223 U. S. 1 at 51, 32 S. Ct. 169 (1912).

[18] West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578 (1937); Carmichael v. Southern Coal & Coke Co., 301 U. S. 495, 57 S. Ct. 868 (1937).