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INTERSTATE COMMERCE — FEDERAL MOTOR CARRIER ACT — EXTENT OF SUPERSEDURE OF STATE JURISDICTION — Prior to the passage of the Federal Motor Carrier Act of 1935,¹ interstate motor carriers were subject to regulation by the states to a limited extent.² This power to regulate may be briefly summarized as follows: (1) a state could not require interstate motor carriers to show that their operation was required in the interest of public convenience and neces-

¹ 49 Stat. L. 543 (1936), 49 U. S. C., § 301 (Supp. 1936).

² For a complete discussion of this question, see Kauper, "State Regulation of Interstate Motor Carriers," 31 MICH. L. REV. 920, 1097 (1933); see also Thrig, "State Regulation of Motor Carriers," 19 MARQ. L. REV. 149 (1935); 23 GEORGETOWN L. J. 854 (1935).

sity;³ (2) it could regulate to some extent the service and facilities offered by such carriers⁴ but it could not regulate their rates;⁵ (3) it could require them to carry liability insurance for the protection of third parties but it could not require them to carry insurance to assure the satisfaction of legal liabilities to passengers and shippers;⁶ (4) it had a wide power to regulate interstate motor carriers in the interests of public safety;⁷ (5) it could impose regulation designed to conserve its highways⁸ and prevent congestion upon them.⁹

Federal legislation became a necessity inasmuch as the states were completely without power to regulate the interstate motor carrier with respect to such matters as competition, rates, and passenger and cargo insurance, and since it was desirable to have uniform standards with respect to some matters over which the states were conceded to have a limited control so far as interstate motor carriers were concerned.¹⁰

Since the enactment of the Federal Motor Carrier Act,¹¹ it becomes appropriate to determine which powers, if any, of those that the state previously exercised over interstate motor carriers survived the enactment of the federal statute.

The federal legislation expressly regulates the interstate motor carrier with respect to certification requirements,¹² rates and service

³ *Buck v. Kuykendall*, 267 U. S. 307, 45 S. Ct. 324 (1925).

⁴ See *Chicago & N. W. R. R. v. Fuller*, 17 Wall. (84 U. S.) 560, 21 L. Ed. 710 (1873); *Missouri Pacific Ry. v. Larabee Flour Mills Co.*, 211 U. S. 612, 29 S. Ct. 214 (1909).

⁵ See *Wabash, St. L. & Pacific Ry. v. Illinois*, 118 U. S. 557, 7 S. Ct. 4 (1886).

⁶ *Sprout v. South Bend*, 277 U. S. 163 at 172, 48 S. Ct. 502 (1928), noted in 27 MICH. L. REV. 823 (1929).

⁷ See *Hendrick v. Maryland*, 235 U. S. 610, 35 S. Ct. 140 (1915); *Northern Pacific Ry. v. Washington*, 222 U. S. 370, 32 S. Ct. 160 (1912); *Atchison, T. & S. F. Ry. v. Railroad Commission of California*, 283 U. S. 380, 51 S. Ct. 553 (1931).

⁸ *Morris v. Duby*, 274 U. S. 135, 47 S. Ct. 548 (1927); *Sproles v. Binford*, 286 U. S. 374, 52 S. Ct. 581 (1932).

⁹ *Bradley v. Public Utilities Commission*, 289 U. S. 92, 53 S. Ct. 577 (1933).

¹⁰ See George, "The Federal Motor Carrier Act of 1935," 21 CORN. L. Q. 249 at 251 (1936).

¹¹ For an analysis of the administrative provisions provided by section 205 of the act, see Kauper, "Utilization of State Commissions in the Administration of the Federal Motor Carrier Act," 34 MICH. L. REV. 37 (1935). For a discussion of the Motor Carrier Act, see George, "The Federal Motor Carrier Act of 1935," 21 CORN. L. Q. 249 (1936). See also, De Felice, Moss, Lechlitter and Stout, "Progress in the Regulation of Motor Carriers by the Interstate Commerce Commission," 5 GEO. WASH. L. REV. 791 (1937).

¹² 49 Stat. L. 543, §§ 206 (a), 207 (a), 209 (a), (b) (1936), 49 U. S. C., §§ 306 (a), 307 (a), 309 (a) and (b) (Supp. 1936). As to the limitation on the power of the Federal Government to impose economic regulations on interstate motor carriers, see Kauper, "Federal Regulation of Motor Carriers," 33 MICH. L. REV. 1 at 21 (1934).

requirements,¹³ insurance requirements,¹⁴ and requirements for the promotion of public safety.¹⁵ With the entrance of the Federal Government into these fields of interstate motor carrier activity, any power that the states may have had prior to the enactment of the Federal Motor Carrier Act of 1935 is now superseded. The real controversy arises as to the continuing power of the states to regulate interstate motor carriers with respect to the preservation of highways and the prevention of congestion thereon. This problem has two aspects: (1) imposition of size and weight limitations, and (2) restrictions respecting increased use of congested highways.

I.

The Federal Motor Carrier Act authorizes the Interstate Commerce Commission to investigate and report on the need for federal regulation as to the size and weight for motor vehicles engaged in interstate commerce.¹⁶ Two recent decisions¹⁷ in the federal district courts have interpreted the act as not authorizing the commission to regulate the size and weight of interstate motor vehicles. Both courts held that the state still had power to require interstate motor carriers to comply with size and weight requirements. In the *Barnwell* case¹⁸ the court said,

“The presumption is hardly to be indulged that Congress intended

¹³ 49 Stat. L. 543, §§ 216, 217, 218 (1936), 49 U. S. C., §§ 316, 317, 318 (Supp. 1936).

¹⁴ 49 Stat. L. 543, § 215 (1936), 49 U. S. C., § 315 (Supp. 1936); Regulation of Interstate Commerce Commission governing surety bonds and policies of insurance, August 3, 1936.

In *University Overland Express v. Alsop*, (Conn. 1936) 189 A. 458, the court held that the power of the states to require insurance had been rendered inoperative since the Interstate Commerce Commission had promulgated regulations concerning that field. In another recent case, *Service Mutual Liability Ins. Co. v. United States*, (D. C. Mass. 1937) 18 F. Supp. 613, it was held that that part of the insurance regulation which provided that the required insurance “must be written by insurance companies legally authorized to transact business in each State in which their policies cover the operation of the insured motor carrier” was within the authority of the Commission to promulgate and that it was not an unconstitutional delegation of authority.

¹⁵ 49 Stat. L. 543, § 204 (a) (1) and (5) (1936), 49 U. S. C., § 304 (a) (1) and (5) (Supp. 1936); Regulation of Interstate Commerce Commission governing qualifications of employees and safety, December 23, 1936.

¹⁶ 49 Stat. L. 543, § 225 [cf. § 204 (a) (1)] (1936), 49 U. S. C., § 325 (Supp. 1936).

¹⁷ *L. & L. Freight Lines v. Railroad Commission of Florida*, (D. C. Fla. 1936) 17 F. Supp. 13; *Barnwell Bros., Inc. v. South Carolina State Highway Dept.*, (D. C. S. C. 1937) 17 F. Supp. 803.

¹⁸ (D. C. S. C. 1937) 17 F. Supp. 803 at 807.

to include size and weight in 'safety of operation and equipment' or 'standards of equipment' as to which the Commission was given full power of regulation, when by section 225, size and weight were specifically dealt with and the Commission was authorized merely to investigate as to these and report on the need of regulation."

These decisions were reached as a matter of interpretation of the Motor Carrier Act, and the question of the constitutional power of the federal government to regulate size and weight was not raised.¹⁹ Although as a matter of interpretation of the Motor Carrier Act the decisions in these cases that the state still has power to prescribe maximum size and weight limitations are undoubtedly correct, it seems desirable that some degree of uniformity as to maximum size and weight requirements for interstate motor carriers should be brought about by federal action in this direction.²⁰

2.

There is no express provision in the Motor Carrier Act with respect to the control of the use of particular highways in order to prevent congestion in the first instance or to avoid further congestion on a highway already overburdened with traffic.²¹ This question of the power of the states, since the Federal Motor Carrier Act, to regulate interstate motor carriers with respect to prevention of highway congestion has arisen in both the Texas and Florida courts. The Texas Court of Civil Appeals held that the state commission had jurisdiction to require an interstate motor carrier to apply for a so-called certificate of convenience and necessity (really a license or permit and not a certificate in the usual sense of a device for the regulation of competition), since the commission in granting the certificate passes on the question of highway congestion, a matter still within the power of the states notwithstanding the passage of the federal act.²² Although the

¹⁹ See Kauper, "Federal Regulation of Motor Carriers," 33 MICH. L. REV. 239 at 265 (1934), for a discussion of the power of the Federal Government in regard to size and weight limitations.

²⁰ See Kauper, "Federal Regulation of Motor Carriers," 33 MICH. L. REV. 1 at 8, 9 (1934).

²¹ 49 Stat. L. 543, § 208 (a) (1936), 49 U. S. C., § 308 (a) (Supp. 1936) provides that the certificate authorized to be issued under the act to interstate motor carriers must be taken subject to reasonable conditions imposed by the Commission, including the fixing of routes over which the carrier shall operate. In practice this power over routes by the commission has been exercised only in regard to economic regulation.

²² *Railroad Commission of Texas v. Southwestern Greyhound Lines*, (Tex. Civ. App. 1936) 92 S. W. (2d) 296.

Supreme Court of Texas reversed this decision on other grounds,²³ their dictum on this question was in accord with the view taken by the Court of Civil Appeals as to the jurisdiction of the state commission. While the Supreme Court of Florida has held that since the enactment of the Federal Motor Carrier Act the state commission has no authority to refuse to issue a certificate of convenience and necessity²⁴ (using this term in its usual sense to refer to a means of regulating competition as distinguished from a mere license or permit), the court points out that the state commission still has power to require registration of the interstate motor carrier for the purpose of taxation and the imposition of regulations under the state police power.²⁵ Although the Texas case asserts that the state commission has the power to require state certification of interstate motor carriers and the Florida cases deny that the state commission has any power whatsoever for this purpose, it is believed that they differ only in the use of the term "certificate of convenience and necessity," and that there is actually no conflict in their views as to the powers the state commissions still have over interstate motor carriers. In Texas the state commission's practice in the certification of interstate motor carriers is to pass on the question of highway congestion; while in Florida, although the court says that the commission cannot deny a certificate of public convenience and necessity to an interstate motor carrier, it states that the commission still has jurisdiction to enforce police regulations including the right to require interstate motor carriers to use specified routes to prevent congestion.²⁶ Both the Texas and Florida courts interpret the Motor Carrier Act as not attempting to invade this power of the state to preserve its highways.²⁷ From these decisions we come to the conclusion that the state power over interstate motor carriers to prevent

²³ *Southwestern Greyhound Lines v. Railroad Commission of Texas*, (Tex. 1936) 99 S. W. (2d) 263. The court reversed the decision of the Court of Civil Appeals on the ground that the issuance of a temporary injunction is a matter of discretion with the trial court and that there was no showing of abuse of that discretion.

²⁴ *Lowe v. Stoutamire*, 123 Fla. 135, 166 So. 310 (1936); *State of Florida ex rel. R. C. Motor Lines v. Florida Railroad Commission*, 123 Fla. 345, 166 So. 840 (1936), noted in 5 GEO. WASH. L. REV. 137 (1936); *State of Florida ex rel. L. & L. Freight Lines v. Douglass*, 124 Fla. 579, 169 So. 389 (1936).

²⁵ Nor does it impair the power of the state to impose "all of its non-discriminatory traffic regulations designed to effectuate the State's police power for the promotion of the public safety of traffic generally." *State of Florida ex rel. R. C. Motor Lines v. Florida Railroad Comm.*, 123 Fla. 345 at 349, 166 So. 840 (1936).

²⁶ See note 24, *supra*.

²⁷ As to the constitutional power of the Federal Government to permit an interstate carrier to use a highway which the state forbids him to use on the ground of highway congestion, see Kauper, "Federal Regulation of Motor Carriers," 33 MICH. L. REV. 239 at 258 (1934).

their use of particular highways because of congestion has not been materially altered by the Federal Motor Carrier Act. It seems, however, that a stronger showing of highway congestion will probably be required since the Federal Government has entered the field so as to prevent any state regulation of interstate competition under the guise of highway congestion.²⁸

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²⁸ The evidence in the Bradley case which was held to be sufficient to support the finding of the state commission that the highway would be too congested consisted of two traffic counts in a town through which the route extended for 2.2 miles. Although it seems certain that the possibility for abuse by state commissions was recognized, at that time the great need for regulation was more important.