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Unfair Competition-Motor Carrier Act - Private Remedy for Operation in Excess of Certificate of Necessity and Convenience

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UNFAIR COMPETITION—MOTOR CARRIER ACT—PRIVATE REMEDY FOR OPERATION IN EXCESS OF CERTIFICATE OF NECESSITY AND CONVENIENCE—In response to plaintiff trucking company's complaint under section 15 of the Clayton Act[1] alleging violation of sections 1 and 2 of the Sherman Act,[2] defendant railroads entered a counterclaim for damages resulting from interference with the railroad's franchise rights by the plaintiff's operations in excess of its Interstate Commerce Commission certificate of convenience and necessity.[3] On plaintiff's motion for judgment on the pleadings to dismiss the counterclaim for failure to state a claim upon which relief could be granted, *held,* motion granted. Congress did not contemplate that the common law action of a franchise holder would lie when a motor carrier exceeded its authority and such an action would be inconsistent with uniform regulation by the ICC under the Motor Carrier Act.[4] *Riss & Company v. Association of American Railroads,* (D.C. D.C. 1959) 178 F. Supp. 438.

1 38 Stat. 731 (1914), 15 U.S.C. (1958) §15.

2 26 Stat. 209 (1890), as amended, 15 U.S.C. (1958) §§1, 2. For the background of this bitter contest between the railroads and the trucking companies, see Riss & Co. v. Association of American Railroads, (D.C. D.C. 1959) 170 F. Supp. 354, which involves the present controversy in the principal case, and Noerr Motor Freight, Inc. v. Eastern Railroads Presidents Conference, (E.D. Pa. 1957) 155 F. Supp. 768, affd. (3d Cir. 1959) 273 F. (2d) 218, which deals with other litigation between the railroads and the trucking companies.

3 As required by 49 Stat. 551 (1935), as amended, 49 U.S.C. (1958) §306.

4 49 Stat. 543 (1935), as amended, 49 U.S.C. (1958) §301 et seq. The Motor Carrier Act is Part II of the Interstate Commerce Act, 24 Stat. 379 (1887), 49 U.S.C. (1958) §1 et seq.

The relation between the Motor Carrier Act and private remedies for unfair competition can be analyzed from three approaches: first, construction of the statute; second, evaluation of the consistency of the remedy with uniform regulation by the ICC; and third, determination of how the statute should be enforced. It is arguable that the Motor Carrier Act preserves common law remedies for damages[5] by incorporating section 22 of the Rail Carrier Act,[6] which recognizes existing common law remedies.[7] However, there is authority for the contrary position that section 22 deals primarily with permissible deviations from tariff regulations and that Congress intended the incorporation of only this aspect into the Motor Carrier Act and did not intend to authorize private remedies for violations of the statute.[8] Support for this conclusion is found in the failure of Congress to provide for private remedies for violation of the Motor Carrier Act,[9] as was done in the Rail and Water Carrier Acts.[10] Furthermore, it can be argued that since the real basis for the action, the certificate violation, came into existence only after the passage of the Motor Carrier Act, the asserted counterclaim is not an existing common-law remedy to qualify for statutory authorization.[11] Thus, is has been held that the violation of its certificate by one trucking company does not confer a cause of action on a competing trucking company acting under a

[5] Judge Sirica's opinion in the principal case, at 441-442, expresses doubt whether a franchise holder can recover damages (as opposed to injunctive relief) for interference with interstate franchise operations. This point was not relied on in reaching the decision. A franchise holder was held entitled to an injunction and to damages in Town of East Hartford v. Hartford Bridge Co., 10 How. (51 U.S.) 541 (1850). Since that time courts have recognized the right to damages, Menzel Estate Co. v. City of Redding, 178 Cal. 475, 174 P. 48 (1918); Davis & Banker v. Nickell, 126 Wash. 421, 218 P. 198 (1923); Boise Street Car Co. v. Van Avery, 61 Idaho 502, 103 P. (2d) 1107 (1940), awarded nominal damages, Independent Truck Co. v. Wright, 151 Wash. 372, 275 P. 726 (1929); Warehouse Distributing Corp. v. Dixon, 97 Ind. App. 475, 187 N.E. 217 (1933), and issued injunctions on the grounds that money damages were not proved, Northern Pac. Ry. Co. v. Yakima-Northern Stages, 135 Wash. 595, 238 P. 905 (1925), or were incapable of measurement, Payne v. Jackson City Lines, 220 Miss. 180, 70 S. (2d) 520 (1954).

[6] Interstate Commerce Act, note 4 supra, §§1-300. The Rail Carrier Act is Part I of the Interstate Commerce Act and the Water Carrier Act is Part III, 54 Stat. 929 (1940), 49 U.S.C. (1958) §§901-923.

[7] Section 22 of the Rail Carrier Act, note 6 supra, provides in part: ". . . and nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

[8] Consolidated Freightways, Inc. v. United Truck Lines, Inc., 216 Ore. 515, 330 P. (2d) 522 (1958), cert. den. 359 U.S. 1001 (1959).

[9] On two occasions, amendments have been offered to permit private remedies for violation of the Motor Carrier Act, but Congress has rejected them both times. S. Hearing on S. 1194, Committee on Interstate and Foreign Commerce, 80th Cong., 2d sess., pp. 1-15 (1948); S. Hearing on S. 378, 85th Cong., 1st sess., pp. 3, 12 (1957).

[10] Section 8 of the Rail Carriers Act, note 6 supra, and §8 (b) of the Water Carriers Act, note 6 supra, provide in part: ". . . such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter. . . ."

[11] See Consolidated Freightways, Inc. v. United Truck Lines, Inc., note 8 supra.

franchise conferred by the same statute.[12] If this result is correct, it is difficult to see why the result should be different when the violation of the certificate interferes with a franchise which arose independently of the statute.[13] It is clear, nonetheless, that passage of the Motor Carrier Act did not preclude all actions against motor carriers, as actions for failure to perform a motor carrier's duty to accept, transport, and deliver goods have been sustained,[14] and the Supreme Court has recognized the existence of other remedies which are not inconsistent with the act.[15] If a different view of the relation between the Motor Carrier Act and private remedies is taken and it is assumed that only inconsistent remedies, whether or not "preserved" by the act, are barred by the passage of the act, the question remains whether allowance of the counterclaim asserted in the principal case would be inconsistent with uniform regulation by the ICC. In *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*,[16] the Supreme Court held that the Interstate Commerce Act impliedly prevented a shipper's action to recover reparations for unreasonable rates without resorting to the primary jurisdiction of the ICC, since Congress clearly granted the power to the ICC to determine the reasonableness of rates. In such a case independent judicial enforcement of the common law remedy would clearly interfere with uniform regulation by the ICC. Each court would separately determine the reasonableness of rates charged by interstate carriers, and what might be reasonable in one state might be unreasonable in another. In the principal case, however, the existence of the common-law remedy for

[12] Ibid. Consolidated Freightways v. United Truck Lines, (9th Cir. 1954) 216 F. (2d) 543. After dismissal from the federal court for failure to assert a federal right on which jurisdiction could be based, Consolidated Freight brought an action on the same facts in the state court. The theory of recovery was based on 3 TORTS RESTATEMENT §710 (1938), which provides: "One who engages in a business or profession in violation of a legislative enactment which prohibits persons from engaging therein, either absolutely or without a prescribed permission, is subject to liability to another who is engaged in the business or profession in conformity with the enactment, if, but only if, (a) one of the purposes of the enactment is to protect the other against unauthorized competition, and (b) the enactment does not negative such liability."

[13] The railroads attempted to distinguish the Consolidated Freight cases with the theory that 3 TORTS RESTATEMENT §710 (1938), note 12 supra, does not apply when the franchise rights are independent of the statute. Petitioner's Brief to the Court of Appeals for the District of Columbia, pp. 41-45. However, comment *h* to §710 states in part: "Nor is it necessary that the legislative enactment violated by the actor be applicable to the other. . . . The issue in each case is the purpose of the particular enactment, whether that purpose is at least in part to protect the business of the other against unauthorized competition or is to protect some general public interest which affects the other only incidentally or in which the other shares only as a member of the public." Thus, if the statute "negative such liability" the result is the same although the legally protectible interest is independent of the statute.

[14] Merchandise Warehouse Co. v. A.B.C. Freight Forwarding Corp., (S.D. Ind. 1958) 165 F. Supp. 67; Montgomery Ward & Co. v. Northern Pacific Terminal Co., (D.C. Ore. 1953) 128 F. Supp. 475.

[15] Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907); T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959), noted, 73 HARV. L. REV. 213 (1959).

[16] Note 15 supra.

interference with the rights of a franchise holder to be free from unauthorized competition would not interfere with the regulatory portions of the act, nor with the National Transportation Policy.[17] The ICC has no expertise to decide questions of unauthorized interference with franchise rights, nor does the statute permit such an inquiry.[18] Assuming, contrary to the court's suggestion in the principal case, that the action would be consistent with the act,[19] it seems that recovery by the railroads still would not be automatic. While statutory justification for the competition is not available, the trucking company could still defend with the common law policy which favors free competition so long as exclusive franchise rights are not invaded.[20] From the standpoint of enforcement of the statute, Congress has expressly given the power to the ICC to determine whether operations by a carrier are in excess of its certificates.[21] Yet, if the act does not prevent it, potential liability in private actions for unfair competition would be an additional inducement to certificate compliance, thereby assisting the ICC in regulating interstate carriers.

Daniel E. Lewis, Jr.

17 54 Stat. 899 (1940), 49 U.S.C. (1958) 8155, 8156, preceding §1.

18 See §4 of the Motor Carrier Act, 49 U.S.C. (1958) §304. While the ICC determines whether there is sufficient public demand to warrant the granting of a certificate of convenience and necessity, the commission is not empowered to decide questions of unfair competition between carriers.

19 Principal case at 445-446.

20 For two discussions on unfair competition generally, see Chafee, "Unfair Competition," 53 HARV. L. REV. 1289 (1940); Handler, "Unfair Competition," 21 IOWA L. REV. 175 (1936).

21 Section 4 (a) (4a) of the Motor Carrier Act, note 4 supra. See also the analysis of the act by the Ninth Circuit in the Consolidated Freightways case, note 12 supra.