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Constitutional Law - Commerce Clause - State Statute Requiring Interstate Motor Carrier to Secure a Permit

Marvin O. Young S.Ed.
University of Michigan Law School

CONSTITUTIONAL LAW—COMMERCE CLAUSE—STATE STATUTE REQUIRING INTERSTATE MOTOR CARRIER TO SECURE A PERMIT—Petitioner brought an action in an Arkansas state court to enjoin enforcement of a state statute which required all contract carriers using the highways of the state to secure a permit from the state Public Service Commission.[1] The Arkansas Supreme Court found that five driver-owners who had been arrested while transporting petitioner's product in interstate commerce without such a permit were "contract carriers" within the meaning of the statute. Neither petitioner nor any of the drivers had applied for a state permit. Under the terms of the statute, granting of the permit was contingent on certain factors, such as the financial reliability of the applicant, applicant's sense of responsibility to the public, and the existing and proposed transportation service.[2] *Held*, four justices dissenting, the requirement of such a permit imposes no undue burden on interstate commence because there was no showing that the state will ever attempt to impose any of the apprehended burdensome conditions as prerequisite to the granting of the

[1] 6 Ark Stat. (1947) §73-1701 et seq., known as Arkansas Motor Carrier Act, 1941.
[2] Id., §73-1712.

permit. *Lloyd A. Fry Roofing Co. v. Wood,* 344 U.S. 157, 73 S.Ct. 204 (1952).

It has been quite uniformly recognized since *Gibbons v. Ogden*[3] in 1824 that the grant of power to Congress under the commerce clause[4] necessarily implies some degree of limitation on a state's power to regulate interstate commerce.[5] The most widely accepted view has been that a state retains the power to regulate commerce as to local matters not requiring uniform national legislation until Congress acts to displace this power.[6] The problem of the principal case, the constitutionality of a state statute which requires an interstate motor carrier to obtain a permit as a condition precedent to use of the highways of the state, was first considered by the Supreme Court in *Buck v. Kuykendall.*[7] In that case the Court held that a state could not refuse a permit to an interstate motor carrier on the ground that existing transportation facilities were adequate, since this constituted an obstruction of interstate commerce and contravened the implied prohibition of the commerce clause.[8] Subsequent cases, however, have established some important distinctions. A state may validly impose safety, health or conservation regulations on carriers, even though they are engaged exclusively in interstate commerce, these being deemed essentially "local" problems under the prevailing view.[9] Thus, a state may deny an interstate motor carrier permission to use a specific highway on the basis of traffic congestion;[10] it may impose reasonable size and weight limitations on interstate carriers as a conservation measure;[11] it may revoke an interstate

[3] 9 Wheat. (22 U.S.) 1 (1824).

[4] U.S. CONST., art. I, §8: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States. . . ."

[5] In Gibbons v. Ogden, note 3 supra, Chief Justice Marshall asserted that the power of Congress over interstate commerce was exclusive, subject only to police power regulation by the states.

[6] This approach was first advanced in Cooley v. Port Wardens of Philadelphia, 12 How. (53 U.S.) 299 (1851). This test was followed by Stone, C.J., in Southern Pacific Co. v. Arizona, 325 U.S. 761, 65 S.Ct. 1515 (1945). See also Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission, 341 U.S. 329, 71 S.Ct. 777 (1951). The enactment of the Federal Motor Carrier Act of 1935 displaced certain powers of the states to regulate interstate motor carriers, e.g., to prescribe maximum hours of service and qualifications of drivers. See 49 Stat. L. 546 (1935), 49 U.S.C. (1946) §304. Current regulations may be found in 49 C.F.R. §191.1 et seq. (1949). On displacement, see comment, 60 HARV. L. REV. 262 (1946). The interstate contract carriers involved in the principal case are required to secure a permit from the Interstate Commerce Commission under this act. 49 U.S.C. (1946) §309.

[7] 267 U.S. 307, 45 S.Ct. 324 (1925).

[8] Ibid. Bush Co. v. Malloy, 267 U.S. 317, 45 S.Ct. 326 (1925), decided the same day, also held that a state could not refuse a permit to an interstate carrier on the basis that existing transportation facilities were adequate.

[9] For a thorough treatment of this subject and a collection of the earlier cases, see Kauper, "State Regulation of Interstate Motor Carriers," 31 MICH. L. REV. 920, 1097 (1933).

[10] Bradley v. Public Utilities Commission of Ohio, 289 U.S. 92, 53 S.Ct. 577 (1933).

[11] South Carolina State Highway Dept. v. Barnwell Brothers, 303 U.S. 177, 58 S.Ct. 510 (1938). See also Maurer v. Hamilton, 309 U.S. 598, 60 S.Ct. 726 (1940) which held valid a state statute that prohibited operations of vehicles carrying another vehicle above the cab or over the head of the operator on state highways. See comment on size and weight limitations, 36 MICH. L. REV. 443 (1938).

carrier's permit when the carrier has disobeyed a state law prohibiting the transaction of *intrastate* business on an interstate permit;[12] or it may validly prohibit interstate shipments of liquor by carriers other than those authorized by the state.[13] Recent decisions have indicated that the Court will go far in upholding local regulations which require a permit or license when it can find that the activity is essentially "local" in aspect, even though the result is to regulate interstate commerce.[14]

In the principal case, both the majority and the dissenters seemed to overlook the true import of *Clark v. Poor*[15] decided only two years after *Buck v. Kuykendall.*[16] In the *Clark* case, the Ohio statute requiring the motor carrier to obtain a permit was similar to the Arkansas statute in the principal case, and provided that the permit could be refused when existing transportation facilities were adequate.[17] As in the principal case, an injunction was sought but refused by the Supreme Court because the carrier had not been refused a permit—the carrier had made no application for one—and because state officials had expressly disclaimed any right to refuse a permit to any carrier engaged in interstate commerce.[18] In these respects, the principal case would seem to be substantially on all fours with *Clark v. Poor.* It is submitted that the result is sound in both of the cases, but that the Court in each case failed to give its real reason for refusing the injunction. It would seem that what the Court was really doing was employing its well-known judicial technique of avoiding the constitutional issue whenever possible.[19] In neither case had the state refused the interstate carrier a permit on the grounds outlawed by *Buck v. Kuykendall,*[20] and it is not at all certain that the state courts would have allowed such a refusal, since both acts contained provisions that the statute should not be construed so as to conflict with the federal power to regulate interstate commerce.[21] It is suggested that the Court should have refused to anticipate the question of constitutional law and refrained from determining the validity

[12] Eichholz v. Public Service Commission of Missouri, 306 U.S. 268, 59 S.Ct. 532 (1939).

[13] Ziffrin, Inc. v. Reeves, 308 U.S. 132, 60 S.Ct. 163 (1939). See also Duckworth v. Arkansas, 314 U.S. 390, 62 S.Ct. 311 (1941), holding valid a state statute requiring all transporters of liquor through the state to secure a permit for identification purposes.

[14] Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission, note 6 supra; Buck v. California, 343 U.S. 99, 72 S.Ct. 502 (1952). Cf. California v. Zook, 336 U.S. 725, 69 S.Ct. 841 (1949).

[15] 274 U.S. 554, 47 S.Ct. 702 (1927).

[16] In both Buck v. Kuykendall and Clark v. Poor, the majority opinion was written by Brandeis, J.

[17] Ohio Gen. Code (Throckmorton, 1926) §614-87. This same statute is now found in Ohio Rev. Code (Baldwin, 1953) §4921.10.

[18] Clark v. Poor, note 15 supra. *Accord:* Columbia Terminals Co. v. Lambert, (D.C. D.C. 1939) 30 F. Supp. 28, app. dismissed and holding essentially affd. 309 U.S. 620, 60 S.Ct. 471 (1940).

[19] For a good example of this approach, see Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 65 S.Ct. 152 (1944).

[20] I.e., that the area the carrier proposed to serve already had adequate transportation facilities.

[21] 6 Ark. Stat. (1947) §73-1726; Ohio Gen. Code (Page, 1946) §614-101 [omitted from Ohio Rev. Code (Baldwin, 1953)].

of the state statute until applied and interpreted by the state,[22] or that the Court should have granted the injunction restraining the state commission from imposing any of the alleged burdensome conditions as applied to carriers engaged in interstate commerce.

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[22] "The mere susceptibility of a statute to a construction which could render it unconstitutional does not afford sufficient ground for injunctive relief where, as here, it does not appear that the Statute has ever been so construed, where the enforcing authorities affirm a recognition of its unconstitutionality if so construed and disclaim any intention to do so. . . ." Columbia Terminals Co. v. Lambert, (D.C. Mo. 1939) 30 F. Supp. 28 at 32.