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THE ABANDONMENT SECTIONS OF THE TRANSPORTATION ACT OF 1920

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The partial or total withdrawal from service of a public utility has been the subject of several recent cases before both federal and state courts.¹ One of the most vexed of the many unsettled phases of this subject is that of the relations which are to exist between federal and state regulatory bodies entrusted with the task of carrying out the present policy of governmental supervision of public utilities.

In section 18 of the Transportation Act of 1920² Congress provided that "no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future *public convenience and necessity* permit of such abandonment."³ Section 20 authorizes the Interstate Commerce Commission to grant a certificate of abandonment in the form prayed for or to "attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require."

The interpretation of these sections of the Transportation Act was involved in the case of *Texas v. Eastern Texas R. R.*⁴ In that case the Interstate Commerce Commission had granted a certificate of abandonment as to the interstate traffic

*See biographical note, p. 474.

¹ For a discussion of the cases on this point see Field, *The Withdrawal From Service of Public Utility Companies*, 35 *Yale Law Journal* 169. See note 1 to the opinion of Justice Brandeis, in *Colorado v. U. S.* (1926) U. S.

² In the nature of an amendment to the Interstate Commerce Act, passed February 28, 1920.

³ Italics are those of the writer.

⁴ (1021) 258 U. S. 204, 66 L. Ed. 566, 42 Sup. Ct. 281.

on a line 30.5 miles long which was located wholly within the state of Texas. The road had originally been a local logging road but at the time when it was sought to be abandoned three-fourths of its business consisted in shipments destined for foreign or other out of state points. The state of Texas resisted the proposed abandonment of the road contending among other things that the Interstate Commerce Commission was without authority to grant a certificate of abandonment to an intrastate road and that if the Transportation Act of 1920 authorized the Commission to grant such certificates in this type of case that Act was unconstitutional because it exceeded congressional power to control commerce between the states.

The court pointed out in its decision that the order of the Commission was restricted to interstate commerce and did not extend to the abandonment of intrastate service. The court said, in the course of its opinion at this point,

"If Secs. 18, 19, and 20 be construed as authorizing the Commission to deal with the abandonment of such a road as to intrastate as well as interstate and foreign commerce, a serious question of their constitutional validity will be unavoidable."

But the court construed the language of these sections to apply only to interstate commerce and concluded that it was within the power of congress to authorize the Commission to allow abandonment by carriers of their interstate business. While the words of the Transportation Act on this point are very broad, being "no carrier" the court was doubtless on sound ground when it decided that the framers of the Act did not intend to extend the powers of the Commission in this respect to intrastate business.⁵

The road involved in the Eastern Texas case was not a branch line, but an entire unit by itself, located wholly within the state and owned by a local corporation. The court indicated that it considered the intrastate operation of this road to be a matter of purely local concern and that the continuance of intrastate service would not affect interstate commerce. As if guard against what might have appeared to be the establishment of a strict view of the Commission's power in these abandonment cases under the Transportation Act the court went on to say,

⁵ The qualification which is introduced in section 18 "subject to this Act" would seem to narrow the very broad sweep of the words "no carrier", and on the whole it is very doubtful whether the framers of the Act intended to extend the power of Congress over intrastate commerce by this amendment. Extensions of that sort are usually the result of judicial decision rather than legislative action in the commerce field.

"It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line, and thereby affect its utility or service as an artery of interstate and foreign commerce."

This would seem to indicate that the court felt that the decision of the *Texas v. Eastern Texas R. R. Co.* case should be rather narrowly confined to its particular facts, namely to the type of situation where the continuance of intrastate business would not injuriously affect the operation of the road as a whole.

In 1926 the case of *Colorado v. United States*⁶ presented exactly the situation apparently in the minds of the judges when they made the reservation just adverted to in their opinion in the *Eastern Texas* case. The state of Colorado resisted the proposed abandonment by an interstate railroad of a branch line located wholly within the state of Colorado. The Interstate Commerce Commission had granted a certificate of abandonment as to this branch line. The constitutionality of the sections of the Transportation Act authorizing the Commission to grant certificates in such cases was again argued before the court.

Justice Brandeis wrote the opinion of the court in the *Colorado* case and began it by asserting that the certificate of abandonment which is issued by the Commission in these cases does not issue to protect the road involved, but to protect interstate commerce. "The Commission by its order removes an obstruction which would otherwise prevent the railroad from performing its Federal duty. Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce." Justice Brandeis then goes on to point out that expenditures may affect rates, and may injuriously affect the financial condition of the carrier and thus affect facilities and operation, and also that continued intrastate operation of a branch line might so affect interstate commerce that the latter would be seriously hampered.

The purpose of these sections of the Transportation Act was said by the court to be "the regulation of interstate commerce." Any control which might be exercised by the Commission over intrastate commerce was said to be incidental to freeing "interstate commerce from the unreasonable burdens, obstruction or unjust discrimination which is found to result from operating a branch at a loss. Congress has power to authorize abandonment, because the state's power to regulate and promote intra-

⁶ (1926) U. S.

state commerce may not be exercised in such a way as to prejudice interstate commerce." The court refers to the rate cases to support this position, for it was in the rate cases that this doctrine that the power of congress over interstate commerce extended to the removal of state regulations of intrastate commerce which resulted injuriously to interstate traffic was formulated.⁷

Returning to the particular facts of the Colorado case Justice Brandeis points out that the carrier here was engaged in both interstate and intrastate commerce, and that the same instrumentality was engaged in both types of commerce. Because of this the efficient performance of one service depends to some extent upon the efficient performance of the other. Many sections of the Transportation Act were said to have been sustained because of this fact.⁸ The control of intrastate commerce and intrastate abandonment was still reserved to the states, according to Justice Brandeis, and in closing his consideration of this phase of the case he said that "The obligation assumed by the corporation under its charter of providing intrastate service on every part of its line within the state is subordinate to the performance by it of the Federal duty,^{8a} also assumed, efficiently to render transportation service in interstate commerce." And the court went still further, stating that even if there was an explicit charter provision compelling the road to operate its line in intrastate commerce at a loss these provisions would have to yield to the "paramount power of Congress to regulate interstate commerce."

⁷ See *Houston, E. & W. T. R. Co. v. U. S.*, () 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. Rep. 833; *Railroad Commission v. Chicago, B. & Q. R. Co.*, () 257 U. S. 563, 66 L. Ed. 371, 42 Sup. Ct. Rep. 232, 22 A. L. R. 1086.

⁸ See in the opinion of Justice Brandeis cases cited supporting the constitutionality of legislation on safety coupling devices, issuance of securities, recapture provisions, compelling rendition of accounts to Commission, etc.

^{8a} This portion of the opinion raises the question to whom is the obligation to serve owing by a public utility? The common law theory seems to have been that the duty to serve was a duty to the community, not to the government. The duty was thought to be one to the group of people bringing themselves within the group to which the public calling "held out" to serve. This idea that a public utility is under a duty to the *government* to serve is a novel one and quite different from the common law theory. The opinion does not analyze this conception, but only adverts to it in passing, however, and it may be that the court did not really mean to suggest a new theory as to the nature of the duty to serve or to whom the duty to serve is owing. To say, however, that there is a *federal duty* resting upon a public utility is at least confusing and misleading.

The sum and substance of the decision of the court in the Colorado case on this point is that congress may authorize the Interstate Commerce Commission to grant certificates of abandonment to intrastate branches of interstate roads whenever the continued operation of the intrastate branch would injuriously affect interstate business on the road in the opinion of the Commission, regardless of charter provisions. Thus far there is nothing radical or surprising in the decision. It only represents a particular application of a doctrine which has been utilized in the rate cases for some time. It should be realized, however, that when the application of this doctrine to abandonment cases has been made, the states lose control over the abandonment of transportation lines in a number of cases hitherto thought to have been subject to state control on this score. With the application of the restrictions of the fourteenth amendment and the restriction of the Colorado case the number of cases still remaining for the state to act upon finally is very small indeed. It has been elsewhere remarked that it would be a rare case, indeed, in which the road if losing money and faced with the prospect of continuing to do so could not be freed from any obligation to continue service, because the only case in which the road could be forced to continue would be when the road had expressly agreed to serve even if losing money.⁹ And in view of the fact that there is probably no charter now in existence containing any provision which would be construed by the Supreme Court of the United States to compel continued service under these circumstances this type of case might as well be laid to one side, so far as having any practical significance. Then, under the Colorado case just considered, if the road has been tied up with the impossible provisions just alluded to, it can still be abandoned if it is shown that it is a branch of a larger system, and that continued operation of the branch would adversely affect the interstate business on the system as a whole. It is submitted that there are very few cases in the transportation field which do not fall within one of these two classes. And it seems only a reasonable conclusion that if a purely intrastate road as the one involved in the Eastern Texas case was carrying both interstate and intrastate business and it was further shown that the continued operation of the road as to intrastate business would seriously injure interstate traffic on the road, the road would be allowed to withdraw from intrastate service.

⁹ For the situation of public utilities under the fourteenth amendment as to withdrawal see 35 Yale L. Jour. 172-177.

The writer believes that the court has adopted a sound policy in these two cases, even though the control of abandonment in transportation cases is placed largely in the hands of the national government. The principle of the Colorado case that if a branch line is losing money and that to continue operating the branch will injuriously affect the whole system the branch service should be discontinued seems economically and socially correct. The purpose to be subserved in these cases is the maintenance of service to the greatest number possible, and the case just considered would seem to attain this result. The Interstate Commerce Commission has been very solicitous of the interests of local communities in the cases thus far decided, and they have been surprisingly numerous.¹⁰ The Transportation Act provides for the presentation of the state's interests in the investigation and hearing by the Commission, and the Commission has seldom decided against the claims advanced by the state. All things considered, it is as likely that justice will be done by the Interstate Commerce Commission in abandonment cases as by state commissions, and the task can be as efficiently handled by the federal body as by the state bodies, because of the very full information always at the command of the federal body concerning interstate as well as intrastate transportation problems.

There was, however, a second point to be considered by the court in the Colorado case. The state of Colorado contended that the Commission had not found that interstate commerce would be injuriously affected by maintaining the local branch in this case, and that if the Commission did so find that there was insufficient evidence to justify such a finding. In answering this contention Justice Brandeis said that the relation of the earnings and burdens between interstate and intrastate commerce in these cases was only *one* fact to be considered by the Commission, but not necessarily the decisive one, and that an examination of the extensive record of the three opinions of the Commission convinced the court that there was ample evidence to support the facts found, and that the judgment of the Commission was not improperly influenced by the "offer to lease the line to protestants at a nominal rental."

¹⁰ In note one to the opinion of Justice Brandeis in the Colorado case, the number of applications for abandonment acted upon by the Commission between 1920 and 1926 is said to be 191. Nine were dismissed for want of jurisdiction. Only six were granted contrary to the advice of the state authorities. Provision is made in section 19 of the Transportation Act for giving notice of the application to the governor of the state, and this notice is to be published for three consecutive weeks in some local newspaper, in the community thru which the line involved passes.

Speaking of the balancing of interests of interstate and intrastate commerce in these cases, Mr. Justice Brandeis said,

"While the constitutional basis of authority to issue the certificate of abandonment is the power of Congress to regulate interstate commerce, the act does not make issuance of the certificate conditional upon a finding that continued operation will result in discrimination against interstate commerce, or that it will result in a denial of such compensation for the property within the state used in commerce interstate and intrastate."

And again, "But the act does not make issuance of the certificate dependent upon a specific finding to that effect." Reference to the words of the Transportation Act quoted in the second paragraph of this paper reveals that the Commission is authorized to grant a certificate of abandonment when they think that "the present or future public convenience and necessity permit" it. And in section 19 the certificate asked for may be modified as "public convenience and necessity may require." Justice Brandeis seems to be correct when he says that the Transportation Act does not restrict the issuance of certificates of abandonment to cases involving a conflict between interstate and intrastate services. Still, that is the express ground upon which the court upheld the certificate in the Colorado case. The portion of the opinion previously considered in the Colorado case rests on the supposed injurious effect which would result to interstate commerce if the local branch were continued in operation. If this is not the controlling factor, what is that factor which shall control, or what are the other factors which are to be weighed in addition to this one? Suppose this one be absent, then are "public convenience and necessity" alone to be sufficient? And if they are to be sufficient is the Transportation Act then constitutional? For it has been thought that Congress has no power to regulate intrastate transportation because of "public convenience and necessity" alone, but that it is only to be regulated because it is necessary and incidental to an interstate commercial regulation. Police power grounds, such as "public convenience and necessity" are not usually associated with congressional power under the orthodox view.

It should be noticed, of course, that Justice Brandeis does say that there was sufficient evidence of a conflict between interstate and intrastate services in this particular case to warrant the findings of the Commission to that effect. So that his statements as to other and additional factors of public convenience are really dictum. But it is submitted that the theory which Justice Brandeis advances in this connection, that a certificate may be granted for other reasons than that assigned in

the Colorado case, namely, on the basis of public convenience, is unsound, and directly repudiates the very basis for the first part of the opinion which he writes sustaining the power of the Commission in the Colorado case. One wonders, which public, is here referred to? Are there publics based on interstate interests and publics based on intrastate interests? Perplexing problems are suggested on this score, just as are suggested when reference is made to the obligations of a public utility assumed towards the federal government and towards the state government. A conception involving several sets of duties, due to the dual character of the American government, is something new in public utility theory. But aside from these latter questions it is believed that the question of the constitutionality of the Transportation Act on the points here under discussion is still an open one and that there is very considerable doubt whether the phrases authorizing the issuance of certificates of abandonment upon the basis of "public convenience and necessity" can be sustained. It is to be hoped that the dictum in the Colorado case will not be followed in later cases, and that the power of the Commission to issue such certificates will be based on the more logical and sound ground advanced in the rate cases which was in effect the doctrine used by Justice Brandeis in the forepart of his opinion to sustain the Commission's authority.