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IN THE

Supreme Court of the United States

OCTOBER TERM 1937

No. 161

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, SOUTH CAROLINA PUBLIC SERVICE COMMISSION, ET AL,

Appellants,

vs.

BARNWELL BROS., INC., POOLE TRANSPORTATION, INC., HORTON MOTOR LINES, INC., ET AL,

Appellees.

Appeal From the District Court of the United States for the Eastern District of South Carolina

PETITION OF APPELLEES FOR REHEARING

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Barnwell Bros., Inc., Poole Transportation, Inc., Horton Motor Lines, Inc., et al, Appellees, respectfully represents:

Your Honorable Court, by its opinion filed February 14, 1938, in the above-entitled case, misconceived cer-

tain fundamental facts and the procedure of the parties, and both points are reflected in the decision.

The specific point raised and argued was the effect of the "Commerce Clause" of Article I (8) of the Constitution of the United States, standing alone, on the authority of the State to impose size and weight limitations on motor trucks, which burden interstate commerce, by increasing the cost, diminishing the amount, and diverting the flow thereof. As Appellees understand the decision, this Court held that the bare power contained in the "Commerce Clause" was, in the absence of Federal legislation, inoperative to disturb the judgment of the Legislature of the State with respect to regulations deemed necessary for safety and preservation of the highways, provided they do not discriminate against interstate commerce within the State; and that the District Courts of the United States are without jurisdiction to review, under the "Commerce Clause," the reasonableness of the state acts.

A second point, involving the interpretation and application of the Motor Carrier Act, 1935, was raised in the Bill and passed on by the Court below; however, no Cross Appeal was taken on this point.

Point 1

In the opinion, this Court went beyond the point raised on Appeal and said:

"But as the District Court held, Congress has not undertaken to regulate the weight and size of motor vehicles in interstate motor traffic, and has left undisturbed whatever authority in that regard the states have retained under the Constitution."

This statement appears to have the effect of affirming the decision of the Court below on the very impor-

tant point involving the construction of the Motor Carrier Act, 1935, which was not raised on Appeal or by Cross Appeal. Appellees Petition for reconsideration of this statement.

Point 2

The decision on the question of jurisdiction of the Federal Courts to review the "judgment" of State Legislature appears to preclude the Courts from determining whether the State has acted properly under its police power and within its reserved powers, or that it has merely employed these powers as a medium for the invasion of rights to engage in interstate commerce, granted under the Federal Constitution and in derogation of Federal regulation actually established. Appellees Petition for reconsideration to the end that the result stated will not follow.

Point 1

Discussion

The quoted statement follows a reference to Federal aid in the construction of the highways and may have been intended by this Court to refer only to the Federal Highway Aid Acts. This Court referred to the decision of the Court below, which decision referred primarily to the Motor Carrier Act, 1935. Appellees are led to the conclusion that the absence of Cross Appeal, Argument, Brief or Record showing facts relating to the administration of the Motor Carrier Act, 1935, either before this Court, or of a Record before the Court below, has resulted in a serious error of far-reaching results, in that the ruling of the Court below on the interpretation of the Motor Carrier Act, 1935, may appear to have been affirmed.

This is a vital point with respect to which no Cross Appeal was taken, no arguments made, or briefs filed, by either the Appellees or the intervenor, the Attorney General of the United States, nor was any testimony taken by the Court below.

The decision appears to cover the Motor Carrier Act, 1935, and if so construed by District Courts, all efforts to develop a Record of testimony will fail on Motions to Dismiss.

The Interstate Commerce Commission intervened before the Court below, but, pursuant to a definite agreement and understanding, did not intervene before this Court on the present Record. The intervention before this Court by the Attorney General of the United States and the brief filed dealt only with the question of burdens on commerce as they affect the policy of Congress in providing Federal Aid Highways.

None of the Appellees or Intervenors below or before this Court accepted the decision of the Court below as being correct with respect to the effect of the Motor Carrier Act, 1935. Subsequent to the decision by the Court below further proceedings involving the particular question were instituted in other Federal Courts and are now pending.

In at least one of these cases, i.e., *Adams Packing Co., et al* vs. *G. Lee McLain,* individually, and as Adjutant General of the Commonwealth of Kentucky, in the United States District Court for the Eastern District of Kentucky, at Frankfort, the Attorney General of the United States and the Interstate Commerce Commission intervened in connection with the administration and interpretation of the Motor Carrier Act, 1935. In that case Motions to Dismiss have been made, heard, and denied, and the case is awaiting trial on its merits,

at which time the facts should be developed on the Record and then this Court will have the benefit of that Record.

Appellees fear that this Court may have foreclosed all opportunity to develop facts showing the conflict between the Motor Carrier Act, 1935, and state authority. The statement by this Court hereinbefore quoted will probably result in dismissal of these cases and greatly delay, if not defeat, the administration of the Motor Carrier Act, 1935, to the great injury of Appellees and the public.

The broad jurisdiction of this Court in equity proceedings, and judicial notice of statutes, will make it difficult for Appellees to contend before other Courts that the quoted statement was dictum.

Procedural matters contributed to the present difficulty. Appellees recognized the possibility that in an equity appeal the entire bill might be considered and the Motor Carrier Act, 1935, noticed, irrespective of Cross Appeal. But as the Court below was not a court of general equity jurisdiction and the portions of the bill dealing with the Motor Carrier Act, 1935, were, in effect, though not in form, dismissed; for those reasons, Appellees believe that this Court would only consider the points specifically raised by the Appeal. They desired to reserve the point involving the Motor Carrier Act, 1935, until an adequate record could be presented.

The decision of the Court below was not based on a Record in which the essential facts in connection with the Motor Carrier Act, 1935, had been developed. The point was disposed of by the Court below in a manner similar to a dismissal, in that the Court *did not* hear evidence applicable to that question; but consented to

hear evidence only on the question of the unreasonable burden on interstate commerce.

The Court below misconceived the views of the Interstate Commerce Commission, when it said that the Commission denied jurisdiction, and this is evidenced by both prior and subsequent Orders of the Commission as set forth herein.

The quoted statement has the effect of rendering ineffective and unenforceable practically *every provision* of the Motor Carrier Act, 1935. Appellees believe that, in the absence of a Record, it was not the intention of this Court to hold that Congress had not acted in any respect, and had "left undisturbed whatever authority in that regard the States have retained under the Constitution;" or that the Interstate Commerce Commission was without authority to prescribe such regulations as may be necessary to administer the Motor Carrier Act, 1935, in accordance with the numerous specific and general directions of Congress.

If the quoted statement refers to the Motor Carrier Act, 1935, as distinguished from the Highway Aid Acts, it probably goes far beyond what this Court would have said had a Record been made before the Court below and a Cross Appeal taken.

By the Motor Carrier Act, 1935, 49 U. S. C. A. 301, Congress enacted a complete regulatory statute covering transportation by carriers by motor vehicles. It embodied in that single statute the composite field of regulation, which had been developed for railroads, step by step, over a half century of legislation; and in the light of numerous decisions of this Court, covering both discriminations against and burdens on interstate commerce.

The Motor Carrier Act, 1935, is so comprehensive

in scope, general in terms, and inclusive by necessary intendment, that its interpretation would seem to depend *on facts developed on a record, rather than by bare statutory construction.* Record facts would show the conflict between State authority and Federal power actually exercised, either through the Motor Carrier Act, standing alone, or the conflict between the State authority and orders, rules and regulations prescribed by the Interstate Commerce Commission.

Appellees submit that there is a *clear distinction* between Federal Legislation or Commission Regulation of sizes and weights, as such, and Commission Regulation of sizes and weights, *to the extent necessary to prevent the Motor Carrier Act,* 1935, *from becoming a nullity.* Because Congress has not prescribed sizes and weights in an Act and the Commission has not prescribed sizes and weights, *as such,* governing vehicles engaged in interstate commerce, it does not follow that when Congress gave the Commission authority to make "safety regulations", to prescribe "standards of equipment", to require "adequate service", to promote "sound economic conditions", and to prevent "discriminations", that Congress "has left undisturbed whatever authority in that regard the States have retained under the Constitution".

The legislative history of the Motor Carrier Act, 1935, shows that provisions designed to prevent the Interstate Commerce Commission from exercising these powers were eliminated from Bills, rejected by Committees, and defeated by vote on the floor. The explanation of the Court below as to the legal reasons for that are now inappropriate, in the light of this Court's decision in this case. The testimony of witnesses before the Congressional Committees quoted by

the Court below was with reference to the Bill as introduced and is hardly indicative of the intent of Congress as expressed in the redrawn Bill and the Act as passed.

MOTOR CARRIER ACT, 1935

49 U. S. C. A. 301

The following provisions of the Motor Carrier Act and its legislative history are referred to by subjects for the purpose of showing the extent to which Congress has acted, with respect to the regulation of motor carriers and more specifically to the extent to which such regulations *necessarily involve some jurisdiction over sizes and weights of motor vehicles.*

The Provisions of the Act

The specific sections of the Motor Carrier Act and the terms which include sizes and weights on the principle that the "greater includes the lesser" are as follows: Section 202(b), "facilities * * * transportation"; Section 203(a)(19), "vehicles"; Section 203(b), "standards of equipment"; Section 203(b)(18), "standards of equipment"; Section 204(a)(1), "Service" (vehicles included in service by definition, see Section 203(a)(19)); Section 204(a)(2), "equipment"; Section 204(a)(3), "standards of equipment"; Section 208(a), "equipment" (used in the sense of vehicles); Section 209(b), "equipment" (used in the sense of vehicles); Section 216(a), "equipment and facilities"; Section 216(b), "equipment and facilities".

The specific sections of the Motor Carrier Act and the terms which by intendment necessarily include jurisdiction over sizes and weights are as follows:

Section 202(a), "inherent advantages * * * sound economic conditions * * * adequate, economical * * *

efficient * * * reasonable charges * * * without unjust discriminations, undue preferences or advantages * * * coordinate * * * properly adapted * * *"; Section 202(b), "procurement of and the provisions of facilities"; Section 204(a)(1), "continuous and adequate service * * * equipment"; Section 204(a)(2), "equipment"; Section 204(a)(3), "standards of equipment"; Section 216(a), "through routes * * * adequate service, equipment and facilities * * * reasonable individual and joint rates, fares and charges"; Section 216(b), "adequate service, equipment and facilities * * *"; Section 216(c), "through routes and joint rates"; Section 216(d), "undue or unreasonable preference or advantage to * * * person, port, gateway, locality or description of traffic * * * unreasonable prejudice or disadvantage".

Considering all of the provisions of the Act in *pari materia* it is evident that without some jurisdiction over sizes and weights, the Commission would be without power over "safety", "service", and "through routes", and without power to prevent discriminations against persons, ports, places, and traffic.

The Motor Carrier Act, 1935, is a general, complete and exclusive Act which, upon the promulgation of regulations by the Interstate Commerce Commission, supersedes all State Laws which are inconsistent with the purposes and objectives of the Federal Law.

The South Carolina Act covering sizes and weights shows on its face that it may conflict with the Federal Law because both deal specifically with the matters of safety and standards of equipment. The State Act may be inconsistent with the Federal Act because the Federal Act takes full jurisdiction over safety, adequate service and proper charges. There is an indis-

soluble relationship between safety, service and charges and the sizes and weights of equipment.

Definition of Equipment

Under the rules of statutory construction, the term "equipment", lacking a prescribed definition, takes the definition recognized in the amended or supplemented Act. In the Interstate Commerce Act, Part I, Sections 1(10); 1(15); 20(1); 1(21), equipment generally refers to vehicles (Interstate Commerce Act, Annotated, Vol. V, General Index, page 4188). In the same Act, safety devices are distinguished from "equipment" by the term "safety appliances" (Interstate Commerce Act, Annotated, Vol. V, General Index, page 4342).

Joint Boards

Instead of stripping the States of all powers, Congress devised a plan of cooperation with the States through Joint Boards created under Section 205 of the Motor Carrier Act. Under this section, the States have jurisdiction which they never had before.

Through Routes and Joint Rates

Congress has taken jurisdiction over "through routes" and "joint rates" and these are terms which were thoroughly understood in the administration of Part I of the Interstate Commerce Act. These terms contemplate that equipment, such as semi-trailers, shall be interchangeable between carriers. The equipment moves through from consignor to consignee, regardless of the number of carriers participating in the "through routes and joint rates" and regardless of the number of States or the variations in State laws as to the width of trucks.

The carriers could not establish and the Commission could not enforce requirements in connection with "through routes and joint rates" if the States could prescribe different widths, heights, and lengths of vehicles at every State line. Through routes and joint rates with interchange of equipment are now in effect in large areas involving many States.

Rail-Motor Coordination

The provisions of the Motor Carrier Act with respect to coordination of transportation by motor carriers and rail carriers is in effect over areas involving several States. Under one of the plans for coordination, which has been approved by the Commission, semi-trailers are pulled by tractors to the railroads and loaded on flat cars, shipped long distances, unloaded in different States and continue the journey under tractor power to the consignee. This plan has a tendency to relieve the highways of certain traffic, but the plan would be entirely defeated if the State in which the consignee may be located could impose a regulation radically different from that of the State of the consignor.

Discriminations

The size of the payload has a direct and substantial bearing on the rates which shippers are required to pay. This feature of operation and regulation is strikingly illustrated in a report of the Interstate Commerce Commission, In the Matter of Container Service, 182 I. C. C. 653. This case involved transportation by motor vehicles which were operated by railroads. At page 663 is set forth a schedule of charges based on minimum payload weights. For a minimum of 6,000 pounds the rate is 40c per hundred pounds and for a

minimum of 10,000 pounds the rate is 30c per hundred pounds, and for 20,000 pounds the rate is 20c per hundred pounds. If this principle of rate making be applied to those shippers affected by the four or five States with low gross weight limitation, a consignor shipping merchandise into or across South Carolina could not possibly ship over 10,000 pounds in one vehicle, therefore, he could not get a rate lower than 30c, but the consignor shipping through North Carolina could ship 20,000 pounds and thereby get a rate of 20c per hundred. In Texas, the consignor could not ship more than 7,000 pounds, therefore, he would have to pay 40c per hundred pounds.

Tariff Conflicts

Motor carriers publish tariffs based on volume ratings and when these tariffs are filed with the Interstate Commerce Commission, they have the effect of law and are binding on the motor carriers and shippers alike. Due to conflicting State laws, motor carriers are prevented from handling volume ratings in certain States, and it becomes necessary for the carriers to publish an exception to their tariffs. The exception withholds volume ratings from shippers when the goods are to move into or across the States having low weight limitations.

It is obvious that there is a direct conflict between the State and the Federal Law and it is impossible for motor carriers to comply with both laws. When the carriers refuse to handle volume ratings in order to comply with the State law, they violate their tariff obligations and duties as common carriers. If they publish higher rates for a smaller volume only, they immediately discriminate between persons and places

and come in conflict with Sections 216(b) and (d) of the Motor Carrier Act, which prohibit discriminations.

The Commission has already suspended several interstate tariffs based on quantities permitted by State laws because the economic loss burdened interstate commerce.

Truck Sizes and Traffic Quantities

Interstate transportation by motor carriers was in its infancy when the Interstate Commerce Commission made its report, Coordination of Motor Transportation, 182 I. C. C. 263, and at page 424 stated that trucks operated by common and contract carriers showed only 11 per cent between 1½ and 3 tons capacity; 60 per cent were from 3½ to 5 tons capacity, and 29 per cent over 5 tons capacity. Today 10 tons or 20,000 pounds is the average unit of interstate commerce in goods and manufacture. Federal Coordinator of Transportation—Freight Traffic Report—page 31—May 6, 1935.

Safety

Surely, it cannot be said that, under the safety provisions of the Motor Carrier Act, 1935, the Commission is without power to limit the height of motor vehicles to prevent them from being topheavy and dangerous. This Court, in sustaining the judgment of the Legislature, stated that weight and width are related to safety. There are no limitations on the authority of the Interstate Commerce Commission to prescribe safety regulations. There are no height limitations in Massachusetts, Maryland, Illinois, Connecticut, and New Hampshire. It cannot be said that Congress has acted with respect to these States and

not as to other States, nor can it be said that Congress has not acted with respect to safety. Some States permit combinations of numerous vehicles, aggregating great length, up to 85 feet, such as Arizona. Permissible gross weights for trucks range from 9 tons in Kentucky to 55 tons in Nevada.

Appellees submit that if the Commission should find that in the interest of safety lower standards should be prescribed, it now has power to do so without further legislation and to impose and enforce suitable regulations; existing State laws notwithstanding.

The Commission in its first safety order, issued December 23, 1936, Ex Parte MC-4, 1 M.C.C. 1, at page 5, gave as part of its program the regulation of "Motor-Vehicle Standards (Sizes and Weights)" and at page 15 it said: "These parts and accessories are important factors in safe operation, but the motor vehicle itself, and particularly its size and weight, must also be considered. We are empowered by the Act to investigate this subject. At least insofar as the regulation of sizes and weight of motor vehicles and combinations thereof has a bearing on safety of operation in interstate or foreign commerce, we believe that we now have authority to undertake such regulation. If it should prove that additional Federal legislation is needed to protect the public interest with respect to this matter, it will be our duty under Section 204(a) (7) of the Act to report to Congress accordingly".

This shows the relationship between safety and sizes and weights as understood by the Commission. It will be noted that with reference to further legislation on the subject of "Sizes and Weights" they referred to Section 204(a) (7) and not to Section 225.

On November 8, 1937, in Ex Parte No. MC 15, the

Commission issued its order for an investigation for the purpose of prescribing "Sizes and Weights".

The order follows in full:

"ORDER

"At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 8th day of November, A .D. 1937.

"EX PARTE NO. MC. 15

"IN THE MATTER OF REGULATIONS GOVERNING THE SIZES AND WEIGHT OF MOTOR VEHICLES AND COMBINATIONS OF MOTOR VEHICLES USED BY COMMON AND CONTRACT CARRIERS IN THE TRANSPORTATION OF PASSENGERS AND BY COMMON, CONTRACT, AND PRIVATE CARRIERS IN THE TRANSPORTATION OF PROPERTY IN INTERSTATE OR FOREIGN COMMERCE

"Section 204(a)(1), (2), and (3), and Section 225 of the Motor Carrier Act, 1935, being under consideration, and good cause appearing therefor:

"*It is ordered*, That investigation be, and it is hereby, instituted into the above-described matter for the following purposes:

"1. To enable the Commission to make a report under the provisions of Section 225 on the need for Federal regulation of the sizes and weight of motor vehicles and combinations thereof, and

"2. To enable the Commission to prescribe reasonable requirements under the provisions of Section 204 of the Act as to the sizes and weight of motor vehicles and combinations

thereof insofar as they affect the safety of operation.

"*It is further ordered,* That notice of this proceeding be given to common and contract carriers by motor vehicle and private carriers of property by motor vehicle, as defined in Part II of the Interstate Commerce Act, and other interested parties by such means as the Commission may hereafter adopt and use for that purpose, including the posting of a notice in the office of the Commission's Secretary.

"*And it is further ordered,* That this proceeding be assigned for hearing at such time and place as the Commission may hereafter direct.

"By the Commission.

"W. P. BARTEL,
(SEAL) "*Secretary.*"

SECTION 225—MOTOR CARRIER ACT

It will be noted that Section 225 speaks of *reports* on the need for *regulation,* whereas Section 204(a)(7) provides for *recommendations* with respect to *legislation.*

Standing alone, Section 225 could possibly be construed as reserving for further consideration legislation, on the subject of sizes and weights of either interstate or intrastate vehicles, or both, as distinguished from regulations under authority delegated to the Interstate Commerce Commission.

Standing alone, it can be construed as a mere matter of procedure to be followed by the Commission in prescribing regulations covering sizes and weights of interstate trucks *and has been so construed by the Interstate Commerce Commission.*

Considered with the Motor Carrier Act as a whole,

it cannot be construed to nullify the Act by defeating its administration. The language employed, though admittedly unfortunate, is susceptible of interpretation consistent with the Act.

The legislative history of the Motor Carrier Act shows that Section 225 was not added to the Bill as introduced, but on the contrary many of the important features of the Act were added subsequent to the inclusion of Section 225. Among such provisions were those in Section 202(a) regarding the preservation of the inherent advantages of motor transportation and reasonable charges therefor without unjust discriminations, undue preferences or advantages. In Section 202(b) there was added the provision giving the Commission jurisdiction over the provision of facilities for transportation. In Section 203(b) standards of equipment were added and repeated in Section 203(b)(7). All of Section 204(a)(3) was added.

The proviso in Section 208(a) regarding equipment was added, and likewise the proviso in Section 209(b), regarding equipment was added. The provisions of Section 216(b) and (c) were added in their entirety. The reservation of power to the States as contained in the proviso at the end of Section 216(e) was added, and Congress did not see fit to reserve to States police powers over interstate commerce.

Congress considered whether it should leave the matter of weights and sizes to the Commission or incorporate regulations in the Act, and it decided to give the Commission jurisdiction for the present. It will be further noted that Section 225 refers to "all motor carriers" whereas the Motor Carrier Act deals only with interstate carriers. If upon investigation by the Commission, it should be found that in order to provide for

the safety of interstate commerce on Federal Aid Interstate Highways, and to protect the investment of the United States in these highways, it should be necessary to regulate the sizes and weights of intrastate traffic, Congress under its plenary powers can do so, as it has already done with respect to the maintenance and repair of such highways. (Federal Aid Act of 1921, Public Law, No. 87, 67th Congress). The inclusion of the word "all" could be construed to refer to such a contingency and to the need for further legislation applicable to intrastate commerce.

All investigations by the Interstate Commerce Commission are called "Reports" and have always been required by law as a condition precedent to the issuance of Orders by the Commission. Sec. 14, Part I. Section 225 of Part II merely prescribes that the usual procedure be observed in connection with the Commission's Orders involving weights and sizes and qualifications and hours of employes.

Legislative History

The following quotations from the *Congressional Record*, 74th Congress, First Session, Vol. 79, are enlightening on the question as to whether Section 225 is to be construed as a limitation on the Commission's authority over sizes and weights, or is to be construed as a procedural requirement, as Appellees contend.

Page 5877, Mr. Wheeler, speaking of the provisions of Section 204 relating to safety of operation and equipment: "This provision, however, is only operative after investigation by the Interstate Commerce Commission and if need is found for such regulation."

Page 5878, Mr. Wheeler, speaking of private carriers and equipment, Section 204(a)(3), said: "Such

regulation is conditioned upon the finding, after investigation, of need therefor * * *."

Page 5879, Mr. Wheeler, speaking of the development of the Act and the requirements in connection with qualifications and maximum hours of service, which terms are mentioned in Section 204, said: "* * * that the Commission felt that they would like first to make a study of the matter, and then come back and report to Congress, *or be given permission* to establish these requirements later; we leave it as the Commission suggested, *giving them power to make the investigation, and if and when they found it necessary to put in effect such rules and regulations as they might deem necessary.*"

Continuing and speaking of the provisions of Section 204 as to all three classes of carriers, the Senator said: "The exercise of this power with respect to the three classes of carriers is intended to be contingent upon the results of the comprehensive investigation of the need for regulation of this kind provided for in Section 225 * * *." "The investigation referred to will permit the Commission not only to develop whether there is need for regulation, but also to establish requirements * * * like authority has been conferred respecting the safety of operation and equipment of private carriers."

Page 5884, Senator Wheeler, speaking of Section 225, pointed out that the investigation to be made was to establish the need for regulation of sizes and weights and of qualifications and maximum hours and that the investigation would "serve to lay the basis for types of regulation which are adapted to the special and varied conditions surrounding the operations of such motor vehicles."

Page 5887, Senator Wheeler, speaking of Section 225 and the investigation provided therein said: "Then we gave them the power in Section 204—to supervise and regulate * * * safety of operation and equipment."

Page 5887, Senator Couzens, remarked that Section 225 would not give the Commission authority to prescribe but only to investigate, and Senator Wheeler answered him as follows: "But on page 10, in Section 204, the Commission is given the power to establish reasonable requirements with respect to the qualifications and maximum hours of service of employes, and the safety of operations and equipment."

Page 12707, Mr. Terry, said: "* * * But what hours shall be observed; what regulations in regard to safety shall be used, depend entirely on the type and character of the service and the type and character of the bus or truck * * *." Mr. Terry, discussing Section 225, said: "In the powers given to the Commission in reference to the regulation of common carriers, it is provided: 'Regulate the maximum hours of service of employes and safety of operation and equipment,' " and then he discusses contract carriers and private carriers and urges the House to vote down an amendment which would write certain standards for hours of service into the bill, because the Committee desires the Interstate Commerce Commission to make this investigation and then provide accordingly.

It would seem to be clear that the investigation which the Commission is required to make is only for the purpose of determining the need for regulation of sizes and weights and for the purpose of determining requirements which would be suitable for different sections of the country. After they have made their

investigation and report, the Commission is authorized to prescribe, to the extent necessary to administer the Act.

There was before Congress the question of regulations suitable for the various sections of the country. The variations between sections were the factors which led Congress to authorize the Commission to investigate and prescribe instead of writing standards into the Bill.

THE INTENT OF CONGRESS WITH RESPECT TO POLICE POWERS

The intent of Congress, the circumstances of the times, and the evils which Congress sought to reach, may be determined not only from the terms of the Act, but from the legislative history.

The Act clearly states the powers which Congress wished to reserve to the States. Section 202(c), reserved the power of taxation and the regulation of intrastate commerce. Section 216(e), reserved jurisdiction over intrastate rates, even though such rates discriminated against interstate commerce. When Congress specifies reservations of powers to the States, that which is not specified is not reserved.

The legislative history shows that Congress did not intend to reserve to the States unlimited police powers over interstate commerce on interstate highways, which powers would impair service, facilities, and burden the commerce among the States.

The Rayburn Bill, H. R. 6836, 73rd Congress, Second Session, undertook to reserve police powers to the States, and Congress took 453 pages of testimony, much of which was to the effect that reservations of police powers to the States would constitute undue

restrictions on the powers of Congress and defeat the purposes of the Act, to secure uniformity and equality (House Committee Hearings on H. R. 6836). The Bill did not pass.

The next year the Wheeler Bill was introduced, S. 1629 and H. R. 5262. The Wheeler Bill did not reserve police powers to the States. The States, acting through their national organization, tried to have the Bill amended to reserve police powers. Both House and Senate Committees rejected the amendment and when it was offered on the floor it was voted down. *Congressional Record*, Vol. 79, pp. 5953, 5954.

DISCUSSION—POINT 2

Prior to the Motor Carrier Act, 1935, the States may have had the power to enact legislation designed to favor transportation of passengers by bus over transportation of freight by truck. They may also have had the power to strangle transportation of property by truck in favor of transportation of property by railroad.

Regulations of this type are made effective by prescribing width limitations for buses consistent with the standards in effect throughout the United States; whereas in the case of trucks, lower standards are prescribed, having the effect of erecting a blockade at the State line. In other cases, dual standards of weight limitations are prescribed for trucks, the higher standard applying when trucks deliver their cargo to railroad stations, and a drastically lower standard applying when the transportation is completed to destination by trucks.

South Carolina, for example, limits trucks (except exempted classes and those covered by local permits)

to 90 inches in width, but permits 96 inches for buses. Act 888, approved June 11, 1936, allows 96 inches for buses.

Clearly, this must be a regulation of the authority to operate as distinguished from a safety regulation. It would be difficult to justify the proposition that a 90-inch width was necessary for the safety of freight, but that the safety of passengers and the public was accommodated with a 96-inch width for buses.

In Texas, motor carriers of freight may haul 7 tons to the nearest railroad station but only 3½ tons if they pass the railroad station. House Bill 336, Chapter 282, page 507, General Laws, Regular Session, 42nd Legislature, Section 7, amending by adding Section 5 b, Chapter 42, General Laws of Texas, passed by the 41st Legislature, Second Called Session. (As the reference is for illustration only, the Act is not set out.) No such method of restricting gross weights, axle weights, or cargo weights is applied to buses.

Kentucky restricts the gross weight of trucks to 18,000 pounds but buses weighing 25,000 pounds or more are permitted to operate, and do operate, over the same highways. Act of March 11, 1932, Section 1, covering definitions applies to trucks and exempts buses, and Section 3 fixes gross weight at 18,000 pounds. (As the reference is for illustration only, the Act is not set out.)

Regulations of the type described are in *purpose and effect* regulation of the authority to engage in interstate commerce. The Interstate Commerce Commission now has exclusive jurisdiction to grant or deny certificates of convenience and necessity for operations in interstate commerce and no State can deprive the

Commission of its jurisdiction by resorting to subterfuge.

Conceivably some color of justification or argument can be advanced linking every State action with some purported exercise of police powers under the guise of safety or protection of the highways. If the Federal Courts may not review the "judgment" of the legislation to determine the bona fides or reasonableness of such legislation, the States are left free to nullify every provision of the Motor Carrier Act, 1935, and every Order of the Commission pursuant thereto.

This Court has repeatedly held that to the extent Congress has exerted its paramount power over the subject of interstate commerce, that the authority of the State is at an end, irrespective of whether the State regulation is consistent, complimentary or for a different purpose.

"That the purpose of Federal regulation of commerce is to secure continuous transportation from one end of the country to the other entirely free from any impositions by State authorities." *Wabash St. L. & P. R. Co.* vs. *Illinois*, 118 U. S. 557.

"The Federal power may be exercised to *require* carriers to be *equipped* to perform the requisite public service." *Dayton-Goose Creek Ry. Co.* vs. *U. S.*, 263 U. S. 456. A provision for such requirements is contained in the Motor Carrier Act, 1935.

This Court had said, "The principle of duality in our system of government *does not* touch the authority of Congress in the regulation of foreign commerce." *Board of Trustees of University of Illinois* vs. *U. S.*, 289 U. S. 48, 57.

In prior cases it has been said that the power to regu-

late interstate commerce is as broad as the power to regulate foreign commerce.

Brown vs. *Houston*, 114 U. S. 622; *Bowman* vs. *C. & N. W. R. Co.*, 125 U. S. 465; *Crutcher* vs. *Kentucky*, 141 U. S. 47; *Pittsburgh & S. Coal Co.* vs. *Bates*, 156 U. S. 577.

In the present case this Court has said that the police powers of the State are "not divisible". Under those circumstances, the police power of the State must end, to the extent that Congress occupied the field of regulation of interstate commerce and such means as Congress may adopt "may have the quality of police regulations". *Hoke* vs. *U. S.*, 227 U. S. 308.

"Commerce between the States has been confided exclusively to Congress and *is not within the jurisdiction of the police power of the State*, unless placed there by Congressional action." *Leisy* vs. *Hardin*, 135 U. S. 100.

Federal regulation is exclusive when Congress has acted and occupied the field. *There can be no divided authority over the same subject matter. Mo. Pac. R. Co.* vs. *Stroud*, 267 U. S. 404; *Northern Pac. R. Co.*, vs. *State of Washington*, 222 U. S. 370; *Erie R. Co.* vs. *State of New York*, 233 U. S. 671.

Even a casual examination of the Motor Carrier Act discloses the extent to which Congress has occupied the field and *a fortiori*, the extent to which the States have been excluded. Whether the State regulation be for the same or a different purpose, Congress having acted under the Motor Carrier Act, such action excludes State regulation; whether consistent, complimentary, additional or otherwise and coincidence is as ineffective as opposition and a State statute is not to be declared a help because it attempts to go further than

Congress has seen fit to go . *Gilvary* vs. *Cuyahoga Valley Ry. Co.*, 292 U. S. 57; *Charleston & W. C. Ry. Co.* vs. *Varnville Furniture Co.*, 237 U. S. 597.

The extent to which this Court has gone in suspending the police powers of the State is illustrated in the case of *Oregon-W. R. Nav. Co.* vs. *State of Washington*, 270 U. S. 87. In that case it was held that the State power to quarantine against the importation of farm produce likely to convey injurious insects was suspended, as to interstate commerce, by U. S. Code, Title 7, Sec. 161, investing the Secretary of Agriculture with full authority over the subject. It was held that such an act cannot be construed as leaving the State at liberty to establish quarantine in the absence of action by the Secretary of Agriculture.

That a State cannot enforce any law obstructing interstate commerce and the name, description, or characterization of an Act by a State Legislature or by State Courts, will not necessarily control all questions of whether it interferes with or burdens interstate commerce and such determination is a Federal question. *La Coate* vs. *Dept. of Conservation of La.*, 263 U. S. 545.

State statutes which by their necessary operation directly interfere with or burden commerce are prohibited regulations and invalid regardless of the purpose with which it was enacted. *Schafer* vs. *Farmer's Grain Co.*, 268 U. S. 189; *Di Santo* vs. *Commonwealth of Pa.*, 273 U. S. 34; *Interstate Buses Corp.* vs. *Holyoke St. Ry. Co.*, 273 U. S. 45.

In the instant case the subject is transportation of interstate commerce which Appellees submit never has been a subject reserved to the States. It is a subject which the States may touch only through the silence

of Congress, and Congress has *ceased to be silent.* The Motor Carrier Act completely occupies the field and whether or not the Motor Carrier Act be construed to vest in the Commission jurisdiction over sizes and weights, as such, the Commission nevertheless has full jurisdiction to make such regulations as may be necessary to effectuate the provisions of the Act. Any ruling to the contrary necessarily has the effect of forcing Congress to completely strip the States of all authority as distinguished from a cooperative plan of procedure as contemplated by the Joint Board arrangement provided for under Section 205 of the Motor Carrier Act.

The Interstate Commerce Act did not give the Commission the authority to limit the length of trains, but it has been held that the States may not do so. *Atchison T. & S. F. Ry. Co.* vs. *La Prade,* 2 Fed. Supp. 855, 861.

Inhibitive Congressional action is not essential to exclude State legislation. It is sufficient if Congress has occupied the field. *Southern R. Co.* vs. *Reed,* 222 U. S. 424.

The continuation of blanket State authority is contrary to the intent and purposes of the Motor Carrier Act, because no investigations or Reports or Orders can be made to determine the proper policy, if States may impose regulations which are economically unsound. This Court has said in similar cases: "There must necessarily be a period for adjustment." *Northern Pacific R. Co.* vs. *Washington,* 222 U. S. 370.

The decision of this Court in the instant case appears to so restrict the authority of the Federal Courts to review Acts of the Legislature that, they will be powerless to review legislative actions for the purpose of determining whether size and weight restrictions are in fact reasonable and necessary exercise of police

powers, or constitute devices for regulating the operating authority of carriers, for the imposition of discriminations between different classes of carriers, and for discriminations against interstate commerce.

HIGHWAYS

Interstate highways are essentially and fundamentally national. Federal jurisdiction would necessarily be an implied power of Federal sovereignty even in the absence of specific Constitutional provisions. A century of Congressional policy and decisions of this Court is consistent with this view. The States are not proprietors but merely trustees for the public. National defense, commerce, post roads and common welfare have necessarily made it so.

There is only one Commerce Clause and it operates to the same extent with respect to all transportation and facilities for transportation including land highways. *California* vs. *Pacific Railroad Co.*, 127 U. S. 1, 39; *Luxton* vs. *North River Bridge Co.*, 153 U. S. 525; *Monongahela Nav. Co.* vs. *U. S.*, 148 U. S. 312.

In addition to more than $2,000,000,000 cash, invested since 1916, millions of acres of land grants have been made to aid in the construction of highways. Beginning with 1802 and continuing down to 1864, and in connection with the admission of Ohio, Louisiana, Indiana, Mississippi, Illinois, Alabama, Missouri, Arkansas, Michigan, Iowa, Wisconsin, Minnesota, Oregon, Kansas, and Nevada into the Union, there have been Federal land grants for highways. In some instances the grants have been exclusively for interstate highways; in some cases for both interstate and intrastate highways; and in some cases for intrastate highways.

Various Federal Acts have declared highways to be post roads.

CONCLUSION

Justice Stone said, in *Borden's Co.* vs. *Baldwin*, 293 U. S. 194: "We are in accord with the view that it is inexpedient to determine grave Constitutional questions upon a demurrer to a complaint or upon an equivalent motion, if there is a reasonable likelihood that the productions of evidence will make the answer clearer." Appellees contend that the failure of the Court below to take evidence on the question of the effect of the State Act on the administration of the Motor Carrier Act, 1935, was in effect equivalent to decision on a motion.

For the foregoing reasons, it is respectfully urged that this Petition for Rehearing be granted:

That the Decree of the District Court of the United States for the Eastern District of South Carolina be not affirmed with respect to that portion of the decision construing, without evidence, the Motor Carrier Act, 1935, as having the effect of leaving the Interstate Commerce Commission without jurisdiction to make such regulations as may be necessary, with respect to safety, service, and the prevention of discrimination between persons and places, and sound economic conditions within the motor transportation industry.

That the case be remanded for further proceedings to take evidence for the purpose of determining whether the size and weight restrictions of South Carolina defeat the purposes of the Motor Carrier Act, 1935, and for the purpose of determining whether such restrictions discriminate against interstate commerce by truck in favor of interstate commerce by bus and

thereby usurp the prerogatives of the Commission with respect to operating authority.

Respectfully submitted,

BARNWELL BROS., INC., POOLE TRANSPORTATION, INC., HORTON MOTOR LINES, INC., ET AL,
Appellees.

By J. NINIAN BEALL

March 10, 1938.

CERTIFICATE OF COUNSEL

I hereby certify that I am counsel for the respective Appellees and Petitioners in the foregoing Petition, and that the same is presented in good faith and not for delay.

J. NINIAN BEALL