Maryland Law Review

Volume 4 | Issue 4 Article 7

State Certification of Carrier Operating Solely Under Federal Contract - Baltimore & A. Ry. Co. v. Lichtenberg et al.

STATE CERTIFICATION OF CARRIER OPERATING SOLELY UNDER FEDERAL CONTRACT

Baltimore & A. Ry. Co. v. Lichtenberg et al.[1]

The Federal Government had been engaged in constructing buildings at sites near Annapolis on both sides of the Severn River, some near the railroad and some as much as four miles distant therefrom. As the Government required the use of workmen otherwise unemployed and on relief, and as there was no adequate supply of such men nearby, the Federal Works Progress Administration had been furnishing them from Baltimore. The plaintiffs-appellees, who were not usually engaged in transporting passengers, entered into an exclusive contract with the Federal Government to haul such workmen to and from Annapolis each day. Ordinary freight trucks were used at a flat rate per round trip, running from a pick-up point in Baltimore to the sites of the work and return. Such contract was to end with the work in Annapolis and in no case to last for more than one year. Plaintiffs-appellees were required by their contract to have their trucks duly licensed and to carry liability insurance. However, they had made no attempt to qualify as passenger carriers by obtaining the permit from the Public Service Commission as required by statute.[2] Upon complaint by the Baltimore & Annapolis Ry. Co. to the Public Service Commission[3] that the plaintiffs-appellees were operating as a contract carrier without compliance with the appropriate statutes, and were thus subjecting the railroad to unrestricted and unregulated competion in the area served by it, the Commission, after conducting a hearing, ordered that such

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[1] 176 Md. 383, 4 A. (2d) 734 (1939). The Supreme Court dismissed an appeal, without opinion, 84 L. Ed. 250, 60 S. Ct. 297 (U. S. 1939). Subsequently to this decision, Lichtenberg entered into an arrangement whereby his trucks were leased to the United States Government and they were run for the same purpose under the leasing arrangement without obtaining any special permits from the Maryland Public Service Commission. Lichtenberg was indicted and convicted in the Criminal Court of Baltimore City for operating his trucks without permit in violation of Code, Art. 56, Sec. 251, (State of Maryland v. Lichtenberg, reported in The Daily Record, Mar. 27, 1940). On motion to the Supreme Bench, a new trial was granted on the ground that Johnson v. Maryland, *infra circa* n. 8, precluded the application of the certification provision to trucks operated directly by the United States Government (State of Maryland v. Lichtenberg, reported in The Daily Record, Apr. 25, 1940).

[2] Md. Code Supp. (1935) Art. 56, Secs. 251 and 252. See also Art. 56, Sec. 255.

[3] Md. Code Supp. (1935) Art. 56, Sec. 255A.

operation be stopped. The plaintiffs-appellees then filed this bill to enjoin enforcement of the Commission's order on the ground that it was unreasonable and unlawful.[4] The lower court decided that the single and exclusive contract shown, for a comparatively short period, was not such a transportation of passengers as was intended to be controlled by the statutes, and that the regulation or stoppage sought would be an unconstitutional obstruction by the State of the performance of an essential function of the Federal Government, and thus granted the injunction prayed.

This decision was reversed by the Court of Appeals on both points. It held that the statute as applied to plaintiffs-appellees did not constitute an interference with the performance of an essential function of the Federal Government. The finding of the Commission to the effect that the plaintiffs-appellees were independent contractors was affirmed, but it was held that the facts that the operation was for the exclusive benefit of the Government, and that the Government had fixed their schedules and routes were not material to that question.[5] Thus, the Court found that the plaintiffs-appellees were not a Governmental agency and regulation of them would not constitute an unconstitutional interference with the performance of an essential function of the Government.

Secondly, the Court held that the business of the plaintiffs-appellees fell within the terms of the Maryland statute which requires Public Service Commission permission to operate.[6] The broad wording of the statute, plus the fact that carriers within it are exempted from "the public duties of a common carrier," seemed to the Court to indicate that the Legislature intended that private and contract carriers, as well as common carriers, should be included therein. The Court further found that plaintiffs-

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[4] Md. Code Supp. (1935) Art. 23, Sec. 359.

[5] Citing: Bentley, Shriver & Co. v. Edwards, 100 Md. 652, 60 A. 283 (1905); Hull v. Phila. & R. Ry. Co., 132 Md. 540, 104 A. 274 (1918); Hilton Quarries v. Hall, 161 Md. 518, 158 A. 19 (1932).

[6] Md. Code Supp. (1935) Art. 56, Sec. 251 requires a permit for any motor vehicle "used in the public intrastate transportation of passengers for hire" and this definition is further elaborated in *Ibid.*, Art. 56, Sec. 252: "All motor vehicles, except when used exclusively for the transportation of pupils to and from public and/or private schools, operating for hire intrastate over the improved roads and streets of this State or of any county or municipality thereof on regular schedules or between fixed termini . . . shall be subject to the provisions of this subtitle . . . except that the public duties of a common carrier shall not thereby be imposed on the owner of any such vehicles not actually engaged in public transportation."

appellees were operating on regular schedules and between fixed termini, thus bringing them exactly within the statute. As to the constitutionality of its application to plaintiffs-appellees, the Court upheld the statute as a reasonable exercise of police power, saying: "If the regulations in the statute bear a conceivably reasonable relation to highway preservation and the safety of passengers carried, there would be no constitutional objection".[7] Then the Court went on to point out how the prerequisites for a permit and the regulations promulgated by the Commission would operate to the benefit of public convenience and safety on the highways. The Court felt that it was quite proper for the Commission, in granting such permits, to inquire into the effect which an applicant's business would have on existing common carrier service. But it then went on to hold that the plaintiffs-appellees were not in direct competition with the railroad, since they were rendering a service which the railroad could not give, i. e. distributing the workmen at the various building sites, thus apparently leaving the way open for the Commission to grant the plaintiffs-appellees a permit upon compliance by them with the statute.

The case presents two main problems. First, the interference by the State with the performance of an essential function by the Federal Government, and second, the regulation by a State of private and contract carriers. As to the first, the case of *Johnson v. Maryland*[8] is an authority for the position taken by the plaintiffs-appellees. There the State of Maryland sought to compel the driver of a mail truck to obtain an operator's license. Mr. Justice Holmes, speaking for the Supreme Court, held the State requirement to be an unconstitutional interference with an essential function of the Federal Government. He pointed out that an employee of the United States does not enjoy complete immunity from State laws while acting in the course of his employment, that the State can regulate matters merely incidental to the carrying out of his employment, but he felt that this license requirement did not fall within the exceptions stated, because it, in effect, allowed a State to determine the competency of a man to work for the Federal Government. In the *Lich-*

[7] 4 A. (2d) 734, 737 (Md. 1939).

[8] Johnson v. Maryland, 254 U. S. 51, 41 S. Ct. 16, 65 L. Ed. 126 (1920). See n. 1, *supra*, for subsequent actions of Lichtenberg in reliance on this case.

tenberg case, this argument was met by holding that plaintiffs-appellees were independent contractors. Reliance was placed upon *James v. Dravo Contracting Co.*,[9] in which the State of West Virginia sought to impose a tax upon the gross income of a construction company engaged in building dams and locks in navigable waters within the State under a contract with the United States. The Supreme Court dissolved an injunction restraining the collection of such tax, holding that, as the taxpayer was an independent contractor, a tax on its gross income would not "lay a direct burden on the Federal Government" and would not hinder the Government in the exercise of an essential function. On this theory the Court of Appeals avoided any conflict with *Johnson v. Maryland*. However, from recent taxation cases, it might be said that the Supreme Court has adopted a more liberal view on such a question and that the authority of *Johnson v. Maryland* may have been somewhat weakened.[10]

The second problem involves state regulation of private and contract carriers, or more specifically, state certification of contract motor carriers. Since the early case of *Munn v. Illinois*,[11] common carriage was accepted as the touchstone of publicness, needed to sustain business regulations (rate control, certification, etc.) against due process objection.[12] Motor carriage, accordingly, would have presented no special problem if common carriage alone had been involved. Upon the extension of certification and rate control to common carriers by motor truck, however, it became apparent that there were a great many trucks on the highways not operated as common carriers, but nevertheless demanding regulation because of the large volume of business done as private or contract carriers. One of the earlier methods of regulating the latter was

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[9] James v. Dravo Contracting Co., 302 U. S. 134, 58 S. Ct. 208, 82 L. Ed. 155, 114 A. L. R. 318 (1937). See also Metcalf & Eddy v. Mitchell, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384 (1926), and Allward v. Johnson, 282 U. S. 509, 75 L. Ed. 496, 51 S. Ct. 273, 75 A. L. R. 9 (1931).

[10] See Helvering v. Gerhardt, 304 U. S. 405, 58 S. Ct. 969, 82 L. Ed. 1427 (1938); and Graves v. O'Keefe, 306 U. S. 466, 83 L. Ed. 927, 59 S. Ct. 595 (1939), noted (1939) 4 Md. L. Rev. 77, where a State tax on the income of an employee of a Federal agency was held to be valid in the absence of a showing that such a tax would result in actual hindrance of such agency in the performance of its function. See *supra* n. 1, for subsequent activities of Lichtenberg as supported by Johnson v. Maryland.

[11] 94 U. S. 113, 24 L. Ed. 77 (1876).

[12] See Robinson, *The Public Utility Concept in American Law* (1928) 41 Harv. L. Rev. 278; Goddard, *The Evolution and Devolution of Public Utility Law* (1934) 32 Mich. L. Rev. 577.

merely to extend existing common carrier regulations to cover all carriers for hire, making no distinction between public and private carriage; but, the Supreme Court several times has held such a method unconstitutional. In *Michigan Public Utilities Commission v. Duke*[13] a State statute provided that any carrier for hire over the State highways should be deemed a common carrier and regulated as such (including the obligations to furnish "adequate, safe and convenient service to the public" and to supply an indemnity bond covering the goods carried). The Supreme Court held that it was unconstitutional to make a contract carrier into a common carrier by legislative fiat. Again, in *Frost v. Railway Commission of California*,[14] the State statute covering common carriers was extended to cover private and contract carriers. A carrier operating under a single private contract was ordered to cease operations until he obtained a certificate of convenience and necessity in accordance with the statute. The Supreme Court of California upheld the statute as applied to contract carriers on the theory that while a State has no power to make a private carrier into a common carrier, it can make a private carrier dedicate his property to a public use as a condition precedent to the use of the public highways for profit. The United States Supreme Court conceded that the State might regulate the use of its highways as a place of business, but it held that the California statute fell under the prohibition of *Michigan Public Utilities Commission v. Duke* and was thus unconstitutional. Again, in *Smith v. Cahoon*,[15] a Florida statute was held unconstitutional which provided regulation for any vehicle "used in the business of transporting persons or property for compensation or as a common carrier over any public highway in this State between fixed termini or over a regular route". A contract carrier was arrested for operating without the certificate of convenience and necessity required by the statute. The Supreme Court of Florida upheld the statute, saying that it did not require private carriers to become common carriers, and the provisions of the statute that were legally applicable only to common carriers were not intended to be applied to, and were not applied to, corporations or

[13] Michigan Public Utilities Commission v. Duke, 266 U. S. 570, 45 S. Ct. 191, 69 L. Ed. 445 (1925).

[14] Frost v. Railroad Commission, 271 U. S. 583, 46 S. Ct. 605, 70 L. Ed. 1101 (1926).

[15] Smith v. Cahoon, 283 U. S. 553, 51 S. Ct. 582, 75 L. Ed. 1264 (1931).

persons who were not common carriers, though engaged in the transportation to which the statute refers. However, it also held that under the state police powers a certificate of convenience and necessity could be required of private as well as public carriers. The Supreme Court was of the opinion, first, that the statute did in fact place public and private carriage on precisely the same footing, thus bringing the statute within the prohibition of the *Forst* case and *Michigan P. U. C. v. Duke;*[16] secondly, that even under the construction placed upon the statute by the Florida court, the statute was invalid because, as a criminal statute, it failed to provide a sufficiently clear standard of conduct.

However, none of the above decisions went so far as to hold exactly that a private or contract carrier could not be subjected to certification.[17] In *Continental Baking Co. v. Woodring*[18] a limited form of private carrier certification was approved by the Supreme Court. The Kansas statute involved in that case purported to regulate motor vehicle transportation but distinguished between "public motor carriers", "contract motor carriers", and "private motor carriers", and it expressly stated that a contract motor carrier is one who is not a public motor carrier. As the Supreme Court construed the statute it did not require private and contract carriers to obtain a certificate of convenience and necessity, as was required of public carriers, but only a "license", which the commission had no discretion to refuse if the carrier complied with normal safety and tax regulations. Under such a construction the Court felt that the Kansas Legislature did not attempt to compel private carriers to become public carriers and did not purport to put them on an identical footing. Those regulations common to both were held, with respect to private carriers, to be a reasonable exercise of police power. Finally, in *Stephenson v. Binford,*[19] regulation was sustained which imposed certification requirements (and also control of rates) on contract carriage. The Texas statute, there involved, placed private

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[16] See notes 11 and 12, *supra.*

[17] See, Rosenbaum and Lilienthal, *Motor Carrier Regulation: Federal, State and Municipal* (1926) 26 Col. L. Rev. 954; Brown and Scott, *Regulation of The Contract Motor Carrier* (1931) 44 Harv. L. Rev. 530.

[18] Continental Baking Co. v. Woodring, 286 U. S. 352, 52 S. Ct. 595, 76 L. Ed. 1155 (1932).

[19] Stephenson v. Binford, 287 U. S. 251, 53 S. Ct. 181, 77 L. Ed. 288, 87 A. L. R. 721 (1932).

and contract carriers in a separate category from common carriers but imposed almost identical regulations upon both classes of carriers. The private contract carriers were required to obtain "permits" to operate which might be refused if the proposed service might decrease the efficiency of the existing service, and could be obliged to charge minimum rates not less than the existing rates of common carriers. A bill was filed to enjoin enforcement of the statute on the ground that it required private carriers to become common carriers, reliance being placed upon *Michigan P. U. C. v. Duke* and the *Frost* case.[20] The Supreme Court, speaking through Mr. Justice Sutherland, held that the statute was constitutional. The earlier cases were distinguished on the ground that the Texas statute did not attempt to make common carriers out of private carriers. Each class of carriers had its own set of regulations, and private carriers were only regulated as private carriers. The Court then went on to justify the regulation of private carriers. The State's highways were public property, it argued, and the use of them as a place of business could be restricted by the State in the interest of the public generally in order to relieve congestion and conserve the highways themselves. Promotion of public safety and convenience on the highways was within the realm of the State's police powers and thus the statute was valid if it constituted a reasonable exercise of such powers. The Court then applied the familiar presumption of reasonableness in the absence of a showing to the contrary. About a year later, in *Hicklin v. Coney*,[21] a South Carolina statute imposing similar regulations upon contract motor carriers was held constitutional by the Supreme Court on the same sort of argument.[22]

[20] *Supra*, notes 11 and 12.

[21] Hicklin v. Coney, 290 U. S. 169, 54 S. Ct. 142, 78 L. Ed. 247 (1933). It is to be noted that in all of these cases the regulation was sustained as a reasonable exercise of police power without regard to whether or not private or contract carriage was a business "affected with a public interest". The latter phrase has been frequently used in cases involving public utility regulation, but its significance as a label or formula was destroyed by the Supreme Court in Nebbia v. People of New York, 291 U. S. 502, 78 L. Ed. 940, 54 S. Ct. 505 (1934), where it was held to be synonymous with "subject to the exercise of the police power". *Cf. supra* n. 12.

[22] Throughout the cases including Stephenson v. Binford and Hicklin v. Coney, there has been argument as to the validity of provisions in the statutes which might be construed as requiring cargo insurance of the contract carriers. The United States Supreme Court opinions, however, leave the question undetermined by refusing to construe the statutes so as to raise this point of questionable constitutionality in the absence of prior state construction requiring it. The case likewise raises an interesting "equal protection of the laws" question not observed in this note.

In Maryland, prior to the *Lichtenberg* case, dispute as to control of private carriage settled largely around the control of co-operatives.[23] In *Rutledge Cooperative Assoc'n, Inc. v. Baughman,*[24] the Court of Appeals had before it a bill to enjoin the Public Service Commission from prosecuting a cooperative for transporting milk and farm produce for its members by truck without the requisite permit from the Public Service Commission.[25] The Court assumed for purposes of argument that the Cooperative was a private carrier, and the specific question raised was, as in the case under discussion, whether the Legislature had the authority to require such a permit. The Court first pointed out that the statute did not attempt to make a common carrier out of a private carrier but merely subjected the latter to *some* of the same regulations as a common carrier. It then went on to discuss the public necessity of such regulation from two angles. The private carrier has engaged in substantially the same character of business as the common carrier, rendered practically the same service, and offered competition just as destructive as common-law common carriers. If private carriage were not subjected to regulation it would prevent rendition of adequate public service by the existing common carriers and would make ineffective regulation of the latter to secure such service. Furthermore, if the number of trucks on the highways were not restricted, there would result traffic congestion, danger to the traveling public, and damage to highway surfaces with the resulting expense to the State. Thus the Court found that competition with existing common carriers, highway conservation, and public safety pro-

[23] On control of co-operatives, see, Schneider, *Will Co-operatively Owned Utilities Go Unregulated by State Commissions?* (1939) Wisc. L. Rev. 409; Mitchell and Cormeny, *Modern Classifications: Carriers Transporting Goods for Co-operative Associations* (1939) 21 Corn. L. Q. 657. For a complete line of Maryland certification cases see: Smith v. State, 130 Md. 482, 100 A. 778 (1917); Towers v. Wildason, 135 Md. 677, 109 A. 471 (1920), (*cf.* Md. Code Supp. (1935) Art. 56, Secs. 252A-252E); Goldsworthy v. Pub. Ser. Comm., 141 Md. 674, 119 A. 693 (1922); Restivo v. Pub. Ser. Comm., 149 Md. 30, 129 A. 884 (1925); Public Ser. Comm. v. West. Md. Dairy, 150 Md. 641, 135 A. 136 (1926), appeal dismissed, 274 U. S. 765, 71 L. Ed. 1334, 47 S. Ct. 763 (1927); Pub. Ser. Comm. v. Express Lines, 168 Md. 581, 179 A. 176 (1935); Pub. Ser. Comm. v. Bakery and Dairy, 176 Md. 191, 4 A. (2d) 130 (1939); also, the co-operative cases in notes 22, 24 *infra*. *Cf.* Pub. Ser. Comm. v. Williams, 166 Md. 277, 170 A. 517 (1934), 167 Md. 316, 173 A. 259 (1934).

[24] Rutledge Cooperative Association, Inc., v. Baughman, 153 Md. 297, 138 A. 29, 56 A. L. R. 1042 (1927).

[25] The statute here referred to is Md. Code Supp. (1935) Art. 56, Secs. 258 and 259 which cover carriers of freight in substantially the same way that *Ibid.*, Art. 56, Secs. 251 and 252 regulate passenger carriers.

duced a demand for regulation which the Legislature had the power to satisfy.

About six years later *Parlett Cooperative Inc. v. Tidewater Lines*[26] presented substantially the same question. The Tidewater Lines operated trucks as a common carrier over certain routes in Howard County pursuant to a certificate issued by the Public Service Commission. The Parlett Cooperative commenced to carry milk for its members over the same routes without obtaining the statutory permit. Tidewater Lines brought a bill to enjoin such operation, alleging that it was losing business to the Cooperative. By way of defense the Cooperative questioned the authority of the Legislature to require it, as a private carrier, to obtain a permit. It was contended that the *Rutledge* case[27] had been overruled by the Supreme Court's decision in *Smith v. Cahoon*.[28] The Court of Appeals pointed out that the Florida statute in the latter case sought to impose upon private carriers *all* of the same regulations imposed upon common carriers, thus bringing it within the prohibition set out in the earlier Supreme Court decisions,[29] while the Maryland statute dealt only with public transportation, including the co-operative by definition. The Court in this connection made a statement which seemed on its face to pave the way for the contention of the plaintiffs-appellees in the *Lichtenberg* case.[30] It said that "the Maryland statute affects only motor vehicle transportation affected by a public interest. The appellant in that case (*Smith v. Cahoon, supra*) served a single person under an exclusive contract, and there was no controversy as to his status as a private carrier, and the service was in no way affected by a public interest."[31] However, it seems reasonable to suppose that the Court was speaking of contract carriers of freight only, especially in view of the fact that the Maryland statute expressly exempts such carriers from its regulation.[32] Having disposed of this question, the Court sustained the statute in

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[26] Parlett Cooperative, Inc., v. Tidewater Lines, Inc., 164 Md. 405, 165 A. 313 (1933). *Cf.* Co-operative Co. v. Pub. Ser. Comm., 168 Md. 95, 176 A. 611 (1935) as to co-operative's right to extend its services to new members without Public Service Commission approval.

[27] *Supra*, n. 21.

[28] *Supra*, n. 13.

[29] *Supra*, notes 11, 12.

[30] *Supra*, n. 1.

[31] Parlett Cooperative, Inc. v. Tidewater Lines, Inc., 164 Md. 405, 165 A. 313 (1933).

[32] Md. Code Supp. (1935) Art. 56, Sec. 259.

much the same manner as in the *Rutledge* case.[33] Since the decision in the latter case the Supreme Court had handed down its decision in *Stephenson v. Binford*,[34] and the Court of Appeals followed that decision very closely. It pointed out that the statutes in that case and the one before it rested upon the same principle, namely that a State had the power, in the public interest, to "prohibit or condition as it sees fit" the use of the highways for gain. Then the Court went on to show just how the public interest was to be promoted by the regulation set out in the statute. As in the *Rutledge* case, the public interest in protecting existing common carriers from unrestrained competition, in safety on the highways, and in conserving the highways themselves was held to be sufficient to justify the statute's express inclusion of co-operatives.

The *Lichtenberg* case,[35] as has been seen, presents for the first time in Maryland the validity of the statute requiring contract carriers of passengers to obtain a permit from the Public Service Commission.[36] After holding that the carrier fell within the terms of the statute,[37] the Court went on to sustain the statute as a valid police regulation. Much the same reasoning was used as in the *Rutledge* case and the *Parlett* case. The statutory prerequisites were set out and held to be "reasonable requirements for the use of highways for gain", and the Court also pointed out that the public had an additional interest in the effect of contract carriage on the existing common carrier service, although it reduced the importance of that factor by holding that, under the particular facts before it, the contract carrier was not competing with the existing common carrier. However, it is sufficiently clear that the Court was using the same approach as in earlier Maryland cases which followed the principles laid down in *Stephenson v. Binford*,[38] that regulation of the highways for the protection of public safety and convenience may extend to certification of contract carriage as well as to common carriage for hire.

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[33] *Supra*, n. 21.

[34] *Supra*, n. 17. However, the Court of Appeals seems to miss the swing away from the "affected with a public interest" concept in Stephenson v. Binford.

[35] *Supra*, n. 1.

[36] Md. Code Supp. (1935) Art. 56, Secs. 251 and 252.

[37] Md. Code Supp. (1935) Art. 56, Sec. 252 does not exempt contract carriers as does *Ibid.*, Art. 56, Sec. 259.

[38] *Supra*, n. 17.