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Legislation and Administration: Carriers -- Motor Carrier Act -- "Hot Cargo" Clause in Labor Contract No Defense to Common Carrier's Refusal to Accept Interline Shipments

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CARRIERS — MOTOR CARRIER ACT — "HOT CARGO" CLAUSE IN LABOR CONTRACT NO DEFENSE TO COMMON CARRIER'S REFUSAL TO ACCEPT INTERLINE SHIPMENTS. — Defendants, common carriers, whose employees were members of unions affiliated with the Teamsters, refused to accept interline shipments from complainant, whose employees were unorganized. Such refusal was permissible under the "hot cargo" clause contained in the labor contract between defendants and their employees, whereby defendants' employees could refuse to handle goods from a carrier involved in a labor controversy with any union. At the time of refusal the complainant was involved in a labor controversy with the Teamsters. Complainant alleged that the refusal was violative of the certificates of public convenience and necessity issued to the defendants, since the defendants had failed in their statutory duty to provide safe and adequate service for the transportation of property in interstate commerce. 49 STAT. 558 (1935), 49 U.S.C. § 316 (b) (1952). Defendants urged that they were excused from accepting shipments by reason of the "hot cargo" clause contained in the labor contract with the Teamster affiliate representing their employees. *Held,* complaint affirmed. Although the ICC has no jurisdiction to determine the validity of "hot cargo" clauses, such a clause is no defense to charges of nonperformance of the statutory obligation to accept and transport all freight tendered in accordance with published tariffs. *Galveston Truck Line Corp.,* No. MC-C-1922 (Dec. 16, 1957).

In reaching its decision the ICC neither exceeded its authority nor encroached upon that of the NLRB because the ICC did not determine the validity of collective bargaining agreements or adjudicate questions of labor relations. The power of the ICC is confined to the regulation of carriers in their relationship to the public and to each other so that continuous and adequate service is provided to the public. See 49 STAT. 540 (1935), 49 U.S.C. § 304 (1952). But it does not extend to regulating the relationship between common carriers and their employees, *i.e.,* determining questions of labor relations. *Montgomery Ward & Co. v. Northern Pac. Terminal Co.,* 128 F. Supp. 475 (D. Ore. 1953). Thus the ICC cannot declare collective bargaining agreements illegal or order employees of a carrier to handle certain goods because these questions are essentially problems of labor relations, clearly outside the jurisdiction of the ICC. *Montgomery Ward & Co.,* 42 M.C.C. 225 (1943). *See* Southeastern Motor Lines, Inc. v. Hoover Truck Co., 34 F. Supp. 390 (M.D. Tenn. 1940). However, the ICC has jurisdiction to determine whether or not a labor dispute or collective bargaining agreement *excuses* a common carrier for the nonperformance of statutory obligations to the public or other common carriers since this involves the relationship of the carrier to the public or fellow carrier. *Planter's Nut & Chocolate Co.,* 31 M.C.C. 719 (1941). The fact that there are certain rights attributable to the relationship of carriers and their employees under the Labor Management Relations Act, 1947, 61 STAT. 136-62, 29 U.S.C. § § 141-68 (1952) does not prevent a determination that those rights are inconsistent with the obligations of common carriers to the public and fellow carriers, and the determination that, because those rights are inconsistent, they do not excuse nonperformance by a common carrier. *Beck & Gregg Hardware Co. v. Cook,* 210 Ga. 608, 82 S.E.2d 4 (1954); *Minneapolis & St. L. Ry.*

v. Pacific Gamble Robinson Co., 215 F.2d 126 (8th Cir. 1954). Thus the ICC has the power to adjudicate questions involving the carrier's statutory duties to the public or other carriers, although incidentally the relationship of the carrier and its employees is involved. But the ICC is powerless to adjudicate questions pertaining to the relationship between a carrier and its employees no matter how much they involve the relationship of the carrier to the public.

Today common carrier obligations are largely statutory, but must, nevertheless, be viewed in conjunction with pre-existing common law. *Montgomery Ward & Co. v. Northern Pac. Terminal Co., supra.* See 58 STAT. 751 (1944), 49 U.S.C. § 22 (1951). At common law the common carrier was under an almost absolute duty to perform without discrimination what it held itself out to perform. *York Co. v. Central R.R.*, 70 U.S. (3 Wall.) 107 (1865). Failure in this regard was excusable only when it resulted from an act of God or enemies of the king. *Coggs v. Bernard*, 2 Ld. Raymond 909, 918, 92 Eng. Rep. 107, 112 (K.B. 1703) (dictum). The strict responsibility imposed upon the common carrier arose from the necessity of protecting the public interest in a dependable transportation system. See *Chicago B. & Q. Ry. v. Burlington C. R. & N. Ry.*, 34 Fed. 481 (C.C.S.D. Iowa 1888). This strict responsibility has been abrogated somewhat so that the common carrier need only respond to a "reasonable request," 41 STAT. 475 (1920), 49 U.S.C. § 1 (4) (1952), and is excused from failure to render service when it becomes impossible or impracticable because of labor difficulties beyond the carrier's control. *Montgomery Ward & Co.*, 43 M.C.C. 225, 231 (1943). But a carrier may not act *affirmatively* and assert that action as an excuse for failure to render service. Thus a carrier may not cause or induce labor difficulties that render service impossible or impracticable. See *Gage v. Arkansas Cent. R. Co.*, 160 Ark. 402, 254 S.W. 665, 666 (1923) (dictum), or enter into agreements permissible under the Labor Management Relations Act, 1947, 61 STAT. 136-62, 29 U.S.C. §§ 141-68 (1952) which prevent fulfillment of obligations, *Beck & Gregg Hardware Co. v. Cook, supra* at 9. The affirmative act of sanctioning a "hot cargo" clause in a labor contract, therefore, does not excuse the carrier, as the refusal to accept interline shipments did not arise from circumstances beyond the carrier's control.

Relative to the instant case is the NLRB decision that "hot cargo" clauses in collective bargaining agreements between common carriers and their employees are illegal in themselves under the Labor Management Relations Act, 1947, 61 STAT. 141, 29 U.S.C. § 158 (b) (4) (a) (1952) wherein it is provided that it shall be an unfair labor practice for a union to force an employer to refuse to deal with another employer. *Local 728, Teamsters Union (AFL-CIO), Genuine Parts Co.*, 119 N.L.R.B. No. 53 (1957). The NLRB reasoned that, although an employer can voluntarily refuse to deal with anyone, a common carrier is prevented from doing so as it is under a positive duty to make its facilities available without discrimination; consequently, no carrier can voluntarily consent to "hot cargo" provisions, and a union which imposes such provision is guilty of an unfair labor practice. Prior to this the Ninth Circuit upheld an earlier Board determination that "hot cargo" clauses are no defense to secondary boycott charges because to force an employer to live up to his

voluntary agreement to boycott certain goods is in effect no different than forcing him to boycott in the first instance. *NLRB v. Local 1976, United Brotherhood of Carpenters, AFL,* 31 CCH Lab. Cas. ¶ 70,504 (9th Cir. 1957). But two circuits have rejected this reasoning on the theory that to compel performance of a voluntary "hot cargo" agreement is essentially different from forcing a carrier to boycott certain goods. *Locals 338 & 680, Teamsters Union (AFL-CIO)* v. NLRB, 32 CCH Lab. Cas. ¶ 70,777 (2d Cir. 1957); *Local 850, International Ass'n of Machinists (AFL-CIO) v. NLRB,* 32 CCH Lab. Cas. ¶ 70,689 (D.C. Cir. 1957).

When the recent decisions of the Board regarding "hot cargo" clauses are viewed in light of the instant case, it is readily seen that they are complementary. This was recognized in the instant case and by the NLRB. *Local 728, Teamsters Union (AFL-CIO), Genuine Parts Co., supra* at 54,963. Congress did not intend that each agency should operate single-mindedly so as to ignore other congressional objectives of equal, if not greater, importance. It is entirely proper that the NLRB and the ICC should make every attempt to effectuate the *objectives* of the other while remaining within the limits of its authority, *Southern S. S. Co. v. NLRB,* 316 U.S. 31 (1942), especially since both agencies are protecting the free flow of interstate commerce.

The decision in the instant case will admittedly affect labor negoctiations between carriers and their employees in that carriers will attempt to avoid "hot cargo" clauses in collective bargaining agreements. However, as seen from the foregoing, the ICC is not doing indirectly what it cannot do directly because (1) it has not increased the obligations of common carriers to the public from what they were in order to affect carrier-employee relations, and (2) it is not running counter to the decisions of the NLRB but rather is effectuating them.

It has been argued that it would be better to allow common carriers to affirmatively discriminate against certain shippers, thus avoiding labor difficulties which may result in no public service whatsoever. *Montgomery Ward & Co.,* 42 M.C.C. 225, 234 (1943). However, *temporary* inconveniences to the carriers and the public are not sufficient reasons for disregarding the dictates of experience that a reliable transportation system depends upon equal service to all. See *Chicago B. & Q. Ry. v. Burlington C. R. & N. Ry., supra* at 484; *Burgess Bros. Co. v. Steward,* 114 Misc. 673, 187 N.Y.S. 873 (1921). The courts, when called upon to reduce the public obligations of common carriers where they conflict with the rights of labor, have continually refused to do so, as if in answer to some deep-seated feeling of the people that economic stability rests upon a reliable transportation system. *Montgomery Ward & Co. v. Northern Pac. Terminal* Co., 128 F. Supp. 475, 519 n.105 (D. Ore. 1953).

Although the holding of the instant case complements the decisions of the NLRB as to the legality of "hot cargo" clauses, it does not rely upon them. Thus if the Supreme Court were to determine that "hot cargo" clauses can be enforced by unions, and even if the *Genuine Parts Co.* case is subsequently overruled, the ICC's decision would remain unaffected. To reverse the ICC decision it will be necessary to reject the principle that a common carrier may not do anything *affirmatively* that tends to prevent fulfillment of its obligations. The interest of labor in this area is to circumvent the provisions of Congress aimed at the evil of a

secondary boycott. This is clearly an insufficient reason for rejecting a principle, basic to common carrier obligations, which stem from the public nature of the undertaking.

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