Washington University Law Review

Volume 26 | Issue 4

January 1941

Constitutional Law—Civil Liberties—Interstate Passengers—Racial Discrimination

tempt of court cannot be said to be the equivalent of the carefully safeguarded statutory proceeding of the board, which the court proceeding is intended to follow.[18]

Originally the board itself recognized that a blanket order was not a general necessity;[19] but subsequently, however, it changed its interpretation of the statute[20] and "consistently held that a violation by an employer of any of the four subdivisions of sec. 8 other than subdivision (1) is also a violation of subdivision (1)," without stating its reasons for this change in policy. The early interpretation of the board would probably be in line with the holding of the majority opinion: broad orders are not excluded by the Supreme Court. What is condemned is the practice of issuing such orders merely because the board has found a single violation of the act. Such orders may still be lawful, but only when there is a relation between the findings of the board and the other practices enjoined, and when the circumstances of the particular case require it.

In an appraisal of this decision, it seems proper to note that the court[21] is more likely to uphold a broad cease and desist order based upon a violation of the subdivisions of sec 8 other than subdivision (5), since they have a more direct relation to right of self-organization granted to employees by sec. 7 of the act[22] and protected by the other provisions of sec. 8.

P. R.

CONSTITUTIONAL LAW — CIVIL LIBERTIES — INTERSTATE PASSENGERS — RACIAL DISCRIMINATION—[United States].—Plaintiff, a colored man, purchased first class railroad accommodations from Chicago, Illinois to Hot Springs, Arkansas. In Memphis, Tennessee he transferred to a sleeper. Shortly after entering Arkansas, the conductor, in accordance with railroad custom and an Arkansas statute requiring "equal but separate and sufficient accommodations,"[1] compelled him under threat of arrest to move to the in-

---

orders, stressing their convenience and arguing that the board's sanctions are insufficient to effectuate the policy of the act. It may perhaps be remarked that this end would require more than any possible cease and desist order could accomplish. The suggested means are therefore inadequate to achieve the end sought.

18. Administrative process may be extremely careful, rather than summary, and may even become more cumbersome than a court's proceeding. Attorney General's Committee on Administrative Procedure, *Final Report* (1941) 89.

19. 1 National Labor Relations Board, *Annual Report* (1936) 121.

20. (1941) 8 L. R. R. 32, referring to the previous *Annual Reports*. Cf. 2 Teller, *Labor Disputes and Collective Bargaining* (1940) secs. 281 and 360, and Lien, *Labor Law and Relations* (1938) sec. 136.

21. Cf. N. L. R. R. v. Friedman-Harry Marks Clothing Co. (1937) 301 U. S. 58; Consolidated Edison Co. v. N. L. R. B. (1938) 305 U. S. 197.

22. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." National Labor Relations Act (1935) 49 Stat. 449, sec. 7, 29 U. S. C. A. (supp. 1940) sec. 157.

1. Ark. Digest of the Statutes of Arkansas (Pope. 1937) sec. 1190.

ferior car provided for colored passengers.[2] Plaintiff filed a complaint with the Interstate Commerce Commission alleging unjust discrimination against colored passengers in violation of Sec. 3 (1) of the Interstate Commerce Act[3] and the Fourteenth Amendment and asking that the Commission require the defendants to cease and desist from the alleged violations and to furnish equal accommodations to colored passengers.[4] The Commission, finding a negligible demand for Negro first class accommodations, held that the failure to provide equal facilities in comfort and convenience was not an unjust or unreasonable discrimination.[5] On appeal the Supreme Court *held:* the comparative volume of traffic did not justify the denial of equality of treatment which is specifically safeguarded by the Interstate Commerce Act.[6] The court further found that the right of equality guaranteed by the Fourteenth Amendment[7] was invaded. *Mitchell v. United States.*[8]

Broad federal prohibition of racial discrimination was attempted in the

2. Id. at sec. 1196.

3. (1920) 41 Stat. 479, c. 91, 49 U. S. C. A. sec. 3 (1).

4. Prior to the Commission's order the railroad installed a separate coach for colored passengers equal to second class white facilities, but the only provision made for first class Negro passengers was separate compartment drawing rooms.

5. Mitchell v. Chicago, R. I. & P. Ry. Co. (1938) 229 I. C. C. 703.

6. (1920) 41 Stat. 479, c. 91, 49 U. S. C. A. sec. 3(1) provides that it shall be unlawful for any common carrier subject to the act "to subject any particular person * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Congress in the orginal enactment of this clause (1887) 24 Stat. 380, c. 104, adopted the language of the English Railway and Canal Traffic Act (1854) 17 & 18 Vict. c. 31, s. 2, and it has been held that the English construction was meant to be adopted. I. C. C. v. Baltimore & O. R. R. (1892) 145 U. S. 263, 284. The English statute was directed against discrimination as to rates. 4 Halsbury, The Laws of England, 74-82. The Court in the instant case, Mitchell v. U. S. (1941) 61 S. Ct. 873, 877 stated: "From the inception of its administration the Interstate Commerce Commission has recognized the applicability of this provision to discrimination against colored passengers because of their race * * *." This has been sustained by prior cases. See cases cited infra note 25.

7. Although the court relied heavily on the Interstate Commerce Act, it was also held that inequality of treatment is "an invasion of a fundamental individual right which is guaranteed against *state action* by the Fourteenth Amendment * * *." (Italics supplied.) Mitchell v. U. S. (1941) 61 S. Ct. 873, 877. The question might be raised as to the existence of "state action" in the instant case. The provisions of the Fourteenth Amendment apply only to discriminatory state laws and discriminatory action by state officials. Civil Rights Cases (1883) 109 U. S. 3. State ex rel. Gaines v. Canada (1938) 305 U. S. 337, which was cited by the court, may be sustained on this ground. The only applicable case cited for the holding was McCabe v. Atchison, T. & S. F. Ry. Co. (1914) 235 U. S. 151. There the court states, l. c. 161-162: "It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, *acting* * * * *under the authority* of a state law, a facility or convenience in the course of his journey which * * * is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded." (Italics supplied.) This would seem to hold the carrier to be a state official within the meaning of the Fourteenth Amendment. This would seem to be the only justification for the position taken by the court in the instant case.

8. (1941) 61 S. Ct. 873.

Civil Rights Act of 1866;[9] but immediately thereafter the Southern states enacted the "black laws of 1865-1868," which took the form of harsh restrictive measures.[10] In order to make the federal Bill of Rights binding on the states, to declare who are citizens of the United States and to re-establish the Civil Rights Act of 1866, the Fourteenth Amendment was ratified in 1868. The most far-reaching federal attempt to provide for the civil rights of Negroes came in the Civil Rights Act of 1875.[11] It provided for the "full and equal enjoyment of the accommodations, advantages, facilities and privileges of public conveyances and other places of public amusement."[12] In 1883 the Civil Rights Act of 1875 was declared unconstitutional as to broad prohibition of segregation or discrimination because of race or color,[13] but the cases left open the question of federal regulation of those matters which come under the commerce clause.[14] After the *Civil Rights Cases*,[15] the Southern states enacted the so-called "Jim Crow" or segregation statutes providing for "separate but equal" accommodations.[16] On the other hand, the Northern states enacted civil rights acts to take the place of the federal law of 1875;[17] these laws were designed to end racial discrimination of any sort in all places of public accommodation.[18]

The segregation statutes have been held valid as applied to intrastate passengers even though they affect interstate commerce, their validity being based on state power to protect life and health under the police power.[19] Earlier cases held the "Jim Crow" statutes invalid insofar as they applied to interstate commerce[20] and the Supreme Court in *Hall v. De Cuir*[21] held

9. (1866) 14 Stat. 27, c. 31. Flack, *The Adoption of the Fourteenth Amendment* (1908) 46-50 states: "The belief prevailed generally that the Civil Rights Bill gave the colored people the same rights and privileges as regards *travel*, schools, theaters and the ordinary rights which may be legally demanded." (Italics supplied.)

10. Stephenson, Race Distinctions in American Law (1909) 43 Am. Law Rev. 205.

11. (1875) 18 Stat. 336, c. 114.

12. Ibid.

13. Civil Rights Cases (1883) 109 U. S. 3, declared the act unconstitutional because it did not come within the Fourteenth Amendment which applies only to protect the individual against state action while the act referred to action by individuals against individuals. The attempt to rest the act on the Thirteenth Amendment as an elimination of badges of servitude was refused; the court held that to validate the act on this ground would stretch the principle too far.

14. Id. at 18.

15. Ibid.

16. Stephenson, Race Distinctions in American Law (1909) 43 Am. Law Rev. 547, 563.

17. Note (1939) 39 Col. Law Rev. 986, 996, footnote 66.

18. For a chart showing relative scope of the civil rights acts, see Stephenson, Race Distinctions in American Law (1909), 43 Am. Law Rev. 547, 565.

19. Louisville, N. O. & T. R. R. v. Mississippi (1890) 133 U. S. 587; Chesapeake & O. Ry. Co. v. Kentucky (1900) 179 U. S. 388; McCabe v. Atchison, T. & S. F. Ry. Co. (1914) 235 U. S. 151; South Covington & C. Str. R. Co. v. Kentucky (1920) 252 U. S. 399.

20. Anderson v. L. & N. R. Co. (1894) 62 Fed. 46; Hart v. State (1905) 100 Md. 595, 60 Atl. 457; State v. Jenkins (1914) 124 Md. 376, 92 Atl. 773;

a state statute *prohibiting segregation* void as an undue interference with interstate commerce. Despite these holdings the more recent cases have held the segregation statutes valid even though they affect interstate commerce primarily.[22]

The cases indicate that the court will allow segregation of interstate passengers by railroad regulation[23] or by state statute,[24] but will require strict equality of comfort and convenience.[25] It might be argued that allowing a requirement of segregation is an undue preference within the meaning of the Interstate Commerce Act.[26] To argue that there is no discrimination, since neither race can use the facilities reserved for the other, is unrealistic; it ignores the stigma attached to the Negro accommodation.[27] The refusal of the Interstate Commerce Commission to find for the plaintiff in the instant case graphically proves segregation to be a real burden on interstate commerce, because it entails the duplication of facilities incommensurate

---

Carrey v. Spencer (1895) 72 N .Y. St. Rep. 108, 36 N. Y. Supp. 886, 5 I. C. C. 636. Cf. Ohio Val. Ry's. Rec'r. v. Landre (1898) 104 Ky. 431, 47 S. W. 344. Annotation (1923) 30 A. L. R. 55.

21. (1877) 95 U. S. 485.

22. Hall v. De Cuir (1877) 95 U. S. 485 was distinguished in Louisville, N. O. & T. R. R. Co. v. Mississippi (1890) 133 U. S. 587 which held a segregation law valid even though it applied to interstate as well as intrastate passengers. This trend was carried to its extreme in South Covington & C. Str. R. R. v. Kentucky (1920) 252 U. S. 399 in which the greater part of the carrier's passengers were interstate. On logical grounds it is difficult to see the distinction between the *De Cuir* case and the *Louisville* case. In the *Louisville* case Justice Harlan, dissenting, l. c. 594 stated, "In its application * * *" the statute in the *De Cuir* case "forbade the separation of the white and black races while such vessels were within the limits of that state." The statute treated in the *Louisville* case "* * * in its application to passengers on railroad trains employed in interstate commerce, requires such separation of races, while those trains are within that State. I am unable to perceive how the former is a regulation of interstate commerce, and the other is not." See also Plessy v. Ferguson (1896) 163 U. S. 537.

23. Ordinarily, in matters of interstate commerce, inaction by Congress has been held to be a declaration that commerce within the scope of the commerce clause be free from interference. Welton v. Missouri (1875) 91 U. S. 275; Escanaba Co. v. Chicago (1882) 107 U. S. 678; Gloucester Ferry Co. v. Pennsylvania (1885) 114 U. S. 196. But it has been held that segregation by railroad regulation is permissable in the absence of the entrance of Congress into the field. Chiles v. Chesapeake & O. R. R. (1910) 218 U. S. 71; Green v. The City of Bridgton (D. C. S. D. Ga. 1879) Fed. Case No. 5,754; The Sue (D. C. D. Md. 1885) 22 Fed. 843; The regulation must be reasonable and of reasonably long standing. Washington B. & A. Electric R. R. Co. v. Waller (App. D. C. 1923) 289 Fed. 598.

24. See cases cited supra note 21.

25. Councill v. Western & A. R. R. Co. (1887) 1 I. C. C. 638; Edwards v. Nashville C. & St. L. R. (1907) 12 I. C. C. 247; Cozart v. Southern Ry. Co. (1909) 16 I. C. C. 226; Crosby v. St. Louis, S. F. Ry. Co. (1926) 112 I. C. C. 239. The discrimination takes two forms within the meaning of the Interstate Commerce Act. Discriminations as to the rule and discriminations as to the application of the rule are both forbidden. Dutton Lbr. Corp. v. N. Y., N. H. & H. R. R. Co. (1929) 151 I. C. C. 391.

26. (1920) 41 Stat. 479, c. 91, 49 U. S. C. A sec. 3(1).

27. Note (1939) 39 Col. Law Rev. 986, 1003.

with the demand for accommodations by the colored passengers.[28] Should the court recognize segregation to be an undue preference, the way would seem to be clear for a federal uniform prohibition of segregation as well as inequality in comfort and convenience.[29]

H. S. H.

CONTRACTS—ARBITRATION AND AWARD—AGREEMENT TO ARBITRATE FUTURE DISPUTES—[Minnesota].—A contract between plaintiff and defendant contained a provision requiring certain questions to be submitted to arbitration according to statute, the decision of the arbitrators to be a condition precedent to any right of legal action. There was an arbitration and an award, but not according to the statutory procedure. Action was brought to recover the award. The plaintiff appealed from a decision for the defendants. *Held:* (two judges dissenting) reversed; since the arbitration statute expressly preserved the right to common law arbitration, the proceedings actually had did not lose their validity. A contention that the defendant had not consented to the common law proceedings was rejected by the court which proceeded to reverse a long line of cases and to announce that an agreement to arbitrate all differences to arise under a contract is not contrary to public policy. The result, as the dissenting opinion points out, is to declare all agreements to arbitrate, including those under common law, to be irrevocable. In reaching this decision the majority stated that public policy is what the legislature declares it to be. The legislature had enacted an arbitration statute. This statute was taken to be the legislative approval of the policy of arbitration, and the court proceeded to give effect to that policy in its broadest sense. *Park Construction Co. v. Independent School District No. 32.*[1]

The view of the court is contrary to the overwhelming weight of authority in this country, which is that provisions for arbitrations of future disputes are revocable.[2] "Such agreements are void—prejudicial to the rights of citizens as guaranteed by the Constitution, to resort to the courts for the determination of their rights;"[3] being an attempt to oust the courts of their jurisdiction, they are held to be contrary to public policy and invalid.[4]

---

28. Mitchell v. Chicago, R. I. &. P. Ry. Co. (1938) 229 I. C. C. 703.

29. By such recognition the court would in effect be holding that the federal government has entered the field and as a consequence state laws would not be allowed to be in conflict with the federal rule. It is to be noted that this suggestion is predicated solely on the suggestion that the courts recognize the inequality in segregation.

1. (Minn. 1941) 296 N. W. 475.

2. Sturges, *A Treatise on Commercial Arbitrations and Awards* (1930) 45. However, there is a distinction generally made between an agreement providing for the ascertainment of facts by arbitrators, and one providing for the determination of legal liability. The former are generally upheld. 6 Williston, *Contracts* (rev. ed. 1938) 5371-5373, sec. 1921.

3. Cocalis v. Nazlides (1923) 308 Ill. 152, 139 N. E. 95. "Void" as used here apparently has the meaning which Sturges includes in the term "revocable": "* * * a party to such a clause or provision can maintain an action in court although the action is based upon a cause which is embraced in