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COMMENT ON RECENT DECISIONS

ADMINISTRATIVE LAW—INTERSTATE COMMERCE COMMISSION—CONDITIONS IMPOSED ON RAILROAD CONSOLIDATION — [United States]. — Plaintiffs, trustees of railroads joining in a lease, sued for an injunction to set aside an order of the Interstate Commerce Commission. The order imposed as conditions to approval of the lease that employees retained be protected against wage cuts for five years and be compensated for moving expenses and loss in selling their homes, and that employees dismissed be given monthly allowances for a fixed period. The Supreme Court reversed the order of the district court granting an injunction and *held*, that the public interest to be served under the provision of the Emergency Railroad Transportation Act of 1933, which authorizes the Interstate Commerce Commission to attach conditions to such leases in the "public interest,"[1] includes the protection of employees affected by a proposed lease.[2]

The broadest grants of discretion are found in statutes which without limitations authorize administrative agencies to execute broad legislative policies by promulgating general rules.[3] These grants permit administrative authorities to determine both the content of legal regulations and the occasions for bringing particular rules into effect. Another type of discretion appears in enabling legislation which authorizes administrative agencies to attach conditions to the activity authorized.[4] Virtually as broad a type of discretion is found in statutes which confer licensing power without specifying the grounds for disapproval.[5] Sometimes such grants contain general

1. (1934) 48 Stat. 217, (1939 Supp.) 49 U. S. C. A. sec. 5 (4) (b). "Public interest," under the Transportation Act of 1920, has been construed as the interest in the maintenance of an adequate transportation system and in the effective consolidation of railroads: New England Divisions Case (1923) 261 U. S. 184; Dayton-Goose Creek Ry. v. United States (1924) 263 U. S. 456; Texas & Pac. Ry. v. Gulf, Colo. & Santa Fe Ry. (1926) 270 U. S. 266; New York Central Securities Corp. v. United States (1932) 287 U. S. 12.

2. United States v. Lowden (1939) 308 U. S. 225.

3. State v. McCarty (1912) 5 Ala. App. 212, 59 So. 543; Skrmetta v. Alabama Oyster Comm. (1936) 232 Ala. 371, 168 So. 168; Denver v. Gibson (1933) 93 Colo. 122, 24 P. (2d) 751; Miller v. Johnson (1921) 110 Kan. 135, 202 Pac. 619; Boyle v. Rock Island Coal Mining Co. (1925) 125 Okla. 137, 256 Pac. 883; Sterling Refining Co. v. Walker (1933) 165 Okla. 45, 25 P. (2d) 312; Associated Industries v. Industrial Welfare Comm. (1939) 185 Okla. 177, 90 P. (2d) 899; State ex rel. Wisconsin Inspection Bureau v. Whitman (1928) 196 Wis. 472, 220 N. W. 929; In re State ex rel. Attorney General (1936) 220 Wis. 25, 264 N. W. 633. But see State ex rel. Davis v. Fowler (1927) 94 Fla. 752, 114 So. 435; Pridgen v. Sweat (1936) 125 Fla. 598, 170 So. 653; Goodlove v. Logan (1933) 217 Iowa 98, 251 N. W. 39; State v. Van Trump (1937) 224 Iowa 504, 275 N. W. 569, commented on in (1938) 23 Iowa L. Rev. 266.

4. People v. Kuder (1928) 93 Cal. App. 42, 269 Pac. 198; Independence Fund v. Miller (Iowa 1939) 285 N. W. 629. But see People to Use of Klemmer v. Federal Surety Co. (1929) 336 Ill. 472, 168 N. E. 401; People for Use of Moore v. J. O. Beekman & Co. (1931) 347 Ill. 92, 179 N. E. 435.

5. Armstrong v. Whitten (D. C. S. D. Tex. 1930) 41 F. (2d) 241; Bernstein v. Marshalltown (1933) 215 Iowa 1168, 248 N. W. 26, 86 A. L. R. 782;

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words of public policy as supposed guides to administrative action,[6] but it is doubtful if these do more than state the limits that would be implied judicially if no such words were used.[7] Discretion is further narrowed in a third type of statute, which confines the exercise of authority to action upon official findings of facts which justify the action.[8] Although the courts find less trouble in upholding the last type of grant, even these standards have fallen afoul of some courts' conception of permissible extent of statutory scope of authority.[9]

Grants of discretion to the Interstate Commerce Commission have been broad,[10] but in dealing with them the court has not hesitated to construe the legislative limits set by Congress more strictly than has the Commission itself. Thus, in rate-fixing the Court has held that the standard "just and reasonable" does not permit basing rates upon such equities of shippers as do not relate to discrimination or other statutory bases.[11] This holding has

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Scott v. Waterloo (1937) 223 Iowa 1169, 274 N. W. 897; State v. Pulsifer (1930) 129 Me. 423, 152 Atl. 711 (revocation); State v. Morrow (1928) 175 Minn. 386, 221 N. W. 423; Lantz v. Hightstown (1884) 46 N. J. Law 102 (revocation); Larkin Co. v. Schwab (1926) 242 N. Y. 330, 151 N. E. 637; Martin v. Morris (1932) 62 N. D. 381, 243 N. W. 747 (revocation); Solt v. Public Utilities Comm. (1926) 114 Ohio St. 283, 150 N. E. 28 (revocation); Lyons v. Gram (1927) 122 Ore. 684, 260 Pac. 220; Child v. Bemus (1891) 17 R. I. 230, 21 Atl. 539 (revocation); Mahaney v. Cisco (Tex. Civ. App. 1923) 248 S. W. 420 (revocation). But see Welton v. Hamilton (1931) 344 Ill. 82, 176 N. E. 333; Schireson v. Walsh (1933) 354 Ill. 40, 187 N. E. 921 (revocation); Picone v. Comm'r (1925) 241 N. Y. 157, 149 N. E. 336; Matter of Small v. Moss (1938) 279 N. Y. 288, 18 N. E. (2d) 281; Winslow v. Fleischner (1924) 112 Ore. 23, 228 Pac. 101; Holgate Bros. Co. v. Bashore (1938) 331 Pa. 255, 200 Atl. 672, 117 A. L. R. 639; James v. State Board (1930) 158 S. C. 491, 155 S. E. 830; State ex rel. Strike v. Common Council (1930) 201 Wis. 435, 230 N. W. 70; St. Johnsbury v. Aron (1930) 103 Vt. 22, 151 Atl. 650.

6. Gordon v. Comm'rs (1933) 164 Md. 210, 164 Atl. 676; Liggett Drug Co. v. Board of License Comm'rs (Mass. 1936) 4 N. E. (2d) 628; Ex parte Bryan (1936) 66 N. D. 241, 264 N. W. 539; In re Dawson (1928) 136 Okla. 113, 277 Pac. 226; San Antonio v. Zogheib (Tex. Civ. App. 1934) 70 S. W. (2d) 333, rev'd (Tex. Comm. App. 1937) 101 S. W. (2d) 539; Clam River Electric Co. v. Public Service Comm. (1937) 225 Wis. 198, 274 N. W. 140. But see State ex rel. Makris v. Superior Court (1920) 113 Wash. 296, 193 Pac. 845, 12 A. L. R. 1428.

7. Noble v. English (1918) 183 Iowa 893, 167 N. W. 629; Miller v. Johnson (1921) 110 Kan. 135, 202 Pac. 619; Morley v. Wilson (1927) 261 Mass. 269, 159 N. E. 41; In re Rudhlan Amusement Corp. (1932) 262 N. Y. Supp. 269.

8. Hubbell v. Higgins (1910) 148 Iowa 36, 126 N. W. 914, Ann. Cas. 1912B 822; Hyma v. Seegar (1926) 233 Mich. 659, 207 N. W. 834; State v. Thompson (1901) 160 Mo. 333, 60 S. W. 1077; Investors Syndicate v. Bryan (1925) 113 Neb. 816, 205 N. W. 294, aff'd (1926) 274 U. S. 717.

9. Green v. Blanchard (1919) 138 Ark. 137, 211 S. W. 375, 5 A. L. R. 84 (revocation); People v. Stanley (1932) 90 Colo. 315, 9 P. (2d) 288; People ex rel. Gamber v. Sholem (1920) 294 Ill. 204, 128 N. E. 377; R. G. Lydy v. Chicago (1934) 356 Ill. 230, 190 N. E. 273; Lux v. Milwaukee Mechanics Ins. Co. (1929) 322 Mo. 342, 15 S. W. (2d) 343.

10. 2 Sharfman, *The Interstate Commerce Commission* (1931) 357-360.

11. Southern Pacific Co. v. United States (1911) 219 U. S. 433.

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been adhered to in spite of attempts by Congress to import such considerations into the standards of the Act.[12] Although the Commission was authorized, in reorganization proceedings, to impose such terms and conditions "as the commission may deem necessary or appropriate in the premises" upon the issuance of securities, a condition requiring court or Commission approval for the disposition of a fund to be set aside for the expenses of the reorganization from receipts from the sale of new securities was held void as not within the power over interstate commerce.[13]

But for the principal case, there exists, in *Railroad Retirement Board v. Alton Ry.*, impressive authority for the view that it is not within the power of Congress, and hence not within the authority of the Commission, to provide for the welfare of railroad employees, when such provision conduces merely to contentment of mind and not to efficiency or safety.[14] Moreover, the sections of the Transportation Act of 1920 setting forth its purposes are silent as to what kind of protection of labor, if any, is included in the objective of maintaining an adequate transportation system. In the principal case, the Court resorted to provisions in a separate title of the Act of 1920,[15] other legislative enactments,[16] and pending legislation[17] as indicating Congressional recognition of a relationship between satisfactory employment conditions and the sound conduct of the transportation system,[18] expressly declining to consider the *Railroad Retirement Board* case. However, the Court's reliance on explicit legislative intention to protect carrier labor is

12. Anchor Coal Co. v. Interstate Com. Comm. (D. C. S. D. W. Va. 1928) 25 F. (2d) 462; Ann Arbor R. R. v. United States (1930) 281 U. S. 658.

13. United States v. Chicago, Milwaukee, St. Paul and Pac. R. R. (1931) 282 U. S. 311.

14. (1935) 295 U. S. 330.

15. Transportation Act of 1920, Tit. III (1921) 41 Stat. 1469, (1928) 45 U. S. C. A. secs. 131-146, sets up a board to adjust labor disputes, and states that it is the duty of carriers and their officers to exert effort "to avoid any interruption to the operation of any carrier growing out of any dispute."

16. Transportation Act of 1920, Tit. III (1921) 41 Stat. 1469, (1928) 45 U. S. C. A. secs. 131-146, repealed; Railway Labor Act of 1926 (1927) 44 Stat. 577, (1939 Supp.) 45 U. S. C. A. secs. 151-163, amended in 1934 (1934) 48 Stat. 1185, (1939 Supp.) 45 U. S. C. A. secs. 151-163; National Labor Relations Act of 1935 (1936) 49 Stat. 449, (1939 Supp.) 29 U. S. C. A. secs. 151-166; Safety Applicance Act of 1893 (1893) 27 Stat. 531, (1928) 45 U. S. C. A. secs. 1-7; Hours of Service Act of 1907 (1907) 34 Stat. 1415, (1928) 45 U. S. C. A. secs. 61-64; Federal Employers Liability Act of 1908 (1909) 35 Stat. 65, (1928) 45 U. S. C. A. secs. 51-58; Adamson Act of 1916 (1917) 39 Stat. 721, (1928) 45 U. S. C. A. secs. 65, 66; Railroad Retirement Act of 1934 (1934) 48 Stat. 1283 (held unconstitutional), amended in 1937 (1937) 50 Stat. 307, (1939 Supp.) 45 U. S. C. A. secs. 228a-228r.

17. The Court cites H. R. Rep. No. 1217, 76th Cong., 1st Sess., which was substituted for Sen. Rep. No. 2009, 76th Cong., 1st Sess.

18. Administrative agencies sometimes apply the policy of other agencies. See Doctor Bloom Dentist, Inc. v. Cruise (1932) 259 N. Y. 358, 182 N. E. 16. In the instant case, however, no existing federal regulation was directly in point.

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a double-edged weapon; a contrary intention might have been inferred from the absence of any explicit provision in this title of the Act.

The Court also relied on economic reasoning to bolster its conclusion. According to the Court, consolidation of railroads involves savings which bear most heavily on the interests of labor. If this hardship is not mitigated, employee morale will be impaired, danger of disputes increased, and interruption of transportation rendered more probable. Even granting that the threat is of sufficient magnitude to overcome objections raised on the basis of the *Railroad Retirement Board* case, it is still possible to question the Commission's authority to deal with a problem normally dealt with by Congress. After eight years of depression, the harsh effects of railroad consolidations on labor are not so unforeseeable as to justify Congress in granting, and the Commission in exercising, such authority on grounds of emergency.[19] The principal case sanctions a liberal extension of an originally wide discretion. The conditions here imposed, unlike past Congressional action and contrary to the holding of the *Railroad Retirement Board* case, seem only indirectly related to the maintenance of an adequate transportation system. The conditions, however, are not beyond the bounds of reasonableness. V. K.

ADMINISTRATIVE LAW—JUDICIAL REVIEW OF ADMINISTRATIVE PROCEDURE—[United States].—The Federal Communications Commission after a hearing denied a corporation's application for a broadcasting license on the grounds that the applicant was not financially responsible and that the principal stockholder was not a resident of the locality in which the station would operate. As the first ground rested upon a mutual mistake of law and the Court of Appeals did not deem the second a considered basis for the decision, on appeal it reversed the decision and remanded the case for further consideration of the second ground.[1] Notwithstanding its own regulation to the effect that it will endeavor to fix the same date for hearing conflicting claims "excepting, however, applications filed after any such application has been designated for hearing,"[2] the Federal Communications Commission then set the case for a rehearing together with other conflicting applications filed subsequent to the setting of the original hearing of the case. The applicant resorted to the Court of Appeals for writs of prohibition and mandamus to require the Commission to hear the application separately and to decide the case upon the previous record. That court granted the writs,

19. Cf. Skrmetta v. Alabama Oyster Comm. (1936) 232 Ala. 371, 168 So. 168; Basalt Rock Co. v. MacMillan (Cal. App. 1926) 251 Pac. 322; Lloyd v. Ramsay (1921) 192 Iowa 103, 183 N. W. 333; State ex rel. Wisconsin Inspection Bureau v. Whitman (1928) 196 Wis. 472, 220 N. W. 929; Associated Gas and Electric Co. v. Public Service Comm. (1936) 221 Wis. 519, 266 N. W. 205.

1. Pottsville Broadcasting Co. v. Federal Communications Commission (App. D. C. 1938) 98 F. (2d) 288.
2. Rules of Practice, Rule 106.4. This has become sec. 12.21 of the Commission's Rules of Practice and Procedure, effective January 1, 1939.

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