

IN THE SUPREME COURT OF THE UNITED STATES

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 RAYMOND MOTOR TRANSPORTATION, INC., :
 a Minnesota Corporation :

and :

CONSOLIDATED FREIGHTWAYS CORPORATION :
 OF DELAWARE, :
 a Delaware Corporation, :

Appellants, :

v. :

No. 76-558

ZEL S. RICE, et al., :

Appellees. :
 ----- :

Washington, D. C.,

Wednesday, November 9, 1977.

The above-entitled matter was resumed for argument
 at 10:04 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
 WILLIAM J. BRENNAN, JR., Associate Justice
 POTTER STEWART, Associate Justice
 BYRON R. WHITE, Associate Justice
 THURGOOD MARSHALL, Associate Justice
 HARRY A. BLACKMUN, Associate Justice
 LEWIS F. POWELL, JR., Associate Justice
 WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Justice Brennan is unavoidably detained for a short period, but he will continue to participate in this case on the basis of the record, the recording of the oral argument and so forth.

You may continue, counsel.

ORAL ARGUMENT OF ALBERT HARRIMAN, ESQ.,

ON BEHALF OF THE APPELLEES -- Resumed

MR. HARRIMAN: Mr. Chief Justice, and may it please the Court:

At this time I'd like to complete the argument on the equal protection phase of this case, and get on to the second question which involves the allegation of a burden on interstate commerce.

In addition to the exceptions discussed yesterday, the appellants complain of two others: one is that it grants longer load privileges to the hauling of pulpwood. Pulpwood is produced on Wisconsin farms, and this exception benefits farmers.

They also complain of a twin trailer allowance in 55-foot lengths for hauling of milk, from the point of production to the point of first processing. This also benefits farmers.

None of these exceptions, which I've just mentioned or those we discussed yesterday, favors intrastate commerce

at the expense of interstate commerce. None of these isolates local industry from foreign competition. These are reasonable classifications. They are designed to promote a proper police power: public purpose.

QUESTION: Could an Illinois milk producer get an exemption under the milk exemption, to bring milk into Wisconsin?

MR. HARRIMAN: No, I don't think so. No.

QUESTION: The regulation on its face doesn't seem to prohibit it, does it?

MR. HARRIMAN: Well, I don't know quite how to answer that. I think it's designed to let Wisconsin farmers ship their milk to the point of first processing. I wasn't aware that it would be available for an out-of-State farmer.

QUESTION: Is there anything in the record about how the Highway Commission, or whoever grants these permits, has construed it?

MR. HARRIMAN: I would think not, because it's very new. It happened, really, after this case was heard. It's very new.

QUESTION: Oh, this exemption was created after the case was heard?

MR. HARRIMAN: That's my recollection, yes.

QUESTION: Mr. Harriman, yesterday, during the argument, Mr. Lederer told us that -- if I understood him,

at least -- that no twin trailer combination of any length could be operated in your State without a permit, and yet I notice in the district court's opinion it stated that Section 348.08 concerns vehicle trains and provides that: except by permit, no vehicle shall draw more than one other vehicle where the over-all length of the combination exceeds 55 feet. Which would imply, to me at least, that a double trailer of 55 feet or less could be operated.

MR. HARRIMAN: No, I don't think so, because the 55-foot limitation in the statute applies only to a two-vehicle unit, a tractor and the trailer.

QUESTION: Right.

MR. HARRIMAN: It's limited to two vehicles.

QUESTION: A semi, so-called.

MR. HARRIMAN: Yes. A semi is the illustration.

QUESTION: Right. So that no double trailer of any length can be operated --

MR. HARRIMAN: Without a permit.

QUESTION: -- as a general rule, without a permit?

MR. HARRIMAN: That's my understanding.

The --

QUESTION: And is that a safety purpose? For a shorter than 55-foot double trailer.

MR. HARRIMAN: I think it has been considered to be a safety purpose. The --

QUESTION: I just don't understand that.

MR. HARRIMAN: Well, the -- I suppose it's history, the older case of, I can't say the whole thing, the Sproles case that arose out of Texas. The Court said that a State may prohibit trains if it chooses to. It assumed that, in length and in configuration of trains -- and of course I'm talking about not railroad trains -- that there was an element of danger.

QUESTION: So that, if what you say is correct, and certainly your brother on the other side agrees with you, the district court really wrote its opinion under a misapprehension, didn't it? When it said that a twin trailer of 55 feet or less could be operated without a permit?

MR. HARRIMAN: I didn't realize that it said that, and if --

QUESTION: Well, I just read to you what it said.

MR. HARRIMAN: I'm sorry.

QUESTION: And provides that, except by permit, no vehicle shall draw more than one other vehicle where the overall length of the combination exceeds 55 feet.

Now, in fact, your law provides that twin trailers of any length are prohibited?

MR. HARRIMAN: Yes, that's true.

QUESTION: So that the district court misapprehended the law, didn't it?

MR. HARRIMAN: Well, --

QUESTION: The State law.

MR. HARRIMAN: -- apparently. This provision regarding these milk trucks, I believe, was not called to the attention of the district court. I believe this was something that occurred after the decision.

QUESTION: Let's assume that's true, that the district court was under a misapprehension. What do you think that would have -- what impact does that have on this case?

MR. HARRIMAN: I don't see an impact on the case. I don't understand that that was the motivation behind their decision.

We point out that the police power may be exercised to promote agriculture and industry, that it's not an improper thing to do. Appellants argue that if you make a special exception for others, you must do it for all; or at least you must do it for us, the plaintiffs in this case.

There's a similar argument, that if you regulate one abuse you must regulate other similar abuses. This Court has rejected that analysis in Sproles vs. Binford. They said the Legislature does not have to regulate all or none, and is not bound to cover the whole field.

Then in Railway Express vs. New York, a more recent case, equal protection does not require that all evils of the same type be eradicated or none at all.

With the Court's approval, I'd like to proceed to the burden on interstate commerce aspect of this case. We hope to have a little time to discuss that.

QUESTION: Well, let's get our facts straight on the burden. When these trucks come through with the two trailers, they have to unhook when they hit the Wisconsin line?

MR. HARRIMAN: Yes.

QUESTION: And then when they leave, they hook up again?

MR. HARRIMAN: Yes.

QUESTION: And that does not interfere with interstate commerce?

MR. HARRIMAN: No, we don't contend that it doesn't. It obviously is a burden. It obviously is a burden. But we think that it's a permissible one; but it obviously is a burden. No question of it.

This Court has announced different tests in deciding interstate commerce questions. The first one is the rational basis test, announced in South Carolina vs. Barnwell, and which this Court applies to highway safety cases. It's also announced -- another test we call the balancing test, it appears to have appeared first in the long train case in Arizona, Southern Pacific vs. Arizona, and more recently stated in Pike vs. Bruce Church.

The rational basis test has been applied in safety

cases, and the balancing test in other cases.

The question before this Court is whether the balancing test should be extended and applied to highway safety cases.

The older cases clearly pointed out that size and weight are elements of safety, and may be taken into account by Legislatures in regulating highways.

The leading case, in 1938, South Carolina vs. Barnwell, said that regulation of the use of State highways is peculiarly a local concern. Now, the Court has never retreated from this statement.

It also said such regulations are inseparable from a substantial effect on interstate commerce. And there they announced the test, this rational basis test: whether the Legislation, in adopting the regulations, has acted within its province and whether the means chosen are reasonably adapted to the ends sought.

They went on to point out that the State may impose non-discriminatory restrictions as safety measures, and said the Court does not sit as a Legislature and that the reasonableness and wisdom are not for the Court. The Court does not substitute its judgment, even where interstate commerce is involved. And it says the Court looks to see whether the legislative choice is without rational basis. That's the statement of the rational basis test.

QUESTION: Yet, Mr. Harriman, I'm frank to say that I'm disturbed by this long list of exemptions that Wisconsin has, and don't those exempt products and the like create just as much safety hazard on Wisconsin roads as the non-exempt?

MR. HARRIMAN: I think, comparing any one truck in any one spot at any one time, I think the answer would have to be yes.

The hauling of -- from plant to plant, that we have, like in American Motors, is a limited trip. We discussed it yesterday. It's 45 miles.

These milk hauls -- I don't know just what these milk hauls, where they go, but they go from the farm to the plant, where the milk is hauled, delivered for processing.

Pulpwood is hauled usually from the farm or field or woods somewhere to one of our paper mills; and of course these car carriers run all over the State. And obviously their length is as dangerous, or non-dangerous, depending on which side of this case you take, as perhaps any other vehicle.

But I think it's a justified police power exception, because automobiles are very long and you can only get a few on a trailer. This extra ten feet makes it possible for them to haul an extra two vehicles.

And, of course, the State apparently takes the position that it's better to have only that many long trucks

running than to have a large, much larger number of long trucks running.

The --

QUESTION: Well, do you suggest that the State can be more tolerant on the safety factors with respect to local industries than interstate haulers?

MR. HARRIMAN: Yes, if it's based upon a proper police power purpose. But I don't think that many of these are more tolerant on the locals than they are on interstate haulers. The hauling of these automobiles is one. And, like shipping from Milwaukee to Kenosha on this plant-to-plant, I mean, that's something, by its very nature, interstate commerce -- I'm sorry; intrastate commerce.

That kind of a thing couldn't be applied to interstate commerce, I mean, by its very nature.

QUESTION: Do any of the exemptions apply so as to favor interstate common -- intrastate common carriers over interstate common carriers?

MR. HARRIMAN: Well, without -- and I realize you're asking me for examples. I mean, without thinking of a specific example, I have to say no. I don't think they apply in such a way as to discriminate against out-of-State carriage.

QUESTION: You mean none -- in the case of none of the exemptions are the goods hauled by -- hauled for hire?

MR. HARRIMAN: Oh, I'm sorry; hauled for hire. I

don't understand that our law discriminates between a for-hire hauler and what we call a private carrier.

QUESTION: Well, I know, but is any of the milk carried for hire? Are any of the logs carried for hire?

MR. HARRIMAN: Oh, I'm sure the milk is carried for hire.

QUESTION: And an interstate carrier could carry that as well as an intrastate carrier, couldn't it?

MR. HARRIMAN: Yes. Yes, and some of those shipments would be interstate, because they would go from the farm across a State line.

The --

QUESTION: Is there anything in the record to show that any local options were denied, or isn't it a fact that all you have to do is to go in and say, "I'm a local resident of Wisconsin, and I'd like an exemption"?

MR. HARRIMAN: Well, I don't -- I don't think you can do that. It would have to fit into one of the --

QUESTION: Is there anything in the record to say you can't?

MR. HARRIMAN: Well, I think that the record shows that we have a series of statutory exemptions.

QUESTION: And you have a whole series of --

MR. HARRIMAN: And you'd have to fit into those.

QUESTION: -- exceptions. You have a whole series of

exceptions.

MR. HARRIMAN: Yes. And you'd have to fit into those. And if you didn't --

QUESTION: Including trucks that are as large as the ones that are being excluded.

MR. HARRIMAN: Yes. Yes. The policy of the State is to have no trucks over 55 feet, but there are --

QUESTION: Unless --

MR. HARRIMAN: -- these exceptions that we've been --

QUESTION: -- they are local.

MR. HARRIMAN: No, I don't think unless they are local. The hauling of automobiles is the best example that they don't have to be local. And --

QUESTION: Although you do have a local one right there. American Motors.

MR. HARRIMAN: That one, that, by its very nature, is a local one, yes. Yes. The two plants are located in the State.

QUESTION: What evidence, if I may get to the first point, did you put in about safety? That the State put in.

MR. HARRIMAN: The evidence that the State -- well, we had two witnesses, that is, there are two witnesses. A man by the name of Robertson testified as to a study he'd made for the, I believe it's the Insurance Institute of Highway

Safety, comparing collisions between vehicles, and comparing particularly large vehicles colliding with small vehicles, and counting the severity of the damage and the number of deaths, and in which vehicle the deaths occurred, and things of that kind.

That was the evidence we put in.

The other evidence was the testimony of our Highway Commission Chairman, which I alluded to yesterday, who testified to the reasons behind Wisconsin's attitude that he knew, because he had been in the Legislature and he had talked to constituents about it.

QUESTION: And his testimony was that the citizens of Wisconsin didn't like these big trucks.

MR. HARRIMAN: That pretty well summarizes what he said, yes.

QUESTION: Well, did any of the letters say, "We don't like out-of-State big trucks"?

MR. HARRIMAN: I don't know that that happened.

QUESTION: Or did they just say big trucks?

MR. HARRIMAN: It's the bigness that scares them.

QUESTION: That's what they were against.

MR. HARRIMAN: Yes, sure.

QUESTION: And that's the only evidence the State put in?

MR. HARRIMAN: Well, yes, that's true. That's true.

QUESTION: To allow you to say that the State was interested in safety.

MR. HARRIMAN: Yes. Yes, but --

QUESTION: And you put in no evidence to contradict all this government --

MR. HARRIMAN: That's true.

QUESTION: You put in no evidence to contradict that.

MR. HARRIMAN: That's true. The evidence, if we had it, would have been in the minds of the Legislators as to why they acted this way. And we -- I mean, the best we could do was to offer Mr. Huber's testimony, who had been there.

QUESTION: Could I ask --

MR. HARRIMAN: Yes, sir.

QUESTION: You may have covered this, and I missed it. Did you say you agreed or you didn't agree with the standard for -- expressed by the Court in the Pike case?

MR. HARRIMAN: Well, I agree with it, but I don't believe that it's applicable to highway safety cases.

QUESTION: You think that just in safety cases it's a much looser standard? Because I summarily --

MR. HARRIMAN: Well, in safety it's looser? Pike says so. Pike makes the point of saying, "but this is not like safety cases" and referred to the long train case.

Now, in the long train case, they were announcing, this Court was announcing that those restrictions were too much

of a burden on commerce.

QUESTION: Well, yes, it may have put them aside, it may have put them aside and is not judging them; but do you think it set a different standard of safety?

MR. HARRIMAN: Yes. Yes. In the long train case they did some balancing, and there they specifically said: "We point out" -- I'm sorry --

QUESTION: Well, Pike was not a non-balancing standard.

MR. HARRIMAN: I'm sorry, Pike was not a non-balancing? That's right, Pike was a balancing standard.

QUESTION: Yes.

MR. HARRIMAN: So was the long train case. And in the long train case, this Court specifically said that this is very different from the highway safety situation. So each of these balancing cases has, in effect, distinguished the highway safety matters.

In Railway Express Agency case, the Court, this Court said that: as to the burden on interstate commerce, great leeway is allowed local authorities. We're talking about highways now. Even though the regulation materially interferes with interstate commerce.

I've mentioned the long train case, and how they distinguished Barnwell.

QUESTION: Well, the Court has certainly made some

distinction, hasn't it, between trains, where the train operates over tracks owned by the railroad company, and highways, where the trucks operate over highways owned by the State, in effect?

MR. HARRIMAN: I don't recall that distinction being made in the cases. The point was that the highway safety is more pertinent to State regulation than train safety. That's the way I read the long train case.

QUESTION: Well, you think that, then, is the distinction between Arizona vs. Southern Pacific and Barnwell?

MR. HARRIMAN: Yes. Yes.

The Bibb case was one involving an Illinois regulation regarding mud flaps, and it was very restrictive because only Illinois required it, and Arkansas prohibited it, and the other States would accept either one. The Court there said that if it were only the cost of this thing, we wouldn't strike down the law, we'd applied Sproles, Barnwell and Maurer.

They also said the same thing if we had to resolve the safety issues. But they said here the burden is too great because of this problem of interlining. Interlining is the function of transferring trailers between carriers. They said here the burden is too great, because of interlining.

There is the Full Crew Law case that we have cited, where the Court said they would not attempt to balance; and

then the Pike case where they did develop this balancing test and said that it will be upheld, the statute will be upheld unless the burden is clearly excessive in relation to the local benefits.

But they said, we're not here dealing with State legislation in the field of safety where the propriety of local regulation has long been recognized. That's when they cited the long train case.

QUESTION: Didn't cite Barnwell, did it?

MR. HARRIMAN: I believe not. For that proposition they cited just the long train case. I believe they did not cite Barnwell.

QUESTION: I think that's correct.

MR. HARRIMAN: And the problem of interlining, which was so pertinent in the Bibb case, we say is not much of a problem here, in these twin trailers.

We say that the Wisconsin law doesn't prevent interlining; trailers can be hauled singly. This makes it more expensive, but it doesn't make the problem of having to change fender guards.

QUESTION: As a matter of physical mechanical fact, can each one of these double trailers be hitched onto a semi and hauled singly?

MR. HARRIMAN: Hauled singly, yes.

QUESTION: There's no difference in the coupling,

then?

MR. HARRIMAN: They're interchangeable, they're the same unit, yes. Yes.

We say that Bibb stands as an authority --

QUESTION: But you do have to put a third --

MR. HARRIMAN: I beg your pardon?

QUESTION: When you do put it on, you have to put a flywheel on the back? Or the first trailer --

MR. HARRIMAN: All you have to do is take off the rear dolly and the rear trailer will fit on the, it's called the fifth wheel, this flap, disc that's on the back of a semi.

QUESTION: On the back of a tractor.

MR. HARRIMAN: Yes. Yes, they fit.

QUESTION: I'm talking about on the back of the first trailer, you have to put another dolly on there, don't you?

MR. HARRIMAN: No, but -- to hook up two trailers, yes.

QUESTION: Yes.

MR. HARRIMAN: Yes, there is a dolly.

QUESTION: All right.

MR. HARRIMAN: Yes. Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Lederer?

REBUTTAL ARGUMENT OF JOHN H. LEDERER, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. LEDERER: May it please the Court:

In answer to your question, Mr. Justice Stewart, on interchanging these vehicles, it is true that each of the vans of a twin trailer can be hauled separately by a twin trailer tractor. But a twin trailer tractor is a different piece of equipment than a semi-trailer tractor. A twin trailer cannot be interchanged with a semi-trailer tractor, and, similarly, a semi-trailer van cannot be placed on a twin trailer tractor.

Thus, Wisconsin, by forcing use of semi-trailers in the State of Wisconsin and through the State of Wisconsin, interferes with interchanging of equipment, because the Wisconsin equipment is not compatible with the equipment used in the other States, the equipment which is the industry standard for general commodity carriers.

I think it pertinent in this case that the State Highway Commission, who are the authors of the administrative regulation which bans twin trailers of any length, or prevents permits from being issued for them, the Chairman of the Commission was asked whether he had any opinion as to the safety of these vehicles. He stated that he was not prepared to comment on that, and would choose not to comment on it.

No Wisconsin Highway official has testified that

twin trailers are unsafe. Indeed, the only Wisconsin Highway official who had an opinion as to their safety, Mr. James Karns, who was the Motor Vehicle Commissioner of the State, testified that he had reviewed the record -- not the record in this case -- but he had reviewed various reports and surveys in preparing to testify before a public hearing, and he had concluded that twin trailers were safe.

No one in this entire record has stated that twin trailers are unsafe; no one. The consistent opinion of the experts, the consistent opinion of State officials who have had experience with these vehicles is that they are safe.

I think this factor removes this case from other cases. The Court is not called upon to second-guess the State Legislature. Here the State Legislature, or the Highway Commission, more properly, has made a decision apparently on no data. What it has done is it permitted an anachronism to exist in the State. They are unable to justify the burden that they've imposed on interstate commerce by anything other than the supposition that it might serve safety, and that supposition has been destroyed by the evidence in this case.

Only if there is an irrebutable presumption, a presumption where it does not matter what the facts are, an irrebutable presumption that vehicle size is tied to safety, do I think that the State of Wisconsin should prevail in this case. Because that is the sole thing that they have going

for them: the presumption, and the assumption, which seems a reasonable one on the surface, that larger vehicles are less safe vehicles.

That is not the case here.

I thank the Court.

QUESTION: Mr. Lederer, on the discriminatory aspect of your claim, do you think that your client as a carrier can raise a claim of discrimination as between Wisconsin manufacturers and out-of-State manufacturers, if the treatment between interstate carriers and intrastate carriers is even-handed?

MR. LEDERER: I believe they can in regard to the interplant permits, because those permits apply not just to the manufacturer but to the manufacturer or its carrier. Thus, --

QUESTION: But then --

MR. LEDERER: -- there is no difference in the application that I know of to the carriers themselves.

In other words, if we were to assume that American Motors or perhaps Cargill Boat Company which runs boats from one side of Wisconsin to the other desired to hire an out-of-State manufacturer -- or out-of-State carrier to carry its boats, presumably it could. But that would seem unlikely, given the situation.

QUESTION: But you don't contend there's discrimina-

tion as to the -- in the manufacturer's right to hire an interstate carrier as opposed to an intrastate carrier for that purpose, do you?

MR. LEDERER: No, I don't think there's discrimination there. I think the discrimination that exists here is the fact that Wisconsin has exempted so many of its own industries, those that are of importance to the State, from the regulation, while continuing to apply the regulation to industries not important to the State.

QUESTION: Can you, as a carrier, object to discrimination against an industry if there is no discrimination between carriers?

MR. LEDERER: Yes, I think we can.

QUESTION: What's your authority for that?

MR. LEDERER: I don't --

QUESTION: Hasn't the rule been, rather than discrimination against carriers, interstate carriers, is that the distinction between intrastate commerce and interstate commerce?

MR. LEDERER: Yes, I think the --

QUESTION: If an interstate carrier -- if a carrier that engages in interstate commerce hires out to do intrastate commerce, it is still engaging in intrastate commerce at the time it does it. I mean, if you hired out to carry, to do the interplant carrying, you would still be in intrastate

commerce, I suppose, for that purpose.

MR. LEDERER: That would be correct. And that would, I suppose, provide a basis for discrimination between interstate carriers and intrastate carriers, in the sense that many of the exemptions that Wisconsin gives, it gives only to operations within the State.

Certainly that's true with regard to the interplant permits.

I thank the Court.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:31 o'clock, a.m., the case in the above-entitled matter was submitted.]

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