



**THE ATTORNEY GENERAL  
OF TEXAS**

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*911b, 5a(b), 6bb (1942)*

Hon. James E. Kilday  
Director  
Motor Transportation  
Division  
Railroad Commission of  
Texas  
Austin, Texas

Opinion No. O-4853  
Re: Whether the Railroad Commission may grant authority to use highways of the State of Texas as a common carrier in interstate commerce to a person who has been issued a certificate of convenience and necessity by the Interstate Commerce Commission authorizing such operation when such person holds an intrastate specialized motor carrier certificate or an intrastate contract carrier permit under Article 911b, R.C.S.

Dear Sir:

We are in receipt of your letter of October 26, 1942, in which you state in part:

"There has been presented to us, by an application duly filed, the question of whether sections 5a(b) and 6bb of Article 911b, Vernon's Revised Texas Civil Statutes, prohibiting dual operation as common carrier motor carrier and specialized motor carrier or contract carrier apply to an application to us for authority to use highways of the State of Texas in transporting interstate commerce in accordance with authority granted the applicant by the Interstate Commerce Commissioner under Part II of the Interstate Commerce Act, as amended, or whether in passing upon such application we may consider only the ability of the applicant to meet police requirements for the protection of the public on the highways and whether the roads are of such type of construction and in such state of repair and are subject to such use that the applicant may use them without interfering with use of such roads by the general public for highway purposes.

"The applicant before us holds an intrastate specialized motor carrier certificate and an intrastate contract carrier permit issued by us, and has recently been issued a certificate of convenience and necessity by the Interstate Commerce Commission authorizing transportation of general commodities as a common carrier in interstate commerce over roads within a prescribed area in Texas.

. . .

". . .

"In light of the above, we submit this question to you: May we grant authority to use highways of the State of Texas as a common carrier in interstate commerce to a person who has been issued a certificate of convenience and necessity by the Interstate Commerce Commission authorizing such operation when such person holds an intrastate specialized motor carrier certificate or an intrastate contract carrier permit under Article 911b?"

As this department construes Article 911b, Vernon's Annotated Civil Statutes of Texas, being House Bill No. 335, Chapter 277, page 480, Acts, 42nd Legislature, in opinion No. O-1518, a carrier may not operate both as a common carrier and a specialized motor carrier or a contract carrier. The question here presented is whether a like prohibition obtains where the applicant has a contract carrier permit and a specialized motor carrier permit for intrastate commerce and subsequently obtains from the Interstate Commerce Commission a common carrier certificate.

As a prerequisite to engaging in interstate commerce a state may not require of a carrier that he obtain from the state a certificate based upon the public need and the usefulness of his proposed business but can make the granting of its authorization contingent only upon consideration of safety of traffic and of the highways and compensation for the use of its roads. *Buck v. Kuykendall*, 267 U.S. 307. And where a carrier has secured an interstate commerce certificate to operate wholly in interstate commerce the State Commission is required to grant such carrier a certificate upon proper application and proof that he will not endanger the State's highways and the traveling public. *Galveston Truck Line Corporation v. Allen*, 2 F.Supp. 488, affirmed by memorandum opinion in 289 U.S. 708; *Ex Parte Truelock*, 140 S.W. (2d) 167.

The State cannot regulate the capacity in which a carrier serves. If the refusal by the Commission to issue a certificate or permit is based, not upon consideration of the traffic safety or protection to the highways, "but only on the commerce itself and the business of those who transport it", refusal is unwarranted and the carrier may have an injunction against being interfered with in carrying interstate commerce. *Galveston Truck Line Corporation v. Allen*, supra. In *Thompson v. McDonald*, (1928; C.C.A. 5th) 95 F.(2d) 937, affirmed in 305 U.S. 263, rehearing denied, 305 U.S. 676, we find the same thought expressed in these words:

"The Interstate Commerce Commission has jurisdiction over the commercial considerations appertaining to

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the interstate trucking business, but the preservation and safety of the roads themselves has been left to the state commission."

And in *Texport Carrier Corporation v. Smith*, 8 F. Supp. 28, 32, the court used this terminology:

"It is only when the Commission has undertaken to exercise control, not over the safety of the highways and of the traveling public, but over the commerce itself that its orders refusing permits to interstate carriers are inoperative."

The refusal to grant a permit to an interstate commerce carrier on the grounds that he had an intrastate contract carrier's permit would be a refusal based not upon consideration of safety of the highways but upon opposition to the carrier's relation with the shipper, to his method of obtaining compensation. This would be unjustifiable obstruction of interstate commerce.

The U. S. Supreme Court held the Michigan Act unconstitutional that declared that all carriers for hire on its highways should be common carriers; such statute constituted a burden on interstate commerce, where it sought to compel a contract carrier to act as a common carrier. *Michigan Public Utilities Commission v. Duke*, 266 U.S. 570. We believe that the doctrine of this case is broad enough to declare the unconstitutionality of any attempt by a state to prohibit interstate commerce on the grounds of the status of the carrier, whether common, contract or specialized motor carrier.

The language of the Texas statute is sufficiently broad to warrant an interpretation that the Railroad Commission might refuse a permit under the conditions here under consideration. However, the general rule of constitutional construction ought to be applied, viz.:

"Where a statute is fairly susceptible of two interpretations, one rendering it constitutional and one not, that construction will ordinarily be adopted which will uphold its constitutionality. The presumption is that the legislature intended to keep within the limits of both the Federal and State Constitutions, and to restrict the operation of its enactments to cases where they will have effect consistently therewith." *Haselton v. Interstate State Lines*, \_\_\_ N.H. \_\_\_, 133 At. 451, 47 A.L.R. 218; *Grenada County v. Brogden*, 112 U.S. 261.

This principle of construction has been applied to state statutes governing the operation of motor vehicles whose

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terms were sufficiently general to include interstate as well as intrastate carriers. *Commonwealth v. O'Neil*, 233 Mass. 535, 124 N.E. 482; *Haselton v. Interstate Stage Lines*, supra.

In construing our Article 911b, R.C.S., the Texas courts have limited its application to intrastate commerce. The Texas Supreme Court in *Southwestern Greyhound Lines v. Railroad Commission*, 128 Tex. 560, 99 S.W. (2d) 263, 109 A.L.R. 1124, said:

"An analysis of the act merely shows that it was the purpose of Congress, in enacting this law, to delegate to the Interstate Commerce Commission the exclusive authority to pass upon the application of a motor carrier engaged exclusively in interstate commerce on the highways for a certificate of public convenience and necessity. Such construction of the law does not deprive the state from protecting its highways and the public safety by reasonable and uniform regulations, and exacting reasonable compensation for the use of such highways. . . . Congress having assumed jurisdiction over this class of legislation, such control is exclusive, and such act of Congress superseded state legislation."

In *Smith v. Coleman*, 127 S.W. (2d) 928, 932, the Court of Civil Appeals at Waco said:

"The Federal Motor Carrier Act operates to limit such provisions of the Texas Motor Carriers Law as confers upon the Railroad Commission the power to determine whether there exists a public convenience and necessity for the proposed service founded upon the adequacy of the existing transportation facilities, etc., to carriers of property moving intrastate. *State ex rel. Board of Com'rs v. Martin*, 210 Iowa 207, 230 N.W. 540; *Buck v. Kuykendall*, 267 U.S. 307, 45 S.Ct. 324, 69 L.Ed. 623, 38 A.L.R. 286; *Bush & Sons Co. v. Maloy*, 267 U.S. 317, 45 S.Ct. 326, 69 L.Ed. 627. But it does not deprive the Railroad Commission of its jurisdiction and power to determine whether the safety of the traveling public and the preservation of the state's property in the highways will permit any additional burdens of commerce upon and over the highways irrespective of whether such burdens result from interstate or intrastate commerce thereon. *South Carolina State Highway Department v. Barnwell Bros., Inc.*, 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734; *Id.* 303 U.S. 625, 58 S.Ct. 510; *Kelly v. State of Washington*, 302 U.S. 1, pars. 5, 7 and 9, 58 S.Ct. 87, 82 L.Ed. 3; *Thompson v. McDinald*, 5 Cir., 95 F.2d 937; *Winton v. Thomson*, Tex.Civ.App., 123 S.W.2d 951. . . ."

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The Texas Court of Criminal Appeals expressed the same view in Ex Parte Truelock, 140 S.W. (2d) 167.

We conclude, therefore, that the fact that a carrier holds an intrastate specialized motor carrier's certificate or an intrastate contract carrier's permit, does not warrant the Railroad Commission in refusing an authorization to a carrier to use the state highways in interstate commerce where he has obtained an Interstate Commerce Commission's certificate authorizing such operation.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By /s/ David W. Heath  
David W. Heath, Assistant

APPROVED NOV 18, 1942  
/s/ Gerald C. Mann  
ATTORNEY GENERAL OF TEXAS

APPROVED: OPINION COMMITTEE  
BY: BWB, CHAIRMAN

DWH:AMM:wb