Railroad Commission, Authority of. Authority, of Railroad Commission. Interstate Commerce, Authority of Railroad Commission in. Orders, Affecting Interstate Commerce.

Power of the Montana Railroad Commission to make intrastate rates in matters affecting Interstate Commerce considered herein.

May 12, 1916.

Hon. Railroad and Public Service Commission,
Helena, Montana.

Gentlemen:

I am in receipt of your communication under date the 8th instant, enclosing a decision of the Interstate Commerce Commission in Docket No. 6710, entitled Bonners Ferry Lumber Company, vs. Great Northern Railway Company. You state that pursuant to this decision you had initiated a motion for the purpose of adjusting the rates on lumber in Montana Intrastate to meet the requirements of the Interstate Commerce Commission. You ask me to construe the decision of the Interstate Commerce Commission as it affects the authority of the Montana Commission to adjust differentials between Bonners Ferry and Columbia Falls and intermediate stations.

So much of the findings of the Interstate Commerce Commission in the case referred to as is pertinent here, is as follows:

> "We find that defendant's present rates for the transportation of lumber from Bonners Ferry to the Montana destinations involved are just and reasonable, and that the present relationship of rates to these destinations from Bonners Ferry and from Montana producing points, Whitefish to Columbia Falls, inclusive, and on defendant's Kalispell branch is not unjustly discriminatory, but that the present adjustment of rates from Bonners Ferry and from Montana points Fortine to Libby, inclusive, unjustly discriminates against Bonners Ferry to the extent that the rates from Bonners Ferry exceed the rates from Libby by more than 1.5 cents per 100 pounds and the rates from Eureka by more than 3.5 cents. In observing the fourth section, rates from intermediate points in Idaho should be constructed on a similar basis."

The authority of a state commission to fix rates which would affect interstate commerce, and work a discrimination as between points in a foreign state and those under the authority of the particular state commission, was involved before the interstate commerce commission in the case of Louisiana v. St. Louis Ry. Co. 23 I. C. C. 31. In an exhaustive opinion by Mr. Commissioner Lane it was held that a state commission could not make interstate rates which would have this effect. The case was appealed to the Supreme Court of the United States, under the title of Houston East and West Railway Company v. United States, reported in 234 U. S. 342. Under the decision of the Supreme Court of the United States in that case, a state commission cannot enforce intrastate rates, which if obeyed by the carrier would work a discrimination against points without the state. The court went very fully into the authority of the state in such a case, and the conditions under which it was prohibited from enforcing such rates. The court in this case, as in numerous other cases, held that the power of Congress over interstate commerce is plenary and exclusive. The language of Justice Hughes is:

> "It is of the essence of this power (over interstate commerce) that where it exists it dominates."

The extent of the power of Congress in this record is indicated by the following:

> "It is for Congress to supply the needed correction where the relations between intrastate and interstate rates presents the evil to be corrected, and this it may do completely by reason of its control over the interstate carrier in all matters having such close and substantial relations to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce."

Our own Supreme Court has recently expressed itself upon the general relation of state and federal jurisdiction over commerce. Speaking of the validity of the Donlan Act, Chapter 1, Laws of 1913, in the Case of State v. Harper, 48 Mont. 456, in which it was urged that in certain instances the state might have concurrent jurisdiction with federal authorities. After adverting to the division of cases arising under the commerce clause into (1) those in which the power of the state was exclusive; (2) those in which the state may act in the absence of legislation by Congress; (3) those in which the power of Congress is exclusive and showing that the case under consideration could not be classified under the first or third classes, the court proceeded to examine the effect of the federal legislation upon the state law.

> "This subject has been passed upon in a number of recent cases, all holding that in those instances in which the state has power to act in the absence of legislation by Congress, when Congress does, by its Act, manifest a purpose to take possession of a subject within its power under the commerce clauses of the Constitution, all state policies, regulations, and laws upon the subject are superseded by the congressional Act (Adams Express Co. v. Croninger 226 U. S. 491, 57 L. Ed. 314, 44 L. R. A. (n. s.) 257, 33 Sup. Ct. Rep. 148; Chicago, B. & Q. Ry. Co. v. Miller, 226

U. S. 513, 57 L. Ed. 323, 33 Sup. Ct. Rep. 155; Northern Pac. Ry. v. State of Washington 222 U. S. 370, 56 L. Ed. 237, 32 Sup. Ct. Rep. 160. The same holding has been made by the Supreme Court of Montana in the recent case of Melzner v. Northern Pac. Ry. Co. 46 Mont. 277, 127 Pac. 1002.

Council for the state, however, insist that both of these Acts remain in effect, and jurisdiction over the offense named is concurrent in the federal and state courts; that the United States and the state being different sovereignties, the same Act may be an offense against both. This might be true in some instances, but here we are confronted with the fact that, so far as the regulation of interstate commerce is concerned, the states have expressly surrendered the entire subject to the general government, and that, when the general government sees fit to exercise the powers, delegated and surrendered to it by the states, the state is precluded from saying that the subject, or any matter connected therewith, is under the concurrent control of the two sovereignties.

State v. Harper, supra.

It would seem, therefore, from the expression of both these courts, that your commission is without authority to make any order regarding rates which have by the I. C. C. been held to affect interstate commerce; that the rates in question have been held to affect interstate commerce follows from what has been said by the Interstate Commerce Commission in Bonners Ferry Lumber Company v. Great Northern Railway Company, docket No. 6710.

It might be argued, however, that although the Montana Railroad Commission is prohibited from lowering the rates between ponts in Montana so that Eureka and Libby should enjoy a greater differential than that established by the I. C. C. over Bonners Ferry, that they might, nevertheless, make such a change as would decrease that differential by raising all rates in Montana. Without considering the effect such a change might have upon the interstate rates and the possibility that even such a change might be an interference with interstate commerce, we suggest that there is another serious objection to such a procedure. Admittedly, the only change which could be made would be a raising of all rates from Columbia Falls, and all points of production west thereof. This could have but one result, that of an unreasonably high rate from these points. Having in the past declared the rates from Columbia Falls and other points reasonable, it follows that unless something has occurred to justify an increase of rates from these points, a higher rate at this time would be unreasonable, and therefore, unlawful.

Yours very truly,

J. B. POINDEXTER,

Attorney General.