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Book Reviews

DISCRIMINATION BY RAILROADS AND OTHER PUBLIC UTILITIES. By Isaac Beverly LAKE. Raleigh, North Carolina: Edwards and Broughton Company, 1947. Pp. xii, 346.

The volume under review, dedicated with the hope Southerners of the next generation might not be handicapped either by unjust rates or by unjust laws, was prepared in partial fulfillment of the requirements for the author's degree of Doctor of the Science of Law at Columbia University.

Chapter I, Development of Legal Restraints on Discrimination in Prices, represents a probing on Professor of Law Lake's part, Wake Forest College, of the origin of the present day prohibition against discriminatory rates. The point is developed that the early common law which did not prohibit discrimination has changed since the turn of the nineteenth century so as to necessitate the incorporation of non-discrimination as an integral part of our common law today. The development of American common law as reflected in the Interstate Commerce Act and similar state statutes is shown to have been based variously on (1) the mistaken view of English history that discrimination was prohibited by early English common law, (2) the public interest in competition, and/or (3) the franchise grant basis. Lake submits as the correct basis the invocation of government prohibition when liberty of contract and economic freedom are jeopardized without means of self-protection. His distinction taken between reasonable and unreasonable discrimination appears meaningless, to the reviewer, since in the last analysis reasonableness to some shippers means only unreasonableness to others with discrimination to some shippers being only non-discrimination to others. Yet the distinction taken has been the one universally accepted since, as Lake cites the late Justice Holmes, equality sometimes leads to hollow formulas.

Chapter II, Discriminatory Rates by Government, adds little beyond a review of accepted constitutional law principles. The sound rule for differentiation as between users of service is submitted as the presumption of public benefit outweighing the charging of some consumer classes less than others. Lake correctly regards the distinction between governmental and proprietary functions as artificial and suggests that the substantive aspect of due process of the Fifth Amendment, although never so interpreted, might be construed so as to prohibit unreasonable federal utility prices.

Chapter III, Preferences to Specific Patrons, is the vehicle for Lake's advocacy of selective discrimination almost to the point, as seen by the reviewer, of equating justice and discrimination as well as tending to throw an undue burden on regulatory agencies of ferreting out bad faith to warrant upsetting the utility's judgment. Specifically, the case is overpresented that Section 2 of the Interstate Commerce Act (direct rate preferences) should be restricted to cases of actual injury to other shippers. Stringent prohibition against free passes, *inter alia*, is regarded as an

unnecessary governmental interference with railroad management and if forbidden to public officials with the requirement railroad revenues be credited for the gift, the discrimination should be accepted as within the management's prerogative to grant or deny. Even if no showing of actual injury were required, the reviewer fears the discrimination would be too noticeably personal to be acceptable. To prevent rebates from creeping in under the guise of rate concessions in compromise claims, Lake prefers commission control as more effective than the present-day rule of cash only for compromises. These are difficult questions to submit to the judgment of regulatory commissions albeit Lake renders a fine performance of considering the protean aspects of reasonableness.

Chapter IV, Preferences to a Class of Patrons, represents Lake's assessment of the cases on legal, social, moral and economic grounds. For railroads, Section 2 of the Interstate Commerce Act is suggested as needing amendment to allow reasonable "handicapping" of businesses classified on some basis of their nature or by purposes of the use to be made of the service within the discretion of the Interstate Commerce Commission. A return to the recognition of approximate reasonableness in allocation of joint costs is advocated. Assuming the competency of the regulatory agency, Lake suggests as the correct basis for charges the principle of ability to pay as measured by volume of use. He inclines generally towards utilities being permitted to select their charities (preferential rates possibly to governments, religious and charitable users) or else charge users uniformly. Preference of industrial over domestic users is regarded as sound for reasons of expediency. Throughout, any other editor of the cases might react variously than Professor Lake has observed.

Chapter V, Preferences to Patrons in a Given Locality, still emphasizing railroads, considers the differences the courts have held warrantable in surveying the reasonableness of the discrimination. Generally, the author recommends reliance on carrier competition rather than dependence on the alleged trial and error of the Interstate Commerce Commission. Apparently, differences in cost of service or carrier competition would be the controlling consideration in Lake's analysis. The former would give the carrier the right to discriminate whereas the latter is presently a factor for the consideration of the Interstate Commerce Commission. The new theory of discrimination in *New York v. United States*, 67 S. Ct. 1207, 1237 (1947) is more far-reaching in its implications than the limited analysis Lake rendered. Heretofore, the same carrier or group of carriers was a necessary showing to prove discriminatory rates. Now, discrimination may be found under Section 15(1) of the Interstate Commerce Act without the same carrier being involved. Also, Lake's treatment of the long and short haul clause of Section 4 of the Interstate Commerce Act appears too abbreviated to be satisfactory.

Chapter VI, Remedies and Penalties, collects the pertinent law cases albeit in hornbook style and based primarily on the railroad cases.

Besides the omission of some valuable case material, the chief limitation of the study is its restriction to only the reported court decisions and basic statutes. The failure to cover the decisions of the Interstate Commerce Commission and other

administrative agencies renders the study somewhat superficial. With the emphasis on railroad discrimination, other transportation agencies such as airways, pipelines, highways and waterways are hardly mentioned although utilities other than transportation are discussed at stated appropriate places. There is some faulty editing which detracts from the scholarship, and in several instances footnotes are inserted as afterthoughts without being renumbered except by letter identification and run over to the following page.

The study nevertheless is stimulating, if not provocative, and reflects a flexible, non-stereotyped conceptualism in the handling of constitutional considerations.

The Southern viewpoint is suspected, *e.g.*, pp. 48 ff., 96, 258-70 and especially his aside on the North having lost the Civil War by the Fourteenth Amendment developing a substantive law aspect so as to circumvent the North's philosophy of governmental power at pp. 51 ff.

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