In the

Supreme Court of the United States

October Term, 1959

No. 409

BRUCE BOYNTON,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF AND APPENDIX FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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January 14, 1960

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PRELIMINARY STATEMENT

In a letter to the Attorney General of Virginia from the Honorable James R. Browning, Clerk of the Supreme Court of the United States, dated December 12, 1959, the Commonwealth of Virginia was requested to respond to the petition for writ of certiorari filed in the instant case and to "deal with the intercorporate relationship between the Trailways Bus Company and the Trailways Bus Terminal, Inc., set forth in any documents of which the Virginia courts can take judicial notice". Respondent was also requested to set forth her "view of the controlling Virginia law under which,

it is claimed, petitioner was convicted for trespass".* In accordance with the request contained in the above mentioned communication, written by the Clerk at the direction of this Court, the within brief of the respondent in opposition to the petition for writ of certiorari is filed.

PRIOR PROCEEDINGS

On January 6, 1959, petitioner was convicted in the Police Court of the City of Richmond, Virginia, for violation of Section 18-225 of the Code of Virginia (1950) as amended. He was sentenced to pay a fine of $10.00 and costs. Upon appeal to the Hustings Court of the City of Richmond, petitioner was again convicted and a similar sentence was imposed on February 20, 1959. A petition for writ of error to the judgment of the Hustings Court was denied by the Supreme Court of Appeals of Virginia on June 19, 1959, and the cause is currently before this Court upon petition for writ of certiorari to the Supreme Court of Appeals of Virginia, filed in the Supreme Court of the United States by the petitioner on September 15, 1959.

STATEMENT OF FACTS

On the night of December 20, 1958, the petitioner, a Negro student at the Howard University School of Law, was traveling via "Trailways" bus from Washington, D. C., to his home in Selma, Alabama. He boarded the bus in Washington, D. C., at 8:00 P. M., and arrived in Richmond, Virginia, about 10:40 P. M. Upon being informed by the driver of the bus that there would be a stopover of some forty minutes in Richmond, petitioner left the bus and entered the bus terminal building located at Ninth and Broad Streets in the City of Richmond (R. 31-33). Although

* Post, Appendix A.

noticing therein a separate restaurant for colored patrons which had seating capacity available (R. 33-34), petitioner entered the restaurant for white patrons, seated himself at a counter and requested service. He was advised—first by a waitress and then by the assistant manager of the restaurant—that separate facilities were maintained for persons of the Negro race and that he could be served in the restaurant reserved for colored patrons. Petitioner stated that he was an interstate passenger and was entitled to be served where he was. The assistant manager requested him to leave the premises and repair to the other restaurant. When petitioner refused to comply with this request, he was arrested, upon a warrant issued at the instance of the assistant manager, for trespass in violation of Section 18-225 of the Virginia Code (R. 22, 29-30, 34-36).

The bus terminal building in Richmond, Virginia, is operated by Trailways Bus Terminal, Inc., which company leases space therein to Bus Terminal Restaurant of Richmond, Inc. The lease in question grants Bus Terminal Restaurant of Richmond, Inc., exclusive authority to operate restaurant facilities in the terminal, and separate facilities for white and colored patrons are maintained by the lessee company (R. 21). The Record discloses that Bus Terminal Restaurant of Richmond, Inc., is "not affiliated in any way with the bus company", and that the bus company has "no control over the operation of the restaurant" (R. 21). Moreover, the restaurant facilities are "not necessarily" operated for bus passengers and have "quite a bit of business . . . from local people" (R. 26).

THE STATUTE

Under attack in the instant case is Section 18-225 of the Code of Virginia (1950) as amended, which statute in pertinent part provides:

"If any person shall without authority of law go upon or remain upon the lands or premises of another, after having been forbidden to do so by the owner, lessee, custodian or other person lawfully in charge of such land, or after having been forbidden to do so by sign or signs posted on the premises at a place or places where they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one hundred dollars or by confinement in jail not exceeding thirty days, or by both such fine and imprisonment."

QUESTIONS PRESENTED

1. Does Section 18-225 of the Virginia Code, as applied to petitioner in the case at bar, contravene Article I, Section 8, Clause 3, of the Constitution of the United States?

2. Does Section 18-225 of the Virginia Code, as applied to the petitioner in the case at bar, contravene the Fourteenth Amendment to the Constitution of the United States?

ARGUMENT

Intercorporate Relationship

In response to this Court's request that the Commonwealth "deal with the intercorporate relationship between the Trailways Bus Company and the Trailways Bus Terminal, Inc., set forth in any documents of which the Virginia courts can take judicial notice, respondent respectfully states that such relationship is not reflected in any documents of which the Virginia courts can take judicial notice. So far as respondent is aware, the only official documents, if any, which would contain evidence of the intercorporate relationship of corporations would be the records of the State Corporation Commission. Upon an examination of the Virginia law, counsel for respondent do not find that the Virginia courts can take judicial notice of such documents.

Under Virginia law, appellate courts will not even take judicial notice of the existence or contents of *legislative* charters of private corporations which were not relied upon in the court below. Section 8-264, Code of Virginia (1950); *Commonwealth* v. *Castner,* 138 Va. 81, 121 S. E. 894. Moreover, Section 8-266 of the Virginia Code establishes the procedure by means of which the existence and contents of records and papers in the office of the State Corporation Commission may be proved. In pertinent part, this statute provides:

> "A copy of any record or paper * * * (2) in the office of the State Corporation Commission, the State Board of Education, or the board of supervisors or other governing body of any county, attested by the secretary or clerk of such Commission or board; * * * may be admitted as evidence in lieu of the original. * * *
>
> "Any such copy purporting to be sealed, or sealed and signed, or signed alone, by any such officer, secretary or clerk, may be admitted as evidence, without any proof of the seal or signature, or of the official character of the person whose name is signed to it."

This provision of the Virginia Code prescribing the manner of proving certain specified documents and referring specifically to records and papers in the office of the State Corporation Commission negatives the authority of the Virginia courts to take judicial notice of such documents. See, *Sisk* v. *Town of Shenandoah,* 200 Va. 277, 279, 105 S. E. (2d) 169; *Bell* v. *Hagmann,* 200 Va. 626, 107 S. E. (2d) 426.

THE VIRGINIA STATUTE AND THE INTERSTATE COMMERCE CLAUSE

Section 18-225 of the Virginia Code first appeared as Chapter 165 of the Acts of the General Assembly of 1934.

Acts of Assembly (1934), Chapter 165, p. 248. With minor amendments not here material, the language of the existing statute is substantially identical to that contained in the original enactment. As is manifest from its terms, the statute does no more than impose criminal sanctions for continued trespass by an individual upon the lands or premises of another after proper warning and is entirely devoid of any racial connotation whatever.

Counsel for respondent respectfully submit that invocation of this statute by an agent of Bus Terminal Restaurant of Richmond, Inc., in the case at bar, presents no substantial question of conflict with the Commerce Clause of the Constitution of the United States. As pointed out by this Court in *Morgan* v. *Virginia,* 328 U. S. 373, 380, "the Constitution puts the ultimate power to regulate commerce in Congress", and Congress has exercised the power thus conferred by enactment of the Interstate Commerce Act. 49 U. S. C. A. 1 et seq. Moreover, in light of the provisions of Sections 3(1) and 316(d) of this Act*— which make it unlawful for any common carrier to make or give any undue or unreasonable preference or advantage to any person, or to subject any particular person to any undue or unreasonable prejudice or disadvantage in any respect—it is manifest that Congress has acted in the field of racial discrimination in interstate commerce and prohibited such discrimination to the extent deemed by it to be permissible or desirable. See, *Henderson* v. *United States,* 339 U. S. 816.

Equally manifest is it that the maintenance of racially separate restaurant facilities in a terminal building by a lessee non-carrier concern is not antagonistic to the provisions of the Interstate Commerce Act. The validity of this proposition was definitively established in *N.A.A.C.P.* v. *St. Louis*—

*49 U. S. C. A. 3(1); 49 U. S. C. A. 316(d); Post, Appendix B.

San Francisco Railway Co., 297 I. C. C. 335, in which case the Interstate Commerce Commission ruled that the maintenance of segregated lunch rooms, located in a railroad passenger station in Richmond, Virginia, by a lessee of the Richmond Terminal Railway Company was not violative of Section 3(1) of the Interstate Commerce Act. Indeed, in that case it was established—in contrast to the want of similar proof in the case at bar—that the defendant corporation, Richmond Terminal Railroad Company, which operated the terminal and leased the lunch room facilities to the Union News Company, was jointly controlled by the Richmond, Fredericksburg and Potomac and the Atlantic Coast Line railroad companies and was a carrier subject to the jurisdiction of the Commission.

The decision of the Interstate Commerce Commission in *N.A.A.C.P.* v. *St. Louis—San Francisco Railway Co., supra,* is clearly at variance with the instant petitioner's contention that the operation of separate restaurant facilities by Bus Terminal Restaurant of Richmond, Inc., constitutes a burden upon interstate commerce, and it is significant that petitioner does not here contend that Section 18-225 of the Virginia Code as applied to the circumstances of the case at bar violates any provision of the Interstate Commerce Act. Counsel for respondent submit that if, as shown above, the operation of racially separate restaurant facilities by a lessee non-carrier concern violates none of the comprehensive provisions of the Interstate Commerce Act or any of the manifold regulations of the Interstate Commerce Commission implementing and applying that Act, such action is not antagonistic to the Commerce Clause *per se.*

Finally, counsel for respondent submit that none of the decisions cited by petitioner is applicable to the situation which obtains in the instant case. These decisions were also

relied upon in *Williams* v. *Howard Johnson's Restaurant,* 4 Cir., 268 F. (2d) 845, in which case the petitioner contended that his exclusion from the Howard Johnson's Restaurant in the City of Alexandria, Virginia, on racial grounds amounted to discrimination against a person moving in interstate commerce and also interference with the free flow of commerce in violation of the Constitution of the United States. With respect to these decisions, the United States Court of Appeals for the Fourth Circuit declared (268 F. (2d) at 848):

> "The cases upon which the plaintiff relies in each instance disclosed discriminatory action against persons of the colored race by carriers engaged in the transportation of passengers in interstate commerce. In some instances the carrier's action was taken in accordance with its own regulations, which were declared illegal as a violation of paragraph 1, section 3 of the Interstate Commerce Act, 49 U.S.C.A. Sec. 3(1), which forbids a carrier to subject any person to undue or unreasonable prejudice or disadvantage in any respect, as in Mitchell v. United States, 313 U.S. 80, 61 S. Ct. 873, 85 L. Ed. 1201, and Henderson v. United States, 339 U. S. 816, 70 S. Ct. 843, 94 L. Ed. 1302. In other instances, the carrier's action was taken in accordance with a state statute or state custom requiring the segregation of the races by public carriers and was declared unlawful as creating an undue burden on interstate commerce in violation of the commerce clause of the Constitution, as in Morgan v. Com. of Virginia, 328 U. S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317; Williams v. Carolina Coach Co., D. C. Va., 111 F. Supp. 329, affirmed 4 Cir., 207 F. 2d 408; Flemming v. S. C. Elec. & Gas Co., 4 Cir., 224 F. 2d 752; and Chance v. Lambeth, 4 Cir., 186 F. 2d 879.
>
> *"In every instance the conduct condemned was that of an organization directly engaged in interstate* com-

merce and the line of authority would be persuasive in the determination of the present controversy *if it could be said that the defendant restaurant was so engaged.* We think, however, that the cases cited are not applicable because we do not find that a restaurant is engaged in interstate commerce *merely because in the course of its business of furnishing accommodations to the general public it serves persons who are traveling from state to state.* As an instrument of local commerce, the restaurant is not subject to the constitutional and statutory provisions discussed above and, thus, is at liberty to deal with such persons as it may select." (Italics supplied)

THE VIRGINIA STATUTE AND THE FOURTEENTH AMENDMENT

Petitioner has devoted less than a page of his petition for writ of certiorari to the contention that Section 18-225 of the Virginia Code, as applied to him in the instant case, violates the Fourteenth Amendment to the Constitution of the United States, and counsel for respondent submit that little consideration need be accorded it here. All that we could wish to say upon this question has already been stated by Judge Soper, speaking for the United States Court of Appeals for the Fourth Circuit, in *Williams* v. *Howard Johnson's Restaurant, supra.* In that case, the petitioner—in addition to asserting that his exclusion from the Howard Johnson's Restaurant in question on racial grounds contravened the Commerce Clause—also contended that such exclusion constituted a violation of the Civil Rights Act of 1875. Noting that the dismissal of petitioner's complaint by the United States District Court for the Eastern District of Virginia "was in accord with the decisions of the Supreme Court of the United States, and other Federal courts", Judge Soper observed (268 F. (2d) at 847-848):

"[Petitioner] points, however, to statutes of the state which require the segregation of the races in the facilities furnished by carriers and by persons engaged in the operation of places of public assemblage; he emphasizes the long established local custom of excluding Negroes from public restaurants and he contends that the acquiescence of the state in these practices amounts to discriminatory state action which falls within the condemnation of the Constitution. The essence of the argument is that the state licenses restaurants to serve the public and thereby is burdened with the positive duty to prohibit unjust discrimination in the use and enjoyment of the facilities.

"This argument fails to observe the important distinction between activities that are required by the state and those which are carried out by voluntary choice and without compulsion by the people of the state in accordance with their own desires and social practices. *Unless these actions are performed in obedience to some positive provision of state law* they do not furnish a basis for the pending complaint. The license laws of Virginia do not fill the void. Section 35-26 of the Code of Virginia, 1950, makes it unlawful for any person to operate a restaurant in the state without an unrevoked permit from the Commissioner, who is the chief executive officer of the State Board of Health. The statute is obviously designed to protect the health of the community but it does not authorize state officials to control the management of the business or to dictate what persons shall be served. *The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment.*" (Italics supplied)

CONCLUSION

In light of the foregoing, counsel for respondent respectfully submit that Section 18-225 of the Virginia Code, as applied to the petitioner in the case at bar, presents no serious

question of conflict with the Commerce Clause of the Constitution of the United States or the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

A. S. HARRISON, JR.
Attorney General of Virginia

R. D. MCILWAINE, III
Assistant Attorney General

Supreme Court–State Library Building
Richmond 19, Virginia

January 14, 1960

APPENDIX A

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON 25, D. C.

December 12, 1959

Honorable A. S. Harrison, Jr.
Attorney General of Virginia
Richmond, Virginia

Re: Boynton v. Virginia
No. 409, October Term, 1959

Dear Sir:

On instructions from this Court, I am writing to ask if the Commonwealth of Virginia will be good enough to respond to the petition in the above case and, included in its response, deal with the intercorporate relationship between the Trailways Bus Company and the Trailways Bus Terminal, Inc., set forth in any documents of which the Virginia courts can take judicial notice. Compare *Henderson* v. *United States,* 339 U. S. 816.

It is further requested that you set forth your view of the controlling Virginia law under which, it is claimed, petitioner was convicted for trespass.

Very truly yours,

James R. Browning, Clerk

By (s) R. J. Blanchard
R. J. Blanchard
Deputy

RJB:vmg

APPENDIX B

49 U. S. C. A. 3(1)

It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

49 U. S. C. A. 316(d)

All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or

disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

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