Opinion No. 71-65

May 5, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. Elmer Kaemper Executive Director Construction Industries Commission Santa Fe, New Mexico 87501

QUESTIONS

FACTS

The Babcock & Wilcox Company of New York Manufactures and sells steam generators, boilers, and related auxiliary equipment. The company maintains neither plant, nor sales office, nor warehouse in New Mexico. The company's only contacts with this state are its sales of equipment to New Mexico customers. The generators and boilers are too large to be shipped assembled, and they are dangerous if not correctly assembled. For these reasons each sales contract contains an agreement that the assembly and installation will be performed at the customer's site under the supervision of a specialized engineer supplied by Babcock and Wilcox. The contract is for the sale of a complete generator or boiler whose assembly will be completed by the company at the customer's site. The company also guarantees its equipment for a certain period. The company does the maintenance work on the boiler for the duration of the guarantee.

QUESTIONS

Is the Construction Industries Licensing Act applicable to the Babcock & Wilcox Company?

ANSWER

Yes.

OPINION

*{*94}* **ANALYSIS**

This question involves three problems. First, do the installation and maintenance activities of the Babcock & Wilcox Company place the company within the definition of "contractor" provided in the Construction Industries Licensing Act? Second, are the installation and maintenance activities part of interstate commerce or are they local business? Third, if these activities are part of interstate commerce, does the Commerce Clause of the United States Constitution prevent New Mexico from applying the Construction Industries Licensing Act to the Babcock and Wilcox Company? We have

concluded that the Babcock and Wilcox Company is a contractor, that its activities are interstate commerce and that the Commerce Clause does not prevent the state from applying the Construction Industries Licensing Act to the company.

The Construction Industries Licensing Act applies the term "contractor" to numerous types of occupations. At least three of those classifications are applicable to installation and maintenance of steam generators. According to Section 67-35-3, "contractor",

"Means any person who undertakes, offers to undertake, or purports to have the capacity to undertake by himself or through others, contracting. Contracting includes, but is not limited to, constructing, altering, repairing, installing or demolishing any:

. . .

(6) sewerage or water treatment facility, **power generating plant,** *{*95}* pump station, natural gas compressing station or similar facility;

. . .

(14) air conditioning, **conduit, heating** or **other similar mechanical works;.** . ." Section 67-35-3A (2) (6) (16), N.M.S.A., 1953 Comp. (1969 P.S.). (Emphasis supplied.)

Installing power generating plants and conduit and heating works certainly includes installing steam generators and boilers.

It is true that the company is primarily a retail seller of tangible personal property. The installation and repair activities are incidental to the sales contract. A glance at the purposes of the Act, however, reveals that those factors can have no bearing on the determination of whether the definition of "contractor" is applicable. The Act was designed to:

"promote the general welfare of the people of New Mexico by providing for the protection of their lives, property, and economic wellbeing against substandard or hazardous construction, alteration, **installation, connection,** demolition, or **repair** work . . ." Section 67-35-4, N.M.S.A., 1953 Comp. (1969 P.S.). (Emphasis supplied.)

It is obvious that the purpose of the installation, whether it be to fulfill the terms of a sales contract or a regular construction contract, is irrelevant to the ends of the Construction Industries Licensing Act. The Act is intended to regulate certain potentially hazardous activities. The motives or commercial context of the activity is irrelevant to its regulation. When the company installs and repairs steam generators and boilers, it is engaging in an activity regulated by the Construction Industries Licensing Act.

The commercial context of the installation and repair activities is relevant to the Act's application in another way. The sales contract is a contract in interstate commerce. If

the installation and repair activities are part of interstate commerce too, the Commerce Clause may affect the applicability of the Construction Industries Licensing Act.

The United States Supreme Court has held that installation done pursuant to an interstate sales contract similar to the one in question is part of interstate commerce. **York Mfg. Co. v. Colley,** 247 U.S. 21 (1918). The contract in that case was for the sale of an ice making machine, the parts of which were to be assembled at the customer's site under supervision of the seller's engineer. The court declared that "the right to make an interstate commerce contract includes in its very terms the right to incorporate into such contract provisions which are relevant and appropriate to the contract made." The court held that the installation agreement was "a contract inherently relating to and intrinsically dealing with the thing sold . . ." **York Mfg. Co. v. Colley, supra.** Consequently, the installation agreement was entitled to the protection of the Commerce Clause. The sales and installation contract employed by the Babcock & Wilcox Company is similar enough to the contract in the **Colley** case to bring it within the rule of that case. The agreement to install the steam generators is part of interstate commerce.

This conclusion does not end our inquiry, for not all aspects of interstate commerce are protected from state regulation by the Commerce Clause. From the earliest Commerce Clause cases, the United States Supreme Court has repeatedly held that the states may regulate certain aspects of interstate commerce in the exercise of their police powers. See **Cooley v. Board of Wardens,** 12 How. 299 (1851). One hundred years after **Cooley,** the Supreme Court summarized the State's power to regulate aspects of interstate commerce as follows:

"It is now well settled that a state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce. Parker v. Brown, 1943." **Cities Service Gas Co. v. Peerless Oil & Gas Co.,** 340 U.S. 179 (1950).

The problem is marking the point at which the national interest in the free *{*96}* flow of commerce overrides the state interest in local regulation. Mr. Justice Frankfurter has written, "the history of the Commerce Clause . . . is the history of imposing artificial patterns upon the play of economic life whereby an accommodation is achieved between the interacting concerns of states and nation." Frankfurter, **The Commerce Clause,** p. 21. The Commerce Clause's most distinguished scholar has also given us the best approach to reading the case law as a guide to determining what the accommodation of state and national interests demands in the present situation:

"The history of this problem is spread over hundreds of volumes of our Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts." **Freeman v. Hewit,** 329 U.S. 249 (1946).

No facile recitation of authorities will dispose of this question. The case law can only supply us with the proper approach to determining what freedom the Commerce Clause allows the state under the special facts of our problem.

In accommodating state and national interests the Supreme Court has balanced several factors. These are (1) the degree of localization of the commerce involved; (2) the nature of the state's interest in regulation; (3) the probability of conflicting regulations among the states; (4) the national interest in uniformity of regulations; and (5) the burden imposed on commerce by the state regulation. See **Bob-Lo Excursion Co. v. Michigan,** 333 U.S. 28 (1948); **Cities Service Gas Co. v. Peerless Oil & Gas, supra.** When we examine the business of the Babcock & Wilcox Company in the light of these factors, we must conclude that their installation and repair activities are subject to state regulation.

Few aspects of interstate commerce could be more localized than the construction and repair of steam generators. The activity occurs wholly within the state; the equipment remains permanently in the state after its installation. The nature of the state's interest is not only obvious but considerable. The dangerous potential of an improperly constructed steam generator needs little discussion. Suffice it to say that the risk to New Mexico lives and property is great. Because of the highly localized nature of this activity, the possibility that conflicting state standards have been a problem only where they were applied to modes of interstate transportation. Examples are regulations governing the length of railroad trains and safety features on trucks. See **So. Pacific v. Arizona,** 325 U.S. 761 (1945); **Bibb V. Navajo Freight Lines,** 359 U.S. 520 (1959). The national interest in uniformity of regulation is unsubstantial. Each state best knows the local conditions which dictate minimum standards of construction.

Finally, we consider the nature of the burden imposed by the Construction Industries Licensing Act. A licensee must post a bond whose maximum amount is $ 5,000. Section 65-35-47(3), **supra.** The licensee must employ a qualifying party who must pass an examination and pay a license fee. Sections 67-35-18, 67-35-22, **supra.** The licensee must obtain a trade board permit to begin any particular project and pay a fee which defrays the costs of inspections. Section 67-35-53, **supra.** These are the chief burdens of the Act.

The contractors' license is not a license to do business in the state. It is a certificate of competence to insure that installation and repair work will be done by qualified personnel. It is one of the means which the state has chosen to insure that construction in New Mexico will conform to minimum safety standards. In this respect the license requirement reinforces the Act's provisions regarding inspection. These inspection provisions are another legitimate exercise of the state's police power.

"In the exercise of its police power a state may enact inspection laws, which are valid if they tend in a direct and substantial manner to promote the public safety and welfare . . . when dealing in articles of general use, as to which Congress *{*97}* has not made any conflicting regulation, and a fee reasonably sufficient to pay the cost of such inspection

may be constitutionally charged, even though the property may be moving in interstate commerce when inspected." **Pure Oil Co. v. Minnesota,** 248 U.S. 158, 63 L. Ed. 180, 39 S. Ct. 35 (1918).

The effect of these burdens will be a relatively slight increase in the cost of doing interstate business in New Mexico. The Supreme Court has specifically held that this burden alone is insufficient to defeat the states' legitimate regulatory power. In **Bibb v. Navajo Freight Lines, supra,** the court struck down an Illinois law regulating mudflaps on trucks because of the burden imposed by conflicting state laws. Before discussing the problem of conflicting state laws the court said,

"If we had here only a question whether the cost of adjusting an interstate operation to these new local safety regulations prescribed by Illinois unduly burdened interstate commerce, we would have to sustain the law . . ." **Bibb v. Navajo Freight Lines, supra.**

In **Morris v. Duby,** 274 U.S. 135 (1927) the court upheld a state law reducing the maximum weight load on state highways even though the reduction made it impossible for certain interstate trucklines to do business profitably over some of the state's highways. Clearly, the Construction Industries Licensing Act does not unduly burden interstate commerce.

In view of these considerations, we conclude that the Babcock & Wilcox Company must comply with the Construction Industries Licensing Act.

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