[J-2A&B-2018][M.O. - Dougherty, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

BUCKS COUNTY SERVICES, INC., CONCORD COACH LIMOUSINE, INC. T/A CONCORD COACH TAXI, CONCORD COACH USA, INC. T/A BENNETT CAB, DEE-DEE CAB, INC. T/A PENN DEL CAB, GERMANTOWN CAB COMPANY, MCT TRANSPORTATION, INC. T/A MONTCO SUBURBAN TAXI, AND ROSEMONT TAXICAB CO., INC. Appellee v. PHILADELPHIA PARKING AUTHORITY AND PENNSYLVANIA PUBLIC UTILITY COMMISSION APPEAL OF: PHILADELPHIA PARKING AUTHORITY Appellant	:	No. 8 EAP 2017 Appeal from the Order of Commonwealth Court dated 1/3/17 at No. 584 MD 2011 ARGUED: March 6, 2018
BUCKS COUNTY SERVICES, INC., CONCORD COACH LIMOUSINE, INC. T/A CONCORD COACH TAXI, CONCORD COACH USA, INC. T/A BENNETT CAB, DEE-DEE CAB, INC. T/A PENN DEL CAB, GERMANTOWN CAB COMPANY, MCT TRANSPORTATION, INC. T/A MONTCO SUBURBAN TAXI, AND ROSEMONT TAXICAB CO., INC.	:	No. 9 EAP 2017 Appeal from the Order of Commonwealth Court dated 1/3/17 at No. 584 MD 2011 ARGUED: March 6, 2018

Appellee :

v. :

PHILADELPHIA PARKING AUTHORITY AND PENNSYLVANIA PUBLIC UTILITY COMMISSION :

APPEAL OF: PENNSYLVANIA PUBLIC UTILITY COMMISSION :

Appellant :

CONCURRING AND DISSENTING OPINION

CHIEF JUSTICE SAYLOR

I join the majority's analysis and holding as concerns the validity of the Jurisdictional Agreement between the Public Utility Commission and the Philadelphia Parking Authority ("PPA").

In terms of the individual PPA regulations, the majority applies a line of authority, exemplified by *Tire Jockey Service, Inc. v. PUC*, 591 Pa. 73, 915 A.2d 1165 (2007), concerning the validity of legislative rules. According to the majority, in light of its application of the *Tire Jockey* strain of analysis, there is no need to consider Appellees' substantive due process claims. *See* Majority Opinion, *slip op.* at 28 n.25.

I believe that it is important to understand, however, that assertions that particular legislatively-sanctioned regulations are substantively unfair or unreasonable are tantamount to substantive due process challenges, whether these are couched under the *Tire Jockey* rubric or otherwise. *Accord Am. Radio Relay League, Inc. v. FCC*, 617 F.2d 875, 879 (D.C. Cir. 1980) ("Whether we say a [legislative] rule must be

'reasonable,' must have a 'rational basis,' or must not be 'arbitrary or capricious,' our standard for reviewing the rule is the same: we must defer to the agency rulemakers unless the challenger shows that the agency has abused the broad policymaking discretion granted it by Congress and thereby acted beyond the scope of its rulemaking authority.").[1] In this regard, I also note that the "reasonableness" criterion of the *Tire Jockey* test is somewhat of a misnomer, since the case law defines the term, in the relevant context, as connoting the higher bar of rationality. *See, e.g.*, *Rohrbaugh v. PUC*, 556 Pa. 199, 208, 727 A.2d 1080, 1085 (1999) ("[A]ppellate courts accord deference to agencies and reverse agency determinations only if they were made in bad faith or if they constituted a manifest or flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions.").

As the majority otherwise relates, error, lack of wisdom, and burdensomeness are insufficient to support judicial intervention to overturn duly-promulgated legislative rules. *See id.* Properly understood, therefore, a challenge under the "reasonableness" facet of the *Tire Jockey* test implicates all of the concerns presented by the *Lochner* era of substantial judicial interference with social and economic regulation under the rubric of due process. *See generally Ferguson v. Skrupa,* 372 U.S. 726, 730, 83 S. Ct. 1028,

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[1] The intertwining of due process and the "reasonableness" standard pertaining to the validity of legislative rules is discussed in the treatise on administrative law that has been consistently cited by this Court in the relevant line of cases. *See* 1 KENNETH C. DAVIS, ADMIN. L. TREATISE §503 (1958) ("The requirement of reasonableness stems both from the idea of *constitutional due process* and from the idea of statutory interpretation that legislative bodies are assumed to intend to avoid the delegation of power to act unreasonably." (emphasis added)).

Notably, some jurisdictions have explicitly framed the last prong of the test for the validity of legislative rules in terms of compliance with constitutional requirements such as substantive due process. *See, e.g.*, *Weyerhaeuser Co. v. State Dep't of Ecology*, 545 P.2d 5, 8 (Wash. 1976) (quoting 1 F. COOPER, STATE ADMIN. L. 250 (1965)).

1031 (1963) (describing a return to "the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies" after the *Lochner* era).[2]

Upon review of the record, it is my considered judgment that Appellees failed to overcome the presumption of reasonableness and the "particularly high measure of deference" associated with validly promulgated legislative rules. *Nw. Youth Servs., Inc. v. DPW*, 620 Pa. 140, 157, 66 A.3d 301, 311 (2013) (citing, *inter alia*, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 844-45, 104 S. Ct. 2778, 2782-83 (1984)). Mostly, Appellee's challenge consisted of local taxicab business owners and managers testifying, anecdotally, that the regulations were burdensome to their companies. For example, while there was evidence of countervailing cost and inconvenience concerns, there was no empirical proof that the requirement of partitions in taxicabs does not improve safety and, is therefore, not rational.[3] By way of another example, concerning the age and mileage limitations embodied in the regulations,

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[2] There has been a resurgence, in the legal commentary, of the idea that economic freedom may require more exacting judicial scrutiny. *See, e.g.*, Randy E. Barnett, *Foreword: What's So Wicked About Lochner?*, 1 N.Y.U. J. L. & LIBERTY 325, 333 (2005). Nevertheless, the governing precedent in Pennsylvania allocating a constrained role to the judiciary relative to legislative rules remains the same, and there is no developed argument presented here that this case should be employed as a vehicle to revamp the law.

[3] The majority's allusion to the ineffectiveness of safety partitions appears to derive solely from conclusory testimony from a vice president of one of the cab company litigants. *See* N.T., Oct. 15, 2015, at 354-361. The validity of almost any regulation could regularly be called into question if courts are to accept evidence of this character as sufficient to overcome legislatively-sanctioned policymaking by regulators.

Notably, protective partitions were, for many years, mandatory in most New York City taxicabs, until 2016, when the New York City Taxi & Limousine Commission afforded the option of installing alternative safety features. *See* NYC TAXI & LIMOUSINE COMM'N RULES & LOCAL LAWS §58-35.

Appellants aptly observe both that the age factor is prescribed by statute in the first instance, *see* 53 Pa.C.S. §5714(a)(4), and it is a matter of common experience that 250,000 miles on an automobile can raise reliability concerns. *Accord Keystone Cab Serv., Inc. v. PUC,* 54 A.3d 126, 129 (Pa. Cmwlth. 2012).

In terms of economic impact, Appellants did not open their books to the court and demonstrate an economic oppressiveness of the regulations. Rather, the proofs were, again, of a more anecdotal nature. *See, e.g.*, N.T., Dec. 13, 2011, at 102-03 (reflecting the testimony of a family business owner that she has had to borrow money against her house in an attempt to comply with the PPA regulations).[4] Consistent with an allusion by the majority, *see* Majority Opinion, *slip op.* at 31 n.26, the discussion about medallion owners being able to collateralize that asset is not particularly informative, especially in light of the testimony suggesting that some medallion owners may have lost hundreds of thousands of dollars on their investments. *See* N.T., Oct. 15, 2015, at 375 (reflecting testimony from a witness for Appellees to the effect that medallions may previously have been worth as much as $525,000, but presently, a seller would be unlikely to receive more than $100,000).

To me, the majority's determination that the presumption of reasonableness has been overcome based on the evidence presented -- and its concomitant allocation of the burden to Appellees to supply a further rationale supporting uniform application of

[4] In various instances, Appellees did adduce evidence concerning the monetary expense associated with PPA regulations. In my judgment, however, they failed to sufficiently put those expenses into a broad enough context so as to demonstrate arbitrariness or oppressiveness. Notably, with similar broad strokes, PPA representatives testified that the regulations promote safe, clean, reliable, day-to-day transportation in the Philadelphia area. *See, e.g.*, N.T., Oct. 14, 2015, at 82, 104; N.T., Oct. 15, 2015, at 499, 519. Again, moreover, the presumption of validity militates in favor of Appellants, and they therefore could more comfortably rely on proofs of a less complete and concrete nature.

the regulations to all taxicabs performing point-to-point services in Philadelphia -- resembles an application of the "hard look doctrine" applied, under the federal Administrative Procedures Act, to some instances of *informal* agency rulemaking. *See, e.g.,* Patrick M. Garry, *Judicial Review and the "Hard Look" Doctrine*, 7 NEV. L.J. 151, 152 (2006) (noting that the Supreme Court of the United States "has solidified the 'hard look' doctrine, which required courts to take a more scrutinizing look at informal rulemaking than had been taken under earlier applications of the arbitrary and capricious test"); Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 255 (2014) ("In fact, under hard-look review, a regulated party can, in a way, sometimes obtain a diluted form of formal rulemaking by attacking an informal rule's 'impact studies, cost-benefit analyses, and risk assessments.'"). The present examples of rulemaking, however, are formal ones per Pennsylvania law at least, and this Court has not previously retreated from applying the presumption of reasonableness and a strong measure of deference to such legislative rules.[5]

In summary, I find the quantum and quality of evidence adduced here to be inadequate to overcome the presumption of validity accorded to duly-promulgated legislative rules. As I read the record, at most Appellees made a case that the PPA regulations are burdensome but not irrational. For these reasons, I respectfully disagree with the affirmance of the Commonwealth Court's decision on the latter issue.

[5] Even in the setting in which it applies, the hard look doctrine remains controversial. *See, e.g.*, CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., 33 FED. PRAC. & PROC. JUDICIAL REVIEW §8414 (2018) ("Hard look review of informal rulemaking . . . has prompted decades of debate regarding whether it intrudes too far into agency policymaking authority.").