

1967

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Recommended Citation

William D. Sutter Jr., *Solicitation by an Interstate Carrier—Is It Doing Business?*, 46 Neb. L. Rev. 122 (1967)

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SOLICITATION BY AN INTERSTATE CARRIER— IS IT DOING BUSINESS?

I. INTRODUCTION

Today, it is a generally well-recognized principle that if a foreign corporation is doing business within a state it is subject to the in personam jurisdiction of that state. The law has, however, had much difficulty in defining the term "doing business." In the case of *International Shoe v. State of Washington*,¹ the Supreme Court abandoned the doing business test in favor of a test of "minimum contacts" and "fair play and substantial justice." This new test has done little to solve the dilemma and consequently most states still adhere to the old "doing business" concepts.

Nowhere is the confusion greater than in the situation where the foreign corporation is an interstate carrier and its only activity within the state is the maintenance of a passenger and freight solicitation office. This is a problem of considerable magnitude in the law today as the major railroads maintain solicitation offices in almost all of the states in the country. These solicitation offices generally do not sell tickets but rather solicit business and forward the orders to the home office. The solicitation offices do not have the authority to bind the home office. In the factual situation which most often gives rise to this problem plaintiff *A* is riding on defendant *B*'s railroad in state *Z*. *A* is injured as a result of *B*'s negligence while in state *Z*. *A* is a resident of state *X*. *B* is incorporated in state *Y* and is also doing business in several other states. However, *B*'s only activity within state *X*, the plaintiff *A*'s residence, is the maintenance of a local office which solicits freight and passenger business. *A*, for various reasons, does not want to bring suit in state *Z* where the cause of action arose or in state *Y* where defendant *B* is incorporated. *A* can bring his suit in state *X* only if *B* is amenable to process there. The question of whether solicitation by an interstate carrier constitutes doing business in a state is of the utmost magnitude to *A*, for the success of his lawsuit in state *X* against *B* depends upon this question.

II. CONFLICT OF LAWS—STATE AND FEDERAL

A great deal of the confusion in this area has resulted from an inability of courts to determine what standards should be applied. A state may determine its own test of doing business so long as it

¹ 326 U.S. 310 (1945).

does not violate the due process clause of the fourteenth amendment or the commerce clause.² Likewise, if the suit is brought in a federal court based upon a federally-created right, a federal standard of doing business is applicable.³ The difficult question is what law should apply in a federal diversity of citizenship suit based upon a state-created right. Some courts have chosen to ignore state cases altogether and have applied a federal standard in a diversity suit.⁴ The preferable view in a diversity suit, in light of *Erie R.R. v. Tompkins*,⁵ is that the federal courts should apply the state standard in determining whether an interstate carrier is subject to suit in the state where the federal court sits.⁶ In a great majority of federal cases in this area a state standard of doing business should be applied. Largely because most of the cases are diversity actions, the majority and preferable view is that state law should determine whether the corporation is amenable to suit in the particular federal jurisdiction. It is only in the case of a federally-created right that a federal standard comes into play and such cases are few. It must be noted, however, that in a diversity suit, state law is only determinative on the issue of whether a corporation is amenable to suit within the state. Federal law then governs the issue as to whether the foreign corporation has been effectively served.⁷

III. SOLICITATION PLUS RULE

The question of whether solicitation by an interstate carrier is doing business remains unanswered in the law today. In 1907, the Supreme Court of the United States held in the case of *Green v. Chicago, B. & Q. Ry.*⁸ that solicitation by an interstate carrier within a jurisdiction did not constitute doing business. In this case the court was explicitly establishing a federal rule of what constituted doing business and not interpreting any constitutional

² *Ibid.*

³ *Singleton v. Atlantic Coast Line R.R.*, 20 F.R.D. 15 (D. Mich. 1956).

⁴ *K. Shapiro, Inc. v. New York Central R.R.*, 152 F. Supp. 722 (E.D. Mich. 1957); *Moore v. Atlantic Coast Line Ry.*, 98 F. Supp. 375 (E.D. Pa. 1951); *Leakley v. Canadian Pac. Exp.*, 82 F. Supp. 906 (D. Alaska 1949).

⁵ 304 U.S. 64 (1938).

⁶ *Lone Star Package Car Co. v. Baltimore & O. Ry.*, 212 F.2d 147 (5th Cir. 1954); *Kelley v. Delaware, L. & W. Ry.*, 170 F.2d 195 (1st Cir. 1948); *Kenny v. Alaska Airlines*, 132 F. Supp. 838 (S.D. Cal. 1955); *Perkins v. Louisville & N. R.R.*, 94 F. Supp. 946 (S.D. Cal. 1951).

⁷ *Perkins v. Louisville & N.R.R.*, 94 F. Supp. 946 (S.D. Cal. 1951); see *Hanna v. Plumer*, 380 U.S. 460 (1965).

⁸ 205 U.S. 530 (1907).

limitations of the fourteenth amendment due process clause or the commerce clause. It must also be noted that this was a diversity of citizenship case decided prior to *Erie R.R. v. Tompkins*,⁹ and now arguably is not binding in federal cases founded upon diversity of citizenship. The *Green* rule was nonetheless interpreted by many states' courts as expressing a constitutional limitation upon them and the mere solicitation rule became the law in almost all jurisdictions.¹⁰

From this early ruling the "solicitation plus" doctrine gradually evolved in both state and federal jurisdictions. Under this doctrine, if the interstate carrier carried on any activities in addition to its solicitation activities it was held to be doing business within the state.¹¹ In *Frene v. Louisville Cement*,¹² the court held that very little more than mere solicitation is needed to constitute doing business. In *Frene*, solicitation by the defendant's agent plus the fact that the agent sometimes checked the jobs in which the defendant's product was being used to see if the product was being applied properly was held to be doing business even though the defendant did not require its agent to do so. Although this case was not an interstate commerce case, it has been cited in interstate commerce cases for the proposition that very little more than mere solicitation is needed to fall within the solicitation plus doctrine. This view was also followed in *Waddell v. Green Textile Associates*,¹³ where the court looked to the totality of the circumstances in determining whether the Southern Railway Company was doing business in Massachusetts. In this case the passenger agent issued "street orders," the freight agent occasionally issued exchange bills of lading, the office was listed in the phone directory and the railroad maintained a bank account in Massachusetts. These activities

⁹ 304 U.S. 64 (1938).

¹⁰ *Philadelphia & Reading Ry. v. McKibbin*, 243 U.S. 264 (1917); *Kelley v. Delaware, L. & W. Ry.*, 170 F.2d 195 (1st Cir. 1948); *Maxfield v. Canadian Pac. Ry.*, 70 F.2d 982 (8th Cir. 1934); *Fannin v. Chesapeake & Ohio Ry.*, 204 F. Supp. 154 (W.D. Pa. 1962); *Noerr Motor Freight v. Eastern R.R. Presidents Conference*, 113 F. Supp. 737 (E.D. Pa. 1953); *Watterson v. New York Central*, 111 F. Supp. 448 (D. Minn. 1953); *Goldstein v. Chicago, R.I. & P.R.R.*, 93 F. Supp. 671 (W.D. N.Y. 1950); *Doyle v. Southern Pac. Ry.*, 87 F. Supp. 974 (E.D. Mo. 1949); *Zuber v. Pennsylvania R.R.*, 82 F. Supp. 670 (N.D. Ga. 1949); *Hershel Radio Co. v. Pennsylvania R.R.*, 334 Mich. 148, 54 N.W.2d 286 (1952); *Lambert v. Schell*, 235 N.C. 21, 69 S.E.2d 11 (1952); *Glaser v. Pennsylvania R.R.*, 82 N.J. Super. 16, 196 A.2d 539 (Super. Ct. 1963); *Hayman v. Southern Pac. Ry.*, 278 S.W.2d 749 (Mo. 1955).

¹¹ *Greenwalt v. Reading Co.*, 209 F. Supp. 954 (E.D. Pa. 1962).

¹² 134 F.2d 511 (D.C. Cir. 1943).

¹³ 92 F. Supp. 738 (D. Mass. 1950).

were held sufficient to meet the solicitation plus test. The investigation of complaints by a freight solicitation office was held to be a sufficient additional activity to satisfy the solicitation plus doctrine.¹⁴ Where the local solicitation office had the authority to bind the interstate carrier, the requirements of the test were met.¹⁵ The adjustment of claims has also qualified as an additional activity.¹⁶ In *Atlantic Coast Ry. v. Goldberg*,¹⁷ the court adhered to the solicitation plus rule but also noted that very little more than mere solicitation is needed to constitute doing business. The court held that the maintenance of an employment office was enough to satisfy the rule.

IV. MERE SOLICITATION RULE

While the solicitation plus doctrine is still the rule in a majority of the states today, several jurisdictions have held that mere solicitation constitutes doing business. The leading state court decision is *Lau v. Chicago & Northwestern Ry.*¹⁸ In this case the plaintiff was a resident of Wisconsin suing the defendant railroad in Wisconsin on a cause of action which arose in Nebraska. The defendant had a solicitation office in Milwaukee, but did not transact any other business in the state. The Wisconsin Supreme Court held that the defendant was doing business in Wisconsin even though it did nothing more than solicit business there and even though the plaintiff's cause of action did not arise out of the defendant's activities in Wisconsin. The court said that the due process clause of the fourteenth amendment does not prohibit the state court from exercising jurisdiction although the defendant's activities were in no way related to the plaintiff's cause of action. The Wisconsin court regarded *Internatonal Shoe v. State of Washington* as controlling. The court stated: ". . . due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"¹⁹

The *Lau* decision was followed in *Hornstein v. Atchinson T. &*

¹⁴ *Moore v. Atlantic Coast Line Ry.*, 98 F. Supp. 375 (E.D. Pa. 1951).

¹⁵ *Kirkland v. Atchison, T. & S.F. Ry.*, 104 Ga. App. 200, 121 S.E.2d 411 (1961).

¹⁶ *Canadian Pac. Ry. v. Sullivan*, 126 F.2d 433 (1st Cir. 1942).

¹⁷ 39 A. 2d 563 (Munic. Ct. App. D. C. 1944).

¹⁸ 14 Wis. 2d 329, 111 N.W.2d 158 (1961).

¹⁹ *Id.* at 334, 111 N.W.2d at 162.

*S. F. R.R.*²⁰ which was a diversity of citizenship case in the Federal District Court for the Western District of Wisconsin. In the *Hornstein* case the plaintiff's cause of action arose in Kansas. The court held that it was obligated to follow the Wisconsin rule of doing business "especially where . . . it is continuous."²¹ The court based its holding upon the policy of the Wisconsin statute—the right of the citizens of Wisconsin to use the courts of the state in suing any foreign corporation actually doing business in the state subject only to limitations imposed upon the state by the federal constitution.

Another decision which has refused to follow the *Green* rule is *Scholnik v. National Airlines*.²² In this case the plaintiff was injured in a flight over Florida. The defendant was a Florida corporation which had no flights or offices in Ohio but did have a leasing agreement with Capitol Airlines, a Delaware corporation, whereby Capitol flew some of the defendant's planes into Ohio. The defendant's crews operated the planes in flight to Ohio. The plaintiff brought suit in Ohio, and the Sixth Circuit Court of Appeals held that it had jurisdiction over the defendant. In so holding the court stated: "The effect of *International Shoe v. State of Washington*, supra, has been referred to by numerous district court cases, the following of which represent the strongly prevailing view that the earlier rulings of the Supreme Court in the *Green* and *McKibbin* cases are no longer a correct statement of the law."²³ It is not clear from the opinion whether the court was applying a state or federal rule. However, the result of this decision is even more far-reaching than the Wisconsin rule. Since, in *Scholnik*, jurisdiction was based upon the defendant's leasing arrangement with Capitol Airlines, any time an interstate carrier's rolling stock entered a foreign jurisdiction the carrier could be subjected to personal jurisdiction. In light of the vast leasing agreements of rolling stock among railroads, the *Scholnik* rule would seem to place an undue burden upon interstate commerce.

Scholnik relied heavily upon *Lasky v. Norfolk & W. Ry.*,²⁴ which was a case decided upon the defendant's solicitation activities within the Northern District of the United States District Court of Ohio. The court, in holding that the defendant was doing business within the northern district of Ohio, followed the language

²⁰ 229 F. Supp. 1009 (W.D. Wis. 1964).

²¹ *Id.* at 1010.

²² 219 F.2d 115 (6th Cir. 1955).

²³ *Id.* at 119.

²⁴ 157 F.2d 674 (6th Cir. 1946).

and reasoning of the *International Shoe* case: "minimum contacts" and "reasonableness to defend" were determinative of jurisdiction. The case does not say whether the court was applying a state or federal standard. While it talks of minimal contacts with the state of the forum, it also refers to the "federal system of government." As will be discussed later, *International Shoe* is a constitutional limitation upon the states by the due process clause of the fourteenth amendment and thus not binding upon a federal court unless it was applying a state standard. However, even if the court was applying a federal standard, it could still look by analogy at the interpretation of the due process clause of the fourteenth amendment.

Perkins v. Louisville & N.R.R.,²⁵ was a federal diversity suit which involved an interpretation of the California doing business concept. In holding that mere solicitation did constitute doing business the court stated: ". . . mere solicitation, without more, constitutes doing business within a state when the solicitation is a regular, continuous and substantial course of business."²⁶ The *Perkins* court felt that solicitation was such an integral part of the railroad business that to say it did not constitute doing business would be ignoring reality.

V. CONSTITUTIONAL LIMITATIONS ON STATE LAW

A. DUE PROCESS LIMITATIONS

Since the state standards are only limited by the federal constitution the relevant question is to what extent does the federal constitution limit the state. The most important limitation is the due process clause of the fourteenth amendment. As mentioned previously, the leading interstate carrier solicitation case is the *Green* case, which is not a due process case. Some courts have taken *Green* at face value and determined that it is the law which governs the states.²⁷ This is not correct. State courts may choose to adopt *Green* as their standard, but they are not bound by *Green* because *Green*, as mentioned previously, did not involve a determination of any constitutional limitation imposed upon the states but rather introduced a federal rule with respect to doing business.

Even if *Green* did formerly apply to the states, there is a good argument that a new rule was established in *International Shoe v. State of Washington*.²⁸ While *International Shoe* did not involve

²⁵ 94 F. Supp. 946 (S.D. Cal. 1951).

²⁶ *Id.* at 951.

²⁷ See note 4 *supra*.

²⁸ 326 U.S. 310 (1945). *International Shoe* has been distinguished in some

an interstate carrier, it was based upon solicitation by shoe salesmen. The Court recognized that the facts of the case might allow a finding that the defendant corporation fell within the solicitation plus rule. However, the Court decided to base its decision upon a new constitutional test—"minimum contacts" and "fair play and substantial justice." The Court also noted that while the defendant's activities might properly fall within the solicitation plus rule, regular solicitation within the state should be sufficient to constitute a "minimum contact."²⁹ There is, then, a strong inference in *International Shoe* that regular and extensive solicitation activity would satisfy the demands of the due process test therein defined. The *International Shoe* case did not explicitly overrule *Green*, but the test that *International Shoe* prescribes is inconsistent with the *Green* holding. *Green* offered a qualitative test—a hard and fast line. Solicitation was not doing business—no matter how much or how little solicitation was carried on. *International Shoe* suggests an added quantitative test which is much more flexible. If an insurance company which sends one insurance contract into California is said to have established "minimum contacts" which do not offend "traditional notions of justice,"³⁰ it can hardly be said that an interstate carrier who has a regular solicitation office employing several people has not established minimum contacts within the state.³¹

If the constitutional limitations of *International Shoe* are to be applied to this area it must be remembered that the state may extend its jurisdiction to these limits but it does not necessarily have to go as far as *International Shoe* allows.³² It is up to each individual state to decide how far it wishes to extend its jurisdiction.

B. INTERSTATE COMMERCE LIMITATIONS

The second limitation imposed upon the states' in personam

jurisdictions upon the basis that the state was suing the defendant for taxes due. *Murray v. Great Northern Ry.*, 67 F. Supp. 944 (E.D. Pa. 1946). The state nonetheless had to obtain in personam jurisdiction over the corporation before the state could enforce its tax. Thus the fact that *International Shoe* involved a state tax does not seem to be a valid distinction.

²⁹ *International Shoe Co. v. State of Washington*, 326 U.S. 310, 320 (1945).

³⁰ *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

³¹ *Atchison, T. & S. F. Ry. v. Ortiz*, 50 Tenn. App. 317, 361 S.W.2d 113 (1962). But *Hanson v. Denkla*, 357 U.S. 235 (1958), seems to suggest that while the quantity of contacts is no longer determinative, the quality of the contacts is.

³² *Doyle v. Southern Pac. Ry.*, 87 F. Supp. 974 (E.D. Mo. 1949).

jurisdiction by the federal constitution is the commerce clause.³³ The issue was first presented in *Davis v. Farmer's Co-op Equity Co.*³⁴ In that case, a Kansas plaintiff sued a Kansas railroad in Minnesota. The railroad maintained a solicitation office in Minnesota and a Minnesota statute authorized service upon the agent. The court held that the statute violated the commerce clause of the constitution but noted that the result might have been different had the cause of action arisen out of the defendant's activities in Minnesota or had the plaintiff been a resident of Minnesota.

As a result of the language in *Davis*, some courts have placed a high degree of significance upon the residence of the plaintiff. In *Western Smelting Co. v. Pennsylvania R.R.*,³⁵ the court held that while the residence of the plaintiff was not controlling, it was of high significance in determining whether there was an undue burden upon interstate commerce. In this case the plaintiff was a resident of the State of Nebraska and there was no undue burden upon interstate commerce. In at least one jurisdiction,³⁶ it has been held that if a defendant is doing business within a district so as to be amenable to process and if the plaintiff is a resident of that district, there is no undue burden upon interstate commerce as a matter of law. However, in *Zuber v. Pennsylvania R.R.*,³⁷ the fact that the plaintiff was a resident of the state in which he brought suit was only one of the factors considered and it was held that there was an undue burden upon interstate commerce.

This limitation of the Constitution is not as important today as it once was, because the vast expansion of interstate commerce has made subjection to interstate jurisdiction far harder to characterize as burdensome. The latest test of the Supreme Court is not whether there is a burden on interstate commerce but whether the burden is oppressive.³⁸ The test prescribed is a very hard one to apply because of the difficulty in differentiating between a burden and an oppressive burden. Because of the inherent difficulties in the application of such a test and the vast nature of interstate commerce, most courts have chosen to avoid the pitfalls of a commerce clause test by not using the commerce clause as a measuring stick with respect to state limitations upon doing business.

³³ U.S. CONST. art. I, § 8.

³⁴ 262 U.S. 312 (1923).

³⁵ 81 F. Supp. 494 (D. Neb. 1948).

³⁶ *Moore v. Atlantic Coast Line Ry.*, 98 F. Supp. 375 (E.D. Pa. 1951).

³⁷ 82 F. Supp. 670 (N.D. Ga. 1949).

³⁸ *International Milling Co. v. Columbia Transp. Co.*, 292 U.S. 511 (1933).

VI. FORUM NON CONVENIENS

Probably the more important limitation upon the state in this area is the doctrine of forum non conveniens. Under this doctrine, a court may refuse to exercise jurisdiction over a transitory cause of action, even though the defendant is amenable to process, if it appears that the case could be more justly tried in another jurisdiction. The Supreme Court of the United States, in the case of *Gulf Oil Corp. v. Gilbert*,³⁹ specified several factors to be taken into consideration in determining whether or not a court should invoke the doctrine. These are: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process for the attendance of unwilling witnesses; (3) the cost of obtaining willing witnesses; (4) the possibility of view of the premises, if view would be appropriate to the action; (5) all practical problems that make the trial of a case easy, expeditious, and inexpensive; (6) the enforceability of a judgment if one is obtained; (7) the relative advantages and obstacles to a fair trial; (8) administrative difficulties; (9) the imposition of burden of jury duty on the community; (10) the local interest of having local matters decided at home; (11) the appropriateness of having the trial of a diversity case in a forum which is familiar with the state law that must govern. All these factors are to be weighed together. By utilizing the doctrine of forum non conveniens, problems of commerce clause interpretation can be avoided by looking at the entire situation and deciding whether it would be fair to subject a defendant to a particular jurisdiction.

A similar type of doctrine has developed in the federal court system. This is known as the doctrine of transferability.⁴⁰ Under this doctrine a federal court has a much broader discretion than has a state court in applying the doctrine of forum non conveniens. If a state court decides to invoke the doctrine of forum non conveniens, a dismissal of the proceeding results. This is not true of a transfer under federal law and consequently a lesser showing of inconvenience is needed in the federal courts.

VII. CAUSE OF ACTION LIMITATIONS

Some states have chosen to limit their jurisdiction by requiring that a defendant doing business in a state can only be sued in

³⁹ 330 U.S. 501 (1947).

⁴⁰ 28 U.S.C. § 1404(a) (1962), which provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

that state if the plaintiff's cause of action arose from the defendant's activities within the state.⁴¹ This is often accomplished by the passage of long arm statutes, among the most notable of which is the Illinois statute.⁴² However, it has been a traditional notion in jurisdiction that a plaintiff may sue a defendant on a transitory cause of action any place from which the defendant can be effectively served with process. Consequently, a great number of states have not required that the cause of action arise from the defendant's activities within the state.⁴³

The question of whether the plaintiff's cause of action should arise from the defendant's activity within the state is closely related to the interstate commerce limitation discussed previously. As a result of this close connection many courts have held that the plaintiff must be a resident of the state or district where he institutes his action.⁴⁴ In at least one federal district court case even the non-residence of the plaintiff was held to be of no consequence.⁴⁵ It must be noted that the defendant could have asked to have the case transferred under the transferability rule.

If a state does require that the plaintiff's cause of action arise out of the defendant's activities within the state, it makes almost certain the meeting of requirements under any doing business standard. In the case of an interstate carrier, particularly with respect to personal injury claims, the plaintiff can almost always sue the defendant where the cause of action accrued. Today, as more people are travelling great distances many courts have recognized the need to give the plaintiff an adequate remedy for any injury he receives. Suppose a man who is a resident of Nebraska is injured while on a train in Ohio, resulting in a claim for 500 dollars. It is doubtful that he would be very anxious to travel to Ohio to

⁴¹ *Jennings v. McCall Corp.*, 320 F.2d 64 (8th Cir. 1963); *Goldstein v. Chicago, R.I. & P.R.R.*, 93 F. Supp. 671 (W.D. N.Y. 1950); *Zuber v. Pennsylvania R.R.*, 82 F. Supp. 670 (N.D. Ga. 1949); *White v. Southern Pac. Ry.*, 386 S.W.2d 6 (Mo. 1962).

⁴² ILL. REV. STAT. ch. 110, § 17 (1961).

⁴³ *Scholnik v. National Airlines*, 219 F.2d 115 (6th Cir. 1955); *Lone Star Package Car Co. v. Baltimore & O. Ry.*, 212 F.2d 147 (5th Cir. 1954); *Lasky v. Norfolk & W. Ry.*, 157 F.2d 674 (6th Cir. 1946); *Hornstein v. Atchison, T. & S.F.R.R.*, 229 F. Supp. 1009 (W.D. Wis. 1964); *Perkins v. Louisville & N.R.R.*, 94 F. Supp. 946 (S.D. Cal. 1951); *Western Smelting Co. v. Pennsylvania R.R.*, 81 F. Supp. 494 (D. Neb. 1948); *Berry v. Pennsylvania R.R.*, 80 N.J. Super. 321, 193 A.2d 569 (Super. Ct. 1963); *Lau v. Chicago & Northwestern R.R.*, 14 Wis. 2d 329, 111 N.W.2d 158 (1961).

⁴⁴ See note 43 *supra*.

⁴⁵ *Wadell v. Green Textile Associates*, 92 F. Supp. 738 (D. Mass. 1950).

sue the railroad. On the other hand, unless several witnesses have to be brought to Nebraska, it would probably be much less burdensome for the railroad to defend in Nebraska. It is submitted that a problem such as this involves a factual determination and could more properly be handled under a doctrine of forum non conveniens or transferability. In this manner each individual court could examine the particular equities of the parties in order to decide where the lawsuit should be entertained.

VIII. NEBRASKA LAW

As discussed previously, a state may set up any standard for doing business so long as it meets federal constitutional requirements. Nebraska has long recognized a doing business concept of corporate jurisdiction. The applicable statute is NEB. REV. STAT. § 21-20,114 (Supp. 1965), which provided that if a corporation does not appoint a registered agent within the state in compliance with § 21-20,112, then the Secretary of State shall be deemed the registered agent of the corporation and the corporation can be served by leaving a copy of the summons with the Secretary of State. In *Wilken v. Moorman Mfg. Co.*,⁴⁶ the court held that a foreign corporation which is actually doing business in Nebraska may have a valid service of process made against it upon the Secretary of State, even though it has not expressly consented to such jurisdiction.

Since Nebraska, in determining its jurisdiction, is subject to the constitutional limitations imposed upon the states by *International Shoe*, the question is whether Nebraska has gone as far as *International Shoe* allows or has stopped somewhere short of *International Shoe*. The Nebraska Supreme Court has never decided a doing business case involving solicitation by an interstate carrier. However, in a case involving a sale of a copying machine by a foreign corporation to a Nebraska plaintiff, the court took judicial notice of the *International Shoe* doctrine as establishing a due process limitation, but held that the corporation was not doing business.⁴⁷ The corporation's only activity was filling a mail order which was sent by the Nebraska plaintiff.

The Nebraska court held in *Brown v. Globe Laboratories*⁴⁸ that the solicitation of orders by a foreign corporation and the holding of dealer schools by the foreign corporation was sufficient

⁴⁶ 121 Neb. 1, 235 N.W. 671 (1931).

⁴⁷ *Dale Electronics, Inc. v. Copymotion, Inc.*, 178 Neb. 239, 132 N.W.2d 788 (1965).

⁴⁸ 165 Neb. 138, 84 N.W.2d 151 (1957).

to authorize service upon it. From the *Brown* case, it can be argued that solicitation is doing business in Nebraska and Nebraska is extending its jurisdiction as far as *International Shoe* allows. Whether this rule would be applied to an interstate carrier is an open question. If *International Shoe* has supplanted the *Green* case, then there is no reason why the same test with respect to solicitation as doing business should not apply to interstate carriers as well as other types of business.

IX. CONCLUSION

There is a basic need in this area for some degree of certainty and uniformity. From the standpoint of an interstate carrier it would be desirable to know to what extent a state can subject the carrier to the state's jurisdiction so the carrier can judge its conduct accordingly. Interstate carriers have placed much reliance upon *Green*, but there is now serious doubt as to whether this case is good law even in jurisdictions which have previously cited it as a correct statement of the law.⁴⁹

The policies in this area are rather evenly divided. It seems quite unfair to subject an interstate carrier to the jurisdiction of a far-off state when the carrier does very little, if anything, within the state. This is why a hard and fast rule like the one established in *Green* is not the solution to the problem. To say that solicitation is doing business or that solicitation is not doing business is quite an arbitrary dividing line. Solicitation activities can vary from a one-man office which is responsible for the solicitation of a few passenger tickets per year to a twenty-man office which solicits thousands of dollars worth of freight business per year.

The plaintiff also has some very valid interests in being able to choose his forum. Today, as more potential plaintiffs are travelling across the country, it has become desirable to provide them with a forum where they can litigate their claims at the least expense and effort, without violating "fair play" and "substantial justice" by requiring the defendant to defend in a remote jurisdiction where jury verdicts are known to be high. Thus, it would be desirable, if not absolutely necessary in order to meet the fairness test of *International Shoe*, to limit the plaintiff's choice of forum to either where the cause of action arose or where the plaintiff maintains his residence, providing that the defendant maintains "minimum contacts" with the forum that the plaintiff chooses.

⁴⁹ *International Harvester Co. of America v. Kentucky*, 234 U.S. 579 (1914).

As stated previously, the rule established in *Green* is extremely arbitrary in view of the vast solicitation activities in which interstate carriers are now engaged. The best solution to the problem is to make it clear that the *International Shoe* test of "minimum contacts" and "traditional notions of fair play and substantial justice" is controlling in the area of interstate carriers as well as in other areas of doing business. This would take a decision by the Supreme Court of the United States. A decision of this nature explicitly adopting the *International Shoe* test would allow the states to extend the doctrine of doing business as far as they wish in interstate carrier cases so long as the *International Shoe* test is not violated. The rule of *International Shoe* is flexible enough to allow a state court to look at any given case and determine the best jurisdiction where the suit should be filed. In this manner, the equities of both parties could be examined and much fairer decisions would result. This rule would also allow a court to determine whether a particular defendant's contact with the forum is sufficient to allow the court to take jurisdiction. Some of the solicitation activities of the major interstate carriers are very extensive and indeed an integral part of the business process. In these situations where the carrier is receiving large amounts of business from a jurisdiction it seems unrealistic and unjust to say that the carrier is not doing business in the jurisdiction.

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