Michigan Law Review

Volume 37 | Issue 4

1939

CARRIERS - DISCRIMINATION -ALLOWANCE IN LIEU OF SPOTTING SERVICE BY RAILROADS -VALIDITY OF CEASE AND DESIST ORDER

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CARRIERS — DISCRIMINATION — ALLOWANCE IN LIEU OF SPOTTING SERVICE BY RAILROADS — VALIDITY OF CEASE AND DESIST ORDER — Nine industrial corporations sought to set aside an order of the Interstate Commerce Commission commanding the railroad or railroads serving industrial plants of the plaintiffs to cease and desist from the payment of allowance for the spotting of cars and switching services performed by plaintiffs on plant facilities. They contended the commission exceeded its powers in making the order and that its findings were not supported by substantial evidence. *Held*, that there was substantial evidence to support the findings and that the order was valid and should be sustained. *United States v. Pan American Petroleum Corp.*, 304 U. S. 156, 58 S. Ct. 771 (1938).

Under the Interstate Commerce Act the commission has the power and duty to order carriers to cease and desist from any violation of the act.[1] The performance of, or the making of allowances out of the line-haul rate for, services which the carriers are not bound to perform constitutes discrimination

[1] Under the Interstate Commerce Act, 24 Stat. L. 384 (1887), 49 U. S. C. (1934), § 15 (1), the commission is authorized and required, if after hearing it be of the opinion that any regulation or practice of a carrier be unjust or unreasonable or unjustly discriminatory "or otherwise in violation of any of the provisions of the act," to determine what is or will be just, fair, and reasonable to be thereafter followed and to make an order that the carrier cease and desist from violation to the extent it finds violation does or will exist.

which is a violation of the act.[2] Therefore, if spotting and switching cars on plant facilities is not part of the service of transportation for which the line-haul rates were set, the performance of, or the making of allowances to an industry that performs, this additional service is a discriminatory practice which the commission has the power and duty to enjoin.[3] The difficult problem is in determining whether this service is a part of the transportation services of common carriers. There is no exact formula to decide this and the only test seems to be whether it is reasonable and customary.[4] In previous cases dealing with the subject, car-spotting was held to be a duty of the carriers by virtue of long-continued practice and custom and therefore a charge for this service was properly included in the line-haul rates.[5] Carriers have even been compelled to spot cars on the reasoning that to refuse amounted to discrimination.[6] There was a duty to perform this service under the line-haul rate unless the carrier was unable to operate conveniently over the plant facilities,[7] or where the service involved greater expense than team track delivery,[8] or where the industry refused to allow the carrier to perform it.[9] However, in these earlier cases the commission was more anxious to prevent discriminations than to determine whether car-spotting on plant facilities was justified in any case.[10] The acute

[2] Merchants' Warehouse Co. v. United States, 283 U. S. 501, 51 S. Ct. 505 (1930); United States v. American Sheet & Tin Plate Co., 301 U. S. 402, 57 S. Ct. 804 (1936). Allowances for such additional services would be a violation of 49 U. S. C. (1934), § 6.

[3] 49 U. S. C. (1934), § 15 (1), § 12 (1).

[4] Mitchell Coal & Coke Co. v. Pennsylvania Ry., 230 U. S. 247, 33 S. Ct. 916 (1912).

[5] Chesapeake & O. Ry. v. Westinghouse Church, Kerr & Co., 270 U. S. 260, 46 S. Ct. 220 (1925); Mitchell Coal & Coke Co. v. Pennsylvania Ry., 230 U. S. 247, 33 S. Ct. 916 (1912); and the Car Spotting Charges case, 34 I. C. C. 609 at 617 (1915), where the commission denied a proposed charge for car spotting on industrial plant on the basis that it had long been the custom to perform such services: "existing rates . . . cover the customary placement of cars at factory doors . . . to now add a charge to the line-haul rate for that service would be revolutionary."

[6] Missouri Pac. Ry. v. Larabee Flour Mills Co., 211 U. S. 612, 29 S. Ct. 214 (1908).

[7] General Electric Co. v. New York Central & Hudson River R. R., 14 I. C. C. 237 (1908), held that where plant facilities are so constructed that delivery at its plant is impracticable, the duty of the carrier is fulfilled by delivery at convenient interchange tracks. See also Brimstone R. R. & Canal Co., 189 I. C. C. 437 (1933); Crane Iron Works v. Central R. R., 17 I. C. C. 514 (1910), 209 F. 238 (1912) (commerce court); 46 YALE L. J. 299 (1936).

[8] 46 Yale L. J. 299 (1936) and cases cited in note 27 therein.

[9] If the carrier is ready and willing to perform spotting services, but is not permitted to do so by the shipper, the carrier's duty to perform the service under the line haul rate is discharged and there is no obligation to make an allowance to the industry for performing the service. Allowance to Texas Gulf Sulphur Co., 96 I. C. C. 371 (1925); Marting Iron & Steel Co. Case, 48 I. C. C. 620 (1918); Stewart Furnace Co. v. Pennsylvania R. R., 68 I. C. C. 528 (1922); Mitchell Coal & Coke Co. v. Pennsylvania Ry., 230 U. S. 247, 33 S. Ct. 916 (1912).

[10] 46 Yale L. J. 299, note 34 (1936).

need of revenue by the carriers since the depression is probably the basis for the commission's turning to this phase of the question. Investigation [11] revealed that carriers in New England, the Southeast, and the extreme Southwest never spotted cars or made allowance to shippers who did it. And where carriers did spot cars or make allowances there was no uniform rule.[12] It was also disclosed that such services involved greater expense than team tracking [13] or running cars onto an ordinary industrial spur. On these facts the commission found that car-spotting on plant facilities was not included in the transportation services for which line-haul rates were set.[14] Such a finding did not exceed the commission's powers. It clearly has the power to determine what is included in the service of transportation.[15] Nor was it precluded from so finding by any prior contra decisions, for the commission is not bound by res adjudicata or stare decisis.[16] Being a question of fact, the conclusion of the commission, if based on evidence, is not subject to review.[17] That this decision is desirable and sound seems only too apparent. Under the previous situation carriers were under constant pressure to grant larger allowances in order to secure the traffic of the big industries.[18] This was bound to result in preferences and discriminations and tended to raise rate levels as to other shippers (including competitors) in the carriers' efforts to recoup these allowances. The commission's finding and sub-

[11] Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, 209 I. C. C. 11 (1935).

[12] In some cases, the carriers spotted cars if it could be done in one movement while other carriers spotted cars or made allowances if the amount of traffic warranted. There was no evidence of any customary practice.

[13] This is a service extended to all shippers. It consists of placing the cars on sidings where it is convenient for shippers to load and unload.

[14] Ex parte No. 104, 209 I. C. C. 11 at 45 (1935). The reports and orders affecting the specific plants are: Mexican Petroleum Corp. of Louisiana, Inc., 209 I. C. C. 394 (1935); Celotex Co., 209 I. C. C. 764 (1935); Great Southern Lumber Co., 209 I. C. C. 793 (1935); Standard Oil Co. of Louisiana, 209 I. C. C. 68 (1935); Humble Oil & Refining Co., 209 I. C. C. 727 (1935); Magnolia Petroleum Co., 209 I. C. C. 93 (1935); Texas Co., 209 I. C. C. 767 (1935); Gulf Refining Co., 209 I. C. C. 756 (1935); Texas Co., 213 I. C. C. 583 (1936).

[15] Los Angeles Switching Case, 234 U. S. 294, 34 S. Ct. 814 (1913); Merchants' Warehouse Co. v. United States, 283 U. S. 501, 51 S. Ct. 505 (1930). In all cases where the commission held that transportation did or did not include car spotting it necessarily exercised the power to define the limits of transportation.

[16] 34 MICH. L. REV. 672 (1936); Bevis, "Procedure in the Interstate Commerce Commission," 1 UNIV. CIN. L. REV. 241 (1927); Cattle Raisers Assn. v. Chicago, B. & Q. R. R., 12 I. C. C. 507 (1907); and Federal Sugar Refining Co. v. Central R. R. of New Jersey, 35 I. C. C. 488 (1915).

[17] Los Angeles Switching Case, 234 U. S. 294, 34 S. Ct. 814 (1913); United States v. American Sheet & Tin Plate Co., 301 U. S. 402, 57 S. Ct. 804 (1936). See also Merchants Warehouse Co. v. United States, 283 U. S. 501, 51 S. Ct. 505 (1930), and cases cited in the opinion. In the last case it is stated, 283 U. S. at 508: "The credibility of witnesses and weight of evidence are for the Commission and not for the courts, and its findings will not be reviewed here if supported by evidence."

[18] 46 YALE L. J. 299 (1936).

sequent orders which are upheld in the principal case [19] corrects this condition, provides a uniform rule of practice, and restores to carriers much needed revenue.

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[19] Similar cease and desist orders were sustained by the United States Supreme Court in United States v. American Sheet & Tin Plate Co., 301 U. S. 402, 57 S. Ct. 804 (1936).