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Administrative Law - Procedure - Primary Jurisdiction to Determine Illegality of Contract Under Shipping Act

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RECENT DECISIONS

ADMINISTRATIVE LAW—PROCEDURE—PRIMARY JURISDICTION TO DETERMINE ILLEGALITY OF CONTRACT UNDER SHIPPING ACT—Plaintiff, an independent shipper, sought review of a Federal Maritime Board order approving under section 15 of the Shipping Act¹ an association's dual-rate contract system² found to be "a necessary competitive measure to offset the effect of non-conference competition." The court of appeals set aside the Board's order³ on grounds that the system was prohibited by section 14 Third of the same act.⁴ On certiorari to the United States Supreme Court, *held*, affirmed, three justices dissenting. A dual-rate contract system found by the FMB to be designed to meet outside competition is a "resort to other discriminatory or unfair methods" to stifle such competition in violation of section 14 Third, and is therefore illegal per se. *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958).

At once striking about the decision in the principal case is that while the Court accepts the finding of the FMB that the system was designed to meet outside competition, it rejects summarily its conclusion that the system was "a necessary competitive measure to offset the effect of non-conference competition." The Court substitutes its judgment for that of the FMB, laying down the broad principle that a dual-rate contract system designed to meet outside competition necessarily stifles that competition and therefore falls within the prohibition of section 14 Third. With the growing importance of administrative tribunals, a constantly recurring problem in American law has been the determination of relative jurisdiction of court and agency. The doctrine of primary jurisdiction has played the important role in this area of allocating the functions of interpretation and application of regulatory statutes between the respective bodies.⁵ This doctrine has very often been explained in terms of the distinction between

¹ Section 15 provides that the Board may ". . . disapprove, cancel, or modify any agreement . . . that it finds to be unjustly discriminatory or unfair as between carriers . . . , or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements. . . ." 39 Stat. 734 (1916), 46 U.S.C. (1952) §814.

² The system was proposed by the Japan-Atlantic and Gulf Conference. In general, dual-rate contract systems provide one rate for services to shippers who agree to give their exclusive patronage to the members of the conference, and a higher rate for identical services to other shippers. The differential is usually fixed, and there is normally a provision for liquidated damages for failure to give the exclusive patronage contracted for. See MARX, INTERNATIONAL SHIPPING CARTELS 207-210 (1953).

³ *Isbrandtsen Co. v. United States*, (D.C. Cir. 1956) 239 F. (2d) 933.

⁴ Section 14 provides: "That no common carrier by water shall. . . Third. Retaliate against any shipper by refusing . . . space accommodations . . . , or resort to other discriminatory or unfair methods. . . ." 39 Stat. 733 (1916), 46 U.S.C. (1952) §812.

⁵ See *United States v. Morgan*, 307 U.S. 183 at 191. (1939):

questions of law and questions of fact,⁶ but the value of such a distinction is doubtful.⁷ What the courts have regarded as within the initial jurisdiction of the administrative agency has depended largely on factors of policy,⁸ including the need for a resort to administrative expertise in resolving any issues not within the conventional experience of judges, and the desirability of employing administrative discretion to settle issues which by their nature require a particular application of regulatory statutes.⁹ The principal case would appear, upon first impression, to be a backward step in the development of this doctrine of primary jurisdiction. In two earlier cases,¹⁰ the Supreme Court refused to pass on the legality under section 14 Third of nearly identical contract systems,¹¹ holding that prior resort to the FMB was necessary. The principal case now holds that whereas the Board has primary jurisdiction to determine the intent and effect of the contract system in the narrow sense of whether it was aimed at non-conference competition, the Court may determine whether the system thus characterized falls within the statutory condemnation. This would appear to be contrary not only to a great number of decisions standing for the proposition that the agency has primary jurisdiction to determine whether a particular rate, practice or agreement is "discriminatory" within the meaning of the regulatory statute,¹² but also to an equal number of decisions which accord to agency determinations of this type a solid degree of conclusiveness.¹³ It would seem, initially, to be precisely this type of determination which courts have traditionally refused to make in the first instance because of a need for a resort to administrative expertise and discretion. Upon closer

⁶ See, e.g., *Brown Lumber Co. v. Louisville & Nashville R. Co.*, 299 U.S. 393 (1937); *Illinois Central R. Co. v. Interstate Commerce Commission*, 206 U.S. 441 (1907). See also DAVIS, *ADMINISTRATIVE LAW* 666 (1951).

⁷ The substantive determination of what is for the agency and what is for the court is difficult to express in terms of two immutable, or even clearly delineated categories. The characterization as questions of law and of fact seems more of a judicial conclusion than an explanation or a useful formula. A rationalization of the necessary overlap between questions of law and of fact is the judicial concession that agencies have primary jurisdiction over "mixed questions of law and fact." See, e.g., *United States v. Western Pacific R. Co.*, 352 U.S. 59 (1956). But the limitations of this concession are far from clear.

⁸ See *Securities & Exchange Commission v. Cogan*, (9th Cir. 1952) 201 F. (2d) 78 at 84-85. See also DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* 55 (1927).

⁹ See, e.g., *Loomis v. Lehigh Valley R. Co.*, 240 U.S. 43 (1916); *Texas & Pacific Ry. Co. v. American Tie & Timber Co.*, 234 U.S. 138 (1914); *Bates & Guild Co. v. Payne*, 194 U.S. 106 at 107-108 (1904).

¹⁰ *United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932), and *Far East Conference v. United States*, 342 U.S. 570 (1952).

¹¹ Principal case at 498.

¹² See, e.g., *St. Louis, Brownsville & Mexico R. Co. v. Brownsville Nav. Dist.*, 304 U.S. 295 (1938); *Midland Valley R. Co. v. Barkley*, 276 U.S. 482 (1928); *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

¹³ See, e.g., *L.T. Barringer & Co. v. United States*, 319 U.S. 1 (1943); *Manufacturer's Ry. Co. v. United States*, 246 U.S. 457 (1918); *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U.S. 541 (1912).

consideration, however, the instant case is explainable on the principle that where the ground of difference between court and agency can be isolated and expressed as a general proposition applicable beyond the particular case to all similar cases, the court will override the administrative determination.¹⁴ Thus the Court's ruling that the type of contract here involved was illegal despite the agency's characterization of the scheme seems justifiable. The Supreme Court has recognized this principle at least impliedly in holding that, where the ICC has fixed a rate which the judiciary feels is less than reasonable in its application to all similarly situated carriers, the court may send the determination back to that agency for further consideration.¹⁵ Explained in this manner, the principal case illustrates the often subtle distinction between "interpretation" and "application" of statutory language. While "application" technically may be said to involve interpretation on a narrow scale, it is to be differentiated from interpretation in its broader sense. The process by which the general scope of statutory language is determined constitutes "interpretation" and is properly for the court. The process by which it is determined whether or not a given fact situation falls within a legal category created by the statute is "application," and is properly for the agency. The principal case, explained on this ground as it must be to avoid conflict with apparently analogous decisions,¹⁶ indicates a tenuousness underlying the doctrine of primary jurisdiction. Under the guise of "interpretation," courts may greatly restrict the authority of agencies to "apply" the regulatory statutes. It would appear, therefore, that the doctrine of primary jurisdiction is based not upon precedent but upon a continuing judicial self-restraint.

Stephen B. Flood

¹⁴ See DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* 168 (1927).

¹⁵ *Southern Ry. Co. v. St. Louis Hay and Grain Co.*, 214 U.S. 297 (1909). Cf. *SEC v. Central-Illinois Securities Corp.*, 338 U.S. 96 (1949); *Railroad Retirement Board v. Duquesne Warehouse Co.*, 326 U.S. 446 (1946); *Otis & Co. v. SEC*, 323 U.S. 624 (1945); *Interstate Commerce Commission v. Baltimore & Ohio R. Co.*, 145 U.S. 263 (1892).

¹⁶ See cases cited in notes 12 and 13 *supra*.