Michigan Law Review

Volume 55 | Issue 3

1957

Administrative Law - Judicial Review - Ripeness for Revew of an Interstate Commerce Commission Order

Robert Knauss
University of Michigan Law School

RECENT DECISIONS

ADMINISTRATIVE LAW—JUDICIAL REVIEW—RIPENESS FOR REVIEW OF AN INTERSTATE COMMERCE COMMISSION ORDER—In order to operate in interstate commerce, motor carriers must obtain a certificate of public necessity and convenience from the Interstate Commerce Commission and must obey the Interstate Commerce Act.[1] However, motor vehicles used in carrying ". . . agricultural . . . commodities (not including manufactured goods) . . ."[2] may operate free of the act. The commission on its own initiative investigated the meaning of the term "agricultural commodities," and after two years published a seventy-one page list classifying certain commodities as within or not within the exemption.[3] Petitioner, an interstate trucker of various commodities listed as non-agricultural, sought to enjoin the classification and have it set aside. A three-judge district court dismissed the action, saying the "order" of the commission was not subject to judicial review.[4] On appeal, *held,* reversed, one justice dissenting.[5] The order has an immediate and practical effect on petitioner; it is not abstract or theoretical and the issues raised are justiciable. *Frozen Food Express v. United States,* 351 U.S. 40 (1956).

For an order of an administrative agency to be reviewable by a federal court, it must arise from a case or controversy[6] and be final.[7] Traditionally an order was final, or ripe for review, when it represented the last action to be taken by an agency in determining the rights of a party.[8] An order was final when it required a party to do, or to stop doing, something. Such an order was called "affirmative" and was held to be reviewable. Thus, an order of the Interstate Commerce Commission determining the value of particular railroad property was not a final order for judicial review.[9] Such an order was "negative" because it did not require the railroad to do,

1 Part II of the Interstate Commerce Act, 49 Stat. 543 (1935), 49 U.S.C. (1952) §§306 (a), 309 (a), and 315 to 318.

2 49 Stat. 543 (1935), 49 U.S.C. (1952) §303 (b).

3 "Determination of Exempted Agricultural Commodities," 52 I.C.C. Reports, Motor Carrier Cases, 511 (1951).

4 Frozen Food Express v. United States, (D.C. Tex. 1955) 128 F. Supp. 374.

5 Justice Harlan dissented on the ground the order was not the final action of the commission, and there was no immediate harmful impact on petitioner.

6 U.S. CONST., art. III, §2.

7 28 U.S.C. (1952) §1336; 60 Stat. 243 (1946), 5 U.S.C. (1952) §1009.

8 See Rochester Telephone Corp. v. United States, 307 U.S. 125 at 130 (1939), and cases cited therein. See also Schwartz, "A Decade of Administrative Law: 1942-1951," 51 MICH. L. REV. 775 at 844 (1953), for a discussion of "final orders."

9 United States v. Los Angeles & S.L. R. Co., 273 U.S. 299 (1927). This is the most frequently cited case on the question of whether or not an administrative order is ripe for review. The following passage, beginning on page 309, was quoted in the principal case at p. 43 and in the district court opinion, note 4 supra. "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing anything; which does not grant or withhold any authority, privilege or license. . . . [I]t is the exercise solely of the function of investigation."

or refrain from, any act. When the commission, however, used this value as a basis for an order determining the rates the railroad must charge, then this rate order was "affirmative" and reviewable.[10] The Supreme Court did away with the distinction between affirmative and negative orders in *Rochester Telephone Corp. v. United States*,[11] where an order by the Federal Communications Commission that petitioner telephone company was subject to its authority was held reviewable. This order was negative since it merely determined status, but the telephone company could show an immediate practical injury because the order meant it must comply with F.C.C. regulations. In other words, the effect of the order upon petitioner was the basis for review. As to the requirement that an order must, to be reviewable, arise from a case or controversy, the court must consider whether or not petitioner is raising only a hypothetical question, for if he is, there is in fact no controversy.[12] This is the case when the court is asked to review regulations and interpretations which petitioner claims will be illegal if and when the issuing agency attempts to enforce them. Even in these cases, however, the Supreme Court has reviewed definite regulations when the penalties for violation were extremely severe,[13] or when petitioner can show an immediate and irreparable practical harm from the mere issuance of the regulations.[14] The Court has been torn between its desire to offer protection from harmful administrative action and its fear of becoming overburdened with hypothetical judicial questions. Generally, the less final an order is in the traditional "affirmative-negative" sense, the greater the immediate injury to petitioner must be for the order to be reviewable.[15] Recent cases illustrate the difficulty of applying such an indefinite test. The Court has refused to review regulations of the Civil Service Commission prohibiting political activity by government employees although petitioners had only the choice of obeying the regulations or risk losing their

10 Interstate Commerce Commission v. Stickney, 215 U.S. 98 (1909).

11 See note 8 supra. The history of the negative-order doctrine is traced and administrative orders on the various types which the federal courts have jurisdiction to review are classified. For an extended discussion of this case, see DAVIS, ADMINISTRATIVE LAW 648-652 (1951).

12 Alabama State Federation of Labor v. McAdory, 325 U.S. 450 at 461 (1945). It has long been this Court's ". . . considered practice not to decide abstract, hypothetical or contingent questions. . . ." See cases there cited in support of this statement.

13 Ex parte Young, 209 U.S. 123 (1908). Under the Passenger Rate Act disobedience in respect to the established rates rendered the offending railroad liable to a fine up to $5,000 and the railroad's officers liable to imprisonment for a maximum of five years. The Court held the petitioner was being deprived of due process because he was unable to challenge the rate regulations by violating them without the possibility of incurring severe penalties.

14 Columbia Broadcasting System v. United States, 316 U.S. 407 (1942). The network showed that independent radio stations were refusing to enter into network contracts because of the existence of Federal Communication Commission regulations.

15 Davis, "Ripeness of Government Action for Judicial Review," 68 HARV. L. REV. 1122-1153, 1326-1373 (1955). This is an excellent review of almost all available cases in the field.

jobs.[16] On the other hand the Court allowed a review of the results of a preliminary investigation which placed petitioner's name on the attorney general's subversive list.[17] The Court admitted the presence of real and immediate injury to petitioner from the mere issuance of the report. While the decisions have been apparently inconsistent, most writers feel that the Court is taking an ever increasing role in reviewing administrative orders.[18] The principal case clearly bears out this contention. A comparison of facts will show the principal case to be a substantial extension of the cases cited by the majority opinion.[19] The "order" of the principal case is an interpretation of a statute. It is a warning to carriers that they may expect the Interstate Commerce Commission to treat certain commodities as non-agricultural. The order is not directed to a particular carrier, and does not establish status as in the *Rochester Telephone* case.[20] The Court states the order has an immediate impact and touches vital interests of carriers. However, the order does not change the liability of petitioner, for if the commission charges a violation of the agricultural exception clause, it must afford petitioner a hearing, in which a principal issue would be the meaning of "agricultural commodities." The order of the principal case classifying commodities would be used only as prima facie evidence of violation in any such hearing.[21] The only harm to petitioner may arise from an increased possibility that the commission will prosecute petitioner on the grounds that its products are not within the agricultural exception, according to the I.C.C. classification. No prior case has been found which allowed review of an administrative report which is as far

[16] United Public Workers, C.I.O. v. Mitchell, 330 U.S. 75 (1947). This case involved the Hatch Act and regulations of the Civil Service Commission prohibiting political activity of various types. Many of these regulations have yet to be tested, as government workers have complied with what may be an unconstitutional restriction of their political rights rather than take a chance on losing their jobs. *Accord:* Standard Computing Scale Co. v. Farrell, 249 U.S. 571 (1919); Eccles v. Peoples Bank of Lakewood Village, Calif., 333 U.S. 426 (1948); International Longshoremen's Union v. Boyd, 347 U.S. 222 (1954).

[17] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951). Cf. Hynes v. Grimes Packing, 337 U.S. 86 (1949).

[18] For the theories of various writers, see Carrow, "Judicial Intervention to Restrain Pending and Threatened Administrative Action," 1 HOWARD L.J. 63 (1955), and Davis, "Ripeness of Government Action for Judicial Review," 68 HARV. L. REV. 1122-1153, 1326-1373 (1955).

[19] The majority opinion distinguishes the Los Angeles & S.L. R. case, note 9 supra, and cites Rochester Telephone case, note 8 supra, and Columbia Broadcasting System, note 14 supra, in support of its conclusion.

[20] See note 8 supra.

[21] In a companion case to the principal case, East Texas Motor Freight Lines v. Frozen Food Express, 351 U.S. 49 (1956), the complainant freight line had applied to the Interstate Commerce Commission to stop defendant carrier from transporting frozen chicken, as this was not an exempted agricultural commodity under the "order" of the principal case. The commission held a hearing and allowed new evidence aside from its "order" before determining if a cease and desist order should be issued for violation of the Interstate Commerce Act.

from being final as the principal case, with so little showing of immediate substantial and irreparable harm. It seems clear this case is opening the way for judicial review of informal reports and administrative declarations if only *some* degree of immediate and future harm can be shown.

Robert Knauss