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Administrative Law - Primary Administrative Jurisdiction - Construction and Reasonableness of Tariff Classification

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RECENT DECISIONS

ADMINISTRATIVE LAW—PRIMARY ADMINISTRATIVE JURISDICTION—CONSTRUCTION AND REASONABLENESS OF TARIFF CLASSIFICATION—Respondent railroads sued in the Court of Claims to recover from petitioner United States, as shipper, the difference between actual tariff payments and those allegedly due on shipments of aerial bomb cases containing napalm gel. Petitioner alternatively asserted that (1) since the bombs as shipped were non-explosive, respondent's advocated classification as "incendiary bombs" was inapplicable, or (2) if such classification were held to apply, then the rate was unreasonable, and preliminary resort to the Interstate Commerce Commission must be had for a determination of reasonableness. On certiorari from summary judgment for respondent, *held,* reversed.[1] The commission has exclusive primary jurisdiction, not only upon the issue of reasonableness of the tariff, but also when, as in the instant case, "the questions of construction and reasonableness are so intertwined that the same factors are determinative on both issues" upon the matter of tariff construction. *United States v. Western Pacific R. Co.,* 352 U.S. 59 (1956).

Initially formulated to take full advantage of administrative competence and to attain and insure uniform tariff application among shippers,[2] the doctrine of primary administrative jurisdiction arises only when statutory provisions are such that administrative and judicial jurisdiction is concurrent.[3] In such a case, the rule may be broadly stated as requiring that questions involving the exercise of administrative discretion or "expertise" be first decided by the agency rather than the court.[4] Thus, allegations of unreasonable or discriminatory carrier rates[5] and practices[6] have consistently signaled judicial invocation of the commission's peculiar technical capacity for fact-finding and fact-interpretation. Where, however, the stated

[1] Douglas, J., dissented. Justices Reed and Brennan did not participate.

[2] Texas and Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907). Of the decision, DAVIS, ADMINISTRATIVE LAW 665 (1951), makes this comment: "This was obviously judicial legislation, but the reasons the Court gave to justify its holding were powerful ones. If courts and juries could determine reasonableness of rates, uniformity would be impossible."

[3] The Interstate Commerce Commission's plenary, though not specifically exclusive, jurisdiction over determination and enforcement of reasonable rates, classifications, and practices by carriers is described in 41 Stat. 484 (1920), as amended 54 Stat. 911 (1940), 49 U.S.C. (1952) §15 (1). See also 34 Stat. 589 (1906).

[4] VOM BAUR, FEDERAL ADMINISTRATIVE LAW §213 (1942), and DAVIS, ADMINISTRATIVE LAW 664 (1951). The doctrine is to be distinguished from that of "exhaustion of administrative remedies," which forbids judicial supervision of the administrative process until the latter has been exhausted. Jaffe, "Primary Jurisdiction Reconsidered: The Anti-Trust Laws," 102 UNIV. PA. L. REV. 577 at 579 (1954).

[5] E.g., Texas and Pacific R. Co. v. Abilene Cotton Oil Co., note 2 supra; Robinson v. Baltimore and Ohio R. Co., 222 U.S. 506 (1912); Director General of Railroads v. The Viscose Co., 254 U.S. 498 (1921).

[6] E.g., Baltimore & Ohio R. Co. v. United States ex rel. Pitcairn Coal Co., 215 U.S. 481 (1910); Northern Pacific R. Co. v. Solum, 247 U.S. 477 (1918); Western & Atlantic R. v. Georgia Public Service Commission, 267 U.S. 493 (1925).

wrong is committed in relation to a non-discretionary standard, as in forbidden departures from a published tariff,[7] violations of an unambiguous contract for distribution of cars,[8] or payment of illegal rebates,[9] the matter becomes merely one of addressing "fixed law to the established fact,"[10] and requires no primary administrative cognizance. The accepted, though not unchallenged,[11] line of demarcation adduced from these decisions—i.e., fact questions and matters requiring technical acumen belong initially to the agencies, questions of law solely to the courts[12]—has perhaps proved most difficult to draw when dispute focuses upon construction of tariff classification language, as in the principal case. Originally maintaining that determination of a controverted rate application to specific goods was one demanding primary administrative jurisdiction,[13] the Supreme Court in *Great Northern R. Co. v. Merchants Elevator Co.* retreated to the position that (1) words of a tariff when clearly used in their ordinary meaning present a question of law susceptible of unassisted judicial consideration, and (2) only when the technical or non-technical tenor of the words was not apparent would prior factual construction be necessary.[14] This decision has been frequently cited, sometimes mechanically, by a host of lower federal courts to support their own independent interpretation of rate categories.[15] Significant, then, is the present Court's candid refusal to permit judicial consideration of the construction question. "Courts which do not make rates cannot know with exactitude the factors which go into the rate-making process. And for the court here to undertake to fix the limits of the tariff's application without knowledge of such factors . . . is tantamount

[7] Pennsylvania R. Co. v. International Coal Mining Co., 230 U.S. 184 (1913).

[8] Pennsylvania R. Co. v. Puritan Coal Mining Co., 237 U.S. 121 (1915); Eastern R. Co. of New Mexico v. Littlefield, 237 U.S. 140 (1915).

[9] Mitchell Coal and Coke Co. v. Pennsylvania R. Co., 230 U.S. 247 (1913).

[10] Pennsylvania R. Co. v. International Coal Mining Co., note 7 supra, at 197.

[11] "While there have been assertions that the doctrine has no application to 'pure' questions of law . . . there is but infrequently an opportunity to raise such a question . . . [and] few issues which the courts are likely henceforward to characterize as purely legal. Where the legal question is bound up with the administrative question, the rule of prior resort applies." COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 318 (1951). An exhaustive study of the "law-fact" distinction in review of administrative determinations is found in Jaffe, "Judicial Review: Question of Law," 69 HARV. L. REV. 239 (1955) and Jaffe, "Judicial Review: Question of Fact," 69 HARV. L. REV. 1020 (1956).

[12] DAVIS, ADMINISTRATIVE LAW 666 (1951), citing Great Northern R. Co. v. Merchants Elevator Co., 259 U.S. 285 (1922).

[13] Texas & Pacific R. Co. v. American Tie & Timber Co., 234 U.S. 138 (1914), involving the application of a "lumber" tariff to oak railway ties.

[14] Note 12 supra. The Court felt that in the event a question of law were judicially decided, requisite uniformity could be achieved through Supreme Court review.

[15] E.g., American Ry. Express Co. v. Price Bros., Inc., (5th Cir. 1931) 54 F. (2d) 67 (small onions); Pennsylvania R. Co. v. Fox & London, Inc., (2d Cir. 1938) 93 F. (2d) 669 (metal scrap); Murray Co. v. Gulf, C. & S.F. R. Co., (N.D. Tex. 1945) 59 F. Supp. 366 (twisted coil metal cylinders); United States v. Louisville & Nashville R. Co., (6th Cir. 1955) 221 F. (2d) 698 (products composed "partly of silver"). See also the opinion of Brandeis, J., author of the majority decision in Great Northern R. Co. v. Merchants Elevator Co., note 12 supra, in W. B. Brown & Sons Lumber Co. v. Louisville & Nashville R. Co., 299 U.S. 393 (1937).

to engaging in judicial guesswork."[16] Although purportedly re-affirming *Great Northern* by continued recognition of at least minimal primary interpretive power in the courts, the opinion plainly evinces a rejuvenation of the Court's original distrust of judicial construction of rates, and indicates, as was recently predicted, an "increasing respect for administrative adjudication."[17] It is doubtful that any tariff classification, sufficiently ambiguous as to warrant litigation between carrier and shipper, could also be so distinctly applicable or non-applicable as to preclude prior administrative resort under the present announced standard. Such an improbable circumstance, when united with the Court's acknowledgment of the essential relation between the government's assertion of inapplicability and the administrative question of reasonableness, leads to the inescapable conclusion that seldom, if ever,[18] will construction of tariff rates be considered a question of law initially determinable by the judiciary. The coincident increase in an already heavy administrative burden is perhaps to be regretted, but it would appear that this unfortunate consequence is at least neutralized by the greater certitude afforded claimants in choosing the initial forum.

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[16] Principal case at 68.

[17] COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 318 (1951). It has frequently been suggested that the doctrine provides a convenient means for permitting a flexible allocation of business between the courts and the agencies. Jaffe, "Primary Jurisdiction Reconsidered: The Anti-Trust Laws," 102 UNIV. PA. L. REV. 577 at 588 (1954). See also Stason, "Timing of Judicial Redress from Erroneous Administrative Action," 25 MINN. L. REV. 560 at 566 (1941).

[18] The sole exception specifically cited by the Court in the principal case is the situation where the commission "has already construed the particular tariff at issue or has clarified the factors underlying it," citing Crancer v. Lowden, 315 U.S. 631 (1942), in which the issue was clearly determinable by a previous commission ruling. Principal case at 69.