No. 2021

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE FIDELITY LUMBER COMPANY, a Corporation,
Plaintiff in Error,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,
Defendant in Error.

PETITION FOR REHEARING.

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COLE PRINTING COMPANY

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Comes now plaintiff in error and petitions this Honorable Court for a rehearing and a reargument of the above entitled case and of the errors heretofore assigned herein for the reason and upon the grounds following, to-wit:

I.

The Court was in error in the statement that in the Potlatch Lumber Company case No. 1348 the complainants made no question as to the reasonableness of rates to Pacific Coast points. The allegations show that complainants in No. 1348 allege that the old 40-cent rate

from Pacific Coast points was all that the carriers were entitled to charge and anything in excess thereof was and is unreasonable.

II.

The Court lays stress upon the statement of the Commission that no prayer for reparation was made in the Potlatch Company case. There was a general prayer, and the practice before the Interstate Commerce Commission is not technical and no prayer is required by the commerce law.

Under technical rules of law, parties to an action or proceeding are entitled to whatever relief the facts show they are entitled to in all cases where the parties have appeared in the action, without reference to the prayer. The prayer does not limit the rights in any manner or respect whatever, so long as the relief granted is consistent.

16 *Ency. Pl. & Pr., pp.* 776, 780, 781, 794, 795, 796;
Oteri v. Scalzo, 145 U. S. 589;
Tyler v. Savage, 143 U. S. 98;
Jones v. Van Doren, 130 U. S. 692;
Tayloe v. Merchants Fire Ins. Co., 9 How. 406;
Boone v. Chiles, 10 Pet. 228;
Watts v. Waddle, 6 Pet 403;
Dormitzer v. German, etc., Society, 23 Wash. 190, 191;

McKay v. Smith, 27 Wash. 442, 447;
Yarwood v. Johnson, 29 Wash. 643, 649.

III.

This Court states and holds:

> "It was finally adjudged that rates from the Spokane Rate Group to points east of the Pembina line should be less than the Coast rates by a differential of not less than 3 cents per 100 pounds."

This finding and conclusion could only be possible upon the theory that the rates fixed for the future are reasonable.

This Court has seemingly overlooked the fact that from the point of shipment to points of destination involved in this action the differential fixed by the Commission was and is the same as existed before the decision in the Potlatch Lumber case No. 1348.

This Court has not given due consideration to the holdings and findings in the Potlatch Lumber case No. 1348, which are set forth on pages 12 to 16, inclusive, of the brief of plaintiff in error, and for convenence we reproduce the same here.

> "From the above it will be seen that the defendant carriers have by their own voluntary actions admitted the pripriety, not only of a group or blanket, for the purpose of rate making from the Spokane-Sandpoint District, but also that some differential under the Coast should be allowed to that group. * * * Their claims in this regard

are based upon (a) the distance, (b) the mountain grades to the summit of the Cascades, and (c) the wide treeless farming section, all to be traversed from the Coast before the timber of the Spokane District is reached. * * *

"Two facts stand out as beacon lights in the sea of testimony produced in this case: * * *; the other is that the carriers by the tariffs complained of, as well as in part by the old tariffs, have admitted in part the propriety of a differential in favor of the Spokane District, as grouped in the new tariffs and in part in the old, as against the Coast.

"A careful examination of the testimony as a whole makes it plain that a differential in favor of Spokane and the Spokane District under the rates from the Coast should exist, but there is great difficulty n determining just what the amount of that differential should be, and from what shipping and to what destination points it should apply. The same is true of the district bordering the eastern slope of the Cascade Range. If, however, the tables hereinbefore set out are referred to, it will be apparent that even under the old tariffs differentials under the Coast were allowed from some shipping points in the present Spokane-Sandpoint District to certain destination points, the grading being from nothing in Minnesota to 6 cents on the line of the Northern Pacific between Mandan and Sully Springs, inclusive, in North Dakota; and along the line of the Great Northern from nothing in Minnesota to from

1 cent at Petersburg to 7 cents at Buford, North Dakota. To the old Spokane District proper no dfferential under the Coast was allowed. Under the new tariffs, along the lines of the Great Northern and Northern Pacific the differentials from the present Spokane-Sandpoint District under the Coast rates are 5 cents in Minnesota, and from 5 cents to 8½ cents in North Dakota. By these same new tariffs the rates from the Montana-Oregon group to various common destination points are from nothing to 5 cents under the Spokane rates, the basing of the Montana-Oregon group being, however, directly under the Coast rates and not under the Spokane rates. The rates from the eastern slope of the Cascade Range are 2½ cents higher than the Spokane rates in all cases, this differential being apparently an intermediate or half step between the Coast and the Spokane rates. These facts, though not conclusive of the grouping that should be made under a practical restoration of the tariffs in effect prior to November 1, 1907, are strongly persuasive that some changes in the former groupings should be made.

* * * "For the purposes of this case it is sufficient that the defendant carriers by their own acts in establishing the varous tariffs, old and new, have made admissions, in the nature of estoppels *in pais,* that parts of the Spokane District, as grouped since November 1, 1907, should have a differential under the rates from the Coast, and that an intermediate differential should apply to the

eastern slope of the Cascade Range—the two districts being separated by a natural barrier of farming country.

* * * "In view of the physical facts, emphasized in the record of this case, that Spokane is separated from the Pacific Coast by a rail distance little short of 400 miles by the routes actually used; that in most of these routes the haul from the Coast necessarily crosses the Cascade Range; that for something like 200 miles east of the Cascades the country is a treeless farming region until the immediate vicinity of Spokane is reached, the Commission's conclusions are that the rates on interstate shipments of lumber, shingles and other forest products from the groups hereafter named to points on and west of a line drawn from Pembina, N. D., southward through Grand Forks, N. D., Moorhead and Breckenrdge, Minn., Sioux City and Council Bluffs, Iowa, St. Joseph and Kansas City, Mo., and thence to Port Arthur, Texas, along the Kansas City Southern Railway, including all points that now take the same rates as any of the points located on said line between and including Sioux City, Iowa, and Kansas City, Mo., should be less than the rates on similar shipments from the "Coast Rates" group as follows:

"Rates from the group points east of the summit of the Cascade Mountains and west of the present "Spokane Rates" group, to points on and west of said line from Pembna, N. D., to Port Arthur, Texas, including all points that now take the same

rates as any of the points located on said line between and including Sioux City, Iowa, and Kansas City, Mo., should be less than the rates prescribed by the Commission in Cases Nos. 1327, 1329 and 1335 from the "Coast Rates" group by differentials beginning at not less than 2 cents per 100 pounds and graded up westwerdly therefrom (a) to a differential of not less than 6 cents per 100 pounds At Buford, N. Dak., on the line of the Great Northern Railway; (b) to a differential of not less than 6 cents per 100 pounds at Medora, N. Dak., on the line of the Northern Pacific Railway; (c) to a differential of not less than 6 cents per 100 pounds at Edgemont, S. Dak., on the line of the Chicago, Burlington & Quincy Railroad; (d) to a differential of not less than 6 cents per 100 pounds at Cheyenne, Wyo., on the line of the Union Pacific Railroad; (e) and to a differential of not less than 6 cents per 100 pounds at Denver, Colo., on the line of the Union Pacific Railroad.

"Rates from the present "Spokane Rates" group and from the present "Montana-Oregon Rates" group to points on and west of said line, including all points that now take the same rates as any of the points located on said line between and including Sioux City, Iowa, and Kansas City, Mo., should be less than the "Coast Rates" as prescribed in the cases specified, by differentials beginning at not less than 3 cents per 100 pounds and graded up westwardly therefrom to a differential of not less than 7 cents per 100 pounds at Buford,

N. Dak., Medora, N. Dak., Edgemont, S. Dak., Cheyenne, Wyo., and Denver, Colo., as described in the preceding paragraph.

"Rates from the group of points east of the summit of the Cascade Mountains, and west of the present "Spokane Rates" groups, to points east of said line, Pembina-Port Arthur, and excluding all points that now take the same rates as any of the points located on said line between and including Sioux City, Iowa, and Kansas City, Mo., should be less than the "Coast Rates," as prescribed in the cases specified, by a differential of not less than 2 cents per 100 pounds, up to and including Duluth, Minneapolis, St. Paul and Minnesota Transfer, and from the Missouri River crossings to the Mississippi River crossings." (14 I. C. C. 46-9.)

The rates for the future in the Potlatch Lumber Company case were fixed upon the basis of reasonable rates, and that basis, as shown by the quotation herein made, is equally applicable to past shipments.

Under the findings of fact and the fixing of future rates upon reasonable basis, the Commission could not arbitrarily deny reparation, nor could they deny reparation upon the basis of reasonable rates fixed for the future and which the findings show were reasonable rates as to past shipments.

The only power or authority which the Commission had was to grant reparation in accordance with their opinion and the future rates fixed in the Potlatch Lum-

ber Company case. The contentions of complainant are supported by two recent decisions of the United States Commerce Court.

No. 18, *Russe & Burgess vs. I. C. C.,* filed Feb. 13, 1912;

No. 19, *Thompson Lumber Co. vs. I. C. C.,* filed Feb. 13, 1912.

Under the law the Commerce Court upon interstate commerce questions is theoretically at least superior to other courts and the court most entitled to consideration and most binding as authority, other than the Supreme Court of the United States.

Plaintiff in error insists that the holdings in these cases warrant the granting of a petition for a rehearing herein and a different conclusion from that heretofore rendered and made herein.

Under these cases, the order of the Commission denying reparation on the basis of the rate fixed in case No. 1348 is beyond and in excess of the power of the Commission, and is a mistake of law and not a finding of fact nor an administrative matter.

IV.

These lumber cases have recently been before and determined by the Supreme Court of the United States, and in these cases the Court held, with reference to the powers of the Commission, that they are defined as follows, to-wit:

"It has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determinations of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

I. C. C. vs. U .P. R. Co., 32 S. C. R. 111.

The Commission in the Potlatch case undertook to fix reparation on the Pacific Coast basis without any evidence whatever to support it. There was no evidence taken by the Commission after they determined to allow reparation. The principle is the same as if the Commission undertook to fix rates contrary to evidence or without evidence.

The Commission acted beyond its power and jurisdiction.

I. C. C. vs. Peavey, 222 U. S. 42, 32 S. C. R. 22.

V.

The Commission has no power to create a discrimination in reparation. The carriers have no such power. It is beyond the power of either.

There is no escape from the fact that when different rates are fixed from different points that to allow different methods of reparation and to fix reparation on different bases of rates than those fixed for the future is a rank discrimination which is prohibited by law and the decisions of the highest Court in the land.

U. P. R. Co. vs. Updike Grain Co., 222 U. S. 32 S. C. R. 40, 41, 42.

H. M. STEPHENS,
Attorney for Plaintiff in Error.

CERTIFICATE OF COUNSEL.

I, H. M. Stephens, attorney for plaintiff in error in the above entitled action and in the above named Court, do hereby certify that in my judgment the petition for rehearing herein is well founded and that it is not interposed for delay.

Dated Spokane, Washington, this 11th day of March, A. D. 1912.

H. M. STEPHENS.