No. 23992

MICHAEL COMELLA ET AL. v. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY ET AL.

Submitted May 3, 1934. Decided June 11, 1934

Upon reargument findings in 197 I.C.C. 39, that rates charged on bananas, in carloads, from New York, N. Y., to points in Canada were unreasonable, reversed. Shipments found to be foreign commerce not subject to our jurisdiction. Complaint dismissed.

Appearances shown in prior report.

REPORT OF THE COMMISSION ON REARGUMENT

BY THE COMMISSION:

In 197 I.C.C. 39, division 5 found that rates charged on imported bananas, in carloads, from New York, N.Y., to points in Canada were unreasonable and awarded reparation. The case was reopened and reargued. The former report sets forth the essential facts of record and they will be repeated here only to the extent necessary to a clear understanding of this report. The reargument deals principally with the question of jurisdiction.

The shipments originated at ports in Costa Rica and Cuba, and were forwarded by the producers to their sales representatives, Fruit Dispatch Company, Banana Sales Corporation, or Di Giorgio Corporation, at New York. Complainants placed their orders with the New York firms specifying bananas from Port Limon, Costa Rica, or Jamaica, Cuba, while the ships were en route to New York or after their arrival at that port. The bananas from each ship were sold for consumption at New York or transshipped to other destinations in the United States and Canada. They were not stored at New York and then reshipped to interior destinations. If any part of the cargo is unsold, it is loaded into cars and consigned to some destination, usually Buffalo, N.Y. Such shipments are sold while in transit and diverted to ultimate destination.

The considered shipments were parts of various cargoes. They were unloaded from the ships into cars alongside on car floats and reshipped on domestic bills of lading from within 2 to 12 hours after the ship docked. Some of them moved in bond from New York.

Complainants contend that the shipments originated at New York, because the ultimate destinations thereof were not known when the ships left the foreign ports; that the demands of the New York market must first be supplied before it can be determined whether there will be any portion of the cargo to fill orders at other points; that the shipments moved on domestic bills of lading; that no portion of any cargo was earmarked for delivery to destinations in Canada; and that title passed to the importers at New York upon delivery of the cargoes at that port.

Defendants submitted affidavits of each of the firms at New York. They state, among other things, that there are no shipments of bananas to interior points within the United States or to points in Canada which originate at or have ever acquired a situs in the port of New York; that such shipments originate in the foreign countries of production and move in unbroken chains of transportation therefrom to interior destinations in the United States or Canada, as the case may be, without coming to rest at the port of New York or elsewhere; that producers of bananas in the foreign countries cut them with the intention that they shall arrive in a green condition, not only at the ports of importation, but at the points of ultimate destination; and that the intention that the fruit shall be transported by rail to interior points is present from the beginning.

In cases of this kind the actual movement and the real character of the shipments are the determining elements. The record is clear that it was the original and continuing intent of both the shippers at the foreign ports and their sales representatives at New York that some portions, if not all, of the cargoes were to be transshipped from New York to interior destinations in the United States or to points in Canada. Neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk, is an essential of a through shipment. These are common incidents of a through shipment; and when the intention with which a shipment was made is in issue, the presence, or absence, of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted the shipments made to the ultimate destinations have at all times been intended, these incidents are without legal significance as bearing on the character of the traffic. *Baltimore & O. S. W. R. Co.* v. *Settle*, 260 U.S. 166. Even if the parties owning and controlling the cargoes of the ships had not disclosed their continuing intent, complainant's position could not be sustained in the light of the following cases.

In *Goldsboro Cham. of Com.* v. *Atlantic Coast Line R. Co.*, 91 I.C.C. 315, the question of our jurisdiction over imported fertilizer

and fertilizer materials discharged by vessels at Wilmington, N.C., was considered. Some of the shipments were made from ship side to destinations in North Carolina and other portions of the cargoes were placed in storage at Wilmington and subsequently shipped to points in the same State. The ultimate destinations of the shipments were not known when the ships left the foreign ports and those shipments from ship side moved on domestic bills of lading. Change of ownership occurred in some instances at Wilmington. After reviewing the decisions of the United States Supreme Court regarding this subject, division 4 found that the shipments from ship side were import traffic and subject to our jurisdiction; and that the shipments made from the warehouses were intrastate traffic and not within the scope of our jurisdiction.

In *Southern Produce Co.* v. *Denison & P. S. Ry. Co.*, 165 I.C.C. 423, the question of jurisdiction was raised regarding bananas and coconuts imported from Central America, Mexico, and the West Indies through the port of Galveston, Tex., to destinations in Texas. The methods of handling and disposing of the cargoes in that case were identically the same as those in the instant case. The producers, importers, and consignors at Galveston testified that it was and always had been the intention and practice of the importers to ship bananas to interior points, including destinations in Texas. It was found that the traffic was import in character and therefore subject to our jurisdiction.

In *Whitehead* v. *Southern Ry. Co.* 163 I.C.C. 405, it was contended that part of a carload of canned salmon, which was sold but not carmarked while the shipment was in transit over a water route from Seattle, Wash., to Norfolk, Va., was in fact an intrastate shipment from Norfolk to Chatham, Va., because the ultimate destination of no portion of the carload was known when it left Seattle. Upon arrival of the vessel at Norfolk a portion of the shipment was immediately forwarded to Chatham and it was found that it moved in interstate commerce.

If complainants' contentions were sound it would follow that we would not have jurisdiction over a shipment of bananas handled under the circumstances above specified from New York to a destination in the State of New York over an intrastate route. Under the *Goldsboro case* and the *Southern Produce case* we would have jurisdiction over such a shipment because it would be import in character. The instant shipments were of the same character. They moved "from a nonadjacent foreign country, through the United States, to destinations in an adjacent foreign country." *Seymour* v. *Morgan's L. & T. R. & S. S. Co.*, 35 I.C.C. 492. We there stated

that, although the regulatory power of Congress undoubtedly extends to such transportation within this country, it has not been placed within our jurisdiction. In a number of other cases, decided over a period of many years, we have found that we are without jurisdiction over such traffic. *Canales* v. *Galveston, H. & S. A. Ry. Co.*, 37 I.C.C. 573; *Quintal & Lynch* v. *Florida East Coast Ry. Co.*, 57 I.C.C. 289; *United States Steel Products Co.* v. *Director General*, 88 I.C.C. 57; and *Fernandez & Co.* v. *Southern Pac. R. Co.*, 104 I.C.C. 193.

We find that the considered shipments moved from one or more foreign origins through the United States to destinations in Canada. The complaint will be dismissed for want of jurisdiction.

LEE, *Chairman*, concurring in part:

I agree with the finding that we have no jurisdiction over the shipments which were sold to complainants before arrival at the port of entry. As to shipments made to fill Canadian orders, which were accepted after the arrival of the ships and after the condition of the bananas had been determined, I believe we have jurisdiction.

COMMISSIONER AITCHISON concurs in the result reached herein.

FARRELL, *Commissioner*, dissenting:

I am unable to concur in the dismissal of the complaint in this case for want of jurisdiction. It is true that the bananas covered by the shipments involved originated in a foreign country, but, according to my understanding of the pertinent facts, when they were shipped from points of origin by water to New York City, neither the consignors nor the consignees had any intention of reshipping them if they could be sold in that city, and therefore they were not shipped by rail from New York City under a common control, management, or arrangement for a continuous carriage or shipment by water and rail. Title to the bananas passed to the consignees upon delivery of the shipments to them at New York City. As shown in the report, the reshipments by rail from New York City covered only parts of various cargoes, and the contracts of transportation under consideration here had their origin in that city. It is further true that the destinations of the reshipped bananas were in Canada. Under these circumstances it is difficult for me to see why the transportation under consideration here does not come within the jurisdiction over rates for the transportation of property from points in the United States to points in foreign countries, conferred upon the Commission by section 1 of the Interstate Commerce Act, as construed by the Supreme Court of the United States in *News Syndicate Co.* v. *New York Central R. Co.*, 275 U.S. 179.

In support of the views expressed herein by me, I refer, also, to the decision of the Supreme Court in *Atlantic Coast Line R. Co.* v. *Standard Oil Co.*, 275 U.S. 257.

I am authorized to state that COMMISSIONER MCMANAMY joins in this expression of dissent.

COMMISSIONER SPLAWN did not participate in the consideration and disposition of this case.