10-1978

Southern Railway Co. v. Seaboard Allied Milling Co.

Lewis F. Powell Jr.

Linda - Out letter

done per letter to Rodak 12/21/78 Linda

PRELIMINARY MEMORANDUM

January 5, 1979 Conference
List 3, Sheet 2

No. 78-575

SOUTHERN RAILWAY CO. — Cert to CA 8 (Gibson, Van Oosterhout & Matthes)

v.

SEABOARD ALLIED MILLING CO., ET AL. — Federal/Civil — Timely by extn

No. 78-597

INTERSTATE COMMERCE COMMISSION — Same

v.

SEABOARD ALLIED MILLING CO., ET AL. — Federal/Civil — Timely by extn

No. 78-604

SEABOARD COAST LINE RR CO., ET AL. — Same

v.

SEABOARD ALLIED MILLING CO., ET AL. — Federal/Civil — Timely by extn

You are out. Paul

SUMMARY: Petitioners in these curve-lined cases challenge the CA's holding that it had jurisdiction to review the ICC's refusal to investigate the lawfulness of a proposed tariff that respondent claimed was patently violative of several sections of the Interstate Commerce Act.

FACTS: Other than the ICC, the petitioners in these curve-lined cases are railroads who filed proposed rate increases with the ICC. Respondents are shippers, private associations and governmental agencies, including the United States Department of Agriculture, which protested the proposed increases to the ICC.

The tariffs filed by petitioners proposed a limited-duration, 20% seasonal surcharge on the shipment of specified grains in several midwestern and southeastern States. The rate increases were to apply only between September 15 and December 15, 1977. Such seasonal surcharges were authorized by Section 202(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 [the 4-R Act], 49 U.S.C. § 15(17), and regulations promulgated by the ICC thereunder, 49 C.F.R. § 1109.10.

Respondents alleged the proposed tariffs were unreasonable, discriminatory and patently violative of Sections 1(5), 2, 3(1), 4(1) and 15(17) of the Interstate Commerce Act, 49 U.S.C. §§ 1(5), 2, 3(1), 4(1) and 15(17). They asked the ICC either to reject the tariffs as patently unlawful or to suspend them until an investigation was made into their lawfulness under Section 15(8)(a) of the Act.

By order issued September 14, 1977, Division II denied the respondents' petition to reject the proposed tariffs. In a separate order issued the same day, the full Commission declined to suspend the tariffs or to open an investigation under Section 15(8)(a). It found the respondents' evidence offered in support of alleged violations of the Act insufficient to warrant such action, noted that Congress intended to authorize experimentation with seasonal rate-making in passing Section 202(d) of the 4-R Act, and observed that the complaint sections of the Act protect the interests of any party adversely affected by the rates. The Commission therefore determined to "permit this temporary adjustment to become effective."

Respondent Seaboard Allied Milling then obtained from the CA a temporary judicial stay of the ICC's orders refusing to reject or suspend the tariffs. The CA, however, vacated its stay order after a hearing, but directed the railroads to maintain sufficient records to permit determination of overcharges in the event that the complainants prevailed on review. The ICC then issued an order permitting the railroads to implement the tariff on one day's notice with provision made for the recordkeeping directed by the CA. The tariffs then went into effect.

On appeal, the principal issue presented was whether the CA had jurisdiction to entertain a petition for review of the ICC orders refusing to reject or suspend the proposed tariffs and to open an investigation under Section 15(8)(a).

HOLDING BELOW: Observing that there was respectful authority that it had no jurisdiction to review the ICC's refusal to suspend the proposed tariffs, and that the period covered by the tariffs had long since expired anyway, the CA found it unnecessary to decide whether it had any jurisdiction to review the no-suspension order. The protective orders issued by the ICC and the court had mooted the practical import of that issue in any event.

The CA then framed the question presented on whether it had jurisdiction to review the propriety of ICC's termination of its investigation into the lawfulness of the proposed tariffs. The court held that such jurisdiction existed in the "peculiar circumstances of this case" where a substantial question of the tariffs' patent illegality had been presented and those charges had not been adequately investigated by the ICC.

In so holding, the CA principally relied on City of Chicago v. United States, 396 U.S. 162 (1969), which holds that an ICC decision to terminate a Section 13a(1) investigation is a final order subject to judicial review. Jurisdiction to review an ICC decision not to pursue an investigation was also supported by Alton Railroad Co. v. United States, 287 U.S. 229, 236-37 (1932). The Court acknowledged that Arrow Transportation Co. v. Southern Railway Co., 372 U.S. 658, 667-68 (1963), supported the view that the Court had no power to review the Commission's refusal to suspend the proposed tariffs. However, the CA believed that the ICC's suspension and investigation powers were separate and distinct. And, the factors prompting

Arrow's holding that suspension orders were not reviewable did not apply to ICC orders refusing to make, or terminating, an investigation of the lawfulness of a proposed tariff.

Here, the shippers had made substantial charges that the tariffs proposed were patently violative of the long-haul, short-haul clause of section 4(1) of the Act, as well as other provisions of the statute. The ICC had a duty not to permit unlawful tariffs to go into effect and had failed to make an adequate investigation of the section 4(1) and other violations alleged. Disagreeing with the CA DC's conclusion in Asphalt Roofing Mfr.'s Ass'n v. ICC, 567 F.2d 994 (1977), that ICC decisions not to pursue an investigation are under all circumstances not final decisions subject to judicial review, the CA 8 reasoned that the ICC's failure to investigate the charges of patent illegality allowed the tariffs to go into effect and was the equivalent of a finding that the tariffs were lawful. There was, thus, as much justification for treating the ICC's termination of its investigation into the shippers' claims of patent illegality as a final order subject to review, as there was for this Court's holding in Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289, 318-19 (1975), that a Commission decision to give no further consideration to environmental factors in a general revenue proceeding was a final order subject to review.

Moreover, significant policy reasons supported the court's holding. For, if the ICC's refusal to pursue an investigation of the shippers' claims was unreviewable, their only recourse

would be to file complaints under section 13(1) after the rates became effective. And, in a section 13(1) proceeding, the burden would be on the complainants to show the unlawfulness of the rates; whereas, in a section 15(8)(a) proceeding initiated by the Commission, the burden would be on the carriers to establish the lawfulness and reasonableness of the proposed tariffs. Also, by permitting review of the Commission's termination of its investigation, the need for ICC and judicial consideration of numerous section 13(1) complaints initiated by individual parties would be obviated.

CONTENTIONS: Petitioners contend that the Court erred by misconstruing the ICC's decision as an order terminating an investigation, when in fact all the agency did was refuse to initiate an investigation under section 15(8)(a). The City of Chicago case is, thus, directly on point. For, although holding that a decision to terminate a previously opened investigation was reviewable, it also held that a decision not to open an investigation was unreviewable. 396 U.S. at 165-66; accord, New Jersey v. United States, 168 F. Supp. 324, 329 (D.N.J. 1958), aff'd, 359 U.S. 27 (1959) (refusal to open a section 13a(1) investigation unreviewable).

This conclusion is also supported by Arrow and United States v. SCRAP, 412 U.S. 669 (1973), which make clear that a decision not to suspend a proposed tariff is unreviewable. As the DC Circuit reasoned in Asphalt Roofing, because the decision not to suspend a proposed tariff and the decision not to open an investigation are two sides of the same coin,

no-investigation orders are no more reviewable than no-suspension orders. Like the decision as to whether to suspend a proposed tariff, the decision whether to investigate its lawfulness is committed to the agency's unreviewable discretion by section 15(8)(a).

Petitioners further observe that the CA erred in asserting that an ICC decision not to investigate a proposed tariff places the tariff in effect and is the equivalent of a finding of lawfulness. Not so. It is the decision not to suspend the tariff that permits it to go into effect; and, the decision not to investigate is not a final determination that the particular rates are just, reasonable or lawful. Cf. SCRAP, 412 U.S. at 692 n.16. The merits of respondents' charges of illegality and unreasonableness, claim petitioners, can be finally determined in a section 13(1) proceeding. Under that section the ICC is under a duty to investigate upon complaint of any aggrieved party if any reasonable grounds are presented for an investigation.

By permitting judicial review of the agency's refusal to open a section 15(8)(a) investigation, the CA has seriously disrupted the Commission's rate review process and violated all of the principles underlying the doctrines of primary jurisdiction and exhaustion of administrative remedies.

Respondents answer that the CA's decision was correct and consistent with longstanding case law. They stress that this is an unusual case because it involved petitions to reject and suspend the proposed tariffs on the ground that they were

patently violative of the long-haul, short-haul provisions of section 4(1) and of other sections of the Act as well. The case was not processed as a routine suspension case wherein the ICC allows a proposed tariff to take effect over protest without issuing any order expressly authorizing the rates to take effect. Rather, the case was assigned to a formal docket and transferred directly to the full Commission, which issued a formal order allowing the rates to take effect. For purposes of this proceeding, the Commission's termination of its investigation of alleged section 4(1) and other violations finally disposed of the issues of patent illegality raised by the petitions to reject and suspend. The ICC was under an affirmative duty not to permit tariffs containing fourth section violations to become effective, and the Commission violated that duty by allowing the tariffs to take effect without resolving the serious claims of patent illegality under section 4(1) that had been raised. Judicial review, thus, was warranted under the rationale of the Trans Alaska Pipeline Rate Cases, 98 S. Ct. 2053, 2058-59 n. 17 (1978), to ensure that the Commission would not overstep the bounds of its statutory authority.

Neither Arrow nor the DC Circuit's decision in Asphalt Roofing are inconsistent with the CA 8's decision. Those cases hold only that refusals to suspend or to investigate the reasonableness of rate increases are unreviewable. They do not insulate from review here the Commission's refusal to comply with the requirements of section 4(1) by allowing tariffs

containing unreviewed fourth section departures to take effect. Neither case dealt with the issues of patent illegality raised herein, and the DC Circuit has recently cited with approval the CA's decision at bar for the proposition that a "Commission decision not to investigate a proposed tariff is reviewable where a substantial issue of patent illegality has been presented." National Small Shipment Traffic Conference, Inc. v. ICC, No. 78-1099, slip op. at 9 n.34 (D.C. Cir. Oct. 26, 1978). [But see Reply of Southern R. Co., No. 78-575, at 3 & n.3.]

The Solicitor General has filed a memorandum with the Court urging that cert be granted. Although conceding that Asphalt Roofing is technically distinguishable in that it involved a general rate increase protested on grounds of unreasonableness and no claims of patent illegality involving alleged fourth section departures, the SG believes that Asphalt's reasoning that the Commission's suspension and investigation powers are inseparable is fundamentally inconsistent with the contrary views expressed by the CA 8 here. In view of the conflict and the critical importance of questions bearing on the reviewability of the ICC no-investigation orders, the SG urges plenary review.

The SG, however, disagrees with both the petitioners and the respondents on the merits. His position is that a Commission decision not to open a section 15(8) investigation is ultimately subject to judicial review but is not immediately ripe for review. The SG reasons that the decision not to open a section 15(8) investigation does no more than determine who shall bear the burden of persuasion, for the protestants can

immediately file a section 13(1) complaint that the Commission is under a duty to investigate. At the close of the section 13(1) proceeding, the Commission's decision not to open a section 15(8) investigation would be reviewable if the allocation of the burden of persuasion were critical to the outcome.

ANALYSIS: Because this case involves what the CA characterized as "substantial claims of patent illegality," its decision may not be squarely in conflict with the DC Circuit's decision in Asphalt Roofing or with any holding of this Court. Nevertheless, the reasoning of such cases as Arrow, City of Chicago, and Asphalt Roofing does support the petitioners' contention that the courts of appeals have no jurisdiction to review an ICC decision not to open a section 15(8)(a) investigation into the lawfulness of a proposed tariff. And, the CA's characterization of the ICC's orders denying the petitions to reject or suspend the tariffs as orders terminating an investigation into the lawfulness of the proposed tariffs seems questionable.

But, whatever one's view of the merits, this case presents a question of first impression that may well be of sufficient import as to merit plenary review regardless of the existence or non-existence of the conflicts alleged here.

There are responses and replies.

12/11/78 Walsh Opn in petns

aml

Court ..... *Voted on* ....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No.78-575

Submitted ....., *19*... *Announced* ....., *19*...

SOUTHERN RAILWAY CO.

vs.

SEABOARD ALLIED MILLING CORP.

You are OUT of this case.

Out

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

OUT

PRELIMINARY MEMORANDUM

January 5, 1979 Conference
List 3, Sheet 2

No. 78-597

INTERSTATE COMMERCE COMMISSION — Cert to CA 8 (Gibson, Van Oosterhout & Matthes)

v.

SEABOARD ALLIED MILLING CO., ET AL. — Federal/Civil — Timely per extn

Please see prelim for No. 78-575 with which this case is curve-lined.

12/11/78 — Walsh — opn in petn

Court ..... *Voted on* ....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No.78-597

Submitted ....., *19*... *Announced* ....., *19*...

ICC

vs.

SEABOARD ALLIED MILLING CORP.

You are OUT of this case.

Out

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

OUT

Out

PRELIMINARY MEMORANDUM

January 5, 1979 Conference
List 3, Sheet 2

No. 78-604 Cert to CA 8

SEABOARD COAST LINE RR CO., ET AL. (Gibson, Van Oosterhout & Matthes)

v.

SEABOARD ALLIED MILLING CO., ET AL. Federal/Civil Timely per extn

Please see prelim for No. 78-575 with which this case is curve-lined.

12/11/78 Walsh opn in petn

January 5, 1979

Court ..... *Voted on* ....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 78-604

Submitted ....., *19*... *Announced* ....., *19*...

SEABOARD RR CO.

vs.

SEABOARD MILLING CORP.

Time for filing extended by Justice Blackmun until October 9, 1978. You are OUT of this case.

Out

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

May 28, 1979

78-575 Southern Railway v. Seaboard

Dear John:

Please show on the next draft of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

Mr. Justice Stevens

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 29, 1979

Re: Nos. 78-575, 78-597 & 78-604 -
Southern Railway Co. v. Seaboard
Allied Milling Corp, etc.

Dear John,

With thanks, I join.

Sincerely yours,

Byron

Mr. Justice Stevens

Copies to the Conference

cmc

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
								4/30/79
Join JPS 6/7/79	Join JPS 5/31/79	Join JPS 5/30/79	join JPS 5/29/79	Join JPS 5/31/79	Join JPS 6/4/79	out late 5/28/79	join JPS 6/29/79	1st draft 5/28/79 2nd draft 5/31/79 3rd draft 6/5/79
				78-575	Southern Railway			