2000

Utah Copper Company, and Corporation v. Public Utilities Commission of Utah: Reply Brief

Utah Supreme Court

Supreme Court of the State of Utah

UTAH COPPER COMPANY,
A CORPORATION,
Plaintiff,

vs.

PUBLIC UTILITIES COMMISSION OF UTAH, AND UTAH POWER & LIGHT COMPANY,
A CORPORATION,
Defendants.

No. 3649
CERTIORARI PROCEEDINGS

PLAINTIFF'S REPLY BRIEF

DICKSON, ELLIS, LUCAS & ADAMSON,
Attorneys for Plaintiff.

ARROW PRESS, SALT LAKE

In the

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The Power Company's "Additional Brief" deals only with the one contention respecting the retroactive feature of the order in Case 248. This is, therefore, all that we will discuss herein.

THE QUESTION IS NOT RES JUDICATA.

The Power Co. urges that the decision of this Court in Case 230 is *res judicata,* on the theory that it was expressly passed upon by this Court, or, if not, was

at least inferentially passed upon by the general affirmance of the order in Case 230. The question certainly was not expressly passed upon. The opinion of the Court did not even mention, much less discuss, the effect of the provisions of Sections 4785, 4800 and 4830, C. L. 1917. Not only did the decision of the Court fail to expressly pass upon this question, but, on the contrary, this Court, upon the petition for the rehearing, stated the question accurately by saying that it was whether or not the Commission had the power to make or enforce the temporary rates; and the Court then expressly and unequivocally said that *"that question was not, nor was it intended to be, decided in any of those cases."*

The Power Co. says that the Court knows what it intended to decide and did decide, and adds that it is perhaps presumptious to argue to the Court which rendered a decision, what was decided thereby. It need only be said that the Court rendered its decision in the English language, and litigants have a right to accept and rely upon the express, unambiguous and unequivocal language of the Court saying that it did not decide, nor intend to decide, the question raised.

The Power Co. urges that the question was inferentially necessarily decided by the general affirmance of the order in Case 230, on the theory that the principle involved lay at the foundation of the order in Case 230. In making its order in Case 230, the Commission, under the statute as construed by this Court, was authorized to interfere with the contract. That it did. It was then authorized, and under the statute it was its duty, to find and declare the reasonable rate to be paid by the consumer. That it did not do. Frankness demands that we state that we regarded those two powers of the Commission and those two duties of the

Commission as interlocking, and therefore we made a specific attack upon the order in Case 230 for its omission to find and declare the reasonable rate as required by the statute. We thought that the Court should and would pass upon that question with respect to the order in Case 230. However, the Court did not do so, and expressly says that it did not do so, and expressly says that it did not intend to do so. The only explanation for the Court's attitude towards this question is that it regarded the order in Case 230, insofar as it dealt with this rate feature, as possibly only an interlocutory order and not a final order, and that the question could best be dealt with and determined when the Commission had finally acted with respect to rates by making its order in Case 248. Accordingly, when we came to review the order in Case 248, we renewed the question.

The Copper Co. had a right to have that question expressly passed upon. It had a right to have it reviewed in connection with the order in Case 230. It has a right to have it reviewed in connection with the order in Case 248. The question is not a mere technical one; it is a substantial one involving practically a quarter of a million dollars. The Copper Co. has done everything prescribed by procedural or remedial law to protect itself with respect to the question raised. Now the Power Co. seeks, on the technical doctrine of *res judicata,* to forever prevent the Court from passing upon the question, simply because the Court declined to pass upon it in reviewing the order in Case No. 230. Such a result would be intolerable. Whether it would be good law is for this Court to say; but certainly it would not be justice or fair play. When a litigant raises a question and attempts to have it determined, and the Court expressly declines to determine it, there is no justice or fairness in refusing to again

entertain the question when again presented, in a *new proceeding,* against a *new order,* and put that refusal on the ground that the question had already been determined inferentially, despite the Court's express statement that the question had not been determined.

The Power Co. says that the effect of the Court's now entertaining this question and deciding it in favor of the Copper Co., would be to leave the customer in the position of being required to pay Schedule 43 rates, and that, therefore, we are seeking to review a portion of the order "which is of benefit to the customer." We hardly see wherein an order which takes a quarter of a million dollars illegally is a benefit to the Copper Co. Aside from this, the suggestion of the Power Co. is untenable, not only because Schedule 43 rates have been declared unreasonable, but also because if the Copper Company's position on the merits of the question presented is sound, then the Copper Co. would only be required to pay the contract rate up to the time that the Commission established the new reasonable rate. This destroys the sophistical suggestion that the order is of any benefit to the Copper Co. Furthermore, this suggestion bears upon the merits of the question, and not upon the point of *res judicata.* It will not do to confound the two propositions. The Court cannot decline to entertain the question on the theory of *res judicata* because of any view it may hold or not hold respecting the merits of the question.

In 23 *Cyc.* 1226, it is said that a judgment to be *res judicata:*

> "Should be free from irreconcilable contradictions and ambiguities which cannot be cleared away."

And in 23 *Cyc.* 1292, it is said that:

> "The estoppel cannot be extended to matters which the judgment expressly declares not to have been in issue in the action in which it was rendered or to have been omitted from consideration therein."

And in 23 *Cyc.* 1297, it is said:

> "The estoppel of a judgment does not extend to matters not expressly adjudicated and which can only be inferred by argument or construction from the judgment."

In 15 *R. C. L.* 955, it is said:

> "If the real merits of the suit are not determined in the prior decision, the judgment will not be a bar."

In 15 *R. C. L.* 980, it is said that a plea of *res judicata* is insufficient, unless it appears that the issue or question was:

> "Positively decided in such former action against the present plaintiff."

The plea of *res judicata* should not be sustained in this case. The issues are not identical. A new order is here under review and it brings before the Court facts which did not exist at the time the original or foundational order was entered.

The question presented was expressly withdrawn and withheld by the Court in passing upon the order in Case 230. The Court's opinion on the application for rehearing as to the former order expressly states that this question was omitted from consideration therein. The real merits of the question were not decided, nor were they intended to be decided, by the judgment as

to the other order. The question is one which in effect was expressly reserved by the Court's opinion in the former case. The question is now open. The Copper Co. should not be hurt by any act of the law. The Court should pass upon the question raised. It did not do so in the former case. It should do so in this case to the end that somewhere, somehow, the rights of the Copper Co. with respect to this matter may be determined. A gross wrong has been done the Copper Co. For every wrong, the law provides a remedy. The pending proceeding affords that remedy.

REPLY ARGUMENT ON THE MERITS.

The Power Co. says Schedule 43 rates would have been applicable to the Copper Company's service but for the contract. It urges that this is evidenced by the fact that for 8000 H. P. in excess of the 31000 H. P. covered by the contract, the Copper Co. paid at Schedule 43 rates. That has nothing to do with this case. The question here involves only the rate for the 31000 H. P. for which there was a contract. Of course, after the Utilities Act was passed and the schedules filed, the schedule rates had to apply to service not embraced within a pre-existing contract. But that does not destroy the express requirement of our statute that as to service embraced in a pre-existing contract the Commission, upon interfering with such contract, should find and prescribe the reasonable rates to be thereafter observed. It is certainly astounding to contemplate the omnipotence of the Power Co. By merely filing a piece of paper it has succeeded in striking down constitutional limitations, and wiping out a clause of the statute, and now seeks to induce the Court to ignore three more express requirements of the statute.

The Power Co. next attempts to excuse the failure of Schedule 43 to carry any symbol denoting any advance in rates as required by the Commission's Tariff Circular No. 3. It seeks so to do because that schedule recited that it was effective on March 1, 1917, and therefore the Power Co. says it was filed previously to the issuance of that Tariff Circular. There are two answers to this, viz.: (1) the uncontradicted fact shown by the certiorari record in Case No. 3582, in this Court, at page 8, is that the schedule was not filed until after the circular, although the Power Co. had had such an unfiled schedule previously; and (2) circular, or no circular, the schedule was not filed until after the passage of the statute, and the statute itself (Sec. 4785) required that attention be directed to any rate advance by an appropriate symbol. All this argument of the Power Co. is shown in its true light, when we remember the fact that the schedule was not designed to increase contract rates, not only because the Power Co. had no right to ignore its contracts, but also because it continued billing at the contract rates and not schedule rates for over two years before the Commission started the investigation. The Court can feel reasonably sure that the Power Co. would have billed on the schedule if it felt that such schedule was designed to, or operated to, affect the contract service rate.

The Power Co. says it was impossible to make the special contracts conform to that rate advance requirement. That is another suggestion thrown in to cloud the proposition. The question is whether the schedule rate affected the contracts. The schedule had to measure up to certain requirements to effect such a result. It did not do so. There was no requirement that any contract should carry any such symbol.

In the last place, the Power Co. says that this provision, designed to give the public notice of rate advances, should be treated by the Court as merely directory and not mandatory, and therefore the failure of the schedule to comply with the statute is to be disregarded as a mere irregularity. This merits no answer.

The Power Co. refers to the opinion of Mr. Justice Gideon as destroying the contracts. That was not the opinion of a majority of the Court. Furthermore, that opinion overlooks the distinction between contracts made prior to the passage of the Act, and those made subsequently. That is certainly a reasonable basis for classification. It is passing strange to say that obedience to a constitutional mandate against the impairment of pre-existing contracts renders a statute unconstitutional for improper classification.

The Power Co. says the contention is technical and subversive of justice. Of course, in their view anything is technical which requires either the Power Co. or the Commission to comply with the mandate of the statute. True, if the Commission had declared Schedule 43 rates reasonable, or had fixed new rates in its October order, this question could not have arisen. But the "mummery of words" the Power Co. complains of happens to be a statutory requirement. To follow a statutory mandate may be regarded as "archaic legal procedure," in these modern days when we have passed from the divine right of kings to the divine right of majorities; but after all, the statute is the voice of those majorities, and this requirement of the statute was put in there so that the consumers might know in advance the exact rate they would be called upon to pay. The Commission never found Schedule 43 rates reasonable as

applied to our service. On the contrary, it found them unreasonable. The "spirit of the Act," and "justice and equity" (as viewed by the courts rendering the decisions cited on pages 15 and 16 of our main brief herein) demanded that the agreed rate should be the only lawful rate until the Commission found and declared a new reasonable rate, in accordance with the statute.

The Power Co. next contends that the order of the Commission in Case 230 making the schedule rate applicable to the service, was equivalent to an approval of those rates and to a finding of their reasonableness. That is not true because that very order said that question had not been determined and ordered the Power Co. to stand ready to make reparation; and ultimately those rates were found unreasonable and reduced. So the Commission never approved Schedule 43 rates and never found them reasonable as applied to this contract service.

The Power Co. says it was the right and duty of the Commission to fix temporary rates for this contract service pending its completion of the investigation and establishment of the reasonable rate, and cites *Fort Smith & W. R. Co. v. State,* and *Muskogee Gas. & E. Co. v. State,* and *Omaha & C. B. St. R. v. Commission.* Those cases are not in point. In none of them was a statutory provision involved such as we have here. In none of them was any pre-existing contract involved. The first case merely held that there was sufficient evidence to justify attaching a *prima facie* validity to an order condemning a schedule rate. The second case merely held that the Commission could, upon proper evidence, fix temporary rates to meet war emergencies, without making a technical valuation of the utility's property. That has nothing to do with the question

here presented. The third case is to exactly the same effect, and has no bearing here. The Commission in Case 248 promulgated these new rates as temporary emergency rates pending a valuation of the Power Company's property. If we were attacking those rates on the theory that a valuation was a condition precedent to fixing the rates, those decisions would be directly in point. But obviously that is not the question here presented. No such statutory requirement, on a contract case, such as we are here dealing with, was involved in any of those decisions cited by the Power Co.

The Power Co. also contends that the fact that a tariff rate is under attack as unreasonable gives a consumer no right to a different rate pending the determination of such attack, and the ascertainment of the reasonable rate, and cites *Suburban Water Co. v. Oakmont,* and *Texas & P. Ry. v. Abilene Oil Co.* That proposition and those cases have no relevancy to the question here at issue. The first of those cases merely presented a situation where a tariff rate was in effect, and a patron, without any contract, sought service, but contended that the schedule rate was unreasonably high. He took the service and declined to pay the bill. It was merely held that he had to pay the bill and seek reparation through the Commission. That case has nothing to do with the question here involved. This is a different situation under a specific and different statutory provision. The second case cited by the Power Co. merely held that a state court had no jurisdiction to declare an interstate freight rate unreasonable, as that issue lay with the Interstate Commerce Commission in the first instance. What that has to do with the question here presented is beyond our comprehension. So the *Kinnavey* case merely determined what was necessary, under the Act

to Regulate Commerce, to attack an interstate rate as unreasonable. That case has no bearing on this one.

The Power Co. also contends that the schedule rates were the only lawful rates "except as any customer may have been entitled to a different rate by virtue of a preserved special contract," and cites *Boston Ry. v. Hooker, Louisville Ry. v. Maxwell, Louisville Ry. v. Dickerson,* and *Poor Grain Co. v. C. B. & Q. Ry.* Every one of those cases can be disregarded as not in point. They arose under the Federal Act. No such statutory provision as we have here was there involved. There is not the slightest analogy in the facts. The *Hooker* case merely involved the validity of a limitation for loss of baggage. The *Maxwell* case and the *Poor Grain Co.* case merely hold that where there is an existing tariff freight rate, a shipper must pay that rate, even though a station agent makes a mistake in naming a lower rate in issuing the bill-of-lading. The *Dickerson* case is to exactly the same effect, except that there the bill-of-lading named too high a rate, and the shipper recovered the excess. In none of those cases was any pre-existing contract involved. In none of them was there any statutory requirement such as we have here involved. In *State v. Billings Co.,* cited by the Power Co., no such statutory provision was involved as we have here. There the Commission was not required to do anything.

The Power Co. says that our contention ignores the provision prohibiting any contract differing from published schedules and making the schedule rates the conclusive lawful rates. That argument is sound as to all contracts entered into since the passage of the Act and the filing of the schedules, but not as to pre-existing contracts. The statute makes the rates in antecedent contracts the only lawful rates until

the Commission sets aside the contract and establishes a new reasonable rate to be thereafter observed, in accordance with the statute.

The Power Co. admits that the Commission must follow the statute in increasing any schedule rate. It admits that the Commission "must follow the method prescribed by the statute in its actions in this respect." All we say is that the Commission, in increasing a contract rate, fixed by a pre-existing contract, "must follow the method prescribed by the statute."

The Power Co. says that "the error" in our position is "in the assumption that both the schedule and contract rates are entitled to equal presumptions of lawfulness." There is no error. The statute preserved the rates named in pre-existing contracts until the Commission not only set aside the contract, but also, as required by the statute, found and fixed the reasonable rates to be thereafter observed.

The authorities cited in our main brief are directly in point. They deserve most careful consideration.

Respectfully submitted,

DICKSON, ELLIS, LUCAS & ADAMSON,
Attorneys for Plaintiff.