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The Western Pacific R. R. Co. v. Wasatch Chemical Co. : Brief of Appellant

Utah Supreme Court

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Case No. 85246

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

THE WESTERN PACIFIC R. R. CO.,
a corporation,

Plaintiff and Respondent,

vs.

WASATCH CHEMICAL CO.,
a corporation,

Defendant and Appellant.

FILED

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APPELLANT'S BRIEF

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APPELLANT'S BRIEF

ASSIGNMENT OF ERRORS

1. The court erred in failing to determine the issue of classification for the appellant, as a matter of law.
2. The trial court's findings of fact and conclu-

sions of law are not supported by the evidence, but are contrary to and against the evidence.

3. The trial court erred in failing and refusing to submit to a jury the issue of reasonableness of the classification.

4. The trial court erred in denying the appellant's motion for a new trial.

NATURE OF ACTION

This action arose from a demand made upon the defendant, by the plaintiff, for a sum of money, which the plaintiff claimed to be due and owing it from the defendant on account of certain freight rates charges made on certain items of freight transported from San Jose, California, by the plaintiff and delivered to the defendant at Salt Lake City, Utah. After a trial by the court, without a jury, a money judgment was entered in favor of the plaintiff. From this judgment, the defendant, now appeals.

STATEMENT OF FACTS

The appellant, herein, is a manufacturer and distributor of chemical compounds, and specifically those presently used in the industry of agriculture. In addition to the compounding of chemical formulas used in agricultural pursuits, it is a supplier of all types of sprayers to contain and apply said chemical solutions.

The respondent is a Railroad engaged, among other things, in the transportation of articles of freight.

Approximately two years next prior to the commencement of this action, the respondent began transporting from San Jose, California, to Salt Lake City, Utah, certain dip spraying machines, for the appellant for which service the respondent, for a time, demanded and received from the appellant a first class rate charge. The appellant, being dissatisfied, protested. Claiming the first class freight rate charge was illegal and not in accordance with freight rate tariff provisions, and put in a claim for a commodity rate, which protest and claim was admitted and granted by the respondent, and thereafter all charges collected by the respondent on account of said first class freight rate charges in excess of the commodity rate were refunded to the appellant, and a commodity rate was thereafter charged on said articles transported until approximately six months prior to the commencement of this action, when the respondent reversed its former position and made demand upon the appellant for the difference between the commodity rate and the first class rate on all articles transported from the beginning of the undertaking, which demand the appellant refused, on grounds that the article transported was a sprayer not classified nor indexed by name in the tariffs, and, therefore, according to the duly declared and published tariff rate for said article the

appellee was only entitled to charge and collect a commodity rate, and that said legal and proper commodity rate on said article had been fully paid and discharged.

The BILL OF EXCEPTIONS in the cause was presented, signed and settled by the court, which contains all of the evidence and proceedings had at the trial and is on file in the Supreme Court as part of the transcript of the record of said cause.

QUESTIONS

WHAT ACTUALLY WAS THE ARTICLE TRANSPORTED?

DID THE FREIGHT RATE FIXING AUTHORITY ACT WITHIN REASON IN CLASSIFYING THE ARTICLE TRANSPORTED?

ARGUMENT

The case of the respondent is presented in the following order :

1. Character of the article transported.
2. Reasonableness of the classification.

3. Failure of the trial court to enter a decision for the appellant as a matter of law.

1. The article transported from San Jose, California, by the respondent, and delivered to the appellant

at Salt Lake City, Utah, is generally and commonly known throughout the livestock-agricultural industries as a Spray-Dip Machine, note: (Appellant's Exhibits); also, it is called a Spray-Dip Machine by the manufacture (Tr. p. 16). It bears a trade-name SPRAY-DIP. Its character in fact is a complex system of parts adapted to the purpose of spraying animals with insecticide solutions in an efficient, effective manner without waste of the solution. It is mounted on pneumatic tires for ease and convenience of mobility. Through spraying heads mounted in a spraying vat insecticide solutions are driven at the rate of 135 gallons per minute by a power driven pump. The run-off solutions are recovered and passed through a filter screen to the storage tank, where moving agitators (Tr. p. 16) keep the solutions in constant suspension. It is an integrated spraying system compactly housed in a single unit (appellant's Exhibits 1 and 2), and in law and in fact is a power-driven spraying machine for livestock.

2. The gravamen of this action is REASONABLE-NESS.

Is it reasonable for a rate making authority to assign an article so generally and commonly known as a Spray-Dip Machine to nameless oblivion to avoid the clear and unmistakable language of Tariff Item No. 15380 of Pacific Freight Tariff Bureau's Tariff No. 260-A? Is it reasonable to circumvent and avoid the effect of a

clear and unmistakable written tariff such as Item 15380 of Tariff No. 260-A (Respondent's Exhibit C) with the circuitous complexity exemplified in the trial court's finding No. five (5) (JR 29), and expect the shipper, to whom it is addressed, to understand it? Is it REASONABLE for a rate making authority to use strained and unnatural language to the extent of terming a spraying VAT, constructed for the sole purpose of economy in recovering expensive run-off insecticide solutions, a pen or chute? The United States Supreme Court said in the case of *Pyper v. Boston & M. RR*, 246 U.S. 439, "The rates established by the appropriate authorities have the force and effect of statutes so far as consistent with law, but not where repugnant thereto", and a freight tariff is not within the law, if it is without reason. When rates are changed, the carrier making the change must, when properly called on be able to give a good reason therefore; and, if in a proper proceeding they are shown to be arbitrary and unreasonable, the court will relieve against it. 13 C.J.S., p. 623, Sec. 275.

The appellant, being a shipper and supplier of various types of sprayers, contends the rate making authority was unreasonable, and did not act within the law when it failed to make comparison of the Spray-Dip Machine with Garden, Field and Orchard sprayers before making the freight rate herein assigned, because, as a matter of fact, the Spray-Dip machine util-

izes less car displacement in shipping, and is much easier of loading and unloading than the garden, field and orchard types of sprayers. (Appellant's Exhibits 1 and 2).

As a practical matter, the reasonableness of a particular rate depends upon the reasonableness of a classification (Beal & Wyman, RR rate regulation, Sec. 499, and comparison of rates are used to determine reasonableness, 9 Am. Jur. (Carriers), Sec. 121; analogous articles should ordinarily be placed in the same class, 19 ICC 507. Articles which are substantially similar in character and in bulk, weight and value should take approximately the same rate for the same distance, making due allowance for the manner of loading and unloading, 9 Am. Jur. (Carriers), Sec. 126. The Spray-Dip Machine and garden, field and orchard sprayers are substantially similar in character and should take the same rate—a commodity rate, as in PFTB-Tariff No. 260-A (Respondent's Exhibit "C") provided.

From the (Tr. p. 13), we quote:

Q. What is the mechanism of this machine. . . . ?

A. It is a portable machine, the idea being to take it to the herd instead of driving them or handling them long distances.

(Tr. p. 14)

Q. What is . . . its mechanical operation?

A. The machine, of course, like any spraying machine that is built for orchards, vegetables, park spraying, or any such thing as that consists of an engine, a pump, vat holding the solution, nozzles, wheels, axles, draw bar and all that sort of thing.

Q. . . . what is the construction of this machine?

A. Of this particular machine?

Q. Of this particular machine, the animal spraying machine?

A. Well, it has all those different components that any spraying machine has, plus instead of having to hold the animal, or drive them up into a corner some place and have them flounce around, you drive them into this machine, that is, one at a time. When they are in the machine, you close the doors, turn the lever and it automatically sprays them with twenty-eight nozzles, striking them from all angles. . . .

From the (Tr. p. 17)

Q. Then this shown here at the top and shown again in these two photographs, and on exhibit B, are including the space—

A. Yes.

Q. —to restrain, or hold the animal?

A. Yes, and to catch the chemicals.

Q. That collects in the bottom?

A. Yes.

From (Tr. p. 20)

Q. What position . . . in the older method of dipping livestock—would this machine take?

A. Well, as I understand it, that old method of dipping livestock, this simply replaces it. That has become obsolete.

Q. What has it replaced?

A. The dipping VAT.

Q. The Vat, or tank?

A. Yes.

Q. It doesn't replace the chutes or pens?

A. No, with the dipping vat you have to have a chute leading up—you back this machine up to the chute.

From the foregoing uncontradicted evidence adduced at the trial of this case, appellant contends the correct characterization of the Spray-Dip Machine is: A SPRAYER adapted to the spraying of livestock, and is substantially identical with sprayers adapted to the spraying of gardens, fields and orchards, and should have, by virtue of comparison and reasonableness been given the same commodity rate as PFBT—Tariff No. 260-A, Items 15370 and 15380 provides.

At the pre-trial of the case, the parties stipulated (Tr. p. 7, 8, 9) that if respondent's witness were called to testify, he would testify: That in his opinion, there

is no specific description to cover the article on the date shipped. In other words, a sprayer that sprays animals, or an animal sprayer as such is not listed (indexed) in the tariffs as of the dates shipped. This is identically the contention of the appellant, and therefore, because it is not listed (indexed) by name—Spray-Dip Machine, Animal Sprayer, and it, nevertheless, in law and in fact being a Sprayer, it must take the rate provided for it which is Item No. 15380 of PFTB—Tariff No. 260-A, which reads: Sprayers, NOT OTHERWISE INDEXED BY NAME, with or without engines. It being so classified, it bears the same rate—a commodity rate—as do the sprayers in Item 15370 immediately preceding, which reads: “Sprayers, field, garden, or orchard, barrell or tank, with or without engines.” All these various types of sprayers being substantially similar, it is fair, just and reasonable that they should carry the same freight rate as in the law provided. *Director General v. Viscose Co.*, 254 U. S. 498; *Missouri K & T v. Harriman*, 227 US 657; *Minneapolis & St. Louis RR Co. v. Minn.*, 186 US 257. To avoid and circumvent the clear and unmistakable language of the tariff, the respondent has contrived a complex, intricate fiction. (see: Paragraphs 5 and 6 of trial court’s findings, JR 29) to defeat the interest of the shipper which the carrier is not permitted to do. 115 ICC 543. Were the respondent permitted to do this, its rate fixing power would be arbitrary and unlimited. The Interstate Commerce Commis-

sion has ruled that: "The failure of the carriers to publish their rates and charges in clear and unmistakable terms, as required by the tariff's rules, may not be used as a cloak to defeat the claims of the shipper, 115 ICC 543. In construing doubtful and ambiguous tariffs, the commission has always resolved the doubt against the party responsible for having such tariffs in effect, 115 ICC 543."

The law is not questioned that tariffs must be written in clear and unmistakable language, and that neither of the parties can urge a strained or unnatural construction (120 ICC 275), yet, notwithstanding this ruling, the respondent proceeds to call a vat a chute or pen to defeat the claim of the shipper (see paragraph 6, trial courts findings, JR 29), when as a matter of fact they are not remotely comparable either in use or similarity.

From (Tr. p. 19-20)

Q. You are acquainted with . . . the old-fashioned method of dipping animals, are you not?

A. Yes.

Q. What particular position in that does this machine take, in method of dipping?

A. Well, of course, this replaces the dipping VAT.

From (Tr. p. 20)

Q. It doesn't replace the chutes or pens?

A. No, with a dipping vat you have to have a chute leading up—you back this machine up to the chute . . . We wish we could sell it for other purposes, there would be more sales. But, I can't think of any other thing in the world than what we sell it for—the spraying of cattle.

The appellant rightfully and earnestly contends that a A SPRAYING VAT is not pen or a chute, and neither is a compartment in a spraying machine constructed chiefly to recover and reclaim expensive chemicals solutions a pen or a chute. The law requires: Generally, the words used will be given their common meaning, or the meaning which they might reasonably carry to the shipper, to whom they are addressed, *Union Wire Rope Co. v. Atcheson T & RR*, 66 Fed. (2nd) 965. A portable spraying Vat is an entirely different thing than a pen or chute, and those engaged in the livestock industry know the two are not even comparable for they service entirely different purposes. (Tr. p. 21). Pens and chutes are used to control and manage animals to get them up to a dipping vat, or a dip spraying machine (Tr. p. 21 22) (Respondent's Exhibit "A"). The vat, or spraying chamber in a spraying machine is the place where the dipping solutions are applied and recovered (Appellant's Exhibits 3 and 4); the pens and chutes are the enclosures where the animals are controlled and manipulated in order to get them into the

vat, or spraying chamber of the machine that the dipping solutions might be effectively applied to them. To insist differently, one must misconstrue and use words and generally known terms loosely, against such practice the Interstate Commerce ruled in the case reported in Vol. 115, ICC 543.

Were it a fact, which reason dictates otherwise, that the spraying chamber of a dip spraying machine is identical with a cattle chute, then, the respondent would still be prevented from charging a first class rate, for item No. 16665 of PFTB—tariff 260-A (Respondent's Exhibit "C") reads as follows: "Cattle dehorning chutes, KD, loose or in packages LCL, 3rd class." Were the dip-spraying chamber of the spraying machine identified with, and declared to be a stall, still the respondent could not charge a first class rate, for item 16955 reads, as follows: "Stalls, KD, livestock, loose or in packages, LCL, 3rd class. However, it is neither a stall, a pen, nor chute. It is simply a spraying chamber comparable to a dipping vat, constructed within a machine built and adapted for its main purpose to spray expensive solutions under high controlled pressure (Tr. pp. 14-15) against the bodies of animals, and again recover the unused run-off solution; cleanse it, and return it to the tank to again be applied.

The appellant earnestly contends, the item trans-

ported by the appellee is an animal dip-spraying machine and should be classified as the legal tariff provides: A SPRAYER, NOT OTHERWISE INDEXED BY NAME. That it is a machine and not something else cannot be questioned. An Iowa court said in the case of *Tubbs v. Insurance Co.*, 131 Iowa 217, “. . . the objection which is specifically urged to the court’s enumeration of the machinery is that the boiler, pipes, and fittings have no proper place in that category, because it is said they did not convey or regulate force. Webster’s International Dictionary definition of machine: Any mechanical contrivance. Machinery—the means and appliances by which any thing is kept in action, or a desired result is obtained; a complete system of parts adapted to a purpose. More narrowly and technically, machinery is said to be: the working parts of a machine, engine or instrument arranged and conducted so as to supply and regulate force. It is in the first and broader sense that the term is usually employed . . . boilers, pipes, washers, irons, mangles and numerous appliances make up a complex system of parts adapted to a purpose . . . when combined and actually connected ready for operation, the entire outfit is machinery in the proper, commonly accepted use of the term. Each is an essential part of the whole and together, we think, they are clearly within the term, machinery.”

From (Tr. p. 18)

Q. So the function of this piece on here is to hold the animal?

A. To hold him and to spray him. That is where the spraying is done. It wouldn't be a sprayer unless you had nozzles. There are the nozzles to do the spraying. In other words, without a pump, an engine, a tank and wheels and strainer it wouldn't be a sprayer . . . all of those different units together make a spraying machine. Take one out and you won't have a spraying machine.

It will be noted, the summation of the foregoing testimony of the witness is indential with the reasoning of the Iowa court in *Tubbs v. Ins. Co.*: That an instrument arranged, and adapted to regulate force is a machine and not a combination of anything, for without any of its working parts it is useless, and nothing.

Reasonableness is the foundation upon which rates are constructed, and according to it they either stand or fall. Any rate that a carrier might fix is subjected to being tested by the court for reasonableness. 13 C.J.S. (Carriers), Sec. 275. And to determine the reasonableness of a classification rating, the character of the article must be considered, *Western Classification Case*, 25 ICC 442. The carrier's right to fix rates is subject to reasonableness. The appellant contends the carrier did not act in reason, when it classified an article so adapted and

generally and commonly known as a sprayer, a combination of articles, including pens and chutes.

The trial court admitted the evidence entered and produced by the appellant, and there was no substantial dispute with respect thereto. The court was, thus, required to make findings in favor of the appellant, which the court declined and failed to do. The evidence as so adduced by the appellant was competent, relevant and material, and as such was admitted by the court in evidence. The evidence, so admitted, was admitted without any objection on the part of the respondent. These matters were all pointed out to the court on appellant's motion for a new trial, notwithstanding which the court overruled the motion, which ruling also was assigned as error. And the trial court particularly failed to find, that which the undisputed evidence shows; that the character of the article shipped is an animal sprayer, and that SPRAYERS, NOT OTHERWISE INDEXED BY NAME, in Pacific Freight Tariff's Bureau's tariff No. 260-A (Respondent's Exhibit "C"), takes the rating of Item No. 15380.

The finding made in paragraph three (3) by the trial court that the article shipped and delivered to the appellant was an automatic Spray-Dip is not supported by the evidence, but is contrary to the evidence, as the evidence is uncontradicted that the article transported was a motor driven sprayer, and essentially not auto-

matic. Likewise, the finding in paragraph four (4) that the article shipped on occasion listed and known as a Spray Dip consists of a combination of motor, pump, storage tank, filter device, spray nozzles and enclosure for holding livestock is not supported by the evidence. The evidence is clear and uncontradicted that the compartment in the sprayer is a vat constructed to reclaim and recover run-off spraying solutions. The trial court's finding in paragraph six (6); that the article transported by the appellee to the defendant is properly classified as a livestock spraying pen or chute in combination is not supported by the evidence, but is contrary thereto. The evidence shows without substantial objection that the article transported is a motor driven sprayer of animals, and being a complex system of parts adapted to a purpose is a machine according to law (*Tubbs v. Ins. Co.*, *supra*), and the trial court erred in not finding that the article transported was a spraying machine as a matter of law. In other words, had the trial court made findings with respect to material facts, as shown by the undisputed evidence, findings would have been made in accordance with the issues in favor of the appellant and conclusions of law and judgment rendered in favor of appellant. And, now, appellant does complain of and assigns as error the findings as so made aforesaid by the court below. For the reasons herein given and because of the law in such matters provided, we submit to this

court that the decision made in the court below should be reversed, and the case remanded and judgment entered for the appellant in accordance with its prayer in the answer.

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