RATES - MOTOR CARRIERS - JOINT SERVICE - Circumstances under which two carriers combining permitted routes are guilty of usurping unpermitted through routing.

August 3, 1937. 8/9

FILED
35

Hon. G. Derk Green,
Prosecuting Attorney of Linn County,
Marceline, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of April 19, 1937, such request being in the following terms:

> "The State Highway Patrol and a representative of the Public Service Commission filed a complaint a few days ago before a Justice of the Peace of this County against John Latta, who operates a truck line out of Brookfield, charging him with accepting property for transportation from a point on a regular route destined to a point on a regular route without having a certificate of convenience and necessity therefor. The facts involved were new as far as I could ascertain, and the Public Service Commission representative did not have any ruling from his department covering a similar fact.
>
> "It was suggested and agreed that before this prosecution continued, an opinion should be obtained from your office. Then the case can probably be disposed of without trial, based upon your opinion.
>
> "The facts are as follows: Defendant Latta has a permit for a regular route between St. Joseph and Brookfield, Missouri. Byers Transportation of Kansas City has a permit for a regular route from Kansas City to St. Joseph, Missouri. The Churchill Truck Lines have a permit for regular route between Kansas City and Brookfield. This particular shipment was shipped by the Koch Butchers Supply Company from North Kansas City, Missouri, to Johnson Brothers at Brookfield, Missouri, and was billed "Byers c/o Latta"

on March 6, 1937. This shipment was delivered to the Byers Trucks, and was by them hauled to St. Joseph. When it arrived in St. Joseph, the Byers people unloaded it at their ware-house and notified Latta that it was there for delivery to Brookfield. Previous to that time, Latta had called at the Byers ware-house for the purpose of accepting this, but it had not arrived at the time he called for it.

"This indicated that he was expecting the shipment. However, when he was later called by Byers and notified that the shipment was there, Latta refused to accept it, because he had no authority to accept shipments originating in Kansas City and destined for Brookfield. The Byers people then stated that they would deliver the shipment to some other authorized trucker for delivery to Brookfield. Latta thereupon telephoned to the shipper, and upon instructions from the shipper, accepted the shipment at the Byers ware-house and delivered it in Brookfield. His arrest was brought about upon the complaint of Churchill. Latta did not have authority to render joint service with Byers from Kansas City to Brookfield.

"The shipper, Koch Butchers Supply Company, explaining the routing through Byers and Latta, claims that they could not find any other truck line with equipment of adequate size to handle the shipment which consisted of a crated counter approximately 13 feet long, 3½ feet thick and 4½ feet high. However, the equipment of Churchill can be shown to be sufficient to handle this shipment, and of equal capacity of Latta's.

"Patrolmen say that this is merely a means of evading the law, and that they have had considerable trouble with carriers 'chiseling' in this way. However, I do not believe we could establish by evidence, the fact that Latta has done this before.

"We would like your opinion as to whether or not Latta is guilty of a violation by accepting this shipment. In view of the fact that the Public Service Commission and the Highway Patrol are not positive on this point,

> and no similar case having been called to my attention, we considered it proper to ask for this opinion from your office. Please advise me as soon as possible, as this case is being delayed awaiting your opinion."

Laws of Missouri of 1935, page 321, Section 5267(e) provides as follows:

> "It shall be unlawful for any motor carrier, except one having a certificate of convenience and necessity authorizing such service, to accept persons or property for transportation from a point on a regular route destined to a point on a regular route, or where through or joint service is being operated between such points, and any motor carrier so offending shall be guilty of a misdemeanor and punished as provided by section 5275 of this act."

You do not state in your letter whether John Latta is a common motor carrier or a contract hauler but it would seem to make no difference under which kind of permit he operates, as Laws of Missouri of 1931, page 304, Section 5270(e) contains the same provision applying to contract haulers.

Although the language of the section above quoted is not as clear as it might be, we believe that it is sufficiently definite to make it unlawful for John Latta and Byers Transportation Company to maintain joint service between Kansas City and Brookfield under an agreement whereby Byers Transportation Company would do the transporting from Kansas City to St. Joseph and Latta from St. Joseph to Brookfield. Nor would the fact that only one shipment was made prevent the acceptance of this one shipment from being a violation of law, because if Latta and Byers Transportation Company should decide to make and carry out such an arrangement for joint service, the first shipment pursuant to this arrangement would be as much of a violation of law as the last such shipment.

On the other hand, we believe that it is equally clear that if a shipper like Koch Butchers Supply Company should engage Byers Transportation Company to haul a shipment from Kansas City to St. Joseph, without the knowledge of Latta, and after the shipment had arrived in St. Joseph the shipper

should for the first time communicate with Latta and enter into a contract with Latta for the carriage by him of this shipment from St. Joseph to Brookfield, the acceptance by Latta of this shipment would be precisely within the terms of his permit, and would not be illegal. Of course, if Latta made a practice of accepting freight under these circumstances, it would tend to show that even although he might not have advance knowledge of the proposed shipments from Kansas City to St. Joseph, that he was deliberately avoiding such advance knowledge so that he could evade the charge of being a party to prohibited joint service, but under the facts as stated in your letter, no practice of this sort could be established, and therefore your inquiry must be treated as dealing only with a single instance of this kind of a shipment.

We will also assume that the actual contract between Latta and the shipper was not entered into and did not become binding until the time of the telephone conversation between Latta and the shipper after the goods had arrived in St. Joseph. We thus have a situation, as we interpret your letter, where the shipper at the time of shipment contemplated a through shipment under a joint service from Kansas City to Brookfield, where the billing showed on its face that this was the intention, where Latta knew this to be a fact before the shipment reached the junction point, declined to accept the shipment after its arrival at the junction point, but then, within a short time, entered into a contract with the shipper to complete the carriage and did complete it so that it was handled exactly in the manner which the shipper intended at the time of shipment from the point of origin.

We have been unable to find any judicial constructions of the statutes above referred to, nor have we been able to find any Missouri cases which would give us any assistance. However, the case of Baltimore & Ohio Southwestern Railroad Co. v. Settle, 260 U.S. 166 (1922), involved a situation so similar to the facts in your case, and contains an analysis and argument which fits so well the situation in your case, that we believe that it will serve as the basis for this opinion.

In the Settle case a shipper at point of origin delivered to a railroad freight consigned to Oakley, paid the freight for this shipment and received at Oakley delivery of the loaded cars, and then, within a few days, reshipped the cars by the same railroad from Oakley to Madisonville, also paying the freight for that shipment. The through rate from the point of origin to Madisonville was higher than the total of the local rates from the point of origin to Oakley, and

from Oakley to Madisonville, and the railroad sued the shipper for the difference between the total freight paid by the shipper and the amount which would have been paid under the through rate.

The court said:

"The contention of the shippers is that the character of a movement, as intrastate or interstate, and, hence, what the applicable rate is, depends solely upon the contract of transportation entered into between shipper and carrier at the point of origin of the traffic; that when an interstate shipment reaches the destination named in this contract and, after payment of charges, delivery is taken there by the consignee, the contract for interstate transportation is ended; that any subsequent movement of the commodity is, of necessity, under a new contract with the carrier and at the published rate; and that, since this lumber came to rest at Oakley before that new movement, the reshipment from there to Madisonville (both stations being within the State of Ohio), was an intrastate movement. * * *whether the interstate or the intrastate tariff is applicable depends upon the essential character of the movement. That the contract between shipper and carrier does not necessarily determine the character was settled by a series of cases in which the subject received much consideration. Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498; Ohio Railroad Commission v. Worthington, 225 U.S. 101; Texas & New Orleans R. R. Co. v. Sabine Tram Co., 227 U.S. 111; Railroad Commission of Louisiana v. Texas & Pacific Ry Co., 229 U.S. 336. And in Baer Brothers Mercantile Co. v. Denver & Rio Grande R. R. Co., 233 U.S. 479, 490, this Court held that a carrier cannot, by separating the rate into its component parts, charging local rates and issuing local way bills, convert an interstate shipment into intrastate transportation, and thereby deprive a shipper of the benefit of an appropriate rate for a through interstate movement.

"* * * Madisonville was at all times the destination of the cars; Oakley was to be merely an intermediate stopping place; and the original intention persisted in was carried out. That the interstate journey might end at Oakley was never more than a possibility. Under these circumstances, the intention as it was carried out determined, as matter of law, the essential nature of the movement; and hence that the movement through to Madisonville was an interstate shipment. For neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk, is an essential of a through interstate shipment. These are common incidents of a through shipment; and when the intention with which a shipment was made is in issue, the presance, or absence, of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been intended, these incidents are without legal significance as bearing on the character of the traffic.

"The mere fact that cars received on interstate movement are reshipped by the consignee, after a brief interval, to another point, does not, of course, establish an essential continuity of movement to the latter point. The reshipment, although immediate, may be an independent intrastate movement. The instances are many where a local shipment follows quickly upon an interstate shipment and yet is not to be deemed part of it, even though some further shipment was contemplated when the original movement began. Shipments to and from distributing points often present this situation, if the applicable tariffs do not confer reconsignment or transit privileges. The distinction is clear between cases of that character and the one at bar, where the essential nature of the traffic as a through movement to the point of ultimate destination is shown by the original and persisting intention of the shippers which was carried out."

We have felt warranted in quoting so much of the opinion in this case because Mr. Justice Brandeis expresses himself in clear and forceful language which, mutatis mutandis, applies with equal force to your case. In both the Settle case and your case, the question is whether a combination of two local services over a route for which there is an authorized through service can be used to the detriment of the through service. In the Settle case this made a difference in rates, whereas in your case it means a difference in the identity of the carriers, but we do not regard this difference as of any importance. In both cases the original intention of the shipper, although it could have been changed at the intermediate junction point, was not changed but was persisted in and carried out as planned. In both cases the contract of carriage between the intermediate point and the point of ultimate destination was not entered into until the goods had come to rest at the intermediate point, and the first lap had been finished and the first contract of carriage completely executed.

The only significant difference between the Settle case and your case is that in the Settle case the parties to each of the two contracts were the same, whereas in your case the contracts are with different carriers. However, since Latta knew about the proposed shipment before it arrived at the junction point, since the shipment was billed through him, and since after an unimportant protest he ultimately carried out his part of the carriage exactly according to the originally planned intention of the shipper, we believe that this eliminates the importance of this variation from the Settle case. The last paragraph quoted above from the Settle case shows that it would not always be easy to draw the line in cases of this kind, but in your case we believe that, even in a criminal prosecution, the facts would bring Latta across the liability line.

In conclusion, it is our opinion that under the facts stated in your letter, John Latta was guilty of a violation of the Public Service Commission Laws in accepting the shipment in question.

Very truly yours,

EDWARD H. MILLER,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.