Opinion No. 70-105

December 30, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Columbus Ferguson Acting Chairman State Corporation Commission Motor Carrier Division Santa Fe, New Mexico

QUESTIONS

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Does the New Mexico State Corporation Commission have jurisdiction over the transportation services deemed not interstate commerce by the New Mexico Court of Appeals in **Albuquerque Moving & Storage Co., Inc. v. Commissioner of Revenue,** 475 P.2d 45 (N.M. App. 1970), **cert. denied,** 475 P.2d 778 (N.M. 1970)?

CONCLUSION

No, but see analysis.

FACTS

Taxpayer is a New Mexico corporation having its place of business at Albuquerque, New Mexico. In the course of its business it renders certain transportation and related services, some of which are intrastate in nature and others are interstate.

While engaged in interstate service Taxpayer does so as a franchised representative of United Van Lines of Fenton, Missouri. United Van Lines is authorized to transport household goods in interstate commerce. The stipulation includes examples of typical cases respecting which the Taxpayer rendered the particular services for which the receipts involved were subjected to tax by the Commissioner. The typical cases include transportation of household goods from out of state to Albuquerque by a civilian and like transportation by the United States for an officer in the military service.

Before further reference is made to these cases we think it is appropriate to say that the tax was imposed by the Commissioner upon receipts for services rendered by the Taxpayer in the handling, storage and local drayage of the household goods. In the civilian case the goods were transported to the consignee at the address of the Taxpayer, Albuquerque Moving and Storage Company, and in the military case the property was consigned to the officer at Albuquerque, New Mexico, and delivery was made to the Taxpayer at its address for handling, storage and local drayage.

The typical civilian case involved the transportation of property from San Diego, California, to Albuquerque, New Mexico, by a shipper who had been transferred by his

company from San Diego to Albuquerque. At the time the goods were transported the shipper did not have a home in Albuquerque and, therefore, wished to have his goods stored in Albuquerque until he found a home. The goods were transported to Albuquerque and placed in storage in Taxpayer's warehouse until the shipper gave notice to transport them to his new home in Albuquerque. The shipper, in this case, paid the transportation charges from San Diego to Albuquerque, handling charges for preparing the goods for storing in Albuquerque, storage charges and local drayage charges for transporting the goods to his new home in Albuquerque. Each of these charges was made pursuant to a tariff filed by United Van Lines with and approved by the Interstate Commerce Commission.

In the typical military case an officer was transferred by the United States Marine Corps from a camp in North Carolina to Kirtland Air Force Base, Albuquerque, New Mexico. The transportation officer at the North Carolina camp secured transportation of the officer's household goods through United Van Lines to Albuquerque. Since the final destination address had not been ascertained a provision was contained in the bill of lading and freight bill for storage in transit up to ninety days. These household goods were transported to Albuquerque and delivered to the Taxpayer. Taxpayer held the goods in storage until notified of the officer's address and they were then delivered to him at such address. In this instance the United States government paid not only the transportation charges but Taxpayer's charges for storage, handling and drayage to the officer's home. Each of the charges are made pursuant to a tariff filed by United Van Lines with and approved by the Interstate Commerce Commission.

In both cases transportation, storage, handling and local drayage were provided for and charges specified under a single contract.

OPINION

*{*189}* **ANALYSIS**

The facts quoted above are taken directly from the opinion of the Court in **Albuquerque Moving & Storage Co., Inc. v. Commissioner of Revenue,** 475 P.2d 45 (N.M. App. 1970), **cert. denied,** 475 P.2d 778 (1970). On those facts, the Court found that the shipment of household goods ceased to be in interstate commerce when delivery was made to the warehouse of the taxpayer Albuquerque Moving & Storage Company. It followed, therefore, that the moving and storage company was liable for gross receipts tax on the storage, handling and delivery out of storage in transit (drayage) since the deduction for gross receipts earned in interstate commerce did not apply.

To determine whether or not a shipment of goods is in interstate commerce, the courts will look to the essential character of the shipment. It is the intention formed prior to the shipment, and pursuant to which the property is carried to a selected destination by a continuous or unified movement, which fixes its essential character. **United States v. Erie R.R. Co.,** 280 U.S. 98, 50 S. Ct. 51, 74 L. Ed. 187 (1929); **Pennsylvania R.R. Co. v. Clark Bros., Coal Mining Co.,** 238 U.S. 456, 35 S. Ct. 896, 59 L. Ed. 1406 (1914);

North Carolina Util. Comm'n v. United States, 253 F. Supp. 930 (E.D.N.C. 1966); **Buckingham Transp. Co. v. Blackhills Transp. Co.,** 66 S.D. 230, 281 N.W. 94 (1938).

The New Mexico Court of Appeals in **Albuquerque Moving & Storage, supra,** did not state the test for determining whether or not the shipment was in interstate commerce in the identical language used by the courts in the immediately preceding paragraph. Instead, the New Mexico Court relied upon the ad valorem property tax cases which emphasized that state taxation of property is permissible when the property has come to rest or the interruption in the transportation is for the convenience of the owner of the property. Nevertheless, it is still possible that applying the essential character test to the facts in **Albuquerque Moving & Storage,** the Court might find that the State Corporation Commission has jurisdiction over the transportation services beginning with the inbound storage in transit, until delivery to the residence of the shipper.

On the other hand, it is quite clear that if the federal courts determine that the shipment is in interstate commerce, then the state regulatory body has absolutely no authority to regulate the carrier either by requiring a certificate of public convenience and necessity or regulating the tariff rates. **Railroad Comm'n v. Worthington,** 225 U.S. 101, 32 S. Ct. 653, 56 L. Ed. 1004 (1912); **Baltimore Shippers and Receivers Ass'n Inc. v. Public Util. Comm'n,** 268 F. Supp. 836 (N.D. Cal. 1967), **aff'd per curiam sub nom, Public Util. Comm'n v. Baltimore Shippers and Receivers Ass'n Inc.,** 389 U.S. 583 (1968); **State Corp. Comm'n v. Bartlett & Co. Grain,** 338 F.2d 495 (10th Cir. 1964), **cert. denied,** 380 U.S. 964 (1965); **Great N. Ry. Co. v. Thompson,** 222 F. Supp. 573 (D.N.D. 1963); **North Carolina Util. Comm'n v. United States, supra.**

Although we have not found a case involving the powers of a state regulatory body as applied to the household goods storage in transit situation, the *{*190}* following discussion of storage in transit by the Interstate Commerce Commission should give an indication of its attitude on this question.

The basic issue herein is whether pipe, transported from the storage-in-transit yards maintained by the defendants in Texas, is in interstate commerce when such pipe moves from the storage yards to an ultimate destination in the same State . . . .

The pipe, having been originally billed 'for S.I.T.,' which means storage-in-transit, is moved to the storage yard and held there for the account of the consignee . . . The pipe remains in the possession of the defendant until final delivery at interior points. Either the identical pipe, or an equal amount of the same exact class of pipe (replaced under the substitution rule of the transit tariff within a period of 2 years) is delivered, upon instruction from the shipper or consignee, to an interior Texas point for ultimate use . . . .

[the] critical fact [is] that this pipe is transported by defendants pursuant to the terms of the storage-in-transit arrangement provided in the tariff duly filed with this Commission . . . .

The record clearly indicates that all the pipe does in fact move beyond the transit point, and that it is the intent of the shipper that the movement from origin to ultimate destination constitutes one continuous movement. Merely because the exact identity of a particular consumer is unknown is of no moment. As has often been stated, transit rests upon a fiction that the incoming and outgoing transportation services, which are in fact distinct, constitute a continuous shipment of the identical article from point of origin to final destination . . . .

If the halt in the movement is a convenient intermediate step in the process of getting the goods to final destination, they remain 'in commerce' until the final destination is reached . . . .

It has long been recognized that carriers subject to the act may provide storage of shipments in connection with their transportation service. Such a transit privilege in itself may have the effect of converting a movement which might otherwise be intrastate into interstate transportation; that is, it ties together two separate transportation services into a single intrastate movement.

Railroad Comm'n v. Oil Field Haulers Ass'n Inc., 325 I.C.C. 697 (1965). Compare, **Atlantic Coast Line R.R. Co. v. Standard Oil Co.,** 275 U.S. 257, 48 S. Ct. 107, 72 L. Ed. 270 (1927), with **North Carolina Util. Comm'n v. United States, supra,** and **Great N. Ry. Co. v. Thompson, supra.**

Although no cases involving regulatory powers were found, another state court reached a similar conclusion as the court in **Albuquerque Moving & Storage Co. Inc. v. Commissioner of Revenue,** on almost identical facts, although the case involved a different legal issue. In **Bekins Van & Storage Co. v. Anderton,** 76 Nev. 351, 354 P.2d 188 (1966), the shipper had consigned a household goods shipment from Los Angeles to storage in transit at Las Vegas, Nevada. One week after the goods arrived and the shipper had paid for the line-haul and the first 30 days of storage in transit, a fire occurred in the moving and storage warehouse. The shipper sued on the theory that the movers were liable under the general law of bailment and not under the limited released value placed upon the goods in accordance with the bill of lading and tariff provisions. The Nevada court refused to rely upon the fact that the shipment had been consigned to storage in transit in accordance with the Interstate Commerce Commission tariff and ruled that the goods had come to rest at the warehouse of the moving and storage company. Consequently, the shipper was entitled to recover for the full value of the goods.

A case similar to the Nevada case arose in New York, but the court did not have to strain to find that the shipment was no longer in interstate commerce and governed by the bill of lading liability provisions. In **Miller v. Greyvan Lines,** 284 App. Div. 133, 130 N.Y.S.2d 378 (1954), the shipment was *{*191}* destroyed by a fire in the warehouse and the defendant attempted to rely on the released value provision arguing that the goods were still in storage in transit under the applicable tariff provisions. The weakness of the defendant's argument was that the tariff only provided for storage-in-transit up to 60

days and the fire which destroyed the goods occurred approximately one year after the goods had arrived at storage.

Given the facts in **Albuquerque Moving & Storage Company,** it appears that the federal courts and the Interstate Commerce Commission will deny the right of the state regulatory body to regulate the transportation in question, but the state courts in cases involving the shipping public and the taxing authorities will find that the transportation is no longer in interstate commerce. If this conclusion seems confusing, we need only recall the words of Justice Holmes:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

Holmes, The Common Law 5 (Howe ed. 1963).

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