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This case concerns 3.8 miles of pipeline facilities owned and operated by SFPP, L.P. in California. These facilities provide a line from certain refineries in Sepulveda to SFPP's pumping facility at Watson station. Although SFPP charged for crude oil transportation over these facilities, SFPP did not have a tariff covering their use on file with the Commission. Texaco Refining and Marketing and ARCO Products Company filed a complaint alleging that the facilities were subject to ICA jurisdiction. The Initial Decision found that the Commission did not have jurisdiction. The Commission reversed.

The Commission concluded that the test for determining whether a portion of a movement is interstate or intrastate depends on the essential character of the movement and the intent with which the shipment was made. Here, it was determined that the shipments transported over the facilities in question are intended to, and do, travel in interstate commerce.

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[¶ 61,200]

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Order Reversing Initial Decision

(Issued August 5, 1997)

Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, and Donald F. Santa, Jr.

On October March 28, 1997, the Administrative Law Judge (ALJ) issued an Initial Decision finding that the Commission did not have jurisdiction over oil movements over a 3.8 mile pipeline owned and operated by SFPP, L.P. connecting refineries at Sepulveda California to SFPP's pumping facility in Watson Station, California.[1] ATT[2] , Ultramar, Inc., and Commission staff filed Briefs on Exception to the ALJ's decision. SFPP filed a brief Opposing Exceptions. As discussed below, the Commission finds the pipeline segment jurisdictional. SFPP is required to file within 60 days of this order interstate tariffs, with its proposed rates pursuant to section 342.2 of the Commission's regulations.

Background

SFPP owns and operates oil pipelines in the Western United States, including pipelines within California and Oregon and from California to Arizona, New Mexico, and Texas. SFPP

[29] In an order being issued in Docket Nos. RP97-291-001 and RP97-291-002 contemporaneously with the instant order, the Commission is accepting Panhandle's filing, and on rehearing of the April 11, 1997 order, reaffirming that the scheduling of capacity on the basis of the highest percentage of the maximum rate is a reasonable way of scheduling firm capacity at secondary points.

[30] *Transcontinental Gas Pipe Line Corp.*, 77 FERC ¶ 61,195 at p. 61,770 (1995); *Great Lakes Gas Transmission, L.P.*, 64 FERC ¶ 61,017 at p. 61,188 (1993); and Order No. 636-B, 61 FERC ¶ 61,272 at p. 62,013 (1992).

[31] See Third Revised Sheet No. 60.

[1] *Texaco Refining and Marketing, Inc. v. SFPP, L.P.*, 78 FERC ¶ 63,017 (1997).

[2] ARCO Products Company (ARCO), Texaco Refining and Marketing, Inc. (TRMI), and Tosco Corporation (Tosco).

this case is three years. They further argue that the jurisdictional status of movements on the alternative "proprietary" lines to Watson Station is irrelevant to the determination of jurisdiction over lines 109 and 110.

SFPP responds that the determination of jurisdiction is factual and that the cases have held that the term transportation in the Interstate Commerce Act does not include the provision of services that are not essential to the provision of common carrier service. SFPP maintains that lines 109 and 110 were constructed for the convenience of the contracting parties in bringing oil to the tariff origin point and are not essential to gain access to the interstate system. It points out that the interstate lines had been operated for 30 years without lines 109 and 110 and the proprietary lines operated by other refiners provide an adequate alternative means of getting access to Watson Station. SFPP further contends the operation of lines 109 and 110 establish that they are not essential to obtaining common carrier service.

Discussion

The Interstate Commerce Act (ICA), in pertinent part, establishes jurisdiction over "common carriers engaged in ... the transportation of oil or other commodity, except water and except natural or artificial gas, by pipeline ... from one State or Territory of the United States ....[5] It then defines "common carrier" to include "all pipe-line companies; express companies; sleeping car companies; and all persons natural or artificial engaged in such transportation for as aforesaid as common carriers for hire."[6] The reach of the ICA is not necessarily coextensive with the reach of Congress under the commerce clause, but is determined by reference to the statutory terms.[7]

The determination of jurisdiction under the ICA depends on the specific facts of the individual case. In the preeminent *Pipe Line Cases*,[8] the Supreme Court held the ICA applied to movements of oil on a pipeline even though the pipeline transported only its own oil. In this case, Standard Oil Company insisted as a condition of carriage that the owner of the oil sell the oil to Standard Oil. The Court held that it would be a "sacrifice of fact to form" if Standard Oil, by the exercise of its market power, could insist on the sale to themselves and then gain exclusion from the ICA since they were not operating as a common carrier. The Court, therefore, found that the purpose of the Act was to bring within its jurisdiction all pipelines carrying all oil offered even if the pipelines were not technically common carriers at common law. At the same time, however, the Court found the ICA did not cover a clearly interstate pipeline that transported oil from the owner's wells to its own refinery.[9]

In *United States v. Champlin Refining Company*,[10] the Supreme Court reaffirmed jurisdiction over movements on an interstate pipeline transporting oil purchased at wells solely for its own use. Although finding jurisdiction, the Court concluded that Champlin did not have to file tariffs, since no party had ever requested common carrier service from Champlin and there were ample other common carrier pipelines available.[11] In *Hunt Refining Company*,[12] the Commission similarly found the oil pipeline's gathering system jurisdictional, but granted waiver from filing and reporting requirements where the pipeline carried only its own oil and there were no immediate or prospective shippers.

However, in another line of cases, the courts, the Interstate Commerce Commission, and this Commission have held that jurisdiction may not attach when the continuity of interstate transportation ends at a terminal or storage facility so that some portion of that transportation can be considered intrastate. In *Baltimore & Ohio Southwestern Railroad Company v. Settle* (Baltimore & Ohio),[13] the Supreme Court found that the test for determining whether a portion of a movement is inter- or intrastate "depends on the essential character of the movement" and the "intent with which the shipment was made."[14] In this case, the Court found that, despite a stop in movement at one city, the shippers' intent was always to transport to their final destination so that the transportation would be considered a single interstate trip to the second destination, rather

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[5] 49 U.S.C. App. § 1(1).

[6] 49 U.S.C. App. § 3(a).

[7] *Southern Pacific Transportation Company v. I.C.C.*, 565 F.2d 615, 617 (9th Cir. 1977).

[8] 234 U.S. 548 (1914).

[9] *See Valvoline Oil Co. v. U.S.*, 308 U.S. 141 (1939) (ICA applied to interstate pipeline purchasing oil at the well-head to transport to its own refinery).

[10] 341 U.S. 290 (1951)(reaffirming the Court's earlier decision in *Champlin Refining Co. v. U.S.*, 329 U.S. 29 (1946)).

[11] 341 U.S. at p. 298.

[12] 70 FERC ¶ 61,035 (1995).

[13] 260 U.S. 166 (1922).

[14] *Id.* at p. 170.

weekly, at four cycles per month, while the refiners schedule lines 109 and 110. Due to these scheduling differentials, SFPP stores oil transported over line 109 at Watson Station pending mainline scheduling. The ALJ further found that SFPP does not operate the pumps on line 109 and it maintains no personnel at Sepulveda; the refiners pump their own oil.

But, storage by itself is not an indicia of purely intrastate movement.[23] The record shows that storage of product is a component of admittedly interstate transportation as well.[24] Moreover, regardless of who operates the pumps, where personnel are located, or how oil is scheduled, SFPP owns and operates the lines and transports oil destined for other states. The record shows no function performed at Watson Station or other facts to suggest that shippers on lines 109 and 110 do not have a fixed intent to make interstate shipments when they move product along these lines.

The ALJ also found that line 109 is the only line in SFPP's system with a separate transmix return line. On SFPP's mainlines, transmix is allocated to shippers, since it is not economical to build a separate return line. The existence of the return transmix line does not indicate that there is a break in transportation. Returning transmix over longer lines is merely economically infeasible.

The ALJ also found that movements over lines 109 and 110 were non-jurisdictional because these lines are only 3.8 miles long. The length of lines 109 and 110 does not, by itself, show that the product is not destined for interstate movement. The Commission has found that interstate movements along a line only 1,400 feet long are jurisdictional.[25] Like this case, movements along this line were destined for both inter- and intrastate destinations.

SFPP contends movements along lines 109 and 110 are non-jurisdictional citing to cases that establish that services which are not essential to interstate service are not considered transportation under the ICA. But the cases cited by SFPP are inapposite. These cases dealt principally with services such as tracking title prior to actual shipment of oil,[26] the use of stock scales for the purpose of weighing cattle, but without connection to transportation service,[27] feeding of livestock,[28] storage of produce after delivery,[29] and warehousing and auctioning services.[30] In contrast, SFPP is not providing an unrelated service; it is providing transportation.

SFPP also cites a 1922 ICC decision, *Certain-Teed Products Corporation v. Chicago, Rock Island, & Pacific Railway Company*,[31] for the proposition that passive ownership of transportation facilities does not necessarily require the filing of a tariff rate for those facilities. In that case, shippers under long-standing agreements had paid $1.00 per car for the use of rail track, which the Chicago, Ottawa and Peoria Railroad (Peoria) purchased. The Peoria did not provide interstate service using that line. Such service was provided by the Rock Island which had tariffs on file for interstate transportation for the shippers. The shippers contended the $1.00 charge could not be added to the interstate rates already on file for Rock Island.

The ICC found that no tariff was necessary, because the Peoria was simply the naked holder of title to the track and performed no common carrier service. It concluded that although the $1.00 per carload rate looked like a transportation charge, it was simply a convenient method of measuring the amount to be paid for the use of the track. SFPP contends that, like *CertainTeed*, SFPP is a passive owner of lines 109 and 110 and the shippers themselves arrange for transportation by providing the pumping necessary to move product over the line.

Not only is this a single I.C.C. decision, but it is distinguishable from the situation here. First, the case is based on certain factors applicable only to railroads. The ICC emphasized that under the ICA, the shipper is required to provide a sidetrack; the railroad is not obligated to provide it.[32] The fact that the shippers chose to lease the side track rather than build their own does not make ownership of the track jurisdictional. The ICA, however, does not impose on shippers the comparable obligation to build facilities to transport oil to the interstate

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[23] *See Department of Defense v. Interstate Storage and Pipeline Corporation*, 353 I.C.C. 397 (1977) (finding that placement in storage not sufficient to break continuity when no change of ownership or other processing of oil in storage).

[24] Tr. 445-46.

[25] *Sadlerochit Pipeline Company*, 76 FERC ¶ 61,125 (1996).

[26] *Coastal States Trading, Inc. v. Shell Pipeline Corporation*, 573 F. Supp. 1415 (S.D. Tex 1983).

[27] Great Northern Railway v. Minnesota, 238 U.S. 340 (1915).

[28] *Thompson v. Chicago, Burlington & Quincy Railroad Co.*, 157 I.C.C. 775 (1929).

[29] *Burkley Produce Company v. Pennsylvania Railroad Co.*, 277 I.C.C. 319 (1959).

[30] *Andrews Brothers Co. v. Pennsylvania Railroad Co.*, 123 I.C.C. 733 (1927).

[31] 68 I.C.C. 260 (1922).

[32] *See Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. U.S.*, 275 U.S. 404, 413 (1928) (citing *Certain-Teed* for this proposition).

Jurisdiction is not dependent on equity. Congress established the scope of Commission jurisdiction in the ICA and the Commission is bound by Congress's determination of the jurisdictional scope. The ICA also establishes no time limit or other bar to raising jurisdictional issues. Admittedly, the refiners here could have raised the jurisdictional issue earlier. However, the initial contracts between the refiners and SFPP contained a rebate provision which protected the shippers for some period, which may explain their failure to raise the issue earlier. But these provisions have now expired, and the renegotiated contracts no longer contain these protections. Changed circumstances may render jurisdictional what previously was not.[39] The jurisdictional status of the other pipelines sending product to Watson Station has not been presented to the Commission for consideration and, therefore, the Commission finds no anomalous or discriminatory treatment in finding transportation on lines 109 and 110 to be jurisdictional.

SFPP places great weight on the existence of vigorous competition from these alternative lines as demonstrating that lines 109 and 110 are not necessary to gain access to Watson Station. However, jurisdictional determinations do not depend on how necessary the lines are: "the existence of adequate competitive alternatives is irrelevant to a pipeline's jurisdictional status."[40]

In the early cases, such as *Champlin*, the Court found jurisdiction even though no shippers sought to use the lines and there were adequate alternatives. The Court did, however, give some consideration to shippers' need for the lines in considering whether to require the pipelines to file tariffs. Under the Commission's rules, consideration of competitive conditions no longer needs to be undertaken in the jurisdictional phase of the proceeding. The regulations permit oil pipelines to file for market-based rates if they believe there is adequate competition to limit the pipeline's market power.[41]

SFPP did not support a particular rate design in this proceeding, contending that it should have the right to develop a rate design if the Commission finds lines 109 and 110 jurisdictional. Other parties submitted proposed cost-of-service rate design proposals. The Commission agrees that SFPP should have the right to file for initial rates pursuant to section 342.2 of the Commission's regulations. SFPP also has the opportunity to raise competitive factors by making a market based rate filing.[42]

The parties also raise issues concerning the appropriate period for determining possible reparations. The possible need for reparations, and the applicable time period for reparations must first await a determination on the appropriate rate to be applied to lines 109 and 110.

The Commission orders:

(A) The initial decision is reversed as discussed in the body of this order.

(B) SFPP is required to make a tariff filing to establish initial interstate rates for shipments using lines 109 and 110 within 60 days of the date of this order.