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JUDICIAL REVIEW OF THE DECISIONS OF THE INTERSTATE COMMERCE COMMISSION

By A. M. Tollefson*

I. Introductory

The purpose of this article is to examine the attitude of the federal courts toward the findings and decisions of the interstate commerce commission. It is the purpose to show in which cases the federal courts will review such decisions and in which cases and to what extent they are conclusive. But in order properly to understand the relationship between the commission and the courts, and the weight that the latter will give to the decisions of the former, it is necessary to know why the commission was created, what its duties are, and to some extent, how it is organized, and how it reaches its decisions. Consequently, as preliminary to the consideration of judicial review of its decisions, it is advantageous briefly to outline some of the main facts concerning the creation, organization, activities, and procedure of the commission.

II. Creation of the Interstate Commerce Commission. Reasons for its Creation and Statutes Conferring Duties and Powers upon the Commission

As soon as it was evident to the public that the railroads could furnish a valuable means of transportation there came a demand for additional railroad mileage. Consequently, during the early period of railroad development in the United States, public attention was directed toward rapid construction, and the national government as well as the several states directed their energy to

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the granting of aid and assistance rather than toward regulation and control. The result was that a large number of evils arose which demanded governmental or, to be more specific, legislative attention. The chief evils probably were the loss of public money invested in railroads and discrimination in behalf of favored shippers and localities. Such discrimination consisted in giving special rates, rebates, drawbacks, underbilling, and reduced classification. Furthermore, without the violation of any law, rates could be changed at will and without notice. The privilege of the railroad to grant free transportation was sometimes abused and the right of the individual shareholder, as well as the right of the public, was at times not given due attention. In addition, as could be expected from the new and immense undertaking of the railroads, accidents were numerous and the loss of lives and limbs heavy.

Since these evils, or at least some of them, had been prevalent in a greater or less degree for nearly a generation prior to 1870, it was to be expected that there would arise a demand for governmental regulation. Such regulation was demanded both from the national government and from the several states, and the latter preceded the former in heeding the demand.

It is interesting to note that the earliest form of state regulation consisted in the creation of state commissions, the purpose of which was chiefly to recommend measures to reduce the number of accidents. Such commissions were established in New Hampshire in 1844, in Connecticut in 1853, in Vermont in 1855, and in Maine in 1858. The commission established in Rhode Island in 1839 had for its purpose the additional function of reporting "the state, condition, and proceedings of the several railroad companies, so far as the public interest" might require the same. The Massachusetts railroad commission, created in 1869, had still broader powers and marks the first outstanding step in state control and regulation of railroads. It was authorized to supervise and examine all railroads in the state with reference to the security and accommodation of the public and the compliance of the corporations with the provisions of their charters and the laws of the state.1

1The Massachusetts Railroad Commission was to investigate complaints against railroads made by town or city authorities and under certain conditions, those made by voters as to the condition and operation of any railroad, any part of whose location was within the limits of such city or town. The commission was further authorized to serve notice upon railroad corporations of their failure to comply with the terms of their
Several of the Eastern states followed the lead of Massachusetts and established commissions with similar powers. For the enforcement of the commission's decisions recourse was had almost exclusively to public opinion enlightened by extensive publicity. The Western and Southern states went further and passed maximum rate laws in the seventies and entrusted their commissions with power to issue and enforce their orders by legal processes.²

It soon became evident, however, that state regulation alone was inadequate and that national legislation was necessary to abolish several unfair practices still prevailing. Several bills to regulate railroads engaged in interstate commerce were introduced in Congress from 1868 on but they all failed to pass either house until 1874,³ when the House of Representatives passed a bill aiming at rate regulation, and in 1878 one which became to a large extent the pattern of the interstate commerce act. Although the bill of 1878 did not provide for the establishment of a commission it proposed a remedy through the courts after a clear legal definition of abuses. In 1885 the Senate selected a committee of five senators to investigate and report upon the subject of interstate transportation. The committee accompanied its report with a bill which provided for a permanent administrative commission to make the suggested statutory regulation of interstate commerce effective. As to the practice of pooling, the House desired to make all traffic agreements illegal while the Senate desired to leave that matter largely to the control of the commission.⁴

The houses of Congress adjusted their differences and on February 4, 1887, passed the act to regulate commerce, which act became effective April fifth of the same year.⁵ This act became the first of a long series of national statutes regulating railways and other public service corporations. The purpose of these

²Bernhardt, I. C. C. pp. 3-4.
³For a list and discussion of bills and resolutions introduced see Briggs, Federal Regulation of Interstate Commerce, 1862-1913, and Haney, Congressional History of Railways.
⁴Bernhardt, I. C. C., pp. 4-6.
⁵24 Stat. at L. 379.
statutes is chiefly to prevent excessive charges, discriminations, and other unfair practices. The law established rules and principles which these corporations, engaging in interstate commerce, must observe. The act put into effect the wishes of the House of Representatives by the prohibition of pooling, and by incorporating the long-and-short-haul clause which prohibited the charging of a higher rate for a short haul than for a long one in the same direction "under substantially similar circumstances and conditions." The wishes of the Senate were enacted into law by the creation of the interstate commerce commission to administer the restrictions and enforce obedience. The chief purpose of the commission was to bring into existence a body which would be better fitted than the courts to decide whether rates or rules published by a carrier were unreasonable or unjustly discriminatory and to secure and preserve uniformity in rates, rules, and other practices.\textsuperscript{6}

Partly because of the recommendations of the commission, Congress amended the act to regulate commerce on March 2, 1889.\textsuperscript{7} The amendment, among other things, provided a remedy by mandamus in case of denial of equal facilities to shippers. Attempts by shippers to obtain lower rates by means of false billing and other fraudulent devices were made criminal offenses. The act required publication of joint tariffs and notification of changes. Violation of the provisions of the act prohibiting the giving of rebates and discriminations by the carriers was made punishable by fine or imprisonment or both instead of by fine only. The taking of testimony by deposition was authorized by an act of February 10, 1891.\textsuperscript{8}

In 1893 the first of a series of laws was passed which conferred upon the commission jurisdiction in matters of safety and the prevention of accidents.\textsuperscript{9}

\textsuperscript{6}Section eleven of the act to regulate commerce established the interstate commerce commission and provided that the commission should consist of five members, not more than three of whom were to be of the same political party, appointed by the president with the concurrence of the senate, for six year terms. Section 21 of the act directed the commission to report to Congress recommendations as to additional legislation on the regulation of interstate commerce as the commission might deem necessary. Great Northern R. Co. v. Merchants Elevator Co., (1922) 259 U. S. 285, 42 Sup. Ct. 447, 66 L. Ed. 943. For a summary of the provisions of the act of 1887 to regulate commerce, see Ripley, Railroads, Rates, and Regulations, p. 452, and Johnson & Van Metre, Principles of Railroad Transportation, p. 495.

\textsuperscript{7}25 Stat. at L. 832.

\textsuperscript{8}26 Stat. at L. 743.

\textsuperscript{9}Act of March 2, 1893, 27 Stat. at L. 531. The act, among other things, pertained to drawbars, grab-irons or hand holds, driving wheel brakes,
The Elkins amendment was passed in 1903\textsuperscript{10} and the Hepburn bill in 1906.\textsuperscript{11} The latter of those acts remedied many of the shortcomings of the act of 1887. The membership of the commission was increased from five to seven and the term of office from six to seven years. The commission was given jurisdiction over express and sleeping car companies and over pipe lines except those used for transportation of water or gas.\textsuperscript{12}

Under the act of 1887 the commission claimed the power not only to investigate problems relating to freight rates but upon the train brake system, and automatic couplers, and made it the duty of the commission to secure adherence to the law and the reasonable rules of the commission which might be published along these lines.

On February 11, 1893, (27 Stat. at L. 443) it was enacted not only that no one should be excused from attending and testifying before the commission but also that no one should be prosecuted or subjected to any penalty or forfeiture for or on account of any affair concerning which he was compelled to testify or produce evidence. Ten years later, on February 11, 1903, the so-called expediting act (32 Stat. at L. 823) was passed which provided that in any suit in equity brought in any circuit court of the United States under the interstate commerce act (the act to regulate commerce as amended by a number of later acts) the attorney-general might file with a clerk of court a certificate stating that in his opinion the case was of general public importance, whereupon the case was to be given precedence and expedited and assigned for hearing before at least three federal judges. Appeal from the decision of the circuit court was to be made only to the Supreme Court and within sixty days of the decree of the circuit court. The purpose of this act was to avoid long delays in the courts, a condition that had been a serious drawback to efficient enforcement of the act of 1887.

\textsuperscript{10}Act of February 19, 1903, 32 Stat. at L. 847. The provisions of the Elkins amendment have been summarized as follows:

The railroad corporation itself, not as heretofore its officers and agents merely, was made subject to prosecution and penalty.

The penalty of imprisonment for non-adherence to the published tariff (as in amendment of 1889) was removed. It was expected that in this way witnesses would not be so reluctant to testify to the activities of associates, since the only penalty was a fine which could fall upon the corporation rather than the individual.

Any departure from the published tariff was made a misdemeanor so that proof of preferential treatment of shippers was no longer required.

Shippers or any other interested parties were made liable to prosecution for receiving rebates as well as carriers for granting them.

Injunctions could be issued by any federal judge whenever the commission had reasonable ground for belief that any common carrier was not conforming to the published tariff or committing any discrimination forbidden by law. See: Ripley, Railroads, Rates & Regulations 493-4.

Bernhardt, I. C. C., p. 21.

\textsuperscript{11}Act of June 29, 1906, 34 Stat. at L. 584.

\textsuperscript{12}The term railroad was broadened to include switches, spurs, tracks, and terminal facilities, and the term transportation was broadened to include "cars and other vehicles and all instrumentalities and facilities of shipment or carriage irrespective of ownership or of any contract, expressed or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage or handling of property transported." Part rail and part water transportation was also included.
complaint of current abuses to prescribe remedy for existing evils. This power claimed by the commission was not seriously questioned until in 1896 when the case of Cincinnati, N. O. & T. P. R. v. Interstate Commerce Commission came before the Supreme Court. That court said that it was unable to find any provision of the act that expressly or by necessary implication conferred such a power. Other cases were decided to the same effect and finally in Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. the Supreme Court decided that the commission had no power to "prescribe a rate for the future, although its right to pass upon the reasonableness or unreasonableness of a rate already paid and of which complaint is made is unquestioned."

These decisions dealt heavy blows to the alleged powers of the commission over rates, and about the only measure still available to it was to declare illegal one rate after another and thus induce the railroads to establish reasonable rates. By the Hepburn act of 1906 the commission was authorized after complaint and upon hearing to fix reasonable maximum rates or charges, regulations, or practices to be subsequently observed by the carriers. The Senate eliminated from the bill the power to pass upon the reasonableness of a proposed schedule of rates prior to its taking effect. Under this amendment also, the commission could order an apportionment of joint rates when the carriers were unable to agree upon a division. It could establish through-rates and fix reasonable charges for services or instrumentalities rendered or provided by the shippers. Furthermore, the orders of the commission were effective from the date of promulgation, and until reversed or set aside and a penalty was provided for violation.

13(1896) 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935. Sometimes referred to as the Social Circle Case.
14(1897) 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243. Sometimes referred to as the Maximum Freight Rate case.
15The industrial commission reported (Report of Industrial Commission XIX, p. 428) that the denial of the right, not only to pass upon the reasonableness of a particular rate, but to prescribe what rate should supersede it, meant the abolition of all control whatever.
1634 Stat. at L. 584.
17All orders of the commission except for money payments were to take effect within such reasonable time, not less than thirty days, as it might prescribe, and were to remain effective for two years, unless suspended, modified or set aside by a court of competent jurisdiction or by the commission. The circuit courts were authorized by suit to enjoin, set aside, annul, or suspend orders or requirements of the commission, provided that five days notice be given the commission to enable it to prepare a protest and a hearing should be had before three federal justices. A
On June 18, 1910, the Mann-Elkins act was passed\textsuperscript{18} which enlarged the jurisdiction of the commission to include interstate wire or wireless telegraph, telephone, and cable companies. The commission was given power to suspend rates pending examination as to their reasonableness. The long-and-short-haul clause of the act of 1887 was amended by eliminating the words “under substantially similar circumstances and conditions” and made hearing and approval by the commission necessary before lower charges could be established to longer distance points.\textsuperscript{19} The commission was furthermore authorized to institute proceedings and to make and enforce orders based thereon as in cases instituted on complaint by other parties. The commission was authorized where necessary, after due hearing, to order such through-routes as it might deem desirable and to prescribe joint rates therefor. By the Act of March 1, 1913,\textsuperscript{20} the commission penalty of five thousand dollars per day, after the expiration of thirty days was fixed for each day's violation of the commission's order.

Before the act of 1887 was amended as above, one of the greatest difficulties in the administration of the act was the inadequate procedure prescribed by the act. The commission's order was not law and was binding on no one until appealed to and affirmed by the courts. Then there was the possibility of appeal to the Supreme Court. The average duration of the appealed cases was four years, resulting in an enormous expense and a costly delay. Ripley, Railroads, Rates & Regulations 462.

\textsuperscript{18}36 Stat. at L. 539.

\textsuperscript{19}The long-and-short-haul clause was further amended by prohibiting a greater compensation for a through-haul than the total of the intermediate rates and by providing that no railroad could increase a rate which it had reduced at competitive points in competition with a water route unless the commission decided after hearing that reasons other than water competition demanded the increase.

\textsuperscript{20}37 Stat. at L. 701.

By the Clayton Act of October 15, 1914, 38 Stat. at L. 730, the commission was authorized to enforce certain provisions of the act which aimed at restraints and monopolies in so far as the law applied to carriers subject to the interstate commerce act. Furthermore, by a series of additional laws pertaining to the safety of passengers and of the employers of the common carriers, Congress gave extensive powers to the commission regarding the administration of the laws. These acts, among other things, provided for publicity, for numerous inspections and reports, as well as for many specific measures for safety; all of which extended the jurisdiction of the commission. See:


With the entrance of the United States in the World War new problems confronted the commission. By the act of August 9, 1917, 40 Stat. at L. 270, the membership of the commission was increased from seven to
was directed to appraise the property of all common carriers subject to the act to regulate commerce.

The transportation act of 1920\textsuperscript{21} authorized the commission to prescribe minimum as well as maximum rates, but a period of 150 days was fixed as the maximum time during which the commission could suspend the operation of proposed schedules.\textsuperscript{22} The

nine, and it was authorized to branch into as many divisions as might be necessary with the senior in service in each division acting as chairman. Authority was conferred upon each division to "hear and determine, order, certify, report, or otherwise act as to any of the work, business, or functions so assigned or referred to it for action of the commission." The act provided that "in all proceedings before any such division relating to the reasonableness of rates or to alleged discriminations not less than three members should participate in the consideration and decision and in all proceedings relating to the valuation of railway property not less than five members should participate. Section four of this act amended section five of the interstate commerce act by adding the provision that until January 1, 1920, no increased rate, fare, or classification should be filed except after approval thereof had been secured from the commission, which body could, in its discretion, grant such approval without formal hearing.

In accordance with a law of Congress, (Act of August 29, 1916, 39 Stat. at L. 645; see also Act of August 10, 1917, 40 Stat. at L. 272) President Wilson by proclamation of December 26, 1917 assumed operation and control of the railroads of the country. Such operation and control were vested in a director-general of railroads, and by an act of March 21, 1918, 40 Stat. at L. 451, the powers of the commission under the new management were defined. The commission was to assist the President and the director-general in the operation and control of the railroads and as such were given a number of functions in connection therewith. On the other hand, as assistants to the president and to the director, the authority of the commission was materially limited in several respects especially as to rates.

By the transportation act of February 28, 1920, 41 Stat. at L. 456, Congress made provisions for the return of the railroads to the owners and laid down regulations for the future. By terminating the powers of the president and director, the powers of the commission were restored as before the war, and in addition new duties were conferred upon it, especially as to the liquidation of governmental operation, and those relating to the carriers after return to the owners. As to the former, the commission, among other things, was directed to ascertain the deficits of the railroads during the period of governmental control and to certify the amounts to the secretary of the treasury for reimbursements. As to the latter, the outstanding thing was the constructive attitude taken toward the carriers, especially in that the commission was to prescribe such rates as would yield a fair return on the capital invested. The commission was also given extensive powers to supervise the financial operations of the carriers as they were prohibited from issuing securities or from assuming obligations or liabilities in respect to securities of others except after approval of the commission.

\textsuperscript{21}Act of February 28, 1920, 41 Stat. at L. 456.

\textsuperscript{22}If the proceedings upon suspension were not concluded within that time, the proposed schedule was to go into effect, but the commission could require the carriers to keep detailed accounts of all amounts received by reason of increases in such rates and charges, and if the decision of the commission were adverse, it could require the carrier or carriers to refund with interest such portions of increased rates or charges as by its decision should be found unjustified.
JUDICIAL REVIEW OF I. C. C. DECISIONS

III. Organization of the Commission

The interstate commerce commission has a staff of several hundred persons including clerks, attorneys, examiners, statisticians, investigators, and technical experts. As to units of organization, the personnel of the commission proper consists of the eleven commissioners, the secretary to the commission, and a small number of clerks. The members of the commission are grouped into five divisions. There are thirteen bureaus, each with a single head who reports to a commissioner, who in turn can bring matters to a division, or, if need be, to the entire commission for determination. The thirteen bureaus are those of administration, formal cases, informal cases, traffic, inquiry, law, safety, locomotive inspection, service, finance, accounts, statistics, and valuation. Each of these bureaus is divided into a number of sections. A board of referees, composed of chiefs of various sections, passes upon minor matters of an administrative nature, as to which the commission's policy has been settled by previous rulings.24

IV. Procedure before the Commission

(a) In General. The rules regarding who may start proceedings before the commission are very liberal as the initiative can be taken by the commission itself, by one or several shippers, or by another party or parties, having a proper interest in the case.

22The members of the commission were grouped into five divisions, numbered one to five, and each division was to consist of three members except division four which was composed of four members. Each division was given power to act in a matter that duly came before it but reservation was made for consideration and disposition by the full commission of all general investigations and of applications for rehearing, reargument, and other consideration, and of certain other cases specifically enumerated.

As to further powers of the interstate commerce commission, see Merchant Marine Act of June 5, 1920, 41 Stat. at L. 988, sec. 8 & 28; Act of June 5, 1920, 41 Stat. at L. 946; Act of February 26, 1921, 41 Stat. at L. 1145; Act of March 4, 1921, 41 Stat. at L. 1444; Act of June 10, 1921, 42 Stat. at L. 27.

See also the Interstate Commerce Act, including text or related sections of other acts, published by the interstate commerce commission, revised to August 1, 1923, Washington, Government Printing Office, 1923.

24For further data as to the organization of the commission, see Bernhardt, I. C. C., ch. 3.
It is the duty of the bureau of administration, headed by the secretary of the commission, among other things, to keep records of complaints and all ensuing proceedings and actions. This bureau issues receipts for papers received, and answers, files, and indexes the general correspondence. In practice, however, much of the general correspondence is answered by the bureau of informal cases with the signature or authorized signature of the secretary of the commission. The bureau of administration also has for its functions the recording of orders and minutes and the filing and docketing of complaints, answers, orders, and other papers, as well as the serving of petitions and orders upon parties to formal proceedings.\(^{25}\)

(b) *As to Informal Proceedings.* The bureau of informal cases disposes of a large volume of business that is handled without instituting formal proceedings. This bureau was established to centralize and standardize the treatment of the many and varied intricate problems submitted to the commission, to provide adequate means of the settlement of claims of shippers against carriers and finally, to dispose of informal complaints before they developed into formal ones, especially in cases where the unreasonableness of the rates, practice, or regulation was admitted by the carrier concerned. In order to carry out these and other functions, this bureau devotes its attention largely to general correspondence, inquiries, and to informal complaints, and to these and other claims that may find their way to the special docket as distinguished from the formal docket of the commission. The decisions or rulings of the bureau of informal cases, as approved, amended, or adopted by the commission, are published in its bulletin of conference rulings, at least insofar as they involve an interpretation of law or rules of the commission.\(^{26}\)

(c) *As to Formal Cases.* The bureau of the formal cases handles all those instituted by formal complaints whether instituted by the commission on its own motion or by shippers or others. Because of the many and varied functions of the commission and of the large number of cases on the formal docket.\(^{27}\)

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\(^{25}\)Bernhardt, I. C. C., pp. 110-111.

\(^{26}\)The number of informal complaints received by the bureau of informal cases during the year ending October 31, 1921, were 7811, while 2350 special docket applications were filed for authority to refund amounts collected under published rates, admitted by the carriers involved or by the director-general of the railroads to have been unreasonable. Orders authorizing refunds were entered in 1289 cases, while 211 cases were disposed of without orders. Bernhardt, I. C. C., p. 113.

\(^{27}\)The following table from Bernhardt, I. C. C., p. 111, shows the
it has for many years been impossible for the commissioners personally to take testimony in the great majority of cases coming before the commission. To meet this situation the Hepburn act authorized the appointment of special examiners. These examiners hear cases and take testimony, generally in the field, and then prepare a report in each case, which is submitted to the parties concerned for any statement of exceptions which they may wish to file. The record of the hearings, the report of the examiner in the case, and the statements filed by the party against whom action has been taken, are laid before the board of review, which consists of members selected from the staff of examiners. The board of review then prepares the final report of the bureau of formal cases and recommends to the commission what action, in its judgment, should be taken and in due course the commission will pass upon the case and render its decision or issue its order.28 One of the thirteen bureaus, the bureau of law, represents the commission in all court proceedings in which the latter is a party.29

V. JUDICIAL REVIEW AND DECISIONS BY THE COURTS, AS TO THE RELATION BETWEEN THE COURTS AND THE INTERSTATE COMMERCE COMMISSION; WITH SPECIAL REFERENCE TO JURISDICTION AND TO QUESTIONS THAT MUST BE CONSIDERED BY THE COMMISSION IN THE FIRST INSTANCE

(a) Provisions of the Act Applicable. Before taking up the problem as to the weight generally given by the courts to the findings and orders of the interstate commerce commission, we shall examine some of the questions that the courts will not consider until they have been passed upon by the commission. In other words we shall consider the questions and the nature of the questions which must be passed upon by the commission in the first instance.

status of the formal case docket as of October 31 for four consecutive years:

<table>
<thead>
<tr>
<th></th>
<th>1918</th>
<th>1919</th>
<th>1920</th>
<th>1921</th>
</tr>
</thead>
<tbody>
<tr>
<td>Formal complaints filed</td>
<td>456</td>
<td>838</td>
<td>1,040</td>
<td>1,487</td>
</tr>
<tr>
<td>Cases at issue but not set for hearing</td>
<td>21</td>
<td>54</td>
<td>146</td>
<td>201</td>
</tr>
<tr>
<td>Cases set for hearing but not heard</td>
<td>142</td>
<td>184</td>
<td>92</td>
<td>205</td>
</tr>
<tr>
<td>Cases heard but not fully submitted</td>
<td>87</td>
<td>234</td>
<td>505</td>
<td>714</td>
</tr>
<tr>
<td>Cases submitted</td>
<td>386</td>
<td>274</td>
<td>385</td>
<td>445</td>
</tr>
<tr>
<td>Cases disposed of</td>
<td>653</td>
<td>598</td>
<td>620</td>
<td>1,021</td>
</tr>
</tbody>
</table>

28Bernhardt, I. C. C., pp. 111-112.
29This bureau also prepares briefs and memoranda on questions of law whenever required, participates to some extent in special inquiries prosecuted by the commission, and supervises and co-ordinates the work of the attorneys engaged in other bureaus of the commission.
In this connection there are chiefly two provisions of the interstate commerce act which are pertinent. Section nine provides that any person or persons claiming to be damaged by any common carrier, subject to the provisions of the act, may either make complaint to the commission, or may bring suit for the recovery of the damages for which such carrier may be liable, in any district or circuit court of the United States of competent jurisdiction. But such person or persons shall not have the right to pursue both such remedies and must elect which one he or they will adopt. Section twenty-two of the Interstate Commerce Act provides that nothing contained in the act shall abridge or alter the remedies now existing at common law or by statute, but that the provisions of the act are in addition to such remedies. The last statement is subject to certain provisos not material in this connection.

(b) Questions of Rates and Discriminations. In construing these sections as to which questions must be considered by the commission before the courts will act, and as to the nature of such questions, the Supreme Court has held that initial action must be had before the commission in an action to obtain relief from an alleged unreasonable freight rate. This is especially true where such rate has been filed with the commission and promulgated as provided by the act, and has been the rate which it was the duty of the carrier to enforce. As to the provisions of section nine of the act referred to, the court held that the right of an individual originally to maintain actions in the courts to obtain pecuniary redress for violations of the act must be confined to such wrongs as can, consistently with the context of the act, be redressed without previous action by the commission. The court also stated that the provisions of section twenty-two referred to cannot be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the statute.

The cases dealing with rates and the reasonableness of these show that whenever a rate, rule, or practice is attacked as un-

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30 Stat. at L. 379, sec. 9.
31 Stat. at L. 379, sec. 22. This section was amended in regard to other matters involved, February 8, 1895, 28 Stat. at L. 643; March 2, 1889, 25 Stat. at L. 855; and August 18, 1922, 42 Stat. at L. 827.
33 Ibid.

reasonable or unjustly discriminatory, there must be preliminary resort to the commission. Sometimes this is required because the function being exercised is in its nature administrative rather than judicial. But ordinarily the determining factor is not the character of the function, but rather the character of the controverted question and the nature of the inquiry necessary for its solution. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function, but even though the function is judicial, preliminary resort to the commission is required. The reason is that the inquiry is essentially one of fact, and of discretion in technical matters; also because uniformity can be secured only if its determination is left the commission. Furthermore, the determination as to whether there has been discrimination for or against certain shippers or unreasonable charges, is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable, and such acquaintance is commonly to be found only in a body of experts.\(^{34}\)

Likewise, the question whether an undue or unreasonable preference or advantage to any locality, forbidden by the act, arose from the operation of an intrastate rate as compared with an interstate rate, or whether any locality was thereby subjected to an undue or unreasonable prejudice or disadvantage, is primarily for the investigation and determination of the commission, and not for the courts.\(^{35}\) The same rule applies as to whether a rate established by a state commission creates undue discrimination against interstate or foreign rates or commerce.\(^{36}\)

The decisions of the courts also show that in cases involving alleged discrimination, or alleged unreasonable rates, practices, or charges, the question whether the acts of a carrier are such as to constitute compliance or noncompliance with the provisions of the interstate commerce act, is an administrative one primarily for the commission to decide.\(^{37}\) Thus maintenance of a suit to

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recover damages from a carrier because of the collection of an unreasonable rate depends on prior action by the commission. This is on the ground that since the reasonableness of rates is an administrative question, it will not be considered by the court in the first instance. Furthermore, a proposed change in a carrier's tariffs, for canceling the published classification and rates on a commodity and including it among articles that would not be accepted for shipment, constitutes an alteration in classification or regulations affecting classifications and as such the commission has exclusive initial jurisdiction to suspend or annul such proposed change.

The courts frequently call attention to the fact that the problems of rates and rate-making are peculiarly administrative in character and are for the commission and not for the courts to pass upon. The commission has exclusive original jurisdiction to determine whether a regulation or a practice affecting rates or matters sought to be regulated by the Interstate Commerce Act is unjust or unreasonable, unjustly discriminatory, preferential, or prejudicial, even though the regulation or practice complained of has ceased. Also permissible discrimination based upon difference in conditions is primarily a question for the commission.

The preservation of uniformity, the prevention of discrimination, and the varying and sometimes conflicting results that might be taken by different tribunals, renders it not only expedient but also necessary that there should be one body with special administrative qualifications to pass upon questions of facts, especially those of an administrative nature, insofar as they relate


to the enforcing of the Interstate Commerce Act. Under the statute there are many acts of the carriers which are lawful or unlawful according as they are reasonable or unreasonable. The determination of such questions frequently involves a comparison of rates with service, or one rate with another. Such questions call for the exercise of the discretion of the commission, which is essentially an administrative body.\(^42\)

(c) Recovery of Damages.

(1) In Case of Rebates

In an action to recover damages sustained by a shipper resulting from rebates, previous action by the commission is not necessary where there is no question of an administrative nature as to what constitutes rebate.\(^43\) If questions arise, however, as to whether the act complained of involves such discrimination or unreasonable allowances as amounts to rebates, those are questions which must first be passed upon by the commission.\(^44\) On this point the Supreme Court said:

"For doing an act prohibited by the statute, the injured party might sue the carrier without previous action by the commission, because the courts could apply the law prohibiting a departure from the tariff to the facts of the case. But where the suit is based upon unreasonable charges or unreasonable practices, there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the commission, and not the courts, should pass upon that administrative question. When such order is made, it is as though the law for that particular practice had been fixed, and

\(^ {42} \text{Atchison, T. 


\(^ {44} \text{Mitchell C. 
the courts could then apply that order not to one case, but to every case,—thereby giving every shipper equal rights and preserving uniformity of practice. . . ”

As to the right of the plaintiff to decide upon his remedy under section nine of the Act in cases involving unreasonable rates or practices, the court said:

“Section nine gives the plaintiff the option of going before the commission or the courts for damages occasioned by a violation of the statute. But since the commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the commission that the practice or the rate was thus unreasonable, and therefore illegal and prohibited.”

(2) Unlawful Distribution of Cars

In order to recover damages sustained by an alleged unlawful distribution of cars, due to unreasonable preference and unjust discrimination, the questions involved as to whether the act complained of amounted to a violation, must be decided by the commission. But if the carrier has failed to furnish cars to which a party is entitled under the carrier's own rule of allotment, proceedings can start either in a state or federal court since there is no administrative question involved as long as the carrier's rule itself in such a case is not attacked. On the other hand where the rule or the method of the carrier in distributing cars is attacked, no action can be had in any court to recover damages alleged to have been inflicted thereby until the commission has made its finding as to the reasonableness of the rule. The same principle holds regarding alleged discriminatory practices by car-

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riers in the giving or refusing of joint traffic arrangements contrary to the Act.49

Also under the Act as amended in 188950 allowing mandamus to compel the furnishing of cars and other facilities for transportation, the Supreme Court held, in an action asking for mandamus to redress grievances produced by regulations of a railway company for the distribution of coal cars in times of car shortage, that such grievances cannot be redressed in advance of action before the commission. The court further held that the provision of the Act allowing mandamus must be limited either to the performance of duties which are so plain and so independent of previous administrative action of the commission as not to require a prerequisite exertion of power by that body, or that the provision of the Act allowing mandamus must be limited to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to the orders of the commission.51

(3) Inadequate Equipment or Facilities

In cases where the carrier refuses or neglects to furnish the necessary equipment and facilities for the convenience of transportation, such as refusing to equip cars with grain doors or transverse bulkhead, which makes it necessary for the shipper to furnish same, the question generally arises as to what character of equipment and what amount should be deemed reasonable and adequate. To determine this inquiry the Supreme Court has held that preliminary resort to the commission is necessary. This is on the ground that adequate consideration of such problems requires acquaintance with many intricate facts of transportation.

In order to determine such controversies properly, it is necessary to understand the nature and the reasonableness of the demands that are made upon the carrier and to know what the law and the rules of the commission require from it. Furthermore, in case of failure on the part of the carrier to furnish what is required, the question arises as to what allowances should be made to the shipper for instrumentalities supplied and for services rendered. These questions have to do largely with administrative

50 Act of March 2, 1889, 25 Stat. at L. 862.
detail, and are administrative in their character, and as such must be passed upon by the commission in the first instance.  

(d) Construction of Tariffs. Where there is some doubt about the construction of a tariff with respect to a rate problem, the courts will not pass on it, but will refer the matter to the commission. But if there is no real ambiguity as to the terms used the courts will act and construe the tariff in conformity to the ordinary meaning of the terms used. The reason for this is that what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute. That is, when the words of a written instrument are used in their ordinary meaning, their construction presents questions of law. But words are used sometimes in a peculiar way, in which extrinsic evidence may be necessary to determine the meaning of words appearing in the document. This is true where technical words or phrases not commonly understood are employed.

In like manner extrinsic evidence may be necessary to establish a usage of trade or locality which attaches provisions not expressed in the language of the instrument. Where such a situation arises and the peculiar use of words or the existence of a usage is proved by evidence, the function of construction, at least to the extent of passing upon words used in a special sense, becomes, in the case where the construction of a tariff is involved, an administrative question for the commission. That is, where the document to be construed is a tariff of an interstate carrier and before it can be construed it is necessary to determine upon evidence the peculiar usage of words or the existence of incidents alleged to be attached by usage to the transaction, such preliminary determination of the meaning of the terms used must be made by the commission, and not until this determination has been made can a court take jurisdiction of the controversy.

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56Ibid.
The style and form of documents filed with the commission setting forth demurrage charges and tariffs are for the commission to pass upon and not for the courts,\textsuperscript{57} as is also the question as to whether a certain commodity is embraced within a railway's filed tariff fixing joint through rates.\textsuperscript{58} It is also for the commission to decide whether words in a tariff are used in their ordinary or in a peculiar or technical sense. This was the situation in the \textit{American T. & T. Co. Case}.\textsuperscript{59} The question really in issue was whether or not the word \textit{lumber} which was made use of in the tariff, had been used in a peculiar sense. The court held that the question was an administrative one and as such preliminary resort must be had to the commission.

In summing up the rule as to whose function it is to construe a statute or a tariff, it may be stated that the construction and interpretation of law is generally for the courts. At least such a question is as a rule ultimately for the courts. But where the words used have a special or a technical meaning or are used in such a way as to lead to ambiguity, or to be subject to a different meaning because of usage, then the proper meaning of such terms, when used in connection with matters within the jurisdiction of the interstate commerce commission, presents an administrative question for the interstate commerce commission to pass upon. The courts in such a case will not act until there has been a decision by the commission. This is especially true where the problems involved have to do with discrimination or the reasonableness or unreasonableness of rates, practices, or charges, since these questions are peculiarly and more completely within the jurisdiction of the commission than most of the other problems with which the commission is concerned.

(e) \textit{Bills of Lading.} Concerning bills of lading, the judiciary frequently construes these without previous action by the commission. The courts pass on all limitations contained in the bills of lading with respect to the time of bringing suit and with respect


\textsuperscript{58}Texas & P. R. Co. v. American Tie & T. Co., (1914) 234 U. S. 138, 34 Sup. Ct. 885, 58 L. Ed. 1255; see, however, J. C. Francesconi & Co. v. Baltimore & O. R. Co., (D.C. N.Y. 1921) 274 Fed. 657, where a federal district court held that even though all questions as to rates of an interstate carrier must be presented to the commission in the first instance, before recourse is had to the courts, yet the courts can determine whether the tariff rules of the carrier on file apply to the situation in the controversy, though such determination involves a construction of the rule.

to notice of loss in regard to claims. It is not clear, however, whether the courts decide it on the question of reasonableness, which is primarily a question for the commission, or merely hold it valid because it is in the tariff, subject only to change by permission of the commission.

One federal court held that a ruling of the commission—to the effect that a provision in the bill of lading requiring suit to be filed within two years from the time the cause of action arose was unreasonable and that meritorious claims could be paid notwithstanding said clause—did not require the court to hold that the provision was unlawful. The court further held that the ruling of the commission at best operated only for the future.

Another federal court held that a provision in a bill of lading, expressly adopted by the commission for good reasons and to the effect that the value of an article lost should be computed at the time and place of shipment, was illegal and that the common law duty should be enforced. That is, according to the decision of the court, the commission did not have the power, at the time when the case was decided, to alter the old rule that the loss should be determined or computed at the point of destination.

These cases show to some extent the willingness on the part of the courts to take jurisdiction in cases where the construction of a bill of lading is involved, whether or not there has been any action in the case by the commission.

(f) Some Cases in which the Courts will Act without previous Action by the Commission. The interstate commerce act as amended by the transportation act of 1920 provides that no interstate carrier shall undertake an extension of its line of railroad without first obtaining from the commission a certificate authorizing it, and that the violation of this provision may be enjoined by the courts.

Under this provision it has been held that the courts have jurisdiction to determine in the first instance whether or not the proposed construction is an extension or an industrial track. Also the collection by a carrier of a rate in excess of the rate

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charged by it for a longer haul over the same route, without permission of the commission, has been held to be a collection of an illegal rate and the excess of such rate over the rate for the longer haul may be recovered by an action in court without resorting first to the commission. Likewise, the power given the commission to determine rates does not deprive a federal court of equity of jurisdiction to enjoin the putting into effect of an interstate rate which is shown to be unreasonable and in restraint of interstate commerce, until such a rate can be passed upon by the commission. This is especially true where an injunction is necessary to prevent irreparable injury.


In proceeding to the subject of judicial review of cases after there has been a decision by the interstate commerce commission, and thus in considering the extent to which the courts will review the decision of the commission, it is necessary to bear in mind at the outset two things. First, it must be remembered that the question of conclusiveness of the findings of the commission has undergone a change since the original act to regulate commerce was passed. This change is due chiefly to the amendments to the act and partly to the changing attitude of the courts. In the second place, it should be noted that whether or not a finding is conclusive may depend upon the nature of the question involved, that is, upon the subject matter at issue. Thus, for instance, the decision by the commission regarding rates has more weight with the courts today than one involving reparation.

The Interstate Commerce Act as originally passed and as amended March 2, 1889, provided that—

"Whenever any common carrier, as defined in and subject to the provisions of this act, shall violate or refuse or neglect to obey any lawful order or requirement of the commission in this

64 Davis v. Parrington, (C.C.A. 9th Cir. 1922) 281 Fed. 10.
66 This is due to the fact that the interstate commerce act at present expressly provides that the findings of the commission shall be prima facie evidence in reparation cases.
68 25 Stat. at L. 859, sec. 5.
act named, it shall be the duty of the commission, and lawful for any company or person interested in such order or requirement to apply in a summary way, by petition, to the circuit court of the United States . . . and on such hearing the report of said commission shall be prima facie evidence of the matters therein stated."

This provision made the findings of the commission, in all cases properly considered by it, only prima facie evidence in the courts and the tendency of the courts, during the first years under the act, was to give the findings only such weight as was generally given to such evidence. This entitled the courts to admit additional evidence and if necessary to overrule or set aside the findings of the commission. The early attitude of the courts is quite readily seen by examining a few cases before the Supreme Court of the United States.

In the case of Cincinnati, etc., Ry. Co. v. Interstate Commerce Commission the important question involved was whether certain rates were reasonable. The Supreme Court held that since the question was one of fact, peculiarly within the province of the commission, and since there was nothing in the record making it a duty to draw a different conclusion, the decision of the circuit court of appeals which approved the findings of the commission should be affirmed.

Although the findings of the commission in this case were finally approved, the case shows that the circuit court could admit additional evidence, and that there was power both in the circuit court and in the circuit court of appeals to consider and apply such additional evidence. This case further shows that the Supreme Court at that time could review their decisions where such additional evidence was involved.

The case of Texas & P. R. Co. v. Interstate Commerce Commission also involved the reasonableness of rates. The Supreme Court called attention to the fact that the judiciary is "not concluded by the findings or conclusions of the commission." It was held in this case, however, that in order that a court may set aside the findings of the commission it is necessary that the important issue involved is before the court and that it has the necessary evidence before it upon which to base its decision.

The question as to the reasonableness of long and short haul rates was involved in Interstate Commerce Commission v. Ala-

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99(1896) 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935,
100(1896) 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940.
It was contended that the court had no jurisdiction to review the judgment of the commission upon a question of fact; that the court was only authorized to inquire whether or not the commission had misconstrued the statute and had thereby exceeded its power. It was also contended that there was no general jurisdiction to take evidence upon the merits of the original controversy. These contentions were overruled by the Supreme Court which stated that—

"We think this contention is sufficiently answered by simply referring to those portions of the act which provide that, when the court is invoked by the commission to enforce its lawful orders or requirements, the court shall proceed, as a court of equity, to hear and determine the matter, and in such manner as to do justice in the premises."

The court further said that it was competent for the circuit court in dealing with the issues raised by the petition of the commission and the answers thereto, and for the circuit court of appeals on appeal, to determine the case upon a consideration of the allegations of the parties, and of the evidence adduced in their support. It was further stated that in so doing the courts should give effect to the findings of fact in the report of the commission as prima facie evidence of the matters therein stated.

The court affirmed the practice adhered to in the Cincinnati Ry. Case in allowing additional evidence to be taken by the court, and held that the courts are not restricted to the evidence adduced before the commission, nor to a consideration merely of the power of the commission to make the particular order under question, but that additional evidence may be put in by either party and that the duty of the court is to decide as a court of equity, upon the entire body of evidence.

The Supreme Court, however, even in these early cases stressed the importance of having questions of fact considered by the commission in the first instance, and in cases where the commission erred in the findings of fact the case should generally be remanded to the commission.

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71 (1897) 164 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414. In this case the board of trade in Troy, Alabama filed a complaint before the interstate commerce commission claiming that the defendant carriers, in the rates charged for transportation of property, discriminated against the town of Troy, in violation of the terms and provisions of the act of 1887.

72 Cincinnati, N. O. & T. P. R. Co. v. I. C. C., (1896) 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 933. In this case the court said: "We do not mean, of course, that either party, in a trial in the court, is to be restricted to the evidence that was before the commission, but that the purposes
In the Texas Ry. Case the court said:

"If the circuit court of appeals were of opinion that the commission, in making its order, had misconceived the extent of its powers, and if the circuit court had erred in affirming the validity of an order made under such misconception, the duty of the circuit court of appeals was to reverse the decree, set aside the order, and remand the cause to the commission, in order that it might, if it saw fit, proceed therein according to law..."

As to the importance of having certain questions considered by the commission, the court said:

"The defendant was entitled to have its defense considered, in the first instance, at least, by the commission, upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded."

As to the nature of questions that should be considered by the commission, the court said:

"The questions whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact, to be passed upon by the commission in the light of all facts duly alleged and supported by competent evidence, and it did not comport with the true scheme of the statute that the circuit court of appeals should undertake, of its own motion, to find and pass upon such questions of fact, in a case in the position in which the present one was."

The Supreme Court further stated in this case:

"We do not, of course, mean to imply that the commission may not directly institute proceedings in a circuit court of the United States charging a common carrier with disregard of provisions of the act, and that thus it may become the duty of the court to try the case in the first instance. Nor can it be denied that, even when a petition is filed by the commission for the purpose of enforcing an order of its own, the court is authorized to 'hear and determine the matter as a court of equity,' which necessarily implies that the court is not concluded by the findings or conclusions of the commission; yet, as the act provides that on such hearing the findings of fact in the report of said commission shall be prima facie evidence of the matters therein stated, we think it plain that if, in such a case the commission has failed, in its proceedings, to give notice to the alleged offender, or has unduly restricted its inquiries, upon a mistaken view of the law, the court ought not to accept the findings of the commission as a legal basis for its own action, but should either inquire into the

73Texas & P. R. Co. v. I. C. C., (1896) 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940. See page 410 supra.
facts on its own account, or send the case back to the commission to be lawfully proceeded in.\textsuperscript{74}

There is an apparent inconsistency in the two statements by the court in that the first in italics implies that questions of fact should not be considered by the courts in the first instance, whereas the second suggests that when the commission has failed to pass on questions of fact, the court should either inquire into the facts on its own account or send the case back to the commission. The apparent inconsistency in the two statements is cleared up, however, in the following paragraph of the opinion which shows that the circuit court of appeals should not have inquired into the facts of its own accord in this case, although it is permissible for the courts to do so in certain cases.\textsuperscript{75} Here the question involved was as to the reasonableness of rates, a question especially for the interstate commerce commission.

One of the outstanding purposes of the creation of the commission was that there might be established a body of experts to pass upon the reasonableness of rates, practices, and charges. Furthermore, the earlier cases were more lenient in allowing the courts to pass upon both questions of fact and law when the case had once been before the commission and the commission had failed to pass upon all necessary questions of fact, than where the case had never been before the commission. Finally, in the early cases, when the courts were allowed to pass on questions of fact, it was generally implied that there must be some reason why such questions should be considered by the courts, such as numerous or urgent complaints against the existing rates, or otherwise, the necessity of an immediate decision.\textsuperscript{76}

In the later cases, decided shortly before the Interstate Commerce Act was amended in 1906,\textsuperscript{77} the courts seem to give greater weight to the findings of the commission. The courts seem to have become more reluctant in going into questions of fact in the

\textsuperscript{74}The italics in the above paragraphs are ours.

\textsuperscript{75}The first statement by the Supreme Court refers to the jurisdiction of the circuit courts of appeals which are exclusively appellate courts, whereas the second statement refers to the power of the circuit courts.

\textsuperscript{76}Texas & P. R. Co. v. I. C. C., (1896) 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940. On these points the Supreme Court said: "The mere fact that the disparity between the through and the local rates was considerable did not, of itself, warrant the court in finding that such disparity constituted an undue discrimination. Much less did it justify the court in finding that the entire difference between the two rates was undue or unreasonable, especially as there was no person, firm, or corporation complaining that he or they had been aggrieved by such disparity."

\textsuperscript{77}See text and footnote 81 of the next installment.
first instance, or in entering into an independent investigation of the facts, and have become more insistent that in case the commission erred in finding facts, the case should be remanded to it. Thus in the case of *Louisville & N. R. Co. v. Behlmer* the commission’s findings of fact were held to be prima facie correct. In *Cincinnati, etc., Ry. Co. v. Interstate Commerce Commission* the Supreme Court states that in view of the fact that the statute gives prima facie effect to the findings of the commission, such findings, when concurred in by a federal court, should not be interfered with unless the record established that clear and unmistakable error had been committed.

The opinions and decisions of the federal courts also show that during the latter part of the period prior to the amending of the act in 1906, the courts gave more consideration to the statement in the act that the findings and reports of the commission should be prima facie evidence of the matters therein stated; and held that under this provision the findings of the commission should not be set aside unless there were urgent reasons for so doing. Furthermore, as the cases before the commission and before the courts under the interstate commerce act became more numerous, the courts realized more and more the expediency of having the commission first pass upon intricate questions of fact, the duty of which was imposed upon it by statute and for which it was considered peculiarly competent.

(To be concluded.)

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78 (1900) 175 U. S. 648, 20 Sup. Ct. 209, 44 L. Ed. 309.