Journal of Air Law and Commerce

Volume 16 | Issue 2 Article 3

1949

The Effects of Tariff Provisions: Some Further Observations

Rufus G. King Jr.

Recommended Citation
Rufus G. King Jr., *The Effects of Tariff Provisions: Some Further Observations*, 16 J. AIR L. & COM. 174 (1949)
https://scholar.smu.edu/jalc/vol16/iss2/3

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.

THE EFFECTS OF TARIFF PROVISIONS: SOME FURTHER OBSERVATIONS

By RUFUS G. KING, JR.

Associated with Norman M. Littell, Attorney, Washington, D. C.; Princeton, A.B., 1938; Yale Law, LL.B., 1943; Member, New York and District of Columbia Bars; *Formerly*, Law Clerk to the Honorable Thomas W. Swan, U.S. Circuit Court, 2d Circuit, 1943-44, Attorney, Air Transport Association, 1944-46, International Editor, Air Cargo Publishing Corp., and President, Tariffs, Inc., 1946-47.

A RECENT article published in this JOURNAL[1] advances two important conclusions as to the legal effects of tariffs filed with the Civil Aeronautics Board pursuant to the requirements of Section 403 of the Civil Aeronautics Act of 1938.[2]

The first, that rate and rule provisions properly on file are conclusive evidence of the contract of carriage, is buttressed by half a century of history and judicial affirmation.[3] It is a conclusion concerning *the validity of the contract of carriage as between the parties,* and means, practically, that when a shipper or passenger accepts the offer of transportation held out in a filed tariff (and regulated carriers can make no other offer), he is bound by every term thereof even though he proves circumstances which would excuse him from an ordinary contractual undertaking, *e.g.,* mistake,[4] waiver,[5] estoppel,[6] or an express agreement on different terms.[7] This conclusion seems unassailable, with a narrow reservation as to the outcome in cases of false billing, or outright fraud on the part of carriers' agents.[8]

---

[1] Markham and Blair, *"The Effects of Tariff Provisions Filed Under the Civil Aeronautics Act of* 1938," 15 J. Air L. & C. 251 (1948).

[2] 52 Stat. 973, 49 USCA §401 *et seq.* (Supp. 1948).

[3] This is, incidentally, the legal basis upon which nearly all regulated passenger carriers have been induced to drop lengthy contracts of carriage from their tickets, in favor of a brief tariff reference. It is an equally sound conclusion for regulated carriers of property, and the standard domestic Airbill now in use contains such a reference in lieu of contract terms—though surface carriers still crowd their shipping documents with fine print. The development of a standard, interchangeable bill of lading for all domestic shipments may become a real possibility when railroads and truckers abandon this useless practice.

[4] *Pittsburgh, C., C. & S. L. Railway v. Fink,* 250 U.S. 577 (1919). Note, 83 A.L.R. 245 (1933).

[5] *Midstate Co. v. Penna. R. Co.,* 320 U.S. 356 (1943). See, *Phillips v. Grand Trunk Ry.,* 236 U.S. 662 (1915); *Am. Trust Co. v. Am. Ry. Express Co.,* 47 F. 2d 16 (CCA 7th, 1931), cert. den. 284 U.S. 629.

[6] *New York, N. H. & H. R. Co. v. York & Whitney Co.,* 102 N.E. 366 (Mass., 1913), writ of error dis., 239 U.S. 631; *Houston & T. C. R. Co. v. Johnson,* 41 S.W. 2d 14 (Tex. Civ. App., 1931).

[7] *Atchison, T. & S. F. R. Co. v. Robinson,* 233 U.S. 173 (1914); *Chicago & Alton R. R. Co. v. Kirby,* 225 U.S. 155 (1912); *Gordon v. Kansas City Southern Ry. Co.,* 2 S.W. 2d 675 (Ark., 1928).

[8] See dictum in *Great Northern R. Co. v. O'Connor,* 232 U.S. 508, 515 (1914). Cf., *Pierce Co. v. Wells Fargo & Co.,* 236 U.S. 278 (1915); *Chicago & E. I. R. R. Co. v. Collins Co.,* 249 U.S. 186 (1919); *Wall-A-Hee v. Northern Pac. Ry. Co.,* 41 P. 2d 786 (Wash., 1935).

The second, that rate and rule provisions properly on file cannot be avoided or invalidated retroactively on any ground, including unlawfulness, provokes the further examination submitted here. This conclusion goes to the *validity of the contract of carriage when challenged in terms of law or public policy.* It means, practically, that the peculiar inviolability of tariff-governed contracts observed above is to be extended to preclude not only assaults based on the circumstances surrounding a particular transaction but also the substantive assault of illegality:

> "No intimation can be found in the Civil Aeronautics Act that a passenger or shipper should be entitled to relief from unlawful tariff provisions involved in past transactions. . . ."[9]

The argument runs like this: the Civil Aeronautics Act[10] imposes on air carriers a statutory duty to publish only "lawful" rates and rules; since the duty is statutory, the correlative remedies provided in the Act must be exclusive; the Act confers no power on the Board to give administrative relief — *i.e.,* award reparations; and, though common law remedies are expressly reserved, the courts cannot intercede because such intercession would disrupt the pattern of uniformity which is a primary objective of legislation in this field. Therefore, unlawful rates or rules, once properly on file, can only be challenged as to their prospective operation, and the shipper or passenger who confronts them in a past transaction is left without his day in court.[11]

The Lawfulness of Rates and Rules

Long before the advent of regulatory legislation, in the last quarter of the Nineteenth Century, courts had imposed rigorous judicial standards of integrity and performance on the activities of common carriers. The designation itself — "common," as opposed to "private," carriage — was a term that carried far more burdens than benefits in its train. Common carriers were answerable to all the general body of law affecting contracts, torts, and bailments. And, besides, they were compelled to serve all comers, up to the limits of capacity and the kind of service held out.[12] They owed their passengers the highest degree of care and protective vigilance.[13] With respect to property entrusted to

---

[9] Markham and Blair, *op. cit.,* 291.

[10] Sec. 404, 52 Stat. 993, 49 USCA §484 (Supp. 1948).

[11] Another line of argument that approaches the same conclusion, albeit more moderately, is noteworthy in passing: Congress has, under the interstate commerce clause, the undisputed power to regulate carrier-passenger and carrier-shipper transactions; Congress also has the power to delegate such regulatory powers to administrative agencies, and—subject to rigorous standardization requirements and constitutional limitations—through such agencies to the regulated parties themselves. On this theory, tariffs approved by the Civil Aeronautics Board would have all the force, but only the force, of enacted statutes. See, *U.S. v. Standard Oil Co. of Indiana,* 155 F. 305 (D.C. Ill., 1907), rev'd on other grounds, 164 F. 376, cert. den., 212 U.S. 579; *Schechter v. United States,* 295 U.S. 495 (1935); Notes, 92 A.L.R. 1464 (1933), and 95 A.L.R. 1396 (1934).

[12] *Missouri Pac. Ry. Co. v. Tucker,* 230 U.S. 340 (1913); *Atwater v. Delaware, L. & W. R. Co.,* 2 A. 803 (N.J., 1803).

[13] *Stokes v. Saltonstall,* 38 U.S. 181 (1839).

them for carriage they were insurors, with strictly limited defenses later allowed.[14] In the United States they could not exonerate themselves from liability for negligence, by contract or otherwise.[15] Their rates and practices were subject to scrutiny for "reasonableness,"[16] while judicial relief was available to persons against whom unjust discrimination had been practiced.[17]

The original Interstate Commerce Act[18] was not intended as an alteration of these standards. It purported only to strengthen the application of certain principles of the common law.[19] It was enacted not because new rights and duties were needed vis á vis the railroads, but because old remedies had proved inadequate — specifically in the area of extortionate rate-making and discriminatory practices.[20] Tariffs were required to be published and posted to insure adequate publicity so that shippers and passengers could protect themselves, but they did not emerge as standards of lawfulness until 1903,[21] and they were not required to be filed with the Commission until 1906.[22] The Commission's prescriptive powers over rates were partially bestowed on it in 1906[23] and subsequently enlarged in 1910[24] and 1920,[25] while its authority with respect to bill of lading terms and conditions, affecting carrier's liability for property, was open to question as late as 1918,[26] and has only been asserted by indirection since.[27]

There is nothing in this history to suggest an abandonment of traditional common law principles in favor of tariff provisions. It is true that the Commission's importance as a substitute for the courts

---

[14] *New Jersey Steam Nav. Co. v. Merchants Bank*, 47 U.S. 344 (1848).

[15] *Railroad Co. v. Lockwood*, 84 U.S. 357 (1873); *Bank of Kentucky v. Adams Express Co.*, 93 U.S. 174 (1876).

[16] *Lewis-Simas-Jones Co. v. Southern P. Co.*, 283 U.S. 654 (1930); *Smith v. C. & N. W. Ry. Co.*, 5 N.W. 240 (Wisc., 1880); *Root v. Long Island R. Co.*, 21 N.E. 403 (N.Y., 1889).

[17] *York Company v. Central Railroad*, 70 U.S. 105; *A. T. & S. Railroad v. D. & N. O. Railroad*, 110 U.S. 667 (1884); *Banner Grain Co. v. Great Northern Ry. Co.*, 137 N.W. 161 (Minn., 1912).

[18] Enacted *sub nomine* ACT TO REGULATE COMMERCE, 24 Stat. 379 (1887).

[19] *U.S. v. Hanley*, 71 F. 672 (D.C. Ill., 1896); *Tift v. Southern R. Co.*, 123 F. 789 (C.C. Ga., 1903).

[20] See, 1 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 46n., 285-6.

[21] With the passage of the ELKINS ACT, 32 Stat. 847. See SHARFMAN, *op. cit.*, 36.

[22] By the HEPBURN ACT, 34 Stat. 584. Joint rates had been filed from the outset, but only because they were "agreements, or arrangements" between carriers. See c. 104, §6, 24 Stat. 381, and c. 382, §1, 25 Stat. 856.

[23] The HEPBURN ACT, *supra*, gave only the power to establish maximum rates. Early attempts at rate-making had been arrested by the courts. *I. C. C. v. Cincinnati, N. O. & T. P. R. Co.*, 167 U.S. 479 (1897).

[24] By the MANN-ELKINS ACT, 36 Stat. 539, permitting the Commission to suspend new rates, and to initiate changes on its own motion.

[25] By the TRANSPORTATION ACT OF 1920, 41 Stat. 456, which finally conferred the power to establish minimum rates.

[26] *Alaska S. S. Co. v. U.S.*, 259 F. 713 (S.D. N.Y., 1918), dismissed as moot, 253 U.S. 113.

[27] See, *Domestic Bill of Lading and Live Stock Contract*, 64 I. C. C. 357, 66 I. C. C. 63 (1921).

grew rapidly in certain areas, *e.g.*, rate matters, and that its discretion was confirmed as exclusive in those areas by the innovation of the "primary jurisdiction" doctrine in the *Abilene* case.[28] It is also true that the Interstate Commerce Act was held to have brought all questions of carriers' liability for property within the ambit of federal law, by an adroit twist, in 1913, of language that had stood in the Act since 1906 serving another purpose.[29] But neither of these developments swept the whole field of liability. And neither suggests a total substitution of administrative protection, *qua* "statutory duty," for the entire body of common law that stood, and stands, unchallenged. From the outset, the Interstate Commerce Act and its later counterparts have carried savings clauses, preserving common law remedies in express terms.[30] The intent of Congress to leave the courts open to aggrieved passengers and shippers could not have been more forcefully indicated.

Yet the full impact of the conclusion reached in the article being examined here is that *all* judicial standards have been scrapped, in so far as they may be contradicted or qualified by tariff provisions, in favor of the exclusive remedial powers of the regulatory agency — exercised prospectively only in the case of the Civil Aeronautics Board which does not have reparations powers.[31] It is one thing to deprive private litigants of their judicial remedies against an established rate structure,

---

[28] *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) holding that a shipper complaining of an unreasonable rate would be denied access to the courts, notwithstanding that they would otherwise have had jurisdiction, where an adequate administrative review (*i.e.*, by the Commission) lay open to him.

[29] The CARMACK AMENDMENT, part of the HEPBURN ACT, 34 Stat. 593 (1906), in establishing the liability of the initial carrier in through service for loss or damage during transportation by subsequent carriers, provided that such initial carrier "shall issue a receipt . . . and shall be liable to the lawful holder thereof for any loss, damage, or injury" caused by itself or by such subsequent carriers. In *Adams Express Co. v. Croninger*, 226 U.S. 491 (1913), this language was held to indicate that Congress had intended to preclude the application of state law in cases of loss, damage, or injury to property moving subject to the Interstate Commerce Act.

This raises a noteworthy question as to air carriers since the Civil Aeronautics Act does not happen to contain such language. It may be argued that the Act does not reach loss and damage liability for property at all. Compare, *Pennsylvania Railroad v. Hughes*, 191 U.S. 477, (1903). But there are authorities from the "pre-Croninger" era to the contrary. See *Southern Ry. Co. v. Reid*, 222 U.S. 424 (1912). Cf., *Siwalk v. Pennsylvania-Central Air Lines, Inc.*, *infra*. Compare *People v. Zook and Craig*, 17 Law Week 4351 (U.S.S.C. Apr. 25, 1949).

[30] The original language: ". . . and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of such act are in addition to such remedies. . . ." ACT TO REGULATE COMMERCE, 24 Stat. 387 (1887). This is carried forward to the present INTERSTATE COMMERCE ACT, 49 USCA §22, and is repeated in the CARMACK AMENDMENT, 49 USCA §20 (11). Cf., COMMUNICATIONS ACT OF 1934, 48 Stat. 1099, 47 USCA §414 (Supp. 1948); MOTOR CARRIER ACT OF 1935, 49 Stat. 558, 563, 49 USCA §§316(j), 319 (Supp. 1948); FREIGHT FORWARDER ACT OF 1942, 56 Stat. 295, 49 USCA §1013 (Supp. 1948). Language identical with that quoted above appears in the CIVIL AERONAUTICS ACT OF 1938, 52 Stat. 1027, 49 USCA §676 (Supp. 1948).

[31] This matter of reparations has not, however, been definitely settled. The Interstate Commerce Commission has no such powers under the MOTOR CARRIERS ACT, cited *supra*, yet see, *Bell Potato Chip Co. v. Aberdeen Truck Line*, 43 MCC 337 (1945); *Park-Tilford Distillers, Inc., v. United Frt. Term., Inc.*, 46 MCC 735 (1947). And see ftn. 55, *infra*. Cf., *United States Rubber Co. v. Associated Transport, Inc.*, Doc. MC-C-871, Feb. 16, 1948.

as the courts have done in the *Abilene* case[32] and its progeny, with the argument that to give relief would work an abhorrent prejudice against others who have paid the rate; it would be quite another to preclude recovery by a passenger for personal injury, or a shipper for negligent damage, with the same argument bolstering up a tariff disclaimer repugnant to the common law.

Concededly, the standards of lawfulness provided for tariff provisions in the Civil Aeronautics Act may extend exclusively to some areas of liability and disability — and this though the Act may be interpreted to withhold the substitute remedy of review by the Board and the award of reparations. It cannot be conceded that they extend to all.

The Adequacy of Administrative Scrutiny

In order reasonably to imply any intent on the part of Congress to substitute the prospective power of the Civil Aeronautics Board for the retroactive power of the courts in dealing with unlawful tariff terms, it would have to be shown that the Board's power is unequivocally conferred, and accurately and adequately delineated. This is not the case. There are, on the contrary, fatal gaps in the Board's powers and duties. In the filing requirement itself, Section 403 (a),[33] matters other than rates, fares and charges — *i.e.,* terms affecting other liability — may be excluded altogether, in the discretion of the Board:

> "(a) Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation * * * and showing *to the extent required by regulations of the Board,* all classifications, rules, regulations, practices, and services in connection with such air transportation. . . ."[34] (Emphasis supplied.)

This option would be hard to explain if it had in fact been contemplated that tariff provisions would fix all liability. And the Board itself has taken a position directly contrary to any such interpretation, by promulgating Par. (b) (6), Economic Regulations 224.1,[35] which provides:

> "(6) The filing of a tariff with the Board in no way relieves an air carrier from liability for any violation of the Act or of regulations issued thereunder."

There was, moreover, an obvious reason for this administrative disclaimer. As the Act is drawn, there is one situation in which the Board's suspension and review powers — *i.e.,* administrative vigilance to insure lawfulness — will not reach tariff provisions at all. *Initial* tariffs are immunized from suspension.[36] If filing alone establishes the unassail-

---

[32] See note 28, *supra.*

[33] 52 Stat. 992, 49 USCA §483(a) (Supp. 1948).

[34] *Ibid.*

[35] "Filing, Posting and Publishing of Tariffs by Air Carriers and Foreign Air Carriers"—Revised, 1940.

[36] Sec. 1002(g) 52 Stat. 1018, 49 USCA §632(g) (Supp. 1948): "(g) Whenever any air carrier shall file with the Board a tariff stating a new individual or joint (between air carriers) rate, fare, or charge for interstate or overseas air

ability of carriers' tariff terms, then *anything* filed in an initial tariff would become unassailable — at least until the slower prescription or modification procedures[37] could be set in motion.

Therefore it would be quite possible as a matter of right, apart from the possibility of inattention or oversight on the part of the Board's tariff staff, for an air carrier to file provisions nullifying every one of the safeguards which passengers and shippers have been accorded in the past, and to rely on them as absolute exoneration before an injured litigant. Suffice it to enumerate a few, from the resources of a limited imagination: a disclaimer of responsibility for willful injury to passengers; a one-day notice requirement for the filing of damage claims; the privilege of refusing to carry at will. Congress itself would run afoul of the courts and the constitution if it essayed to legislate such things,[38] yet the carrier who slipped them into his tariff could not be brought to a judicial reckoning.

Judicial Reactions

In surface-carrier cases the courts have consistently followed the *Abilene* case in holding that no judicial review of lawfulness will be

---

transportation or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Board is empowered, upon complaint or upon its own initiative, at once, and, if it so orders, without answer or other formal pleading by the air carrier, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such classification, rule, regulation, or practice; and pending such hearing and the decision thereon, the Board, by filing with such tariff, and delivering to the air carrier affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such tariff and defer the use of such rate, fare, or charge, or such classification, rule, regulation, or practice, for a period of ninety days, and, if the proceeding has not been concluded and a final order made within such period, the Board may, from time to time, extend the period of suspension, but not for a longer period in the aggregate than one hundred and eighty days beyond the time when such tariff would otherwise go into effect; and, after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Board may make such order with reference thereto as would be proper in a proceeding instituted after such rate, fare, charge, classification, rule, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed rate, fare, charge, classification, rule, regulation, or practice shall go into effect at the end of such period: *Provided, That this subsection shall not apply to any initial tariff filed by any air carrier.*" (Emphasis supplied.)

[37] Sec. 1002(d) and (f), 52 Stat. 1018, 49 USCA §642(d) and (f) (Supp. 1948).

[38] It is enlightening to compare an enactment in which Congress seems clearly to have intended and achieved the result imputed to it here, in a narrow field and subject to precise limits. Section 406(f) of the FREIGHT FORWARDER ACT OF 1942, 56 Stat. 288, 49 USCA §1006(f) (Supp. 1948), provides:

"(f) Whenever in any investigation under this chapter, or in an investigation instituted upon petition of the freight forwarder concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, charge, classification, regulation, or practice of any freight forwarder, made or imposed by authority of any State, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons subject to this chapter, with respect to the relationship between rate structures and practices of such persons subject to the jurisdiction of such State bodies and of the Commission; and to that

undertaken with respect to rates.[39] And the same result has been reached with respect to other tariff provisions which affect the consideration paid for a service rendered to whole classes of transportation users, *e.g.*, distribution rules,[40] routing practices,[41] and freight classifications.[42] In these cases, the paramount need for uniformity in the treatment of the entire class has been continuously remarked and relied upon:

> "If a shipper could recover . . . for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. It is no answer to say that each of these might bring a similar action. . . . Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief. . . ."[43]

This rationale has even been extended, with the same result, to cases where a large class of persons were distinguishable because some injury had been worked upon them — *e.g.*, claimants challenging a notice requirement in connection with a reparations order.[44]

But such cases are distinguishable from that of a claimant whose injury puts him in a small class among transportation users, or is not classifiable at all. In the latter, the argument for uniformity-at-any-price loses its weight. The passenger who has suffered personal injuries, for instance, or the shipper whose property has been destroyed, is not in a position where equality with other transportation users similarly situated is of much public concern. If he chooses to assault an allegedly unlawful provision which stands in his way, he does not thereby jeopardize the "assurance of uniform treatment" so zealously de-

---

end the Commission is authorized, under rules to be prescribed by it, to hold joint hearings with any such State regulatory bodies upon any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this chapter. Whenever in any such investigation the Commission, after full hearing, finds that any such rate, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. *Such rates, charges, classifications, regulations, and practices shall be observed while in effect by the freight forwarders parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.*" (Emphasis supplied.)

[39] *Robinson v. B. & O. R. R.*, 222 U.S. 506 (1912); *Mitchell Coal & Coke Co. v. Penna. R. R.*, 230 U.S. 247 (1913); *Lewis-Simas-Jones Co. v. Southern P. Co.*, 283 U.S. 654 (1931).

[40] *Morrisdale Coal Co. v. Penna. R. R. Co.*, 230 U.S. 304 (1913).

[41] *Northern Pac. Ry. v. Solum*, 247 U.S. 477 (1918).

[42] *Director General v. Viscose Co.*, 254 U.S. 498 (1921).

[43] *Keogh v. Chi. & N. W. Ry.*, 260 U.S. 156 (1922), refusing to take jurisdiction in a rate action brought under the anti-trust laws.

[44] *Phillips v. Grand Trunk Ry. Co.*, 236 U.S. 662 (1915).

fended in the rate cases. His problem — and his rights — would seem to be that of any ordinary litigant confronted with an unconstitutional statute or an illegal contract term. If he prevails, he gains a preference over those who have acquiesced or otherwise lost their remedies. But this alone has never shocked the judicial conscience.

Such cases, clearly put, have been rare in the courts. The issue of lawfulness has often been obscured by other considerations; the cases are easily confused with the vast array of judicial precedent supporting the conclusive effect of tariffs as evidence of the contract of carriage.[45] But there have been a few, and when squarely invoked to do so the courts have worked their way to the correct result, applying their own standards of lawfulness to the challenged provision, in almost every case.

Although some of the early opinions employed slightly intemperate language in affirming the force of tariffs without qualification, a clear note of caution was sounded in *Kansas City S. R. Co. v. Carl,* 227 U.S. 639 (1913). There, affirming the validity of a released-value rate, the Court said:

> "The valuation the shipper declares determines the legal rate where there are two rates based upon valuation. He must take notice of the rate applicable, and actual want of knowledge is no excuse. . . .[46]
>
> "Both the adjustment of rates upon the class of articles based upon differences in valuation, as well as the acceptance of stipulations in the carrier's bill of lading which affect the liability declared by the Carmack Amendment, are administrative duties of the Commission. *To the extent that such limitations are not forbidden by law,* they become, when filed, a part of the rate."[47]

In *Boston & M. R. Co. v. Piper,* 246 U.S. 439 (1918), the plaintiff had shipped cattle on a bill of lading which reduced the carrier's liability for negligent delay to the mere cost of extra feed consumed — thus conflicting with the time-honored standard that carriers cannot exonerate themselves from the consequences of their own negligence. Delay occurred, and the plaintiff sued for the full damages caused thereby. In a brief opinion which dismissed the cases on the evidentiary force of filed tariffs as inapplicable in this situation, the Supreme Court affirmed judgment for the plaintiff for the full amount of his damage:

> "In the bill of lading, now under consideration, there is an express agreement limiting liability from unusual delay and detention, caused by the carrier's negligence, to the amount actually expended by the shipper in the purchase of food and water for his stock

[45] See, Markham and Blair, *op. cit.,* 259-272, for copious citations. Even the injured passenger is bound by the *contract* evidenced in applicable tariffs, of course, as he is not in a limited position among all other contracting parties. It is only his conflict with allegedly unlawful provisions affecting his recovery—a conflict which passengers as a class never encounter—that would, in the present analysis, entitle him to judicial intervention.

[46] 227 U.S. at 652.

[47] *Ibid.,* 654.

> while so detained. This stipulation controvenes the principle that the carrier may not exonerate itself from losses negligently caused by it, and is not within the principle of limiting liability to an agreed valuation which has been made the basis of a reduced freight rate. Such stipulations as are here involved are not legal limitations upon the amounts of recovery, but are in effect attempts to limit the carrier's liability for negligence by a contract which leaves practically no recovery for damages resulting from such negligence. *While this provision was in the bill of lading, the form of which was filed with the railroad company's tariffs with the Interstate Commerce Commission, it gains nothing from that fact.* The legal conditions and limitations in the carrier's bill of lading duly filed with the Commissioner are binding until changed by that body (*Kansas City Southern R. Co. v. Carl*, 227 U.S. 639); but not so of conditions and limitations which are, as is this one, illegal, and consequently void."[48] (Emphasis supplied.)

In *Gooch v. Oregon Short Line R. Co.*, 258 U.S. 22 (1922), Gooch was injured while traveling on a special "drover's pass," issued pursuant to carrier's filed tariff and containing a 30-day notice requirement. He failed to give timely notice, and challenged the requirement, when the carrier pleaded it as a defense to his suit, on the ground that it was unreasonable. The court sustained the requirement *on the merits*, after a careful examination of its reasonableness, with three justices dissenting because they believed it should have been declared unreasonable.[49] The case of *Pacific S. S. Co. v. Cackette*[49a] presented a harsher notice requirement, 10 days, and a more aggravated injury, assault on a female passenger by one of the carrier's employees. She was allowed to recover though she took no action for 10 months. The court first attempted to isolate her case and exclude it entirely from the workings of the regulatory pattern:

> "A tariff is ordinarily understood to be a system of rates and charges. The public, in dealing with a common carrier, are bound to take notice that it has filed a tariff of rates and charges, and are chargeable with notice of everything that is properly included in or related to such system of rates and charges. Rates for passenger transportation may be, as the court found in the *Hooker* case [233 U.S. 97 (1914] directly affected by the degree of the carrier's responsibility for safe carriage and delivery of baggage. No provision is found in the Interstate Commerce Act which relates to rights of action against carriers for damage or injuries from negligence or assault. Notice of claims for such damages has no perceptible relation to rates and charges for transportation. . . ."[50]

Then, however, it took an unequivocal stand:

> "We consider the foregoing considerations conclusive of the question here involved, but it may be added that the District Judges for the Western District of Washington have held that such a limitation

---

[48] 246 U.S. at 445.

[49] See also, *Northern P. R. Co. v. Wall*, 241 U.S. 87 (1916), and *St. Louis, I. Mt. & So. Ry. Co. v. Starbird*, 243 U.S. 592 (1917), upholding notice requirements, in connection with claims for damages to property, as reasonable—on the merits.

[49a] 8 F. 2d 259 (CCA 9th, 1925), cert. den., 269 U.S. 586.

[50] 8 F. 2d at 261.

> of time for presentation of a claim for injury to a passenger, although printed upon the face of the ticket, is void as unreasonable. *Blackwell v. Alaska S. S. Co.* (W.D. Wash., 1923) 1 F. 2d 334."[51]

Tariff provisions filed by air carriers have been attacked in the courts on the ground of unlawfulness twice in the life of the Civil Aeronautics Act. Neither case is entirely satisfactory, as the issue here under consideration does not seem to have been artfully pleaded or exhaustively considered. One, *Adler v. Chicago and Southern Air Lines, Inc.,* is probably unsound.[52] In the *Adler* case, the plaintiff sued for damages incurred when the defendant air line cancelled a scheduled flight. The air line defended on the basis of its tariff rule authorizing cancellation. Plaintiff challenged the rule as unreasonable. The court, relying on the *Abilene* case,[53] dismissed the complaint with the assertion that the Civil Aeronautics Board had exclusive jurisdiction to pass on the lawfulness of the rule in question.[54]

The second case, *Siwalk v. Pennsylvania-Central Airlines Corp.,*[54a] is more illuminating. There the carrier had filed a tariff rule to the effect that "liquids" would not be accepted as baggage. A bottle of mouthwash, packed with plaintiff's personal effects, was broken, concededly by negligent loading and handling, and plaintiff sued for the resulting damage. It happened that plaintiff was an intrastate passenger, which introduced the additional question of whether the tariff should control at all,[55] but, assuming an affirmative answer to this, the court allowed recovery, observing that:

> "In my opinion the regulations should be construed so as not to bar a reasonable quantity of toilet liquid for personal use in a traveler's case."

---

[51] *Id.* See also, *Union Pac. R. R. Co. v. Burke,* 255 U.S. 317 (1921), (filed released-value provision held void for failure to give option); *Erie R. Co. v. Steinberg,* 113 N.E. 814 (Ohio, 1916), (filed limitation of liabilty for luggage lost held void); *Southern Ry. Co. v. Porter,* 44 S.E. 2d 688 (Ga., 1947), (filed released-value provision held void where option unreasonable). Cf., *St. Louis S. W. Ry. v. Spring River Co.,* 236 U.S. 718 (1915); *Warehouse Co. v. U.S.,* 283 U.S. 501 (1931); *Baltimore & O. R. Co. v. U.S.,* 305 U.S. 507 (1939).

[52] 41 F. Supp. 366 (E.D. Mo., 1941). Cf., Markham and Blair, *op. cit.,* 281-3.

[53] *Supra,* note 28.

[54] Which the Board subsequently did, 4 CAB 113 (1943), without considering the fact that under the Civil Aeronautics Act it is without power to make findings with retroactive effect. Its conclusions, sustaining the rule, ended the matter. See, *Jones v. Northwest Airlines, Inc.,* 157 P. 2d 728 (Wash., 1945). Cf., *Schwartzman v. United Air Lines,* 6 FRD 517 (D.C. Neb. 1947). Of course *if* the Board had found the rule to be unlawful, and if the court had *then* allowed recovery (as its opinion implied it would), the correct result, of preserving to the plaintiff his right to have lawfulness tested, would still have been approached, albeit in the administrative forum only, and by indirection. Compare the procedure developed under the Motor Carrier Act of 1935, *supra,* note 31. This approach raises obvious difficulties: there is no period of limitation applicable to such retroactive reviews; the Board's finding would be subject to separate appeal; it could be a matter of years before plaintiff's primary cause of action was so much as established.

[54a] 1 Avi 900 (Cir. Ct., Wayne Co., Mich. 1940).

[55] See *supra,* note 29. It was indicated that under local (Michigan) law the rule would have been voided as a stipulation purporting to relieve the carrier from liability for negligence.

For all its gentleness, this finding amounts to a judicial reformation of the challenged rule. And note how, on such a set of facts, the uniformity-at-any-price argument breaks down: the rule could have been immunized from attack on that basis *only by persuading the court that to allow Mrs. Siwalk to recover would have prejudiced other passengers who had suffered similarly in the past to an extent repugnant to public policy.*

CONCLUSION

On the basis of the foregoing analysis and authorities, it does not seem clearly established that *all* tariff provisions become, from the mere act of filing, unassailable. They *are* the contract of carriage. But like any other contractual terms, they may be challenged for unlawfulness in the courts. And though some may be held sacrosanct out of respect for the desirable aim of treating all shippers and passengers alike, there are others which do not seem to affect this aim substantially.[56] The line has not been sharply drawn, in the few adjudicated cases where it has been questioned. It probably lies between those situations, on the one hand, where the plaintiff is one of many shippers or passengers similarly affected by the challenged provision, and those, on the other, where he complains of an effect peculiar to himself or to the members of a small class of transportation users.

If the courts do not recognize such a line of demarcation, the Board will probably be forced to adopt the unsatisfactory, compromise position suggested in the *Adler* case, making retroactive findings on the basis of which judicial relief can subsequently be obtained, and this would, of course, expose *all* provisions to the risk of overthrow. Motor carriers once stood where air carriers stand today with respect to their duties as common carriers; the want of equity in their position led the Interstate Commerce Commission to fashion jurisdiction for itself:

> "To hold that a motor carrier which has violated any of these prescribed duties is immune to civil liability to one injured thereby while rail and water carriers similarly offending must respond in damages would be not only at variance with the fundamental rule of *ubi jus ibi remedium* but would also disregard the provisions of [the] sections . . . which preserve all common-law and statutory remedies."[57]

---

[56] The courts have sometimes referred to the peculiar qualifications of the regulatory agency, as a body of experts, to rule on the complicated questions presented. See, *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 230 U.S. 304 (1913); *Pennsyvania R. Co. v. Puritan Coal Min. Co.*, 237 U.S. 120 (1915); *Pennsylvania R. Co. v. Sonman S. C. Co.*, 242 U.S. 120 (1916). This consideration, as a substitute for the uniformity-at-any-price argument, would seem to apply with identical results. The "reasonableness" of rates, and some practices, is a notoriously complex issue. The lawfulness of other stipulations is not.

[57] *Bell Potato Chip Co. v. Aberdeen Truck Line, supra,* note 31.