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summon to bare their records, relevant or irrelevant, in the hope that something will turn up, or to invade the privacy protected by the Fourth Amendment . . . but only that the Commission may, without interference, seek through an investigation of its own making information properly applicable to the legislative standards set up in the Act."⁵⁴

Robert Loren Williams.

PROCEDURES IN CLAIMING REPARATIONS FOR UNLAWFUL SHIPPING CHARGES IN INTERSTATE COMMERCE

THIS Comment is restricted to the various methods of recovery available to shippers who have sustained injuries as a result of the wrongful conduct of common carriers. By the Interstate Commerce Act Congress created new rights and obligations. Persons adversely affected by a carrier's failure to conform to the various provisions of the Act are entitled under Section 8 to the "full amount of damages sustained."¹ Common law liability of carriers was abolished by the Act only in instances where liability may be limited by strict compliance with provisions of the Act.² Section 9 provides the methods an injured party may pursue to recover damages as a result of a common carrier's failure to comply with the Act.³ Shippers may file a complaint with the Interstate Commerce Commission, with judicial review in a district court of the United States, or in a state court.

A state court can award damages sustained by a shipper on the basis of common law duty, as where the carrier has charged the shipper in excess of a lawful tariff.⁴ Where reparations are sought in a state court, however, the court cannot pass independent

⁵⁴ 126 F. 2d at 128.

¹ 24 STAT. 382 (1887), as amended, 49 STAT. 543 (1935); 49 U. S. C. 1946 ed. § 8.

² *American Trust Co. v. American Railway Express Co.*, 42 F. 2d 272 (N. D. Ind. 1930), *rev'd on other grounds*, 47 F. 2d 16 (7th Cir. 1931).

³ 24 STAT. 382 (1887), as amended, 49 STAT. 543; 49 U. S. C. 1946 ed. § 9.

⁴ *Baxter v. Atchison, T. & S. F. Ry Co.*, 310 Ill. App. 616, 35 N. E. 2d 563 (1941)

judgment on matters calling for technical knowledge within the peculiar competence of the Interstate Commerce Commission.⁵ If the common law is utilized as a basis for a shipper's suit for damages in a state court, the matter does not necessarily have to be submitted first to the Commission.⁶ As a result of restrictions on the jurisdiction of the state courts, and the numerous cases involving diversity of citizenship which usually are removed to the federal courts, state courts are seldom utilized to recover reparations.

Apart from suits filed in state courts, Section 9 of the Act accords shippers claiming to have been charged excessive rates by a common carrier the choice of complaint for reparations to the Commission or a suit for damages in a district court of the United States. The only limitation upon initiating suits in the district courts was announced in *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*⁷ Under the rule of that case, when the suit involves a question requiring expert knowledge of a practice within the scope of the Commission's authority, the shipper *must* first make complaint to the Commission for a determination of the reasonableness of the practice in question. Such questions are not within the jurisdiction of the courts but are said to be within the "primary jurisdiction" of the Commission.

If reparations are sought through the administrative channels of the Commission, the statute⁸ requires application for rehearing, reargument, or reconsideration by the full Commission as a condition precedent to judicial review of the order entered by a division of the Commission. Whether the Commission should grant a rehearing in a case which has been previously determined is a matter resting in the sound discretion of the Commission.⁹

⁵ *Hewitt v. New York, N. H. & H. R. Co.*, 284 N. Y. 117, 29 N. E. 2d 641 (1940).

⁶ *Thomas v. Chicago, B. & Q. R. Co.*, 127 Kan. 326, 273 Pac. 451 (1929).

⁷ 204 U. S. 426 (1906).

⁸ 49 U. S. C. 1946 ed. § 17, ¶ 9.

⁹ *Carolina Scenic Coach Lines v. United States*, 59 F. Supp. 336 (W. D. N. C. 1945), *aff'd*, 326 U. S. 680 (1945).

The Commission is given authority to reopen, on its own motion, proceedings in respect to orders previously entered, if such action appears to be necessary.¹⁰ Thus, in *Baldwin v. Scott County Milling Co.*¹¹ a shipper, under an award by the Commission, made demand for, and collected, reparations; subsequently, however, the Commission reopened the matter and found that the rates previously declared unreasonable were in fact reasonable. The Supreme Court held that the shipper remained subject to the authority of the Commission to set aside the order authorizing reparations.

In an action before the Commission for reparations, the Commission performs a quasi-judicial function. It has been said that the Commission should observe the rules of law governing admission of evidence in court proceedings and that the evidence should be as competent and conclusive as is necessary to support a judgment in an action at law.¹² The limited judicial review available, however, provides no assurance that cases will be decided by the Commission upon evidence of this quality.

Judicial review of an order of the Commission *denying* reparations was refused in *Standard Oil Co. v. United States*.¹³ The decision was based in part on Section 9 of the Interstate Commerce Act,¹⁴ which affords parties the choice of proceeding before the Commission or in the district court, and in part on the "negative order" doctrine. Under *United States Code (1946 ed. Supp. III)*, Title 28, Section 1336, district courts have jurisdiction of cases brought to enjoin, set aside, annul, or suspend orders of the Com-

¹⁰ 49 U. S. C. 1946 ed. § 17, ¶ 6.

¹¹ 307 U. S. 478 (1939).

¹² *Hackney Bros. Body Co. v. New York, Cen. R. Co.*, 85 F. Supp. 465 (E. D. N. C. 1949).

¹³ 283 U. S. 235 (1931).

¹⁴ "Any person or persons claiming to be damaged by any common carrier... may either make complaint to the commission... or may bring suit... for the recovery of the damages... in any district court...; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." 24 STAT. 382 (1887), as amended, 49 U. S. C. 1946 ed. § 9.

mission. In an earlier case¹⁶ the Supreme Court had held that Congress conferred jurisdiction on the courts to entertain complaints only as to *affirmative* orders of the Commission. If no affirmative action was required by an order, judicial review was not available. This ruling was known as the "negative order" doctrine. In *Rochester Telephone Corp. v. United States*¹⁶ the Supreme Court expressly overruled the "negative order" doctrine:

"'Negative' has really been an obfuscating adjective in that it implied a search for a distinction—non-action as against action—which does not involve the real considerations on which rest . . . the reviewability of Commission orders within the framework of its discretionary authority and within the general criteria of justiciability."

In the *Rochester* case, the Court stated that the main basis of the decision in the *Standard Oil* case was not the "negative order" doctrine but the statutory scheme dealing with reparations.

In *Ashland Coal & Ice Co. v. United States*¹⁷ the Supreme Court had an opportunity to indicate whether by abandoning the "negative order" doctrine the basis for the *Standard Oil* case was destroyed. In a *per curiam* opinion the Court cited two pages of the *Standard Oil* decision as basis for denying a hearing. It was later said that a "fair inference" was that the pages cited contained two bases other than Section 9 for the decision in the *Ashland Coal & Ice Co. case*.¹⁸ However, one court thought it "abundantly clear" that the Supreme Court in deciding the *Ashland Coal & Ice Co.* case reaffirmed the doctrine that having submitted its claim to the Commission in the first instance, rather than to the district court, claimant had waived judicial review of the ruling of the Commission.¹⁹ In the *Standard Oil* case and *Ashland Coal & Ice Co.* case private shippers were the complainants.

¹⁶ *Procter & Gamble Co. v. United States*, 225 U. S. 282 (1912).

¹⁸ 307 U. S. 125, 141 (1939).

¹⁷ 325 U. S. 840 (1944).

¹⁸ *United States v. Interstate Commerce Commission*, 337 U. S. 426 (1949).

¹⁹ *Great Lakes Steel Corp. v. United States*, 81 F. Supp. 450 (E. D. Mich. 1948), *rev'd on other grounds*, 337 U. S. 952 (1949).

In the recent case of *United States v. Interstate Commerce Commission*²⁰ the Government as shipper filed a complaint with the Commission seeking reparations. The practice of the carrier on which the Government based its claim was within the "primary jurisdiction" of the Commission, and the Government, therefore, *was required* under the law to submit the matter to the Commission rather than to file suit as an original proceeding in the district court. The Commission denied reparations, holding that the practice in question was reasonable. The Government then brought suit in the district court to set aside the order, alleging among other things that the Commission's action was arbitrary, that the order was not supported by evidence, and that the Commission acted in defiance of the standards of the Act. From an adverse decision in the three-judge district court, the Government sought writ of certiorari in the Supreme Court. The Supreme Court held that the Government was not barred from judicial review of the order of the Commission.

In considering Section 9, the Court concluded that Congress had intended that a shipper should have a right of election in selecting the forum in which to obtain reparations. As the dispute involved a question of the reasonableness of a practice by the carrier, the Commission's "primary jurisdiction" had to be invoked, and the Government did not, therefore, have a right of election in this particular case.

"Consequently the Government here had no 'right of election' between Commission and court that could be 'deemed an adequate ground for making the Commission's award final. . . .'"²¹

The Court held that Section 9 was intended to prevent a shipper from *initiating* a claim in a district court after the Commission's jurisdiction had been invoked, but not to prevent the possibility of suit to set aside an adverse order of the Commission.

The majority concluded that judicial review by a district court

²⁰ 337 U. S. 426 (1949).

²¹ *Id.* at 438.

of the "negative order" of the Commission could be sustained under what is now *United States Code (1946 ed. Supp. III)*, Title 28, Section 1336, which provides that district courts have jurisdiction of cases brought to enjoin, set aside, annul, or suspend any order of the Commission. In taking this view, the majority reasoned that the action of the Commission should be treated as coming within the decision of the *Rochester* case. The decision of the *Standard Oil* case was thought to have been supported and "rooted" in the rejected "negative order" doctrine.

In January, 1951, the United States District Court, District of Massachusetts, considered a problem closely analogous to the facts of *United States v. Interstate Commerce Commission*.²² After the Commission had denied reparations, the shipper appealed under *United States Code (1946 ed.)*, Section 1336. The carrier questioned the jurisdiction of the court on the ground that the matter in question could have been brought either in the district court or before the Commission, and contended that, since the shipper had an election and had chosen to seek relief from the Commission, judicial review had been waived. The Court acknowledged that this point was left open in *United States v. Interstate Commerce Commission*, but pointed out that the Supreme Court in that case had decided specifically that Section 1336 authorized judicial review. The matter in question was determined to be within the "primary jurisdiction" of the Commission, however, and thus within the precise holding of *United States v. Interstate Commerce Commission*. The district court in this case interpreted the *Standard Oil* case as having been based on the ground that a *retrial* of the case on the merits was sought in the district court, such action being clearly forbidden by Section 9 of the Interstate Commerce Act, since an appeal from the Commission to a district court is a limited review and not a trial *de novo*.

If a carrier fails to pay reparations awarded by the Commission, the shipper may institute proceedings in the proper district

²² *Old Colony Furniture Co. v. United States*, 95 F. Supp. 507.

court for collection. When such action is taken by a shipper, the district court is to proceed with the case as in other "civil cases"; however, the Commission's findings and orders are deemed to be "prima facie" evidence of the facts therein stated.²³ The presumption given to findings and orders of the Commission is only a rule of evidence; therefore, no defense is cut off, no obstacle is interposed to a full contest of all the issues, and a jury or court may make findings of fact.²⁴ As suits for reparations are to "proceed in all respects like other civil suits for damages,"²⁵ a one-judge district court will entertain suits of this nature. A suit for reparations is not the type of order contemplated by the "Urgent Deficiencies Act,"²⁶ which requires invoking the jurisdiction of a three-judge district court.²⁷ The shipper who elects to seek reparations through the Commission is limited to the amount of the Commission's award in a suit for enforcement thereof.²⁸ The Commission must make an express determination that the practice attacked is unjust and unreasonable.²⁹ Ultimate fact findings are sufficient,³⁰ and the Commission's findings are presumed to be sustained by evidence, in the absence of contrary showing.³¹ The courts are not to make their independent determination of the reasonableness of any practice, where the Commission's order is supported by substantial evidence.³² Therefore, if the practice involves a question of reasonableness, and the court should find that the order was not supported by substantial evidence, the court would have to

²³ 49 U. S. C. 1946 ed. § 16, ¶ 2.

²⁴ *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412 (1914).

²⁵ 49 U. S. C. 1946 ed., § 16, ¶ 2.

²⁶ 36 STAT. 539 (1910), 28 U. S. C. 1946 ed. § 41, ¶ 28. Under this provision, a suit contesting the validity of certain administrative orders must be determined by a three-judge court, one of them being an appellate judge. After a decision by a three-judge court, an appeal directly to the Supreme Court is permitted.

²⁷ *United States v. Interstate Commerce Commission*, 337 U. S. 426 (1949).

²⁸ *Baltimore & Ohio R. Co. v. Brady*, 288 U. S. 448 (1933).

²⁹ *Great Northern Ry. Co. v. Sullivan*, 294 U. S. 458 (1935).

³⁰ *City of Danville v. Chesapeake & O. Ry. Co.*, 34 F. Supp. 620 (W. D. Va. 1940).

³¹ *Hygrade Food Products Corp. v. Chicago, M., St. P. & P. R. Co.*, 10 F. Supp. 767 (S. D. N. Y. 1935), *rev'd on other grounds*, 85 F. 2d 113 (2d Cir. 1936).

³² *United States v. Chicago Heights Trucking Co.*, 310 U. S. 344 (1940).