1948

The Effect of Tariff Provisions Filed under the Civil Aeronautics Act

D. W. Markham

Drury H. Blair

Follow this and additional works at: https://scholar.smu.edu/jalc

Recommended Citation
D. W. Markham et al., The Effect of Tariff Provisions Filed under the Civil Aeronautics Act, 15 J. Air L. & Com. 251 (1948)
https://scholar.smu.edu/jalc/vol15/iss3/1

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 EFFECT OF TARIFF PROVISIONS
FILED UNDER THE CIVIL AERONAUTICS ACT

By D. W. Markham and Drury H. Blair

Mr. Markham, Assistant General Counsel, Air Transport Association; Colgate University, A.B., 1931; University of North Carolina, J.D., 1936; member North Carolina and District of Columbia Bars. Formerly, Legislation Section, Office of the General Counsel, U. S. Treasury Department; Assistant Professor of Law, University of North Carolina Law School; General Counsel's Office, Civil Aeronautics Board.

Mr. Blair, Legal Department, Air Transport Association; University of Virginia, L.L.B., 1937; member Virginia and Florida Bars. Formerly, general practice, Wideman, Wardlaw and Caldwell, West Palm Beach, Florida; Legal Staff, Farm Credit Administration; General Counsel's office, Office of Price Administration.

INTRODUCTION

ALTHOUGH the Civil Aeronautics Act (Act) of 1938\(^1\) has some features which are unique, it approaches most of the problems of common-carrier regulation along well-beaten paths. The Act's requirement, for example, that air carriers file tariffs and adhere to their provisions was anything but an innovation. It could find antecedents in dozens of federal and state public utility statutes. It was a regulatory device which had stood the test of experience—of administrative interpretation and application and of judicial scrutiny, in scores and scores of cases. Its purposes were clear and, with such a rich heritage of statutory and decisional precedent, one would have supposed that its effects were too. But in the ten years since the enactment of the Civil Aeronautics Act, the requirement has proved to be a source of controversy and debate—and some litigation.

What is the effect of the requirement upon the relationship between the carrier, on the one hand, and a passenger or shipper, on the other? The Act expressly requires that the carrier adhere to its tariffs; but are the tariffs equally binding on either passenger or shipper? For example, may the latter rely upon special terms and conditions of the contract of carriage not embodied in the tariffs? May he attack tariff

\(^1\) 52 Stat. 973, 49 USCA §401 \emph{et seq.} (Supp. 1947).
provisions retroactively and avoid their application to him? May he, after receiving the transportation, attack the tariff rate as unlawful and recover damages? May he escape a tariff provision establishing a limit on the carrier's liability on the ground that it is invalid? If so, in what forum are those remedies available, and what tests or standards of validity are to be applied? Does the Civil Aeronautics Board (CAB) have primary jurisdiction to pass on the lawfulness of tariff provisions, or may a court assume such jurisdiction? In either event, are the standards of lawfulness prescribed by the Act exclusive, or can the question be considered as a matter of general law?

These are typical questions which have been raised repeatedly since the Act became effective. The few reported decisions do not answer them either completely or consistently. It is appropriate, therefore, to examine them further. A thorough consideration of all of them would not be possible in one article, but an effort will be made to find the correct answers to some of them, so that the legal effects of the tariff-filing requirement will be clear, at least in general outline.

Before undertaking to examine the principal questions, it might be well to consider briefly the purpose of the tariff-filing requirement, as evidenced by its historical background, and by the relevant provisions of the Act itself.

Historical Background of the Tariff-filing Requirement

The precise origin of the notion that a person engaged in a public calling should be required to publish tariffs, setting forth his charges and other terms of his offer to serve the public, does not seem to be known. There is evidence that it was employed, both in this country and in England, prior to the adoption of the Interstate Commerce Act (ICA) in 1887, but its principal development as a regulatory device stems from experience under that Act.2

Prior to enactment of the ICA, railroads had been relatively free to pursue their business without legislative interference. Discrimination, through preferences to favored individuals and localities, was rife. Practices of railroads have been characterized as a system of secret and special rates; rebates, drawbacks and concessions for the purpose of fostering monopoly and preventing free competition.3 Public reaction against those discriminatory practices appears to have been manifested first through the Granger Movement following the

---

2 24 Stat. 379 (1887), 49 USCA §1 et seq. (Supp. 1947). Originally enacted as the "Act to Regulate Commerce," it became the "Interstate Commerce Act" by a provision in the Transportation Act of 1920 (41 Stat. 499); and by a provision of the Motor Carrier Act, 1935 (49 Stat. 543), the Act as it stood became "Part I" with specific provision that it might continue to be cited as the "Interstate Commerce Act," and Part II, which was added, might be cited as the "Motor Carrier Act, 1935." The special designations of Parts I and II for citation purposes were eliminated by the Transportation Act of 1940 (54 Stat. 919) and the four parts of the ICA are now to be cited as such.

3 In the Matter of Underbilling, 1 ICC 633, 634 (1888).
EFFECT OF TARIFF PROVISIONS

Civil War. The Movement resulted from the clamor of small farmers in the Middle West against maintenance of high transportation charges in face of falling grain prices. Rate wars among railroads were prevalent and resulted in fluctuating rates between competitive points, but high rates between non-competitive points remained virtually unchanged. Feelings ran high during this period, and there were charges that railroads, controlled by Eastern capital, were attempting to dominate the economic life of farmers and of the Middle West. Initially, the Movement seems to have been directed against extortionate charges made by railroads, and agitation for maximum-rate laws appears to have had as its object simply the securing of cheaper transportation. Illinois first initiated legislation to regulate railroads. In 1870 a clause was incorporated into the state constitution, authorizing enactment of such laws, and in 1871 an act was passed which prescribed maximum rates, prohibited discrimination and established a railroad and warehouse commission with power to prescribe schedules of reasonable maximum rates. Similar legislation was adopted shortly thereafter by Iowa, Michigan, Minnesota, Wisconsin, and Missouri. While this early state legislation dealt mainly with establishment of maximum rates, discriminatory practices of railroads were not being overlooked.

These attempts at regulation of railroad rates proved weak and ineffective. In 1886 the Supreme Court handed down its decision in Wabash Ry. Co. v. Illinois, in which it asserted the exclusive right of federal control of interstate commerce by railroad, even as to that portion within boundaries of a state and in absence of congressional action in that field. This decision removed the majority of railroad traffic from state control and accentuated the necessity for effective regulation. It was in response to those conditions that federal authority over the railroads was asserted by Congress through passage

---

4 Munn v. Illinois, 94 U.S. 113 (1877); Chi., Burl. & Q. R. R. v. Iowa, 94 U.S. 155 (1877); Peik v. Chi. & N. W. Ry., 94 U.S. 164 (1877); Chi., M. & St. P. R. R. v. Ackley, 94 U.S. 179 (1877); Winona & St. P. R. R. v. Blake, 94 U.S. 180 (1877); Stone v. Wisconsin, 94 U.S. 181 (1877).
5 2 HANEY, A CONGRESSIONAL HISTORY OF RAILWAYS 240; 1 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION' 14, 15.
6 The Granger Movement proper seems to date back to the Farmers' Anti-Monopoly Convention held in Des Moines, Aug. 13, 1873, where it was resolved to agitate for maximum-rate laws. 2 HANEY, op. cit. supra note 5, at 240.
7 There had also been consideration of rate regulation in Congress. As early as 1869 a resolution had been introduced in the House of Representatives charging trunk lines with consolidation and monopoly resulting in exorbitant and unequal charges on agricultural products bound for the eastern seaboard. Alleging that tariffs on the East Coast discriminated against the West, it was requested that the power of Congress to regulate railroad rates be clarified. And, in 1874 the House had passed the McCravy Bill which forbade unreasonable charges and provided for prescription of maximum rates by railroad commissioners. Id. at 243, 244, 255.
8 Three bills directed against discriminatory practices by railroads were introduced in Congress in 1872 which were followed by bills in 1873, 1874, and five bills in 1875. Complaints were also made against the practice of manipulating railroads to control the petroleum and anthracite coal industries which were accompanied by discriminatory practices. Id. at 285, 287.
9 118 U.S. 557 (1886).
of the original ICA in 1887.\textsuperscript{10} That Act was primarily directed at elimination of excessive charges and discriminatory practices.\textsuperscript{11} The emphasis, however, was on discrimination.\textsuperscript{12}

In the Cullom Report,\textsuperscript{13} which formed the basis for subsequent enactment of the ICA, there appears a clear explanation of the evils at which the legislation was directed:

"... The theory of the common law is that all who are situated alike must be treated alike. Unjust discrimination is the chief cause of complaint against the management of railroads in the conduct of business, and gives rise to much of the pressure upon Congress for regulative legislation. The railroad companies do not recognize as they should the fact that they sustain a different relation to the public from persons engaged in ordinary business enterprise. Railroad companies are not disposed to regard themselves 'as holding a public office and bound to the public' as expressed in the ancient law. They do not deal with all citizens alike. They discriminate between persons and places, and the States and Congress are consequently called on to in some way enforce the plain principles of the common law for the protection of the people against the unlawful conduct of common carriers in carrying on the commerce of the country.'"

The Interstate Commerce Commission (ICC), in its First Annual Report described the situation in the following words:

"Those who have controlled the railroads have not only made rules for the government of their own corporate affairs, but very largely also they have determined at pleasure what should be the terms of their contract relations with others, and others have acquiesced, though oftentimes unwillingly, because, they could not with confidence affirm that the law would compel it, and a test of the question would be difficult and expensive. The carriers of the country were thus enabled to determine in great measure what rules should govern the transportation of persons and property; rules which intimately concerned the commercial, industrial, and social life of the people."\textsuperscript{14}

It seems clear that the original requirement that tariffs be published and posted was aimed at the discriminatory practices of the railroads. In the Cullom Report, the committee expressed the view that one of "the chief purposes of any legislation for the regulation of interstate commerce should be to secure the fullest publicity both as to charges made by common carriers and as to the manner in which their business is conducted"; and went on to say that reasonableness and uniformity in rates could not be secured without publicity, "which is the surest and most effective preventive of unjust discrimination."\textsuperscript{15}

\textsuperscript{10} See 1 SHARFMAN, \textit{op. cit. supra} note 5, at 1-21.


\textsuperscript{12} 2 HANEY, \textit{op. cit. supra} note 5, at 291.

\textsuperscript{13} Sen. Rep. No. 46, 49th Cong., 1st Sess. 40 (1886). This was a select committee appointed to investigate and report upon the subject of regulation of transportation of freight and passengers between the several states by railroad and water routes. Senator Cullom subsequently introduced S. 1532 on Feb. 16, 1886, which was ultimately enacted as the original ICA in 1887.

\textsuperscript{14} 1 Annual Rep. of ICC 4 (1887).

EFFECT OF TARIFF PROVISIONS

It was pointed out by the committee that, while it was customary for the railroads to print tariffs for guidance of their agents and information to the public, they were subject to change as circumstances demanded. The light of publicity upon published tariffs was believed to be the most effective deterrent to discrimination.\(^\text{16}\)

This theory was embodied in the ICA, and the importance in the scheme of regulation was attested in the following language:

"The chief object of the act to regulate commerce is the prevention of discrimination. Carriers being engaged in a public employment must serve all members of the public on equal terms. This was the doctrine of the common law. It has been explicitly stated and strengthened by successive acts to regulate commerce. The requirement of the act that all rates should be published is perhaps the chief feature of the scheme provided for the effective outlawing of all discrimination. If this portion is not strictly enforced, the entire basis of effective regulation will be lost. Secret rates will inevitably become discriminatory rates. Whenever discriminatory rates or practices are made public, a thousand forces of self-interest and of public policy will be set at work to reduce them to fairness and equality. The failure of any carrier to properly file and publish its rates is quite as serious a violation of the act to regulate commerce as a failure to observe such rates after they have been properly filed and published."\(^\text{17}\)

To be sure, experience under the ICA soon demonstrated that a mere requirement that tariffs be published was not a cure-all. Such a provision had to be buttressed with an adequate system of penalties and with effective administrative control over carrier rates and practices.\(^\text{18}\) But its usefulness in combating discrimination remained un-

\(^{16}\text{Id. at 198-208 (general discussion of the importance of publicity). See also 1 SHARFMAN, op. cit. supra note 5, at 21, 22, 42, 43.}\)


\(^{18}\text{From the beginning, Section 6 of the ICA contained requirements that carriers publish and post schedules of rates and all classifications, rules and regulations which in any wise affected such rates, and elsewhere, a positive duty was imposed upon carriers to maintain just and reasonable rates, and departures from published rates were prohibited, with provision made for civil liability for violations of the ICA, as well as criminal penalties for unjust discrimination. However, the legislation proved ineffective due to denial of the authority of the ICC to prescribe rates for the future in ICC v. Cincinnati, N. O. & T. P. Ry., 187 U.S. 479 (1897), difficulty encountered by the ICC in obtaining effective enforcement of its orders and reluctance of courts to impose criminal sanctions. The force of the tariff was considerably enhanced by amendments to the ICA effected by the Elkins Act of 1903 (32 Stat. 847) which imposed greatly increased penalties in the nature of fines for failure to publish tariffs and for departures therefrom, which were made applicable to the carrier corporation whereas previously they applied only to the carrier's agent responsible for the discrimination. The most significant amendatory legislation increasing effectiveness of tariffs resulted from the Hepburn Act of 1906 (34 Stat. 584), which, in addition to strengthening the sanctions against rebates by restoring the imprisonment penalty and subjecting the shipper to penalties for accepting rebates, granted the ICC authority, after a hearing upon a complaint, to prescribe maximum rates and regulations or practices for the future. Furthermore, the requirement was added that tariffs be filed with the ICC. The ICC's control over tariffs was further amplified by amendments included in the Mann-Elkins Act in 1910 (36 Stat. 539), which granted the ICC authority to suspend proposed changes in rates, to prescribe tariff rates and rules for the future on its own initiative with specific inclusion of}\)
questioned. It survived many amendments which the ICA underwent, and became an accepted and recognized part of the pattern of regulation—a pattern which has been widely copied in other state and federal statutes, including the Civil Aeronautics Act.

PROVISIONS OF THE CIVIL AERONAUTICS ACT

Students of public regulation will find that tariff-filing and rate provisions of the Act fall into a generally familiar pattern. However, since the questions to be considered are essentially problems of statutory construction, we should examine the language of the relevant provisions.

The Act first requires filing of tariffs. Section 403 (a) provides, in part:

"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 between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void."21

Strict observance of its filed tariffs is then enjoined upon the carrier.

"No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs, except those specified therein."22

Departure from the tariff is made a criminal offense.23

tariff rules within the power. And, under amendments included in the Transportation Act of 1920 (41 Stat. 456), the ICC's power over tariffs was extended to include prescription of specific or minimum rates and to adjust intrastate rates when they were found to result in an undue discrimination against interstate commerce.

19 Other than those applicable to rates for the transportation of mail.
20 52 Stat. 992, 49 USCA §483(a) (Supp. 1947).
21 The CAB has, pursuant to the authority granted by this section, promulgated regulations governing the form and content of tariffs to be filed by carriers, and has required that tariffs contain rules and regulations "which in any way affect the rates named in the tariff, or the service under such rates." Economic Regulations, §224.1, particularly paragraphs A-3, A-4, and E-7. 14 Code Fed. Regs. §224.1 (Cum. Supp.).
22 Sec. 403(b); 52 Stat. 992, 49 USCA §483(b) (Supp. 1947).
23 Sec. 902(a) and (d); 52 Stat. 1015, 49 USCA §622(a) and (d) (Supp. 1947).
Tariffs may be changed only after notice.

"No change shall be made in any rate, fare, or charge, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, specified in any effective tariff of any air carrier or foreign air carrier, except after thirty days' notice of the proposed change filed, posted, and published in accordance with subsection (a) of this section. Such notice shall plainly state the change proposed to be made and the time such change will take effect. The Board may, in the public interest, by regulation or otherwise, allow such change upon notice less than that herein specified . . . ."\(^\text{24}\)

In order to insure that the tariffs themselves will provide for fair and equal treatment to all comers, a positive duty is imposed upon carriers "to establish, observe, and enforce just and reasonable individual joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to . . . air transportation,"\(^\text{25}\) and discrimination resulting from application of tariff provisions is specifically prohibited.

"No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."\(^\text{26}\)

However, sole reliance is not placed upon the carriers. The CAB is given authority to suspend a tariff provision before it can go into effect if it has reason to believe that the provision departs from requirements of the Act. Section 1002 (g)\(^\text{27}\) provides:

"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 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.

\(^{24}\) Sec. 403(c); 52 Stat. 993, 49 USCA §483(e) (Supp. 1947).
\(^{25}\) Sec. 404(a); 52 Stat. 993, 49 USCA §484(a) (Supp. 1947).
\(^{26}\) Sec. 404(b); 52 Stat. 993, 49 USCA §484(b) (Supp. 1947).
\(^{27}\) 52 Stat. 1019, 49 USCA §642(g) (Supp. 1947).
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."

Furthermore, even after a tariff provision has taken effect, the Board is given ample authority to investigate and determine its lawfulness. Sections 1002 (a) and (b) authorize the Board to conduct investigations, either on complaint or on its own initiative, of any alleged or suspected violation of the Act, and Section 1002 (d) provides that:

"Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board shall determine and prescribe the lawful rate, fare, or charge (or the maximum or minimum, or the maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective: Provided, That as to rates, fares, and charges for overseas air transportation, the Board shall determine and prescribe only a just and reasonable maximum or minimum or maximum and minimum rate, fare, or charge."

Special provision is also made for correction of discrimination in foreign air transportation.

"Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected, or received by any air carrier or foreign air carrier for foreign air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board may alter the same to the extent necessary to correct such discrimination, preference, or prejudice and make an order that the air carrier or foreign air carrier shall discontinue demanding, charging, collecting, or receiving any such discriminatory, preferential, or prejudicial rate, fare, or charge, or enforcing any such discriminatory, preferential, or prejudicial classification, rule, regulation, or practice."

Thus, a carrier is permitted initially to determine rates which it will charge and other terms and conditions upon which it will offer

---

28 52 Stat. 1018, 49 USCA §642(a) and (b) (Supp. 1947).
29 52 Stat. 1018, 49 USCA §642(d) (Supp. 1947).
30 Sec. 1002(f); 52 Stat. 1010, 49 USCA §642(f) (Supp. 1947).
its services to the public. Those rates and terms and conditions must, however, be embodied in tariffs published and filed with the Board. They must be just and reasonable and non-discriminatory, and they must be strictly adhered to. Departure from any tariff provision subjects the carrier to criminal penalties, and, in the event rates or terms and conditions of the carrier's offer do not comply with standards established by the Act, the CAB may either suspend offending provisions before they take effect, or correct them later.

There is one other provision of the Act which accounts for much of the confusion which has existed concerning the legal effect of the Act on the relationship between carrier and passenger or shipper. Section 110681 provides that "Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

With this historical background and Provisions of the Act before us let us now turn to some major questions which have arisen concerning the effect of tariffs filed under the Act.

ARE TARIFF PROVISIONS FILED UNDER THE CIVIL AERONAUTICS ACT CONCLUSIVE EVIDENCE OF THE CONTRACT OF CARRIAGE?

Cases Under the Interstate Commerce Act

As we have seen, a carrier subject to the Civil Aeronautics Act is required to publish and file tariffs containing his rates and rules, which, taken together, constitute the terms of its offer to serve the public. The Act expressly prohibits the carrier from deviating from published terms; any departure is punishable as a criminal offense. But nowhere does the Act say in so many words, that the other contracting party—passenger or shipper—is similarly restricted. What, then, is the effect of the Act upon the contractual relationship of the parties? Is the tariff equally binding upon passenger or shipper? Are they to be deprived of a special term of the contract, even though the carrier committed a criminal offense by agreeing to it? Is the requirement of the Act that the carrier adhere strictly to its tariff a sort of statutory parol evidence rule?

One of the first indications of the effect of a filed tariff upon the contract of carriage appeared in Gulf C. & S. F. Ry. v. Hefley & Lewis. In that case furniture was shipped from St. Louis, Missouri, to Texas consignees at the revised rate appearing in the filed tariff, but delivery was refused at destination because the agent insisted on payment of a higher rate appearing in an unrevised tariff. A Texas statute made the bill of lading binding on the parties and provided for recovery of damages for each day delivery of goods was refused after a

---

22 Hereafter, we shall use the word "rates" as shorthand for the statutory "rates, fares, and charges," and the word "rules," for "classifications, rules, regulations, practices, and services."
33 158 U.S. 98 (1895).
tender of charges in the bill of lading. In reversing a recovery by the shipper in the state court, the Supreme Court pointed out that under Section 6 of the ICA, the carrier was required to file its tariff and was subject to penalties for any departure therefrom. Therefore, the Court reasoned, the Texas statute making the terms of the bill of lading controlling was of no effect, and recovery could not be sustained. With the exception of Van Patten v. Chicago, M. & St. P. Ry., in which it was held that the filed tariff was the only standard to be considered by courts and juries in determining whether the rate charged was unreasonable and that no recovery could be had unless the rate exceeded that filed, there was no further consideration of the relationship of filed tariffs to the contract of carriage until the penalties for departure from the filed tariff and against rebates had been extended by the Elkins Act and the Hepburn Act.

As far as rates are concerned, courts quickly concluded that the filed tariff is conclusive evidence of the terms of the contract. Commencing with Texas & Pacific Ry. v. Mugg & Dryden, a long line of cases established the rule that the filed tariff controls the rate, and is equally binding on both carrier and shipper or passenger. The courts frequently referred to the filed tariff as being "impressed with the force of law," but this was simply a short way of saying that the tariff embodied terms and conditions upon which the carrier offered its services to the public; that, since the carrier could not legally deviate from those terms, the passenger or shipper was bound to accept them when he used the carrier's services; and, therefore, that the tariff is, by force of law, sole evidence of the terms of the contract of carriage.

The Mugg & Dryden case involved an action to recover additional charges which the shipper had been required to pay over quoted rates. The rates paid were in accordance with the filed tariff. A recovery by the shipper in a Texas court was reversed on the ground that the tariff filed with the ICC established the rate to be charged, regardless of any agreement between the parties as to a different rate.

The same principle was applied to passenger tariffs in Louisville & Nashville R. R. v. Maxwell. A passenger purchased a round-trip ticket, but the agent mistakenly quoted a fare lower than that applicable under the filed tariff. The carrier was denied recovery for the additional fare in a state court. On appeal, the Supreme Court held that the carrier was entitled to recover the additional fare, since the filed tariff fixed the only rate that could be charged and there could be no departure from the filed rate even in the case of a mistake.

---

34 81 Fed. 545 (W. D. Iowa 1897).
35 32 Stat. 847 (1903), 49 USCA §41 (1940); 34 Stat. 587 (1906), 49 USCA §41 (1940).
36 202 U.S. 242 (1906).
37 Ibid.
38 The St. Louis & San Francisco R. R. v. Heffley & Lewis case was cited in support of this position. 158 U.S. 98 (1895).
39 237 U.S. 94 (1915).
made in good faith by the carrier and passenger. The Court said:

"Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."

The rule has been followed in numerous cases.

While tariffs filed under Part I of the ICA have been clearly recognized as conclusive evidence of the rate provisions of the contract of carriage, tariff rules have not always been accorded the same treatment. Section 6 required filing of rules as well as rates, but for some time after passage of the ICA, courts were inclined to treat tariff rules as contractual terms only if agreed to by the parties and subject to common law principles the same as before the advent of the regulatory legislation.

*Judge v. Northern Pac. Ry.* exemplifies the early attitude of courts toward tariff rules and indicates the ease with which the rules could be circumvented. A theatrical performer traveled with a chimpanzee which was placed in the regular baggage car since there was no room in the special baggage car. Through the negligence of the railroad’s agents in placing the animal next to a steam radiator, it was killed; but the railroad disclaimed liability under a filed tariff provision which prohibited the transportation of the animal in the regular baggage car. The court held that while the contract of carriage was in contravention of the filed tariff provision and therefore

---

43 189 Fed. 1014 (Ore. 1911).
void, nevertheless, the carrier, by accepting the property, became a
bailee and, in absence of a binding contract limiting its liability was
subject to the duties of a common or private carrier as the facts might
establish. The carrier's liability was said to arise out of the contract
of affreightment and duties and obligations imposed upon it by the
ICA.\textsuperscript{44}

The first indication of judicial recognition of a filed tariff rule as
conclusive evidence of a term of the contract of carriage appeared in
two early cases in lower federal courts: \textit{Baltimore & O. R. R. v. Ham-
burger}\textsuperscript{45} and \textit{Louisville & N. R. R. v. Dickerson}.\textsuperscript{46} The \textit{Hamburger}
case involved a suit in equity by the railroad to enjoin the defendant
from dealing in non-transferable passenger tickets. The injunction
was denied on the ground that, under Section 6 of the ICA, the rail-
road was required to file tariff provisions affecting rates charged or
value of the services rendered, and since the non-transferability pro-
vision was not included in the filed tariff, it was void. The court had
this to say:\textsuperscript{47}

\begin{quote}
“Whatever may be said of stop-over and such like advantages, 
the sale and transfer of the ticket is not only a privilege, but a
right which directly enters into and affects the value of the ticket;
and hence, if either the right is to be denied or the privilege
abridged, under the plain language of the act in question, it must
be shown in the published tariff and schedule of the company.
The requirement in this respect is quite as positive as the one pro-
viding for publication of schedules showing such rates and charges,
and prohibiting deviation therefrom.”
\end{quote}

In the \textit{Dickerson} case the railroad received a shipment as initial
carrier for transportation over its own line and lines of other carriers
under a joint through rate established and filed with the ICC. The
tariff made no provision for diversion of the shipment. The bill of
lading, however, provided that the shipper would bear any increased
costs in case of a change of routing because of necessity. The shipment
was rerouted because of the refusal of a connecting carrier to accept
the shipment and the shipper paid the additional charges. Subse-
quently, the shipper obtained a reparations order from the ICC,\textsuperscript{48}
awarding him the amount of the additional charges. The railroad
refused to pay and the shipper sued. In holding that the shipper was
entitled to recover, since any special contract in the bill of lading at
variance with the filed tariff was void, the court made this comment:\textsuperscript{49}

\begin{quote}
“It seems clear that the regulation in question immediately
affected the rates for shipment between the points indicated. It
\end{quote}

\textsuperscript{44} The Supreme Court had issued earlier a dictum that where goods were
transported under a contract at variance with published tariff rates, the contract
was void, but that the contract of affreightment was not void and the carrier
would be liable for its negligence. See \textit{Merchants Cotton Press & S. Co. v. Ins.
Co. of North America}, 151 U.S. 368 (1894).
\textsuperscript{45} 155 Fed. 849 (E. D. Va. 1907).
\textsuperscript{46} 191 Fed. 705 (C. C. A. 6th 1911).
\textsuperscript{47} 155 Fed. 849, 851 (E. D. Va. 1907).
\textsuperscript{49} 191 Fed. 705, 710 (C. C. A. 6th 1911).
directly increased the lawfully established and agreed compensation for the carriage. A regulation having such effect is required to appear in defendant's tariff, and not so appearing is ineffective."

In reaching this conclusion, the court cited with approval the *Hamburger* case; but history of the two cases does not reveal further reference to their holdings.

Similarly, in *Chicago & Alton R. R. v. Kirby*,\(^50\) the carrier and shipper had entered into a special agreement for the expedition of a shipment of horses. No extra charge was to be made for the special service. The carrier failed to fulfill the agreement, and the shipper recovered damages in a state court. In reversing the decision of the state court, the Supreme Court held that the shipper and carrier were bound by the filed tariff which made no provision for such special service, and that to recognize the agreement would give effect to an undue preference. In its opinion the Court said:\(^51\)

> "The broad purpose of the commerce act was to compel the establishment of reasonable rates and their uniform application. That purpose would be defeated if sanction be given to a special contract by which any such advantage is given to a particular shipper as that contemplated by the defendant in error. To guarantee a particular train was to give an advantage or preference not open to all, and not provided for in the published tariffs . . . ."

The landmark in this field is *Adams Express Co. v. Croninger*.\(^52\) A shipper delivered a small package containing a diamond ring to the express company for transportation from Kentucky to Georgia. Upon non-delivery of the package, he brought action in a Kentucky court to recover full market value of the ring. Provisions in the receipt and in tariffs of the express company filed with the ICC required the value of a shipment to be declared and limited liability for loss to $50 if the value was not declared. Rates for shipments valued in excess of $50 were graduated under the tariffs. A Kentucky statute invalidated such limitations of liability, and the shipper recovered full value of the ring. In reversing the state court decision, the Supreme Court concluded (1) that a contract for an interstate shipment of goods, as evidenced by a receipt or bill of lading, was governed by provisions of the ICA rather than by state law; (2) that a provision in the receipt or bill of lading and filed tariff limiting liability of the carrier to an agreed value, and fixing rates proportionate to risk, was valid under general law as applied in federal courts; and (3) that the shipper was presumed to have knowledge of filed tariff provisions and was therefore bound by the provision.\(^53\)

\(^{50}\) 225 U.S. 155 (1912).

\(^{51}\) *Ibid.*

\(^{52}\) 226 U.S. 491 (1913).

\(^{53}\) The decision in the *Croninger* case was rendered against a background of diverse legislative and judicial treatment of the question of the right of interstate common carriers to exempt themselves from all or part of their common-law liabilities by tariff rules. The result was confusion and it was practically impossible for a carrier to determine with any reasonable degree of certainty what his responsibilities were in this respect. The Court apparently seized upon provi-
Following the Croninger case, a number of decisions affirmed the binding effect on carrier and shipper of filed tariff rules providing for a limitation of the carrier's liability for property loss or damage in interstate shipments, based upon released values with a choice of rates proportionate to risks assumed. Boston & Maine R. R. v. Hooker, sions of the Carmack Amendment (present Section 20(11)) to the Hepburn Act of 1906, enacted ten years earlier, as a basis for asserting federal control over this question. The Carmack Amendment provided in substance that an interstate common carrier should issue a receipt or bill of lading and would be liable to the shipper for any loss or damage "caused by it" or by any connecting carrier; that the carrier could not exempt itself from liability imposed by any contract, rule or regulation; and that nothing in the Amendment would deprive a holder of a bill of lading of any remedy or right of action under existing law.

The Court construed this language to mean that Congress had exercised its conceded authority to regulate the interstate carrier's liability for property offered for transportation, and its action superseded all policies of the states on the same subject. In determining the liability imposed upon a carrier under the Amendment, the Court reasoned that in view of the language "any loss, damage, or injury to such property caused by it," it was not the intent to make the carrier an absolute insurer, but only to impose liability for some breach of its common-law duty in view of the qualifying phrase "caused by it." This was held to show that Congress had evidenced an intent to regulate the liability of interstate carriers of property. Having made this determination, the Court found the tariff provisions binding and valid since under the established rule of common law in federal courts, a carrier could by agreement limit its liability for property loss to an agreed value based upon a choice of rates proportionate to the amount of risk assumed. In 1915 the ICC, in commenting indirectly on the result of the Croninger case, pointed out that the primary purpose of the Carmack Amendment was to impose liability on the initial carrier for property received for interstate transportation on account of any loss or damage to the property caused by it or any other connecting carrier; and that it did not undertake to prescribe or limit terms of the bill of lading, but rendered them void to the extent of any attempted limitation of liability. Louisiana State Rice Milling Co. v. M. L. T. R. & S. S. Co., 34 ICC 511, 512.

The ICC's observation of the effect of the Croninger case was stated as follows: "... Following the decision in that case there was a distinct change of policy on the part of carriers, generally, in the adjustment of claims made upon them for loss, damage, or injury to property. From a former policy of compromise, of making the best terms possible with the claimant, which was not wholly disadvantageous to the claimant in many instances, and which, of course, was often discriminatory in its operation, a disposition was developed upon the part of many carriers to stand uncompromisingly upon their rights as defined in the bill of lading...."

The ICC's observation of the effect of the Croninger case was stated as follows:

"... Following the decision in that case there was a distinct change of policy on the part of carriers, generally, in the adjustment of claims made upon them for loss, damage, or injury to property. From a former policy of compromise, of making the best terms possible with the claimant, which was not wholly disadvantageous to the claimant in many instances, and which, of course, was often discriminatory in its operation, a disposition was developed upon the part of many carriers to stand uncompromisingly upon their rights as defined in the bill of lading...."

The ICs's observation of the effect of the Croninger case was stated as follows:

"... Following the decision in that case there was a distinct change of policy on the part of carriers, generally, in the adjustment of claims made upon them for loss, damage, or injury to property. From a former policy of compromise, of making the best terms possible with the claimant, which was not wholly disadvantageous to the claimant in many instances, and which, of course, was often discriminatory in its operation, a disposition was developed upon the part of many carriers to stand uncompromisingly upon their rights as defined in the bill of lading...."

Prior to the decision in the Croninger case, supra, there had been much conflict in the decisions, both of the federal and state courts, upon the question of validity of conditions in bills of lading which limited or sought to limit the amount of the carrier’s liability for loss, damage, and injury to goods transported. The proviso in the amendment had been construed by both federal and state courts to preserve to the shipper the remedies then existing under state laws when the latter were more advantageous to him than the remedy provided by federal law, and so the rules were interpreted differently according to the jurisdiction in which the case arose. The Croninger case held that it was the purpose of Congress to assume jurisdiction in the fixing of the carrier's liability upon interstate shipments, and thereafter such questions were generally construed in the light of the decision in that case, in which it was held that a contract for transportation containing a stipulation of value to which the carrier's liability was sought to be limited was valid and not in violation of the provision of the act." In the Matter of Bills of Lading, 52 ICC 671, 677, 683 (1919).


55 233 U.S. 97 (1914).
EFFECT OF TARIFF PROVISIONS

extended the rule of the Croninger case to a tariff rule governing liability for baggage. Previously, the cases dealing with rates based upon released values had involved shipments of property moving under express receipts or bills of lading specifying limitations of liability, although those cases had also accorded recognition to filed tariff provisions. The Hooker case involved a limitation-of-liability provision appearing only in the filed tariff, and it was conceded that the passenger had no actual notice of the rule. The rule limited liability for baggage loss or damage to $100 unless a greater value was declared and excess charges paid based upon valuation. The passenger declared no value and no inquiry was made as to value upon acceptance. In an action in a Massachusetts court, the passenger recovered actual value of the baggage on the theory that the ICA did not change the common-law rule in Massachusetts that such limitations were void unless brought to the attention of the passenger and assented to by him. The Supreme Court reversed the decision, stating: “The effect of the filing gives the regulation as to baggage the force of a contract determining ‘baggage liability.’”

As a result of these decisions, use of released value rates became widespread. Congress in 1915 enacted the First Cummins Amendment which revised Section 20 (11) of the ICA (the Carmack Amendment). In effect, this Amendment made the carriers liable for full actual loss or damage to property notwithstanding any limitation of liability, limitation of amount of recovery, or agreement as to value. These provisions were modified by the Second Cummins Amendment of 1916, which permitted released value limitations in connection with baggage and, as authorized by the ICC, in connection with other property, except livestock. Congress thus supplied standards for determining validity of tariff rules establishing limitations of liability and filed under the ICA. The force of cases decided prior to these amendments would not, however, seem to have been weakened; rather, it is strengthened by legislative recognition of the conclusive effect of such tariff provisions when filed pursuant to a regulatory statute.

Following the Cummins Amendments, there were additional released value cases asserting the binding effect of tariff rules establishing limitations permitted by the legislation. In N.Y.C. & H.R.RR v. Beaham, action was brought to recover full value of baggage lost by an interstate carrier. Both the ticket and baggage check, as well

---

56 The Court went on to say that reasonableness of filed charges could only be attacked in a proceeding before the ICC.
59 Galveston, H. & S. A. Ry. v. Woodbury, 254 U.S. 357 (1920) (filed baggage limitation held binding on both carrier and passenger); American Ry. Express v. Lindenb[urg, 260 U.S. 584 (1923) (released value limitations in filed tariff rates binding in shipment of trunks); American Ry. Express Co. v. Daniel, 269 U.S. 40 (1926) (shipper bound by provisions of filed tariff rates based upon valuation even though he had no knowledge of rate provisions).
60 242 U.S. 148 (1916).
as the filed tariff, contained limitations of liability. Because of faulty certification, the state court refused to admit the filed tariffs in evidence, and full recovery was allowed. In reversing, the Supreme Court stated: 61

"In order to determine the liability assumed for baggage it was proper to consider applicable tariff schedules on file with the Interstate Commerce Commission; and the carrier had a Federal right not only to a fair opportunity to put these in evidence, but also that, when before the court, they should be given due consideration."

The foregoing released value cases, while recognizing the binding effect of filed tariff rules, are somewhat weakened by emphasis in the opinions on the relation of rules to rates. 62 This possible distinction between rules closely related to rates and more general rules has not, however, been regarded as significant in the cases dealing with other types of rules. In Southern Ry. v. Prescott, 63 an interstate shipment of goods at reduced rates arrived at destination, and the consignee paid the freight charges and removed part of the goods. The remainder of the goods, which was retained by the carrier at the consignee's request and for his convenience, was destroyed by fire. In consideration of the reduced rates, one of the rules contained in the bill of lading and also included in the filed tariff was that property held over 48 hours after notice of arrival would be subject to warehouseman's liability only. The consignee recovered in a state court upon application of more liberal local law on the theory that the interstate transportation had ended. In reversing this judgment, the Supreme Court held that retention of goods was a "terminal service" and therefore a part of interstate transportation within purview of the ICA. Hence, the filed rules could not be departed from. The Court made this comment: 64

"... It is also clear, that, with respect to the service governed by the Federal statute, the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates [citations omitted] and the established principle applies equally to any stipulation attempting to alter the provisions as fixed by the published rules relating to any of the services within the purview of the act [citing Kirby and Robinson cases supra]. This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discriminations. No carrier may extend 'any privilege or facilities,' save as these have been duly specified. And as the terminal services incident to an interstate shipment are within the Federal Act, and the conditions of liability while the goods are retained after notice of arrival are

61 Ibid.
63 240 U.S. 632 (1916).
64 Ibid.
stipulated in the bill of lading under the filed regulations, the parties cannot substitute therefor a special agreement.

Tariff rules providing limitations upon giving notice of loss, damage, or injury have also been enforced by courts as binding upon parties to the contract of carriage. In *Northern Pac. Ry. v. Wall*, the bill of lading, covering an interstate shipment of cattle, provided that in case of damage notice had to be given to the agent of the carrier at destination before the cattle were removed. After delivery by a connecting carrier, a claim for damage was filed with the initial carrier without complying with the notice requirement. Reversing the recovery in the state court, the Supreme Court held that the filed tariff rule was reasonable and binding on the parties, notwithstanding that it was contrary to a Montana statute. Similarly, *Erie R. R. v. Stone* involved a shipment of horses under a livestock contract. Filed tariff rules conditioned liability upon giving notice of damage within 5 days from time of removal from the car. Reasonableness of the rule was left to the jury in the state court, and recovery was allowed. In reversing, the Supreme Court stated that the filed tariff rule was binding on both parties, and it did not have to consider reasonableness of the rule since it had been held reasonable in the *Wall* case.

In *Gooch v. Oregon Short Line R. R.* an action was brought for damages for personal injuries sustained by the plaintiff while riding on a drover's pass, under which the plaintiff agreed not to hold the carrier liable for injuries unless notice of injury was given in writing within 30 days after an accident. The notice requirement was contained in the filed tariff. Plaintiff was injured but failed to give required notice. The Court, in denying recovery although the carrier had actual notice, held the rule to be binding on the parties. And in *Georgia F. & A. Ry. v. Blish Milling Co.* there appears the following dictum concerning a provision of the bill of lading requiring notice of loss to be given within a specified time:

"But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed."

A filed tariff rule requiring written notice of an order for cars

---

66 Ibid.  
67 Ibid.  
68 Ibid.  
69 Ibid.  
was considered in *Davis v. Henderson*. The shipper brought an action in a state court for damages for the carrier's failure to furnish cars upon oral request and recovered. In reversing, the Supreme Court said:

"There is no claim that the rule requiring written notice was void. The contention is that the rule was waived. It could not be. The transportation performed was that of a common carrier under published tariffs. The rule was a part of the tariff."

Earlier, reference was made to the case of *Judge v. Northern Pac. Ry.*, as illustrating the early tendency of the courts to disregard the controlling effect of tariff rules. *American Ry. Exp. Co. v. American Trust Co.*, involving a situation similar to that in the *Judge* case, illustrates later acceptance of the principle that tariff rules are conclusive evidence of the terms of the contract of carriage. The plaintiff, a banking house, had over a period of years engaged the services of the express company in making shipments of money and other valuables. The express company had filed a tariff providing that "Packages containing money, bonds, or other securities will be received for transportation only when delivered at the Express Company's office by shippers." The company collected a shipment from the plaintiff in the express company's armored truck at the bank's premises. This conformed to the company's practice over a period of years. En route to the company's office, the money was stolen from the truck and the bank sued for its value. The express company contended that any contract resulting from its practice in violation of the tariff rule was void and no liability could be predicated thereon. The district court held that the contract in violation of the tariff rule was void and unenforceable but allowed recovery on the ground that the company, by accepting the money for transportation, assumed the liability of a common carrier. The court cited with approval the *Judge* case and dictum in *Merchant's Cotton-Press & Storage Co. v. Ins. Co. of North America*. The Circuit Court of Appeals, holding that the tariff rule was binding upon the parties and could not be waived, reversed the district court. The court had this to say:

"But if, the evidence showed that both appellant's agent and the bank understood that the legal possession of the money passed to the carrier at the bank, and if we further assume that a receipt was given therefor by appellant's driver at the bank door, these facts would not, under the decisions, affect appellant's liability. For the published tariff may not be avoided, enlarged, or varied by the shipper and the carrier through express or implied contract.

---

71 266 U. S. 92 (1924). Similarly, a special contract to provide cars at special time is preference contrary to requirement that tariff be adhered to. *Davis v. Cornwall*, 264 U. S. 660 (1924).
72 Ibid.
73 189 Fed. 1014 (Ore. 1911).
74 47 F. 2d 16 (C. C. A. 7th 1931), cert. denied, 284 U. S. 629 (1931).
76 151 U. S. 368 (1894).
77 47 F. 2d 16, 18 (N. D. Ind. 1930).
The decisions are clear and explicit. Such tariffs, at least those which are factors in determining the carrier's charges, have the force and effect of statutes.

Two cases involving tariffs of telegraph companies also have an important bearing on this question. In W. U. Tel. Co. v. Esteve Bros. & Co., the telegraph company delivered an unrepeated cable to Esteve Bros., directing the sale of 2,000 bales of cotton. It should have read "200 bales." As a result of the error, Esteve Bros. suffered a loss and sued to recover the amount. Although not required to do so by the ICA at that time, the telegraph company had filed with the ICC its tariff containing a provision that the "company shall not be liable for mistakes in transmission...of any unrepeated message, beyond the amount of that portion of the tolls which shall accrue to it." The sender did not know that the condition existed. Under Section 1 of the ICA, messages could be classified into "day, night, repeated, unrepeated, letter, commercial, press, government and such other classes as are just and reasonable and different rates (might)...be charged for the different classes of messages." Full damages were recovered in the lower court. The Supreme Court reversed, reducing recovery to the charge (§4.65) paid for transmission of the message in accordance with the tariff rule. The Court stated the question to be "whether since the amendment of June 18, 1910, to the ICA to Regulate Commerce, the sender is, without assent in fact, bound as a matter of law by the provision limiting liability because it is a part of the lawfully established rate." In answering this question in the affirmative, the Court proceeded on the theory that the rate, of which the limitation of liability was an inherent part, was lawfully established in accordance with the ICA, and, therefore, the company was prohibited by Section 3 from granting anyone an undue preference or advantage over the public generally. The Court was careful to point out that the fact that the rates and rules were filed was immaterial, since the result flows, not from the filing, but from the requirements of uniformity and equality. The Court said:

"The Act of 1910 introduced a new principle into the legal relations of the telegraph companies with their patrons which dominated and modified the principles previously governing them. Before the act the companies had a common-law liability from which they might or might not extricate themselves, according to views of policy prevailing in the several states. Thereafter, for all messages sent in interstate or foreign commerce, the outstanding consideration became that of uniformity and equality of rates. Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, not, as before, a matter of contract, by which legal liability could be modified, but as a matter of law, by which uniform liability was imposed. Assent to the terms of the rate was rendered immaterial, because, when the rate is used, dissent is without effect."
In W. U. Tel. Co. v. Priester, the Alabama court had disregarded a limitation of liability included in the company's filed tariff on the theory that the company had been guilty of gross negligence. In reversing, the Supreme Court said:

"... The established rates for unrepeated messages thus became the lawful rates and the attendant limitation of liability became the lawful condition upon which messages might be sent... What had previously been a matter of common law liability, with such contractual restrictions as the states might permit, then became the subject of Federal legislation to secure reasonable and just rates for all without undue preference or advantage to any. Since that end is attainable only by adherence to the approved rate, based upon authorized classification, that rate 'represents the whole duty and the whole liability of the company..."

The ICC, in response to a request to waive the four-month limitation on presentation of claims by the shipper contained in tariffs, gave recognition to the controlling effect of the filed tariff rule when it stated that it had no authority to disregard the tariff rule. In re Bills of Lading it made the following comment:

"... When it becomes apparent to carriers that they cannot, ought not, or will not enforce the provisions contained in their established tariffs, whether in regard to matters of the kind here involved, demurrage, reconsignment, or other like practices, as well as to rates, they should change the tariffs in the manner prescribed by law so that their practices may be in conformity thereto..."

While, as we have seen, later cases arising under Part I of the ICA have generally recognized that terms of a contract of carriage are to be determined solely by reference to the filed tariffs, the rule has not re-

---

80 276 U.S. 252 (1928).
81 Ibid.
82 29 ICC 417, 419 (1914).

EFFECT OF TARIFF PROVISIONS

ceived unanimous judicial approval and application. In *Pacific S. S. Co. v. Cackette*,84 the plaintiff purchased and signed a ticket, sold subject to all conditions of the lawfully published tariff. The tariff, filed with the California Ry. Board, U.S. Shipping Board and the ICC, contained a rule that all claims for loss or damage should be presented in writing within 10 days of landing. The plaintiff was assaulted by an employee of defendant and brought an action for damages 10 months later without giving the required notice. On appeal from a judgment allowing recovery, the only question was whether the cause of action was barred under the tariff rule. The court affirmed, basing its decision on the ground that the ICA contained no provision relating to rights of action against carriers for assault or negligence, and that notice of such claims has no perceptible relation to the charges for transportation. The court recognized that the passenger was chargeable with notice of the tariff, which became a part of the contract of transportation [citing the *Harriman* and *Hooker* cases], but distinguished the cases supporting the rule on the ground that in those cases limitations were required to be filed in the tariffs. It reasoned that a passenger or shipper was not chargeable with notice of any rule not contemplated or required by the ICA.85

The Supreme Court in *Boston & M. R. Co. v. Piper*,86 in a decision which is difficult to explain, departed from its general acceptance of the rule. That case involved an action for damages resulting from delay in a cattle shipment. The cattle were shipped at reduced rates under a bill of lading filed with the tariffs. The bill of lading contained a provision that in case of unusual delay caused by carrier’s negligence, recovery would be limited to actual cost of feed and water with an option of a higher recovery upon the payment of higher rates. The Court held that this was not a valid limitation on the amount of recovery, but an attempt to exonerate the carrier from liability for its negligence by a contract which left practically no recovery for damages and was therefore void. The Court stated that:87 “The legal conditions and limitations in the carrier’s bill of lading are binding until changed by that body . . . ; but not so of conditions and limitations which are, as is this one, illegal, and consequently void.” This instance of a court disregarding the binding effect of the tariff provision under its own conception of “illegality” would appear to be an exception to the general rule.

The doctrine developed under Part I of the ICA has also been applied to tariffs under the Communications Act of 1934.88 *Ambassador, Inc. v. U.S.*,89 was an appeal from a decree enjoining defendant hotels from charging guests more than the toll charges of the Telephone Com-

---

84 8 F. 2d 259 (C. C. A. 9th 1925), cert. denied, 269 U.S. 586 (1926).
86 246 U.S. 439 (1918).
87 Ibid.
89 325 U.S. 317 (1945).
pany in connection with interstate or foreign telephone calls. The Telephone Company had filed a tariff with the Federal Communications Commission (FCC) which provided: "Message toll telephone service is furnished to hotels, apartment houses and clubs upon the condition that use of the service by guests, tenants, members, or others shall not be made subject to any charge by any hotel, apartment house or club in addition to the message toll charges of the Telephone Company as set forth in this tariff." The tariff had been filed pursuant to an order of the FCC requiring the Telephone Company either to file tariffs covering such charges, or to issue tariff regulation specifying conditions under which such service would be furnished to hotels. The Court affirmed the injunction on the ground that the Communications Act authorized filing of regulations governing the service, and, since the tariff rule in question clearly affected the service, it was binding on subscribers.

Decision Under the Civil Aeronautics Act

In the one reported case in which the question has been squarely presented whether a tariff filed under the Civil Aeronautics Act is conclusive as to the terms of contract, the court reached a result consistent with that developed under earlier regulatory statutes. In *Jones v. Northwest Airlines, Inc.*,90 the plaintiff had purchased a round-trip ticket from Seattle to Washington, D. C. He explained to the ticket agent that he had a limited time in which to make the trip, and was told that he could probably do it all right. The ticket bore the legend, "Sold subject to tariff regulations." The plaintiff's flight was cancelled en route because of weather, and he was offered the next available reservation. His demand for a seat on the next plane having been refused, he returned to Seattle without completing the trip. In his action for breach of contract, he alleged that the contract of carriage was made on the basis of the time element involved and that he was, therefore, entitled to a seat on the next plane after his flight had been cancelled. The applicable tariff on file with the CAB provided that the carrier could cancel any flight at any time it deemed such action advisable or necessary, and that the carrier would not be responsible for its failure to arrive or depart on schedule. In affirming a decision by the trial court that there had been no breach of contract, the Supreme Court of Washington pointed out that the plaintiff purchased the ticket subject to the tariff provisions, and that the carrier was prohibited from departing from them by the Act.91

90 157 Pac. 2d 728 (Wash. 1945); commented on in Orr, *The Law Affecting Aviation Liability*, 20 Temple L. Q. 64 (1946):

"The significance of the above decision is that it is the first we have had upholding the legality of the rules and regulations filed by all airlines with the CAB and hence applying the great volume of law already decided in connection with the filing of like tariffs by railroads and other surface carriers with the ICC. This includes the limitation of liability on checked baggage and other property—a subject of increasing interest as air travel increases."

91 By way of dictum, the court added that had the provisions been attacked as unreasonable, it would not have had jurisdiction, since that was a question to be passed upon by the CAB in the first instance.
While there have been occasional deviations from the rule as developed under earlier regulatory acts, it seems clear, both on principle and authority, that a tariff filed under the Act is conclusive evidence of terms of the contract of carriage. No other conclusion would be consistent either with the express provisions of the Act or with its objectives.

A carrier subject to the Act is required to publish and file tariffs containing its rates and rules. These, then, taken together, constitute the terms of its offer to serve the public. The Act expressly prohibits the carrier from deviating from those terms; departure is punishable as a criminal offense. To be sure, the Act does not explicitly say that the other party to the contract — the passenger or shipper — is similarly restricted. But the restriction upon his freedom to contract follows as a matter of course. If the carrier is legally free to agree only to terms published in its tariff and no others, there can hardly be a “meeting of the minds” on other contractual terms, even though the passenger or shipper retains complete freedom. The tariff, then, contains the only terms upon which the parties can legally agree. It contains the carrier’s offer, which the passenger or shipper accepts when he uses the carrier’s service. It is the contract of carriage.

It might conceivably be argued that, in spite of the prohibition against deviation from its tariff, the carrier retains legal capacity to enter into a binding contract including terms not specified in its tariff, and that the tariff, therefore, is not conclusive evidence of the terms of the contract. It is certainly true that a criminal statute does not destroy capacity of the criminal to violate the statute. But whether the rationale is lack of legal capacity to enter into a contract deviating from the tariff, or whether we regard such a contract as unlawful and therefore unenforceable, the fact remains that the purposes of the Act cannot be achieved if effect is given to such a contract. It will be recalled that the primary purpose of the tariff-filing requirement was to prevent discrimination. To recognize as valid and enforceable a contract deviating from the tariff would defeat that objective of the Act. It would be giving effect to a discrimination. Only by refusing to recognize such a contract as valid and by refusing to enforce it can the objectives of the Act be achieved.

It seems clear, also, that whether either a tariff rate or a rule related directly or remotely, or not at all, to the rate is involved, the result must be the same. No sound basis for distinction exists. The degree of discrimination might vary, but the fact of discrimination remains. The principles involved apply equally in each case.

**Can provisions of a tariff filed under the Civil Aeronautics Act be avoided or invalidated retroactively?**

If, as we have concluded, the filed tariff is conclusive evidence of terms of the contract of carriage, the question arises whether a passen-
ger or shipper, having become a party to the contract, may avoid its provisions on the ground that they are unlawful. May he, for example, after receiving transportation, attack the tariff rate as unreasonable and recover as damages the excess over the lawful rate? May he escape the effect of a tariff rule limiting the carrier's liability on the ground that it is invalid? In the case of ordinary contracts, of course, a party can obtain relief from provisions which are illegal or otherwise contrary to public policy. Is this principle applicable to a contract of carriage embodied in a tariff filed pursuant to the Act?

Essentially, the question is whether particular remedies are available to enforce a statutory duty of the carrier. The Act, as we have seen, imposes an affirmative duty on carriers to publish lawful tariff rates and rules, i.e., rates and rules which are "just and reasonable" and which do not result in "any undue or unreasonable preference or advantage" or in "any unjust discrimination or any undue or unreasonable prejudice or disadvantage." To insure performance of this duty, the Act provides an elaborate system of safeguards and remedies. The CAB may, through the exercise of its suspension powers, prevent an unlawful rate or rule from taking effect. Even after the unlawful provision has become effective, the Board may take corrective action and require the carrier to substitute a lawful provision. The carrier may be subject to criminal penalties for willful disregard of its statutory duty. Our problem is to determine whether or not, in addition to these remedies, the Act permits a passenger or shipper to attack the validity of a tariff provision in order to establish a common-law right of action against the carrier or deprive the carrier of a defense based on the terms of the tariff. Was this remedy provided as additional insurance against breaches of the carriers' statutory duty?

While the problem is one which might be attacked from several different quarters, perhaps the most direct approach is to inquire whether the CAB has power to pass upon lawfulness of a filed tariff provision retroactively. If not, can the courts exercise such a power? Obviously, if no judicial or quasi-judicial power exists to declare a tariff provision invalid retroactively, the provision is immune from such an attack. On the other hand, if the power exists, presumably it can be exercised in appropriate cases. Let us examine first the powers of the CAB.

Retroactive Power in Administrative Agencies

Since the CAB is a creature of statute, its powers are derived solely from statute. Hence we must look to provisions of the Act to determine whether power to declare tariff provisions unlawful retroactively

---

92 Williston, Contracts, §1628 et seq. (Rev. Ed.).
93 Sec. 404(a); 52 Stat. 998, 49 USCA§484(a) (Supp. 1947).
94 Sec. 404(b).
95 Sec. 1002(g).
96 Sec. 1002(d).
97 Sec. 902(a) and (d).
has been conferred upon the Board. If such a power has not been expressly granted by, or cannot be reasonably implied from, the Act, then no such power exists.

Nowhere in the Act is there an express grant of power to the Board to invalidate tariff provisions retroactively. The only power to change tariff provisions expressly conferred on the Board is to be exercised prospectively. If the Board is of the opinion that a tariff provision "is or will be" unlawful, it is to determine and prescribe the lawful rate "thereafter" to be charged or the lawful rule "thereafter" to be made effective. The finding that a tariff provision "is or will be" unlawful looks to the present and future. The prescription of a lawful rate or rule "thereafter" to become effective looks only to the future. The lawfulness of the rate or rule at some time in the past is not presented as a subject either for determination by the Board or for remedial action.

Absent any express grant of authority to the Board to determine the lawfulness of tariff provisions retroactively, can such a power be implied from provisions of the Act? The express grant of a limited power is persuasive evidence that Congress did not intend to confer a broader or unlimited power. Precision in statutory drafting cannot be regarded as unintentional. Hence, the express grant of a power to invalidate tariff provisions prospectively not only militates strongly against implying a power to invalidate them retroactively, but, on the contrary, also suggests that the power was deliberately withheld.

This conclusion finds potent support in a comparison of the Act and Part I of the ICA, which had been passed approximately fifty years previously and which, in many respects, served as a model for the later Act. It is highly significant that at the time the Act was adopted, Part I of the ICA, relating to rail carriers, made specific provision for civil liability for damages sustained by anyone as a consequence of a violation of any provision of that Part. The person claiming damages might either complain to the ICC or bring suit in a district court of the United States; and the ICC was expressly granted authority to make an award of reparations. From its inception, the ICC had been expressly granted reparation powers, and the Act had been amended

---

98 Sec. 1002 (d).
99 Sec. 8; 24 Stat. 382 (1887), 49 USCA §8 (Supp. 1947).
100 Sec. 9; 24 Stat. 382 (1887), 49 USCA §9 (Supp. 1947).
101 Sec. 16; 34 Stat. 590 (1906), 49 USCA §16 (Supp. 1947). Originally, reparation orders of the ICC were enforceable only in equity, and the ICC assumed the position that it was precluded from considering the question of assessment of damages since no jury trial was afforded. Council v. Western & Atl. R. R., 1 ICC 339 (1887); Heck & Petree v. E. Tenn., Va. & Ga. R. R., 1 ICC 495 (1888); Riddle, Dean & Co. v. N. Y., L. E. & W. R. R., 1 ICC 594 (1888). This defect was cured by an amendment of March 2, 1889 (25 Stat. 859), providing a summary proceeding for enforcement of the ICC's orders in federal courts; but the ICC continued to assume the attitude that the assessment of damages was peculiarly suitable for jury trial until forced to abandon its position in the face of decisions in federal courts that if the complainant elected to proceed before the ICC and received no award of damages, he could not subsequently pursue his remedy at law. See 5 ANNUAL REP. OF ICC 10 (1891); Macloon v. Chi. & N. Ry., 5 ICC 84 (1892).
from time to time to increase the effectiveness of that remedy. Surely, when Congress enacted the Civil Aeronautics Act it was fully cognizant of the existence of the reparation powers of the ICC, and knew that the ICC, in exercising those powers, had been passing upon the validity of tariff provisions retroactively for the prior half-century. Under those circumstances, Congress' failure to follow the example of Part I of the ICA on such an important point implies a deliberate departure, and a decision to rely upon other sanctions and remedies to insure performance of the carriers' statutory duties.

If omission of reparation powers from the Act were an isolated instance, contrary to a uniform regulatory formula prescribed for other types of carriers, it might conceivably be argued that the omission was an oversight, and that the power of the CAB to invalidate tariff provisions retroactively should be implied, so as to give effect to a well-established Congressional pattern. But that is not the case. When Congress enacted the Motor Carrier Act (MCA) in 1935, it omitted any provision imposing liability for civil damages for violations of the Act and made no express grant of reparation powers to the ICC. Yet, five years later, when Part III (relating to water carriers) was added to the ICA, Congress reverted to the pattern of Part I and provided civil liability for damages resulting from violations of that Part and expressly granted reparation powers to the ICC. But, only two years later when Part IV was added to regulate freight forwarders, no mention was made of reparation authority. Similarly, in the field of shipping, packers and stockyards, and communications, the regulatory statutes expressly include reparation authority; but with respect to the regulation of natural gas, no reparation power was expressly granted. These variations in the regulatory pattern established for the different types of utilities can hardly be explained as the result of oversight or accident. On the contrary, they constitute indisputable evidence of deliberate inclusion in some cases and exclusion in others.

The conclusion seems clear. Congress was presented with a choice between including or excluding a grant of reparations power in the Act. It had granted the power to the ICC in the case of rail carriers, but withheld it in the case of motor carriers. It had exercised a similar election in the case of other regulatory statutes. It elected not to grant such powers to the CAB, but, instead, granted the limited power to modify tariff provisions prospectively. The most reasonable, if not the only reasonable, inference is that no power to

---

102 49 Stat. 543, 49 USCA §301 (Supp. 1947), now Part II of the ICA.
104 Sec. 308; 54 Stat. 940, 49 USCA §908 (Supp. 1947).
107 PACKERS AND STOCKYARDS ACT, 1921, 42 Stat. 156 (1921), 7 USCA §808 (1940).
invalidated them retroactively was conferred on the Board.\textsuperscript{110}

While the foregoing conclusion has not been judicially confirmed, it finds support in the construction placed by the courts on statutes similar to the Act. In \textit{Hope Natural Gas Company v. Federal Power Commission},\textsuperscript{111} the Federal Power Commission (FPC), conceding the lack of any reparation power under the Natural Gas Act, asserted its authority in aid of state regulation to make a finding as to past lawfulness of rates.\textsuperscript{112} The Natural Gas Act also conferred on the FPC express power to modify rates prospectively,\textsuperscript{113} but conferred no power to invalidate rates retroactively. The Circuit Court of Appeals reversed the FPC's order on the ground that, in the absence of an express grant of such authority, none existed. The Supreme Court, while not passing upon the question of the FPC's power, reversed on the ground that the court had no jurisdiction to review the FPC's order under judicial review provisions of the Natural Gas Act\textsuperscript{114} until some further action had been taken under the order. Although the order had been mistakenly reviewed, the opinion of the Circuit Court of Appeals is not without value.\textsuperscript{115}

"The fundamental difference between quasi-legislative and quasi-judicial power is that the one is concerned primarily with prescribing regulations for the future, the other with determining rights in the light of what has occurred in the past. . . . The Natural Gas Act shows clearly that it was the intention of Congress to give the Commission quasi-legislative power, i.e., regulatory power as to future rates; but there is no indication of any intention to clothe it with judicial or quasi-judicial powers with respect to past charges or practices, such as was vested in the Interstate Commerce Commission by section 9 of the Interstate Commerce Act. As the Commission itself says, it was not given authority to fix rates for the past or to award reparations on account of past rates. If it was not given the power to fix past rates, or award reparations based upon their unreasonableness, it certainly was given no power to do the same thing indirectly by making findings of fact as to past rates to be given effect in rate proceedings before state commissions. No intention on the part of Congress to vest any

\begin{flushleft}
\textsuperscript{110} Recourse to legislative history of the MCA and the Civil Aeronautics Act fails to disclose any information as to reasons for the different treatment when the acts were passed. The ICC has recently recommended that motor carriers, some water carriers (not presently liable), and freight forwarders be made liable for damage resulting from violations of the act, and subject to reparation orders. See \textit{ANNUAL REP. OF ICC}, 118 (1945); 122 (1946); 148 (1947). In supporting a pending bill in Congress which would accomplish that recommendation, the Legislative Committee of the ICC in commenting on the omission of reparation power from Part II of the ICA pointed out that at the time of its enactment it was believed that conditions in motor transportation were not stabilized and the subjecttion of motor carriers to liability for damages should be deferred until problems under the new regulations had been solved. After twelve years of experience under the regulations it is now believed that conditions justify addition of the reparation remedy for the benefit of the shipper. \textit{Hearings before Committee on Interstate and Foreign Commerce on H. R. 2324 and H. R. 2295}, 80th Cong., 1st Sess. 5 (1947).
\textsuperscript{112} \textit{Hope Natural Gas Co. v. F. P. C.}, 134 F. 2d 287, 309 (C. C. A. 4th 1943).
\textsuperscript{113} \textsuperscript{115} See 54 (a); 52 Stat. 823, 15 USCA §717(d) (Supp. 1947).
\end{flushleft}
such unusual power in a commission ought to be indulged unless conferred in the plainest terms; and not only is it not plainly given here, but such power cannot be spelled out of the statutes on any theory of interpretation with which we are familiar.” (Citations omitted.)

A number of state courts construing state statutes have reached a similar conclusion. The regulatory scheme of the ICA has been widely followed in the statutes regulating intrastate carriers. However, many state acts, like the Civil Aeronautics Act, expressly grant authority to state boards or commissions to prescribe tariff provisions or to change them prospectively, but are silent as to any power to invalidate provisions retroactively. These statutes have generally been construed as conferring no jurisdiction on regulatory boards or commissions to invalidate tariff provisions retroactively.6

The question was presented under the New York statute in Murphy v. New York C. R.R.,7 involving an action to recover track storage charges paid under a filed tariff. The claim was based on a resolution of the State Commission that the charges were unreasonable. The statute contained an express grant of power to change tariff provisions prospectively, but contained no reparation authority. In reversing a recovery in the lower court, it was pointed out that the statute conferred no jurisdiction on the Commission to pass upon rates retroactively:8

"The action at bar asserts the doctrine that the Public Service Commission is empowered to determine that a rate or charge for intrastate transportation, duly scheduled and filed with it, has been, through a period of years during which it has been filed and paid, and is, unreasonable and unjust, that the payor is entitled to recover from the carrier the excess fixed by the Commission beyond the reasonable charge, and that the determination of the Commission is prima facie proof in the courts of the state of the facts determined. We cannot discern in the statute such legislative intent."

In Great Western Portland Cement Co. v. Public Service Commission,9 a complaint charging that railroad rates applicable in the past were unreasonable and requesting a determination by the Commission of rates that would have been reasonable had been filed with the state Commission. Upon refusal of the Commission to make the determination for lack of jurisdiction, the complainant obtained a writ of mandamus to compel such action. On appeal, the mandamus order was reversed. The Court held that the statute neither expressly nor by fair interpretation conferred power on the Commission to make findings as to reasonableness of rates previously charged.

A similar result was reached under the Virginia Statute.10 An

---

7 122 N. E. 700 (N. Y., 1919).
8 Id. at 701.
9 127 Pac. 881 (Kan. 1926).
10 Mathieson Alkali Works v. N. & W. Ry., 137 S. E. 608 (Va., 1927).
EFFECT OF TARIFF PROVISIONS

action in assumpsit was brought to recover overcharges. The rates charged had been in accordance with a tariff filed after a general order of the Commission granting increases. Upon a later finding that the rates were unreasonable at certain destination points, the Commission had corrected them; and the question presented was whether this finding had retroactive effect in the absence of an express grant of reparation powers. The Court held that the rates were conclusively presumed to be reasonable as long as they remained in effect, and that the Commission had no power to invalidate them retroactively. In reaching that conclusion the Court in part relied on the fact that, unlike the ICA, the Virginia statute contained no express grant of reparation powers. The Court made the following observation:121

"The omission to specifically confer the power on the State Corporation Commission to declare a legally established rate unreasonable retroactively and to award reparation is significant, in view of the fact that the Federal Act was before the constitutional convention and the legislature when the Constitution was adopted and the corporation statutes were enacted, and many of its provisions were adopted. An intentional omission, under the circumstances, seems clear."122

The Montana Court, in Montana Horse Products Co. v. Great Northern Ry.123 and Sunburst Oil & Refining Co. v. Great Northern Ry.,124 considered the power of the State Commission to pass upon the reasonableness of rates previously prescribed or approved by it and held that since there was no express grant of reparation powers in the statute, rates prescribed by the Commission were presumed to be reasonable as long as they remained in effect and could not be declared unreasonable retroactively.125 In the Sunburst case the Court said:126

"Since the finding by the commission as to the unreasonableness of the rate because of the difference between the actual and the estimated weights of the oil operated prospectively only, and the only lawful tariff which could be exacted by the carrier was that which was at the time prescribed in its published tariff as fixed by the Commission, it is apparent that the plaintiff is not entitled to damages by way of reparations. Common-law rights of the shipper are superseded by the statute.

"Under our statutes, so long as the rates established by the

121 Id. at 775.
122 When the question was later presented to the Virginia Court, it again reviewed the statute and found that, in view of provisions expressly granting the ICC prospective powers to change tariff provisions and the absence of any grant of reparation powers, no power to change tariff provisions retroactively could be implied. Commonwealth ex rel. Appalachia v. Old Dominion Power Co., Inc., 34 S. E. 2d 364 (Va., 1945).
123 7 P. 2d 919 (Mont., 1932).
124 7 P. 2d 927 (Mont., 1932).
125 The holding was made applicable for the future, since the court felt compelled to follow an earlier precedent reaching an opposite result. This aspect of the case was affirmed in Great Northern Ry. v. Sunburst Oil & Refining Co., 287 U.S. 358, 77 L. Ed. 360 (1932), as not depriving the carrier of property without due process.
126 7 P. 2d 927, 929 (Mont., 1932).
Commission are in force, they are presumed to be reasonable, and neither the commission nor the courts have power to retroactively declare such established rates unreasonable and then permit the recovery of damages to the extent of the overplus paid by a shipper or an undercharge collected by the carrier."

In the Montana Horse Products case, the Court pointed out the error of a former decision\textsuperscript{127} in which it held that a court had no jurisdiction to award damages based upon unreasonableness of rates until the Commission had made such a finding, and that the Commission's lack of authority to award reparations did not preclude its making a finding of unreasonableness which could serve as the basis of a common-law action. The Court said that without reparation authority, the Commission's jurisdiction did not include power to determine validity of tariff rates retroactively, and, therefore, the previous decision could not be reconciled with the statute.

These cases illustrate the position that has generally been adopted in construing state statutes which expressly grant regulatory commissions power to prescribe or change tariff provisions prospectively, but omit any reparation power.\textsuperscript{128} No power on the part of the commission to determine validity of tariff provisions retroactively has been implied under such circumstances. On the contrary, the express grant of a power to be exercised prospectively, coupled with omission of any authority to make retroactive determinations, has been regarded as clear evidence that the latter authority was deliberately withheld.

While, as we have seen, there is ample support, both in principle and authority, for the conclusion that the CAB has no authority to make retroactive determinations of the validity of tariff provisions

\textsuperscript{127} Doney v. Northern P. Ry., 199 Pac. 432 (Mont., 1921).


In most of the cases construing state acts, courts in denying any implication under the statutes of power in the commission to invalidate tariff provisions retroactively placed much emphasis on the fact that rates were commission-made as distinguished from carrier-made rates under Part I of the ICA, which made them legislative in nature. The appraisal of the distinction in a case which arose under the New Mexico statute is interesting. Kemp Lbr. Co. v. A. T. & S. F. Ry., 9 P. 2d 387 (N. M., 1932). There an action was brought to recover overcharges based on the difference between the rate as finally fixed by the SC and the rate which had been established by the carrier within the maxima previously set by the legislature and charged from the time of complaint. The contention was made that a right of action survived since the rates were carrier-made under the New Mexico law as distinguished from the scheme of commission-made rates in other states. The court, however, refused to regard the distinction as significant, since the carrier-initiated rates, if permitted to remain unchanged, became in effect commission-made rates. Observing that the statute provided no reparation power, the court stated that the commission's control over rates was solely legislative, to which the common law remedy must give way.
filed with it in accordance with the Civil Aeronautics Act, the path to that conclusion is not without obstacles. One obstacle was created by a case invoking the so-called primary jurisdiction doctrine. In that case involving the validity of a tariff provision filed under the Act, the court held that the CAB had primary jurisdiction to determine such issues. Adler v. Chicago & Southern Airlines, Inc.\(^\text{129}\) was an action brought against an airline for damages allegedly resulting from cancellation of a scheduled flight. On motion of the defendant, the court dismissed the action on the ground that the practice of cancelling flights was a "practice" within the meaning of the Act, and that the court was without jurisdiction to grant relief until either the CAB found that the practice complained of was unlawful or the plaintiff had exhausted his remedies before the Board.\(^\text{130}\) The decision is clearly at odds with the conclusion suggested above, for it assumes that the Board has jurisdiction to pass upon lawfulness of the practice retroactively. And it seems to assume also that the plaintiff's remedies before the Board not necessarily would be limited to a prospective change in the tariff rule covering the complained-of practice. The case therefore requires further attention.

In reaching its conclusion that the primary jurisdiction doctrine applied, the court in the Adler case relied upon the precedents established under Part I of the ICA. The doctrine has its origin in Texas & Pacific Ry. v. Abilene Cotton Oil Co.\(^\text{131}\) where it was held that a shipper could not sue a rail carrier to obtain redress for being charged an unreasonable rate, prior to a determination by the ICC that the rate was unreasonable. The doctrine was regarded as essential to preservation of the regulatory system created by Part I of the ICA and to the effectuation of its purposes. Although the ICA itself provided access to federal courts for a passenger or shipper who had been injured by a carrier's breach of statutory duties, it was recognized that uniformity of treatment—which was one of the major purposes of the ICA—could never be achieved if validity of tariff rates and rules was to be tested by divergent standards of different courts.

\(^\text{129}\) 41 F. Supp. 366 (E. D. Mo. 1941).

\(^\text{130}\) In a subsequent proceeding before the CAB the jurisdiction of the Board to pass upon lawfulness of the practice was not questioned. The complaint did not allege any specific unlawful, unreasonable or improper practice, and it was dismissed since, after investigation, the Board found no failure by the carrier to comply with the provisions of the Act and that the practice was not unjust or unreasonable. 4 CAB 113 (1943). In Schwartzman v. United Air Lines, 6 FRD 517 (D. C. Neb. 1947), an action, similar to that in the Adler case, was brought to recover damages for failure of the airline to transport the plaintiff, after purchase of a ticket and reservation of space, and for return of the purchase price of the ticket. A motion was made to dismiss on grounds that the CAB had primary jurisdiction of the question and that the plaintiff had failed to exhaust his remedies before the Board. The motion was denied, since at that stage of the pleadings no question had been presented which was within the statutory jurisdiction of the Board, but without prejudice to a renewal of the motion if an issue within the jurisdiction of the Board were later raised by the pleadings. The court disagreed with the conclusion reached in the Adler case that the single act of cancellation constituted a "practice" within the Act on basis of the facts reported in the opinion in that case.

\(^\text{131}\) 204 U.S. 426 (1907).
and juries. Only by centralizing responsibility for making such decisions could consistent results be expected and desired uniformity achieved. The primary jurisdiction doctrine, therefore, was a prerequisite to proper administration of Part I of the ICA and attainment of its major objectives. Consequently, the doctrine was consistently applied in cases involving validity of tariff rates or rules under Part I of the ICA.

It should be recalled that the primary jurisdiction doctrine had its origin under a statute which expressly granted power to the ICC to award reparations. As long as the doctrine is applied under such a statute, there can be no question concerning the soundness of the assumption of administrative jurisdiction underlying the doctrine. But when the doctrine is transplanted into a field where the regulatory statute grants no such authority, the assumption underlying the doctrine falls—and the doctrine with it. An administrative agency which has no jurisdiction to make retroactive determinations of the validity of tariff provisions certainly cannot have primary jurisdiction to do so; and courts, by blind invocation of the doctrine, cannot confer jurisdiction which the statute withheld. Thus, if the jurisdiction exists, it must be derived from the statute, not from a doctrine of judicial self-limitation.

Examination of the opinion in the Adler case reveals that the court relied upon precedents under Part I of the ICA and the Shipping Act, in which the doctrine had been applied, and upon the general similarity of regulatory patterns created by those Acts, on the one hand, and the Civil Aeronautics Act, on the other. It neither made any detailed examination (so far as the opinion indicates) of provisions the Act, nor did it mention the significant differences between Part I of the ICA and the Civil Aeronautics Act which have been previously noted. Under those circumstances, it is difficult to believe that the court, fully aware of the problem, construed the Civil Aeronautics Act as conferring, by implication, authority on the CAB to determine retroactively validity of the practice in issue. It seems more likely that precedents under other Acts and the general similarity of those Acts to the Civil Aeronautics Act were accepted by the court uncritically, and that the assumption of adequate jurisdiction in the Board was not questioned.

But whatever the explanation of the court's decision, it is believed to be unsound. As already indicated, there are convincing reasons for the conclusion that the Civil Aeronautics Act did not confer on the CAB power to determine retroactively the validity of tariff provisions. If such power exists, it must be implied in the Act, and any such implication is defeated by considerations outlined above. Certainly,


the reasoning of the Adler decision does not furnish a convincing answer to those arguments. On the contrary, the opinion in the Montana Horse Products case\(^{134}\) seems to furnish a more than adequate answer to the Adler decision.

A second obstacle to the conclusion that the CAB does not have power to invalidate tariff provisions retroactively is the position which the ICC has taken under the MCA. Although the pertinent provisions of that Act closely parallel the provisions of the Civil Aeronautics Act,\(^ {135}\) the ICC has held that it has implied power to pass upon lawfulness of rates involved in past transactions, even though it does not have express authority to grant reparations.\(^ {136}\) The leading case\(^ {137}\) in which the Commission asserted its authority involved a complaint against lawfulness of rates charged on past shipments of potato chips. The Commission found the rates to be unreasonable both for the past and the future. While admitting that it had no power to grant reparations for past unlawful charges, the Commission felt that its determination of unlawfulness could form the basis for an action for damages in court. The Commission relied upon its general powers under the MCA to enforce the Act,\(^ {138}\) and more specifically upon its power, upon complaint or its own initiative, to investigate and determine whether a motor carrier has complied with the provisions of the Act and to make necessary orders to obtain compliance.\(^ {139}\) The Commission reasoned that since the duty of establishing just and reasonable rates was imposed on carriers, and unjust and unreasonable charges were prohibited and made unlawful...

\(^{134}\) Montana Horse Products Co. v. Great Northern Ry., 7 P. 2d 919 (Mont., 1932).

\(^{135}\) Sec. 204(a) (6); 52 Stat. 1237, 49 USCA §304(a) (6) (Supp. 1947); Sec. 204(c); 54 Stat. 925, 49 USCA §304(c) (Supp. 1947); Sec. 216(a), (b), (d) and (e); 49 Stat. 558 (1935), 52 Stat. 1240 (1938), 54 Stat. 924, 49 USCA §815(a), (b), (d) and (e) (Supp. 1947); Sec. 217; 49 Stat. 560 (1935), 54 Stat. 925, 49 USCA §817 (Supp. 1947).


\(^{138}\) Sec. 204(a) (6); 52 Stat. 1237, 49 USCA §304(a) (6) (Supp. 1947).

\(^{139}\) Sec. 204(c); 54 Stat. 922, 49 USCA §304(c) (Supp. 1947).
ful, it had authority to issue an order declaring rates on past shipments unlawful.\textsuperscript{140}

The Commission's opinion on this point is, of course, entitled to great respect, but it cannot be regarded as conclusive. It rests, necessarily, on the premise that a passenger or shipper who has been injured by a carrier's breach of statutory duty to establish lawful rates and rules is entitled to maintain an action for damages against the carrier. But, as we have seen, this premise has been specifically denied by state courts construing analogous statutes. They have concluded that the statutes created new rights and remedies which superseded the common-law remedy of damages. If that remedy is unavailable, the incentive for finding, in the general provisions of the Act, an implication that the Commission has the power to make determinations in aid of the remedy disappears and jurisdiction so implied becomes a futility, under the reasoning of the Commission. Whether the remedy is available—and hence the validity of the Commission's premise—is part of the second phase of our present inquiry.

\textbf{Retroactive Power in Courts}

Turning now to our second question—whether the courts have jurisdiction to invalidate tariff provisions retroactively—we find ourselves confronted at the outset with Section 1106 of the Civil Aeronautics Act:

"Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."\textsuperscript{141}

Although this purported reservation of common-law remedies is comprehensive in terms, the courts have been unwilling to construe such provisions to preserve rights which are inconsistent with the purposes of the statute in which they appeared. The wording of section 1106 is practically identical to that contained in the saving clause of Part I of the IGA.\textsuperscript{142} In \textit{Texas & Pacific Ry. v. Abilene Cotton Oil Co.},\textsuperscript{143} discussed above, the Court recognized the existence of a common-law right to the relief sought, which was apparently pre-

\begin{footnotesize}
\begin{itemize}
  \item An interesting variation of the assertion of the ICC's conception of its authority in this respect appears in \textit{United States Rubber Co. v. Associated Transport, Inc.} (Doc. No. MC-C-871, Feb. 16, 1948). The carrier determined that rates charged on certain shipments were inapplicable and sought to collect the additional charges under the applicable tariff. The complaint alleged that the charges sought to be collected were unreasonable and requested the ICC to prescribe reasonable rates for the future and authorize the carrier to waive collection of outstanding undercharges. The carrier admitted that the charges were unreasonable and was willing to waive them. The ICC not only concluded that rates on past shipments were unreasonable, but also expressed the opinion that the carrier could waive collection of undercharges on the basis of rates found to have been reasonable. It reached this conclusion by interpreting the prohibition against departures from the filed tariff in light of the provision making the charging of unreasonable rates unlawful.
  \item 52 Stat. 1027, 49 USCA §676 (Supp. 1947).
  \item Sec. 22; 24 Stat. 387 (1887), 49 USCA §22 (1940).
  \item 204 U.S. 426 (1907).
\end{itemize}
\end{footnotesize}
served by the saving clause. But in refusing to enforce the right, the Court said: 144

"This clause, however, cannot in reason be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act."

Again, in Robinson v. B. & O. R. R., 145 a shipper sought to recover damages based upon payment of allegedly discriminatory rates, without prior resort to the ICC. The Court referred to the saving clause in the following language: 146

"Of course, the provision in §22, as also the provision in §9, must be read in connection with other parts of the act, and be interpreted with due regard to its manifest purpose; and, when that is done, it is apparent that neither provision recognizes or implies that an action for reparation, such as is here sought, may be maintained in any court, Federal or State, in the absence of an appropriate finding and order of the Commission."

When the Carmack Amendment147 was added to the ICA, it also contained a proviso purporting to preserve remedies which were available under existing law. Nevertheless, the Court, in Adams Express Company v. Croninger, 148 rejected the contention that the proviso preserved remedies provided under state law:

"But it has been argued that the nonexclusive character of this regulation is manifested by the proviso of the section, and that state legislation upon the same subject is not superseded, and that the holder of any such bill of lading may resort to any right of action against such a carrier, conferred by existing state law. This view is untenable. It would result in the nullification of the regulation of a national subject, and operate to maintain the confusion of the diverse regulation which it was the purpose of Congress to put an end to.

"What this court said of the 22d section of this act of 1887 in the case of Texas & P. R. Co. v. Abilene Cotton Oil Co. . . . is applicable to this contention. It was claimed that that section continued in force all rights and remedies under the common law or other statutes. But this court said of that contention what must be said of the proviso in the 20th section, that it was evidently only in-

---

144 Ibid.
145 222 U.S. 506 (1912).
146 Ibid.
147 Sec. 20(11); 34 Stat. 595 (1906), 49 USCA §20(11) (1940). "... Provided further, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law: . . ."
148 226 U.S. 491 (1913).
tended to continue in existence such other rights or remedies for
the redress of some specific wrong or injury, whether given by the
interstate commerce act, or by state statute, or common law, not
inconsistent with the rules and regulations prescribed by the provi-
sions of this act. Again, it was said of the same clause, in the
same case, that it could not in reason be construed as continuing in
a shipper a common-law right the existence of which would be
inconsistent with the provisions of the act. In other words, the act
cannot be said to destroy itself.

"To construe this proviso as preserving to the holder of any
such bill of lading any right or remedy which he may have had un-
der existing Federal law at the time of his action gives to it a more
rational interpretation than one which would preserve rights and
remedies under existing state laws, for the latter view would cause
the proviso to destroy the act itself. One illustration would be a
right to a remedy against a succeeding carrier, in preference to
proceeding against the primary carrier, for a loss or damage
injured upon the line of the former. The liability of such suc-
cceeding carrier in the route would be that imposed by this statute,
and for which the first carrier might have been made liable."

It seems clear, in the light of these decisions, that the provisions
of Section 1106 do not provide a ready and automatic answer to our
question. Common-law remedies were preserved only to the extent
that they are consistent with general purposes of the Act and the regu-
latory system created by it. Hence we must look to the rest of the
Act to determine the scope and effect of Section 1106. But before
doing that, it may be helpful to review the experience under other
regulatory statutes and the judicial reactions to the question.149

The treatment of the problem by state courts has varied under
different state regulatory acts. In general, however, where the stat-
utes provide for comprehensive supervision of tariff provisions by
the administrative agency and grant no express reparation authority,
the courts have concluded that the common-law rights of passengers
and shippers based upon unlawful tariff provisions have been super-
seded by statutory remedies. In some cases, emphasis is placed on

149 The opinion of the Court in Sitwalk v. Pennsylvania-Central Airlines
Corp., 1 Avi 900 (Cir. Ct. Wayne Co., Mich. 1940), has received considerable
attention since it is one of the few judicial expressions touching upon the efficacy
of a tariff provision filed by air carriers. That case was an action for damages to
the plaintiff's baggage while she was a passenger on an intrastate trip. A bottle
of mouthwash which she carried in her traveling bag was broken as a result of
the negligence of the airline's employee. The airline had on file with the
CAB a

 tariff which provided, among other things, that "liquids" were unacceptable as

 baggagge. The plaintiff received a baggage claim check which had written on it

 "subject to tariff rules and regulations." The case was tried on stipulated facts,

and the Court held that the plaintiff was an intrastate passenger even though the

airline was of an intrastate and interstate character. Then, assuming that the

tariff filed pursuant to a federal act controlled, the Court construed the tariff pro-

vision as not prohibiting the inclusion of a small amount of mouthwash in the

passenger's baggage. The court pointed out that if the tariff were not applicable
to intrastate trips, the plaintiff would be entitled to recover under the stipulated
facts which, under Michigan law, amounted to a stipulation of negligence. While

the validity of the tariff provision was not at issue, some observers seem to feel
that had the Court felt constrained to rule that the mouthwash was excluded from
acceptable baggage under the rule, it would have held the rule to be invalid.
EFFECT OF TARIFF PROVISIONS

the fact that tariff rates are established by the commissions themselves and, therefore, can only be changed prospectively in accordance with the statutes.\footnote{Woodrich v. Northern Pac. Ry., 71 F. 2d 732 (C. C. A. 8th 1934); Montana Horse Products Co. v. Great Northern Ry., 7 P. 2d 919 (Mont., 1932); Sunburst Oil & Refining Co. v. Great Northern Ry., 7 P. 2d 927 (Mont., 1932); Mathiesen Alkali Works, Inc. v. N. & W. Ry., 137 S. E. 608 (Va., 1927); see Gurney Heater Mfg. Co. v. New York, N. H. & H. R. R., 182 N. E. 897 (Mass., 1928); City of Boston v. Edison Elec. Illuminating Co., 136 N. E. 113 (Mass., 1922).} In such cases, the rates are conclusively presumed to be lawful as long as they remain in effect. In other cases, while relying on the legislative nature of the tariff provisions because of the power granted the commissions to prescribe rates, the courts have reached the same conclusion with respect to tariff provisions initiated by the carrier.\footnote{Miller Mill Co. v. Louisville & N. R. R., 92 So. 797 (Ala., 1922); Young Heading Co. v. Payne, 89 So. 782 (Miss., 1921). See statement by court in Mathiesen Alkali Works, Inc. v. N. & W. Ry., supra note 150, that no affirmative duty was imposed on commission to determine reasonableness of all rates but that it is contemplated that all rates are to be approved.} Although, in some cases, a common-law right of action has been held to survive notwithstanding the absence of a reparation power in the regulatory act,\footnote{National Radiator Co. v. Penna. R. R., 143 Atl. 85 (N. J., 1928); see Sonken-Galamba Corp. v. Mo. Pac. R. R., 40 S. W. 2d 524 (Mo., 1931); Houston Chamber of Commerce v. Railroad Comm. of Texas, 19 S. W. 2d 583 (Tex. Civ. App., 1929).} a majority of the cases support the position that any common-law right of action, based on unlawfulness of tariff provisions, must give way to remedies provided by the statutes themselves.\footnote{Kemp Lumber Co. v. Atchison, T. & S. F. Ry., 9 P. 2d 387 (N. M., 1932).}

A clear statement of the reasons for acceptance of this principle is to be found in Purcell v. New York Central R.R.\footnote{197 N. E. 182 (N. Y., 1935), cert. denied 296 U.S. 545 (1936).} There a shipper, after the State Commission had prescribed rates for the future, brought an action for damages and sought to use the Commission's determination as the basis for the charge that the rate paid in the past had been excessive. The New York Act, significantly, granted the Commission power only to modify tariffs prospectively. In concluding that all common-law remedies had been superseded by the New York Act, the Court stated:\footnote{Ibid.}

"When the railroad filed its tariff schedules as required by section 28 of the Public Service Law, these were the lawful charges to be paid by the brick company for its shipments of brick. The shipper could not legally pay less, the railroad could not charge more or less. These were the rates fixed according to the statute until modified as therein provided. A subsequent change, although delayed, did not make the prior charges illegal or unreasonable. The statute creating the Public Service Commission and empowering it to supervise rates and charges was intended to cover the whole subject of rates and supersede all common-law remedies. As long as the charges enforced are those on file with the commission, they are the only lawful charges which may be collected. No departure from the filed rate is permitted."

"The Legislature has provided a means for the protection of shippers against unreasonable rates. The action at law resulted in
different rates for different shippers dependent upon the opinion of juries as to what was reasonable. The statute makes the specified rate as fixed uniform and lawful until changed by or with the permission of the commission.

“We therefore hold that the remedy provided by our Public Service Law for excessive rate charges is the only relief open to the plaintiff under the circumstances here set forth . . . This question was left open in the Murphy Case . . . We now decide it.”

At an earlier stage of the proceedings in this same case, it was contended that survival of the common-law remedy under the statute was supported by statements in opinions of the primary-jurisdiction cases under the ICA. But the court distinguished those cases as arising under an act which specifically provided a statutory liability for damages:

“Plaintiff's argument for a statutory action finds support in statements in the opinions in cases decided by the Supreme Court of the United States [citing the Abilene and Robinson v. B. & O. R. R. Cases] made in reference to the federal act to regulate commerce, which does provide a statutory cause of action. A corresponding right to bring an action is not contained in the state law. There the rights of the shipper are protected by the power of the Commission summarily to suspend a filed rate and fix a temporary rate for a period which ordinarily would permit a full hearing and final determination and the fixing of a permanent rate which, to the Commission, seemed fair to both parties . . .”

The primary jurisdiction cases under Part I of the ICA also recognize that the purposes of the ICA would be defeated if courts were to exercise the right to determine the validity of tariff provisions retroactively. The compelling reason for the pronouncement of that doctrine was the statutory objective of uniformity and the necessity of avoiding the risk of divergent decisions by different courts and juries. This is apparent in the opinion of the Court in Texas & Pac. Ry. v. Abilene Cotton Oil Co. in which the doctrine had its origin:

“When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble duty, between the provision for the

---

158 See also Miller Mill Co. v. Louisville & N. R. R., 92 So. 797, 802 (Ala., 1922): “Such schedules cannot be made unlawful for and during the period of their approved operation by any subsequent retroactive finding and order of the commission. Such a practice would be odious to the generally established notions of justice, and would, moreover, be utterly subversive of the policy and utility of any system of rate regulation; for no rate could be relied upon as stable, and neither the carrier nor the shipper could ever be certain of the basis upon which business was being conducted . . .” Young Heading Co. v. Payne, 89 So. 782, 786 (Miss., 1921): “If the contention on behalf of the appellant were sound, the whole scheme and plan of the supervision statutes would be upset, because varying judgments might be rendered by different shippers, even though each case was based upon identically the same state of facts. Thus instead of having uniform and fixed rates the result could and might be a different rate for every shipper who chose to go into court in a suit against the carrier to test an alleged overcharge . . .”


156 Id. at 73.

159 204 U.S. 426 (1907).
EFFECT OF TARIFF PROVISIONS

establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because, unless the requirement of a uniform standard of rates be complied with, it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable, and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the Commission, would give rise to a change of the schedule rate and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal which the act created with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergency between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in
the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible."

It must be remembered that this doctrine was developed under Part I of the ICA, which not only provided specifically for liability on the part of carriers and made it enforceable in federal courts, but also purported to preserve all common-law remedies. The doctrine has been applied both in cases involving lawfulness of tariff rates under Part I of the ICA, and in cases where tariff rules were an issue.161

Similarly, where an action for damages for alleged violation of the antitrust laws was based on a conspiracy to fix rates in restraint of trade, the Court's comment in approving a dismissal for want of jurisdiction affords additional evidence of judicial reaction to exercising a power to invalidate tariff provisions retroactively:

"Section 7 of the Anti-Trust Act gives a right of action to one who has been injured in his business or property. Injury implies violation of a legal right. The legal right of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights, as defined by the tariff, cannot be varied or enlarged by either contract or tort of the carrier . . . This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated. If a shipper could recover under §7 of the Anti-Trust Act 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 under §7. 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 . . ."162

One point emerges from these cases with remarkable clarity. Judicial authority to invalidate tariff provisions retroactively cannot be

---


exercised without destructive effects upon the statutory scheme of uniformity. And this is true whether or not the statute provides the injured passenger or shipper a remedy in damages. Even though the statute expressly affords that remedy, and expressly confers jurisdiction on the courts to enforce it (as in the case of Part I of the ICA), the courts will refrain from exercising jurisdiction until the determination of invalidity has been made by the administrative agency charged with primary responsibility for administration of the statute. In no other way can the right to damages be reconciled with the paramount objective of uniform treatment for all. In the case of those statutes which do not expressly reserve common-law rights or provide for civil liability on the part of the carriers, the courts have, in many cases, concluded that the preservation of such rights would be inconsistent with the objective of uniformity and have construed the statute as abolishing that type of remedy. Under both types of statutes, great stress has been laid upon the statutory objective of uniformity and non-discrimination.

**Conclusion**

There can be no question that the Civil Aeronautics Act, like its predecessors, had as one of its major purposes prevention of discrimination and assurance of uniform treatment for all passengers and shippers similarly situated. In providing regulatory means to achieve that end, Congress borrowed heavily from the experience under Part I of the ICA. However, it omitted—and we must conclude deliberately—provisions contained in Part I of the ICA which imposed civil liability for violations of the ICA, and which authorized either the ICC or the federal courts to enforce such liability. Moreover, the powers of the CAB to determine the validity of tariff provisions were expressly made prospective. 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, unless it is contained in the general reservation of common-law rights contained in Section 1106. As we have seen, however, that section must be construed as preserving only those rights which can be exercised consistently with the other provisions of the Act and its general objectives.

If the objective of uniformity is to be accorded weight in construing the Act, only two implications are available. One would be to construe Section 1106 literally, but subject to an implied primary jurisdiction in the CAB to make necessary determinations of validity. This construction would complete the analogy to the pattern provided by Part I of the ICA, minus only a power in the Board to award reparations. The other alternative is that adopted by many of the state courts in construing their regulatory acts, i.e., to say that rights and remedies provided by the Act are exclusive and have superseded any
common-law right to relief from unlawful tariff provisions involved in past transactions.

The choice between these two alternatives is really a choice between partial uniformity and complete uniformity. The preservation of a common-law right to damages, or the right to avoid an unlawful tariff provision, no doubt affords an additional sanction with which to enforce the statutory duty of carriers to publish only lawful rates and rules. It does, however, destroy the possibility of achieving complete uniformity. A simple example will show this. If the rate charged during a given period were later found to be excessive and unlawful, recognition of a common-law right to damages for the excess over the reasonable rate would provide relief only to those shippers who filed their actions within the allowed time. Even though the danger of diverse decisions were avoided by application of the primary jurisdiction doctrine, many thousands of shippers who were charged that rate during the period of its invalidity would not for one reason or another, obtain relief to which they were entitled. Some might not know of the availability of the remedy. Some might feel that the amount recoverable would not justify the expense of litigation. But whatever the explanation, it is virtually certain that the number of shippers who obtained relief would be relatively small, compared to the total number who were injured by the unlawfulness of the rate. To recognize their right to damages, therefore, is to grant to those shippers who pursue their remedy a preference over those who do not. It seems obvious, therefore, that adoption of the first alternative cannot, as a practical matter, produce complete uniformity of treatment. On the contrary, it is certain to result in preferences for those passengers and shippers who are either sufficiently diligent or sufficiently litigious to pursue their remedies in every case.

On the other hand, the second alternative guarantees complete uniformity of treatment for all. As long as the tariff provision remains in effect, it is binding on all. The only relief is prospective, and that relief redounds to the benefit of all. Certainly, then, the second alternative is the more consistent with the general purposes of the Act. And it gives effect, as the first does not, to the differences in the provisions of the Civil Aeronautics Act and Part I of the ICA—differences which, under the normal rules of statutory construction, must be regarded as deliberate and significant.

It may be claimed that if the second construction were adopted, the passenger or shipper who had been injured by an unlawful tariff provision would be left without a remedy. But the public is not left to the mercy of the carriers. The Civil Aeronautics Act provides a comprehensive system of controls and supervision which adequately safeguards the public from breaches of duty by carriers. The carriers must file and publish tariffs containing all their rates and rules.

163 Sec. 403(a); 52 Stat. 992, 49 USCA §483(a) (Supp. 1947).
EFFECT OF TARIFF PROVISIONS

Thus the public receives notice of the complete terms upon which transportation is offered. Strict observance of the tariff as filed is required of the carrier. Any departure from the tariff is made a criminal offense, and the carrier may not change any filed tariff except after thirty days' notice of the proposed change, unless the Board, in the public interest, allows such a change upon shorter notice. As a further guarantee of equality of treatment, a positive duty is imposed on the carrier to establish and observe just and reasonable tariff provisions, and discrimination resulting from application of the tariffs is prohibited.

But the Act does not rely solely upon the voluntary compliance by the carrier with statutory duties. The Board is authorized, upon its own initiative or upon complaint by the public, to suspend a tariff provision before it takes effect, if it has reason to believe that the provision does not comply with the requirements of the Act. Furthermore, even after the tariff provision has taken effect, the Board has authority to conduct investigations of the lawfulness of the provision, either upon its own initiative or upon complaint, and if it finds the tariff provision to be unlawful, it may prescribe the lawful provision thereafter to become effective. The public, therefore, has been provided for its protection with a full arsenal of remedies, both preventive and punitive.

---

164 Sec. 403 (b).
165 Sec. 902 (a) and (d).
166 Sec. 403 (c).
167 Sec. 404 (a).
168 Sec. 404 (b).
169 Sec. 1002 (g).
170 Sec. 1002 (a) and (b).
171 Sec. 1002 (d).

172 In construing the state statutes containing similar comprehensive provisions, the courts, generally, have recognized that the statutory provisions completely safeguard the rights of the public. Purcell v. New York C. R. R., 197 N. E. 182 (N. Y., 1935); Mathieson Alkali Works, Inc. v. N. & W. Ry., 137 S. E. 608 (Va., 1927); see Commonwealth ex rel. Appalachia v. Old Dominion Power Co., Inc., 34 S. E. 2d 364 (Va., 1945). The court in State ex rel. Standard Oil Co. v. Dept. of Public Works, 53 P. 2d 318, 319 (Wash., 1936), in denying a power of the department to award reparation based on unreasonable charges prior to the date of the complaint (the statute conferred such power only after complaint), summed up the reasons as follows:

"This court, in its construction of our statutes relating to the subject matter, has reached a different conclusion. The difference between a legal and a lawful rate is not recognized, but, on the contrary, the rates specified in the schedules filed and in effect are held to be the only lawful rates and remain such as long as they are effective.

"The appellant argues that to deny recovery as against an allegedly unreasonable rate, prior to the date of filing a complaint with the department, is in effect the denial of a common law right and leaves a wrong without a remedy. But our statute requires that all rates be reasonable, and to insure this, prescribes that they be filed and published with the regulatory authority for a named period before their effective date, so that everyone concerned may have notice with an opportunity to challenge them; and the department of public works may, upon its own motion, suspend them pending investigation. They are also subject to challenge after their effective date by anyone affected. So long as they remain effective and unchallenged, they are presumed to be reasonable... Without further analysis, we think that the statute law, when read and considered as a whole, leads to the view, and we must hold, that when a rate is filed, published, and permitted to become effec-
The conclusion that a tariff provision properly filed under the Civil Aeronautics Act cannot be avoided or invalidated retroactively seems inescapable. To recognize existence of such a power in either the CAB or the courts would defeat one of the principal purposes of the Act—uniformity of treatment. In the face of legislative history, constructions placed upon similar state statutes, and provisions of the Act itself, it is believed that the remedies specifically provided by the Act were designed to be exclusive. As a result, a tariff is equally binding on both parties as long as it remains in effect. It is the contract of carriage and is unimpeachable until changed.

tive by the department, it is and remains, until challenged in the manner provided by statute, the lawful rate and the only rate to be charged and collected. . . . Otherwise, the carrier would never know what its lawful earnings were and could never allocate its earnings to betterment and dividends without the possibility of being embarrassed by delayed orders to make restitution. It cannot be the legislative intent that its only protection in that respect is the two-year limitation contained in the statute. Therefore, when a schedule is challenged, that challenge should affect the scheduled rates only from the date of the filing of the complaint."