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JUDICIAL REVIEW OF THE DECISIONS OF THE
INTERSTATE COMMERCE COMMISSION†

By A. M. TOLLEFSON*

VII. EFFECT OF THE HEPBURN AMENDMENT OF 1906 UPON
THE FINALITY OF THE DECISIONS OF THE INTERSTATE
COMMERCE COMMISSION. WEIGHT ATTRIBUTED TO THE
DECISIONS OF THE COMMISSION IN REPARATION CASES

(a) *In General.*—The amendment of the interstate commerce act on June 29, 1906,⁸¹ already referred to,⁸² provides that in cases where the interstate commerce commission shall find that a party is entitled to an award of damages, the commission shall make an order directing the defendant to pay the complainant the sum to which he is entitled. If the order is not obeyed, suit may be brought in the courts, and such suits shall proceed in all respects like other civil suits for damages, except that on the trial the findings and order of the commission shall be prima facie evidence of the facts therein stated.

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†For first installment see, 11 MINNESOTA LAW REVIEW 389. Ed.

⁸¹In addition to a slight amendment of March 2, 1889, not material here, section 16 of the interstate commerce act was amended as follows: Hepburn Act of June 29, 1906, 34 Stat. at L. 584, 590; Mann-Elkins Act of June 18, 1910, 36 Stat. at L. 539, and by act of February 28, 1920, 41 Stat. at L. 451, 491, 492.

But the amendments since 1906 did not alter the provisions of the amendment adopted in 1906 regarding the weight of evidence given to the findings of the interstate commerce commission. Section 16 as amended reads in part as follows:

"That if, after hearing on a complaint made as provided in section 13 of this act, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this act for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named. If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated. . . ."

⁸²Page 414 supra.

This section as amended also provides that if any carrier fails or neglects to obey any order of the commission other than for the payment of money, any party injured thereby, or the commission in its own name, may apply to the circuit court for an enforcement of such order. But in the latter case nothing is stated as to the weight to be given to the findings of the commission.

The courts have interpreted the provision regarding prima facie evidence of facts in cases involving reparation or award as words of limitation. That is, the weight to be given to the findings of the commission in these cases has been limited to that of prima facie evidence of the facts stated, according to the provision of the statute, whereas in other cases the value or the weight attributed to the findings of the commission has not been so limited. As to the additional weight to be given to findings in other cases, such as rates, discrimination cases, etc., the courts have held that this is a question for the discretion of the courts, but that the import of the interstate commerce act is that more weight shall be attributed to the findings of the commission in non-reparation cases.

The result of the amendment of 1906, as is evidenced by an examination of adjudicated cases, shows that the courts have applied the provision of the amendment according to the clear and unmistakable terminology of the section so far as reparation cases are concerned. In such cases the findings and orders of the commission are regarded as prima facie evidence in actions before the courts. This, however, does not mean that the findings and orders of the commission in reparation cases are given the identical consideration which was generally attributed to the orders of the commission under the act of 1887. That act, as we have seen,⁸³ provides that if a carrier, subject to the act, violates an order of the commission, the commission or someone interested may apply to a circuit court and on a hearing before such court the report of the commission shall be prima facie evidence of the matters therein stated.

In spite of the similarity in the provisions of the two statutes,⁸⁴ the courts have given more weight to the findings of the commission, even in reparation cases, than they did shortly after the

⁸³See pp. 409-10 supra.

⁸⁴Provisions of the act of 1887 pertained to the decisions of the commission both in reparation and in non-reparation cases, whereas the provisions in the amendment of 1906 applied to the findings and orders of the commission only in reparation cases.

commission was established. That is, to begin with, the provision in the act of 1887 regarding prima facie evidence was given less consideration than after the commission had proved its efficiency and after the cases before the commission and before the courts had become more numerous. After the commission had been in existence for some fifteen or twenty years, and especially after the amendment of 1906, the courts have generally refused to set aside its findings, even in reparation cases, unless there were some real reasons for so doing, as for instance where the evidence against the prima facie presumption as to the correctness of the findings were sufficiently great to make it quite clear that there must have been some error in the decision of the commission.

In regard to non-reparation cases, as will be seen later,⁸⁵ the courts, as stated, have exercised the privilege or possibly the duty, given them by the interstate commerce act, of attributing more weight to the decisions of the commission in these cases than was attributed to the decisions of the commission in such cases during the early period of the existence of the commission. And after 1906 they have given much more weight to the findings of the commission in non-reparation cases than in the reparation cases. On this point the Supreme Court has said that originally the duty of the courts to determine whether an order of the commission should or should not be enforced carried with it the obligation to consider both the facts and the law. Later, according to the court, it came to pass⁸⁶ that in considering the subject of orders of the commission, for their enforcement, the courts were confined by statutory operation to determining whether there had been violations of the constitution, a want of conformity to statutory authority, and to ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred.⁸⁷

(b) *Reparation Cases.*—A few leading cases decided by the Supreme Court since 1906 illustrate the attitude of the courts to—

⁸⁵Section VIII of this article, *infra*.

⁸⁶Prior to the passage of the act of 1910 creating the commerce court.

⁸⁷*Proctor & Gamble Co. v. United States*, (1912) 225 U. S. 282, 32 Sup. Ct. 761, 56 L. Ed. 1091.

It should be kept in mind, however, that although there is no provision in the interstate commerce act prescribing the weight to be attributed by the courts to the findings of the commission in non-reparation cases, yet the import of the act, as well as provisions of the judiciary act as

ward the amendment of that year in the reparation cases. In *Meeker v. Lehigh Valley R. Co.*,⁸⁸ the plaintiff sought to recover damages sustained by reason of the carrier's overcharges and unjust discrimination. The commission found in favor of the plaintiff and this was affirmed in the district court but reversed in the circuit court of appeals. At the trial the plaintiff offered in evidence the reports and orders of the commission and asked that the facts stated therein be taken as prima facie true. This was allowed by the lower court and the Supreme Court refused to consider an objection to its admissibility. Regarding the weight to be given to such findings the Supreme Court said that—

“The plain import of the findings is that the amounts awarded represent the claimant's actual pecuniary loss; and, in view of the recital that the findings were based upon the evidence adduced, it must be presumed, there being no showing to the contrary, that they were justified by it.”

To the defendant's claim that the amended section was unconstitutional, the court said:

“This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence.”

The same conclusion regarding the weight of the commission's finding was reached in the so-called second *Meeker case*⁸⁹ where the court held that the presence of irrelevant matter in the report of the commission was harmless error where the case, made by the evidence rightly admitted, was such as in the absence of any opposing evidence entitled the shipper to a verdict for the amount claimed.

Likewise, in *New York, etc., Ry. Co. v. Ballou & Wright*, the finding of the commission that the rate charged to the petitioner was unreasonable and that he was damaged to an amount stated, was held to be prima facie correct. In *Vicksburg, S. & P. Ry. Co. v. Anderson-Tully Co.*,⁹¹ it was held that in a suit to enforce an award of damages made to a shipper by the commission the introduction in evidence of the findings and order of

amended, undoubtedly is that the findings of the commission on questions of fact, shall be conclusive in non-reparation cases.

⁸⁸(1915) 236 U. S. 412, 35 Sup. Ct. 328, 59 L. Ed. 644.

⁸⁹*Meeker v. Lehigh Valley R. Co.*, (1915) 236 U. S. 434, 35 Sup. Ct. 336, 59 L. Ed. 659.

⁹⁰(C.C.A. 9th Cir. 1917) 242 Fed. 862.

⁹¹(C.C.A. 1919) 261 Fed. 741, affirmed in (1921) 256 U. S. 408, 41 Sup. Ct. 524, 65 L. Ed. 1020.

the commission was sufficient to entitle the applicant to judgment in the absence of any evidence to the contrary.

In *Pennsylvania R. R. Co. v. Minds*⁹² a warrant by the commission in favor of a shipper on account of discrimination in furnishing cars was held to be only prima facie evidence of the amount of damages, and as such it was held that in an action for the damages that question could be litigated. These cases together with *Pennsylvania R. Co. v. Weber*,⁹³ *Mills v. Lehigh Valley R. Co.*⁹⁴ and *Spiller v. Atchison, T. & S. F. Ry. Co.*⁹⁵ established the principle that in the reparation cases the findings and orders of the interstate commerce commission under the act as amended are prima facie evidence of the facts therein stated. The *Spiller Case*, however, shows an inclination on part of the court to give even a greater weight to the findings of the commission and shows reluctance to review such findings even in reparation cases as long as such findings are based on evidence. This is true even if part of the evidence is hearsay. On this point, and especially in answer to the contention that certain evidence had been admitted which should have been excluded, the court said:

"If we were called upon to review the proceeding as upon a writ of error or appeal, it might be difficult to say that no improper evidence was admitted, that production of the best available was insisted upon, or that a different conclusion might not have been reached upon that which was admitted. But the scope of judicial review is not so extensive. . . . We are not here called upon to consider whether the commission may receive and act upon hearsay evidence seasonably objected to as hearsay; but we do hold that in this case, where such evidence was introduced without objection and was substantially corroborated by original evidence clearly admissible against the parties to be affected, the commission is not to be regarded as having acted arbitrarily, nor may its findings and order be rejected as wanting in support, simply because the hearsay evidence was considered with the rest."

In referring to the provision of the commerce act that the commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice, as well as to other provisions of the act, the court said:

⁹²(1919) 250 U. S. 368, 39 Sup. Ct. 531, 63 L. Ed. 1039.

⁹³(1921) 257 U. S. 85, 42 Sup. Ct. 18, 66 L. Ed. 141.

⁹⁴(1915) 238 U. S. 473, 35 Sup. Ct. 888, 59 L. Ed. 1414.

⁹⁵(1920) 253 U. S. 117, 40 Sup. Ct. 466, 64 L. Ed. 810.

"These provisions allow a large degree of latitude in the investigation of claims for reparation, and the resulting findings and order of the commission may not be rejected as evidence because of any errors in its procedure not amounting to a denial of the right to a fair hearing, so long as the essential facts found are based upon substantial evidence."

Likewise, in the case of *Pennsylvania R. Co. v. Weber*,⁹⁶ the fact that the commission improperly used a wrong basis in making an order for reparation, on account of unjust discrimination in the distribution of coal cars to shippers, was held not to be prejudicial error, where there was testimony tending to show damages in at least the sum awarded by the commission.⁹⁷

(c) *Evidential and Ultimate Facts*.—It is worthy of note that the provision in the statute that the findings of the commission shall be prima facie evidence does not apply to evidential facts but to ultimate facts found by the commission. Thus in reparation cases, questions whether there has been injury, and if so to what extent, are ultimate questions and the findings on such questions are prima facie evidence in the courts. But questions preliminary to these and which are administrative in character, such as reasonableness of rates, are evidential facts and such findings, with some exceptions noted later and chiefly as to questions of law, are conclusive and will not be reviewed by the courts even where such questions arise in reparation cases.⁹⁸

As such, even in reparation cases, there are a number of preliminary questions that the courts will not consider unless there are clear or unmistakable errors on the part of the commission. Thus, for instance, the courts will not pass upon the qualifications of witnesses to give expert testimony. In this connection the Supreme Court said:

"Whether he had shown such special knowledge as to qualify him to testify as an expert was for the interstate commerce commission to determine; and its decision thereon is not to be set aside by the courts unless clearly shown to have been unfounded."⁹⁹

⁹⁶(1921) 257 U. S. 85, 42 Sup. Ct. 18, 66 L. Ed. 141.

⁹⁷See also *Pennsylvania R. Co. v. Jacoby & Co.*, (1916) 242 U. S. 89, 37 Sup. Ct. 49, 61 L. Ed. 165.

⁹⁸*Meeker v. Lehigh Valley R. Co.*, (1915) 236 U. S. 412, 35 Sup. Ct. 328, 59 L. Ed. 644; *Meeker v. Lehigh Valley R. Co.*, (1915) 236 U. S. 434, 35 Sup. Ct. 336, 59 L. Ed. 659; *Mills v. Lehigh Valley R. Co.*, (1915) 238 U. S. 473, 35 Sup. Ct. 888, 59 L. Ed. 1414; *Spiller v. Atchison, T. & S. F. R. Co.*, (1920) 253 U. S. 117, 40 Sup. Ct. 466, 64 L. Ed. 810.

⁹⁹*Spiller v. Atchison, T. & S. F. R. Co.*, (1920) 253 U. S. 117, 40 Sup. Ct. 466, 64 L. Ed. 810.

VIII. FINALITY OF THE DECISIONS OF THE INTERSTATE COMMERCE COMMISSION IN NON-REPARATION CASES

In taking up the problem as to how far the courts will review the findings of the interstate commerce commission in non-reparation cases, we find, as already noted, that much greater weight will be given to these, and we note that in such cases the findings of fact by the commission are conclusive, with some exceptions.

It is especially when we consider the non-reparation cases that we realize that the federal courts, and especially the Supreme Court, by their interpretation of the interstate commerce act and otherwise, have in a number of cases¹⁰⁰ established a category of administrative questions. When such administrative questions are involved, the courts will not only refuse to act, except where immediate action is necessary, but will also, whenever they deem it possible, refuse to substitute their judgment for that of the commission.

In the first place we note that the findings of the commission as to whether a certain rate is reasonable and whether or not rules pertaining to rates results in preferences and discriminations, are conclusive upon the courts. In *I. C. C. v. Delaware L. & W. R. Co.*¹⁰² the court said in this connection:

"The finding of the commission that to permit the enforcement of the rule would give rise to preferences and engender discriminations prohibited by the act to regulate commerce embodies a conclusion of fact beyond our competency to re-examine."

It is, of course, even more evident that the courts will not examine the facts on which the commission based its order affecting rates so long as the commission acted within its authority and so long as the conclusions reached by the commission and its order are based on evidence.¹⁰³

¹⁰⁰The outstanding cases in this connection are: *Texas & P. R. Co. v. Abilene Cotton O. Co.*, (1907) 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553; *Baltimore & O. R. Co. v. U. S. ex rel. Pitcairn C. Co.*, (1910) 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292; *Morrisdale Coal Co. v. Pennsylvania R. Co.*, (1913) 230 U. S. 304, 33 Sup. Ct. 938, 57 L. Ed. 1494; *Northern Pacific R. Co. v. Solum*, (1918) 247 U. S. 477, 38 Sup. Ct. 550, 62 L. Ed. 1221; *Director General of R. v. Viscore Co.*, (1921) 254 U. S. 498, 41 Sup. Ct. 151, 65 L. Ed. 372; *Great Northern R. Co. v. Merchants Elevator Co.*, (1922) 259 U. S. 285, 42 Sup. Ct. 477, 66 L. Ed. 943.

¹⁰²(1911) 220 U. S. 235, 31 Sup. Ct. 392, 55 L. Ed. 448. See also *Hooker v. Knapp*, (1912) 225 U. S. 302, 32 Sup. Ct. 769, 56 L. Ed. 1099.

¹⁰³*I. C. C. v. Union P. R. Co.*, (1912) 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308.

In *I. C. C. v. Union P. R. Co.*,¹⁰⁴ where an order of the commission reducing rates was involved, the court calls attention to the fact that the statute makes the findings of the commission prima facie correct, and shows the tendency on the part of the courts to interpret this to mean that the order of the commission is final unless made without authority or based upon a mistake of law.

The courts have likewise no authority to review an order of the commission establishing rates for pre-cooling cars for interstate shipments of fruits.¹⁰⁵ In this connection we note that what is a proper rate on fruit in pre-cooling shipments, and a fair charge for hauling necessary ice and rendering other transportation services, are all rate-making matters committed to the commission. As such that body may determine what shall be the difference in rate between carload and less than carload lots. It may also decide whether the difference in revenue, due to a difference in method of loading, warrants a difference in the rate on carload shipments of the same article.¹⁰⁶ The interstate commerce commission may furthermore prescribe the form in which schedules shall be prepared and arranged and may approve tariffs stating that the single rate includes both the line haul and accessorial services absorbed in the rate. On the subject of through rate, it may prescribe a tariff fixing a through rate which includes not only the haul of the fruit, but the haul of the ice necessary to keep the fruit in condition.¹⁰⁷

"All these are matters committed to the decision of the administrative body, which, in each instance, is required to fix reasonable rates and establish reasonable practices. The courts have not been vested with any such power. They cannot make rates. They cannot interfere with rates fixed or practices established by the commission unless it is made plainly to appear that those ordered are void."¹⁰⁸

Also, an order by the commission restoring an old local rate which had been raised by the carrier, will not be set aside or reviewed by the court when supported by substantial although conflicting evidence;¹⁰⁹ and a finding that a rate or fare imposed

¹⁰⁴Ibid.

¹⁰⁵*Atchison, T. & S. F. R. Co. v. United States*, (1914) 232 U. S. 199, 34 Sup. Ct. 291, 58 L. Ed. 568.

¹⁰⁶Ibid.

¹⁰⁷Ibid.

¹⁰⁸Ibid. See also *I. C. C. v. Union P. R. Co.*, (1912) 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308.

¹⁰⁹*I. C. C. v. Louisville & N. R. Co.*, (1913) 227 U. S. 88, 33 Sup. Ct.

by state authority or intrastate commerce causes undue, unreasonable, and unjust discrimination against interstate and foreign commerce is binding on the courts if there is sufficient evidence to support it.¹¹⁰ Equally conclusive is a finding that a railroad is engaged in interstate commerce and subject to the jurisdiction of the commission.¹¹¹

The weight given to the commission's findings of fact in cases involving the question whether a railroad may make a greater charge for a short than for a long haul was discussed by the court in *United States v. Louisville & N. R. Co.*,¹¹² in which it was held that the amendment in 1910 to section four of the act of 1887 takes from the carrier and primarily vests in the commission power to determine the existence of conditions justifying a greater charge for a short than for a long haul, and such determination by the commission is final.

An order of the commission will not be reviewed where it was based upon a determination that existing rates subjected shippers from a certain point to undue prejudice. Such order is conclusive in an action to enjoin enforcement of an order requiring railroads to cease discrimination.¹¹³ Likewise, where the evidence was ample to support an order of the commission dividing joint rates between carriers, the court will not consider the weight of the evidence or the wisdom of the order made.¹¹⁴

On the subject of railroad cars we note that the interstate commerce act confers power on the commission to regulate the distribution of cars,¹¹⁵ and its jurisdiction over the subject is exclusive.¹¹⁶ As such the courts will not under the guise of

185, 57 L. Ed. 431; *Louisville & N. R. Co. v. United States*, (1918) 245 U. S. 463, 38 Sup. Ct. 141, 62 L. Ed. 400.

¹¹⁰*Illinois C. R. Co. v. Railroad Co. of Ky.*, (D.C. Ken. 1924) 1 F. (2d) 805; *Lehigh Valley R. Co. v. Public S. C.*, (D.C. N.Y. 1921) 272 Fed. 758.

¹¹¹*City of New York v. United States*, (D.C. N.Y. 1921) 272 Fed. 768.

¹¹²(1914) 235 U. S. 314, 35 Sup. Ct. 113, 59 L. Ed. 245.

¹¹³*United States v. Illinois C. R. Co.*, (1924) 263 U. S. 515, 44 Sup. Ct. 189, 68 L. Ed. 417.

¹¹⁴*Akron, C. & Y. Ry. Co. v. United States*, (1923) 262 U. S. 184, 43 Sup. Ct. 270, 67 L. Ed. 605. The case of *Finkbine Lumber Co. v. Gulf & S. I. R. Co.*, (C.C.A. 5th Cir. 1920) 269 Fed. 933 (certiorari denied, 41 Sup. Ct. 377) shows that an order by the commission as to switching charges is conclusive.

¹¹⁵See section 15, (1), (3), (4), (6), (10), (11), (12), (14), and section 3, (1); U. S. Comp. Stat. secs. 8563, 8565, 8583.

¹¹⁶*United States v. New River Co.*, (1924) 265 U. S. 533, 44 Sup. Ct. 610, 68 L. Ed. 1165; *I. C. C. v. Union P. R. Co.*, (1912) 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308; *Kansas City So. R. Co. v. United States*,

exerting judicial power, usurp merely administrative functions by setting aside an order of the commission within the scope of the power delegated to it upon the ground that such power was unwisely or inexpediently exercised.¹¹⁷ Also, where the commission has determined that an emergency existed, and has suspended a rule prescribing the distribution of cars among coal mines, the court will not annul the order on the ground that the power conferred upon the commission was unwisely or improvidently exercised.¹¹⁸

The regulation of the commission that all cars having sides more than thirty-six inches in height must be equipped with side ladders is final, and not subject to review or change by the courts.¹¹⁹ However, a finding that a carrier has held itself out to carry oil in tank cars gives rise to a question of law for the courts, where based on a rule providing rates for articles in such cars, and providing that carriers assume no obligation to furnish the cars.¹²⁰ This decision, however, was reached by the courts partly on the ground that the commission was given no power under the act to order a carrier to provide and furnish to shippers tank cars for interstate shipments of goods. As such, an important question of law was involved as to whether or not the commission had jurisdiction to act in the matter.¹²¹

The Supreme Court frequently reiterates that an administrative question decided by the commission, when the commission acted within its powers and not subject to any mistake in law, will not be reviewed by the courts. Thus the findings by the commission that spur tracks within switching limits in a city were part of the carrier's terminals and that the receipt and delivery on these tracks of carload freights in interstate commerce were a like service as compared with such receipts and delivery at team tracks and freight sheds within such switching limits, are con-

(1913) 232 U. S. 423, 34 Sup. Ct. 125, 58 L. Ed. 296; *United States v. Louisville & N. R. Co.*, (1914) 235 U. S. 314, 35 Sup. Ct. 113, 59 L. Ed. 245; *Manufacturers R. Co. v. United States*, (1918) 246 U. S. 457, 38 Sup. Ct. 383, 62 L. Ed. 831.

¹¹⁷*Finkbine Lumber Co. v. Gulf & S. I. R. Co.*, (C.C.A. 5th Cir. 1920) 269 Fed. 933.

¹¹⁸*Baltimore & O. R. Co. v. Lambert R. Co.*, (C.C.A. 4th Cir. 1920) 267 Fed. 776, certiorari denied, *Lambert R. Co. v. Baltimore & G. R. Co.*, (1920) 254 U. S. 651, 41 Sup. Ct. 148, 65 L. Ed. 458.

¹¹⁹*United States v. Duluth S. S. & R. R. Co.*, (D.C. Mich. 1921) 281 Fed. 347.

¹²⁰*United States v. Pennsylvania R. Co.*, (1916) 242 U. S. 208, 37 Sup. Ct. 95, 61 L. Ed. 251.

¹²¹*Ibid.*

clusive on the courts.¹²² Likewise, an order by the commission concerning the absorption of switching charges is conclusive.¹²³

A finding by the commission that a refusal of trunk line railways to absorb the charges of a terminal company was not unjust, unreasonable, or discriminatory will not be reviewed by the court, where based on evidence and within the authority of the commission.¹²⁴ Also a finding that a tap railroad of a proprietary company is a mere plant facility, is reviewable only on allegation that it is not supported by any substantial evidence or that it is arbitrary. But arbitrary action in such a case can be predicated only on a disregard by the commission of the very criteria which it adopts to determine the ultimate question of fact or on the adoption in different cases of distinctions without real differences.¹²⁵

Orders of the commission regulating railroad accounting are conclusive and will not be set aside by the courts unless they unlawfully interfere with property rights.¹²⁶

What is an undue or unreasonable preference or advantage, forbidden by the interstate commerce act¹²⁷ is a question not of law but of fact for the commission to determine. If the order does not contravene any constitutional limitation, and is within the constitutional and statutory authority of the commission, and supported by testimony, it cannot be set aside by the courts, as it is only the exercise of an authority which the laws vests in the commission.¹²⁸ Even if there is no dispute as to facts in such cases the courts cannot substitute their judgment as to the existence of a preference by carriers for that of the commission.¹²⁹

¹²²*I. C. C. v. Atchison T. & S. F. R. Co.*, (1914) 234 U. S. 294, 34 Sup. Ct. 814, 58 L. Ed. 1319; *I. C. C. v. Southern P. Co.*, (1914) 234 U. S. 315, 34 Sup. Ct. 820, 58 L. Ed. 1329. See also *Louisville & N. R. Co. v. United States* (1916) 242 U. S. 60, 37 Sup. Ct. 61, 61 L. Ed. 152.

¹²³*Seaboard Air Line R. Co. v. United States*, (1920) 254 U. S. 57, 41 Sup. Ct. 24, 65 L. Ed. 129.

¹²⁴*Manufacturers' R. Co. v. United States*, (1918) 246 U. S. 457, 38 Sup. Ct. 383, 62 L. Ed. 831.

¹²⁵*United States v. Louisiana & P. R. Co.*, (1914) 234 U. S. 1, 34 Sup. Ct. 741, 58 L. Ed. 1185.

¹²⁶*Kansas City Southern R. Co. v. United States*, (1913) 231 U. S. 423, 34 Sup. Ct. 125, 58 L. Ed. 296.

¹²⁷24 Stat. at L. 380, sec. 3.

¹²⁸*Pennsylvania Co. v. United States*, (1915) 236 U. S. 351, 35 Sup. Ct. 370, 59 L. Ed. 616; *United States v. Louisville & N. R. Co.*, (1914) 235 U. S. 314, 35 Sup. Ct. 113, 59 L. Ed. 245; *Manufacturers R. Co. v. United States*, (1918) 246 U. S. 457, 38 Sup. Ct. 383, 62 L. Ed. 831.

¹²⁹*United States v. Louisville & N. R. Co.*, (1914) 235 U. S. 314, 35 Sup. Ct. 113, 59 L. Ed. 245.

As previously stated in this article, findings of fact of the commission in connection with unlawful discrimination are conclusive, and can be reviewed only where its action is arbitrary or transcends the legitimate bounds of its authority.¹³⁰ Such findings of the commission are not conclusive, however, if they are founded on a mistaken basis and the error of the commission in choosing a wrong basis is material.¹³¹

Furthermore, the question whether the discrimination by a carrier, found to exist, can be held in law to be attributable to the parties to the order, can be reviewed.¹³² On this point the Supreme Court said:

“As to administrative orders operating in future, the commission’s findings of fact are conclusive, subject to qualifications here not pertinent; and a finding that the discrimination is unjust is ordinarily a finding of fact. . . .¹³³ But the question presented here is whether the discrimination found can be held in law to be attributable to the appellants, and whether they can be required to cancel existing joint rates, unless it is removed. No finding by the commission can prevent the review of such questions.”¹³⁴

IX. LIMITATIONS AND PREREQUISITES TO THE FINALITY OF THE DECISIONS OF THE INTERSTATE COMMERCE COMMISSION

(a) *In General.*—As we have already seen there are certain marked limitations to the conclusiveness of the findings made by the interstate commerce commission. These limitations have been summed up by the courts substantially as follows: First, the statute or acts conferring power upon the commission must be valid. Second, the commission must act within its statutory and constitutional authority. As such, it must keep within the powers conferred upon it by the interstate commerce act. Third, whether as a part of this or not, there must be due process of law. A rate order, for instance, is not final if the rate is so low as to be

¹³⁰Seaboard Air Line R. Co. v. United States, (1920) 254 U. S. 57, 41 Sup. Ct. 24, 65 L. Ed. 129; I. C. C. v. Delaware, L. & W. R. Co., (1911) 220 U. S. 235, 31 S. C. R. 392, 55 L. Ed. 448; Manufacturers R. Co. v. United States, (1918) 246 U. S. 456, 38 Sup. Ct. 383, 62 L. Ed. 831; Nashville, C. & St. L. R. v. Tennessee, (1923) 262 U. S. 318, 43 Sup. Ct. 583, 67 L. Ed. 999.

¹³¹Pennsylvania R. Co. v. Jacoby & Co., (1916) 242 U. S. 89, 37 Sup. Ct. 49, 61 L. Ed. 165. See text and footnote 97, *supra*.

¹³²Central R. Co. of N. J. v. United States, (1921) 257 U. S. 247, 42 Sup. Ct. 66 L. Ed. 217.

¹³³Manufacturers R. Co. v. United States, (1918) 246 U. S. 457, 38 Sup. Ct. 383, 62 L. Ed. 831.

¹³⁴Central R. Co. of N. J. v. United States, (1921) 257 U. S. 247, 42 Sup. Ct. 80, 66 L. Ed. 217.

confiscatory, or if it amounts to a taking of property without due process of law. Fourth, findings and orders of the commission are reviewable if the commission exercised its powers in an arbitrary, unjust, or unreasonable manner. Fifth, whether as a part of the limitations mentioned or not, we note that an order is not conclusive if there was no hearing in cases where a hearing is required. Sixth, findings and orders are not final if contrary to evidence or if not based on evidence. Seventh, the decisions of the commission are generally reviewable on questions of law.¹³⁵

The seven limitations just mentioned, however, can be included in the following four: First, the acts conferring power upon the commission must be valid. Second, the commission must act within the authority of the statutes. If the act is valid and the commission confines itself to the limitations of the act, it is to be expected that the action of the commission is neither arbitrary, unjust, nor unreasonable, nor should such an act transgress the provisions of the constitution. However, if there is any further limitation necessary along this line, it will be included in the following; namely, a third limitation that there must be due process of law, including an opportunity for hearing wherever required by law, and a decision based upon evidence. Fourth, questions of law as a rule are reviewable.

(b). *Constitutional Validity of the Interstate Commerce Act.*—When points have been raised regarding the constitutional validity of the interstate commerce act, such questions have almost invariably been decided in favor of the validity of the provisions of the statute.¹³⁶ In a number of cases, however, the Supreme Court has rendered decisions which have seriously curbed the powers of the commission,¹³⁷ and in *Counselman v. Hitchcock*,¹³⁸ the

¹³⁵*Manufacturers R. Co. v. United States*, (1918) 246 U. S. 457, 38 Sup. Ct. 383, 62 L. Ed. 831; *I. C. C. v. Union P. R. Co.*, (1912) 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308.

¹³⁶*I. C. C. v. Illinois*, (1910) 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280; *Intermountain Rate Cases (United States v. Atchison, T. & S. F. R. Co.)*, (1914) 234 U. S. 476, 34 Sup. Ct. 986, 58 L. Ed. 1408; *Baltimore & O. R. v. I. C. C.*, (1911) 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878; *Atchison, T. & S. F. R. v. United States*, (1917) 244 U. S. 336, 37 Sup. Ct. 635, 61 L. Ed. 1175; *I. C. C. v. Goodrich Transit Co.*, (1912) 224 U. S. 194, 32 Sup. Ct. 436, 56 L. Ed. 729; *Pipe Line Cases (United States v. Ohio Oil Co.)*, (1914) 234 U. S. 548, 34 Sup. Ct. 956, 58 L. Ed. 1459; *O'Keefe v. United States*, (1916) 240 U. S. 294, 36 Sup. Ct. 313, 60 L. Ed. 651.

¹³⁷*Cincinnati, N. O. & T. P. R. v. I. C. C.*, (1896) 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935; *I. C. C. v. Cincinnati, N. O. & T. P. R.*, (1897) 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243; *Kentucky & Ind.*

Supreme Court held invalid a part of the interstate commerce act pertaining to compulsory testimony. The amendment of 1889 made it a penal or criminal offense for carriers, shippers, or other agents to participate in personal discriminations, payment of rebates, etc. In 1890 a shipper declined to answer to a question relating to his enjoyment of a preferential rate on the ground that the fifth amendment to the constitution provided that no person should be compelled in any criminal case to be a witness against himself. The Supreme Court held that the revised statutes of the United States¹³⁹ did not give adequate protection to witnesses.

Following this decision, Congress passed a law¹⁴⁰ providing "that no person shall be excused from attending and testifying . . . before the interstate commerce commission or in obedience to the subpoena of the commission." But, according to the act, no person should be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he might testify, or produce evidence before the commission. The validity of this provision was upheld in 1896 in the case of *Brown v. Walker*.¹⁴¹

(c) *Commission must act within the Limits of the Authority Conferred upon it.*—It is an elementary principle of law that the interstate commerce commission, in order that its action shall be valid, must act within the statutory authority conferred upon it. Also in order that an order of the commission shall be conclusive it is necessary that the commission shall not have acted in such an arbitrary way as to deprive a party of his legal or constitutional rights,¹⁴² or in such a way as to amount to an

Bridge Co., v. Louisville & N. R. Co., (C.C. Ky. 1889) 37 Fed. 567; I. C. C. v. Northern P. R. Co., (1910) 216 U. S. 538, 30 Sup. Ct. 417, 54 L. Ed. 608 and cases there cited.

¹³⁸(1892) 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110.

¹³⁹Section 860 of the revised statutes provided that witnesses should not be excused from testifying because their testimony might tend to incriminate them, but it provided that such testimony should not be used against them in any criminal proceedings. The Supreme Court held that this was not sufficient protection to the witness.

¹⁴⁰Act of February 11, 1893, 27 Stat. at L. 443.

¹⁴¹(1896) 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819.

¹⁴²*Manufacturers R. Co. v. United States, (1918) 246 U. S. 457, 38 Sup. Ct. 383, 62 L. Ed. 831; Seaboard Air Line R. Co. v. United States, (1920) 254 U. S. 57, 41 Sup. Ct. 24, 65 L. Ed. 129; Lehigh Valley R. Co. v. United States, (1917) 243 U. S. 412, 37 Sup. Ct. 397, 61 L. Ed. 819; United States v. Atchison, T. & S. F. R. Co., (1914) 234 U. S. 476, 34 Sup. Ct. 986, 58 L. Ed. 1408; United States v. Union P. R. Co., (1914) 234 U. S. 495, 34 Sup. Ct. 995, 58 L. Ed. 1426; United States v. Louisiana & P. R. Co., (1914) 234 U. S. 1, 34 Sup. Ct. 741, 58 L. Ed. 1185; Florida E. C. R. Co. v. United States, (1914) 234 U. S. 167, 34 Sup. Ct. 867, 58 L. Ed. 1267; Proctor & Gamble Co. v. United States, (1912) 225 U. S.*

abuse of discretion.¹⁴³ This is referred to by the Supreme Court in several cases, either as dicta or as a part of the decision in the case.¹⁴⁴ Where the commission has exceeded its statutory authority and as a result its actions are void, the order of the commission is not only inconclusive but in such a case the courts have jurisdiction to enjoin the enforcement of an order even if the plaintiff has not attempted to secure redress in a proceeding before the commission.¹⁴⁵ But an appeal will not lie to the courts to review an act of the commission in refusing to entertain a petition upon the ground that the subject matter was not within the scope of its powers.¹⁴⁶

Closely connected with the matter of arbitrary action is the fact that matters of constitutional rights are frequently not to be conclusively determined by the commission, and a party is apparently not debarred from attacking an order of the commission upon constitutional grounds even though they were not taken in the hearing before that body.¹⁴⁷ The courts do not attempt to

282, 32 Sup. Ct. 761, 56 L. Ed. 1091; *United States v. New River Co.*, (1924) 265 U. S. 533, 44 Sup. Ct. 610, 68 L. Ed. 1165; *Kansas City So. R. Co. v. United States*, (1913) 231 U. S. 423, 34 Sup. Ct. 125, 58 L. Ed. 296.

¹⁴³*United States v. Baltimore & O. R. Co.*, (1912) 225 U. S. 306, 32 Sup. Ct. 817, 56 L. Ed. 1101; *I. C. C. v. Diffenbaugh*, (1911) 222 U. S. 42, 32 Sup. Ct. 22, 56 L. Ed. 83.

¹⁴⁴*Pennsylvania Co. v. United States*, (1915) 236 U. S. 351, 35 Sup. Ct. 370, 59 L. Ed. 616; *Hooker v. Knapp*, (1912) 225 U. S. 302, 32 Sup. Ct. 769, 56 L. Ed. 1099; *Proctor & Gamble Co. v. United States*, (1912) 225 U. S. 282, 32 Sup. Ct. 761, 56 L. Ed. 1091; *United States v. Atchison, T. & S. F. R. Co.*, (1914) 234 U. S. 476, 34 Sup. Ct. 986, 58 L. Ed. 1408; *United States v. Union P. R. Co.*, (1914) 234 U. S. 495, 34 Sup. Ct. 995, 58 L. Ed. 1426; *Skinner, Eddy Corporation v. United States*, (1919) 249 U. S. 557, 39 Sup. Ct. 375, 63 L. Ed. 772; *I. C. C. v. Diffenbaugh*, (1911) 22 U. S. 42, 32 Sup. Ct. 22, 56 L. Ed. 83; *United States v. New River Co.*, (1924) 265 U. S. 533, 44 Sup. Ct. 610, 68 L. Ed. 1165; *Kansas City So. R. Co. v. United States*, (1913) 231 U. S. 423, 34 Sup. Ct. 125, 58 L. Ed. 296; *Manufacturers R. Co. v. United States*, (1918) 246 U. S. 457, 38 Sup. Ct. 383, 62 L. Ed. 831; *I. C. C. v. Illinois C. R. Co.*, (1910) 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280.

¹⁴⁵*Skinner, Eddy Corporation v. United States*, (1919) 249 U. S. 557, 39 Sup. Ct. 375, 63 L. Ed. 772; *I. C. C. v. Diffenbaugh*, (1911) 222 U. S. 42, 32 Sup. Ct. 22, 56 L. Ed. 83; *Louisiana & P. R. Co. v. United States*, (Com. Court 1913) 209 Fed. 244; *Atlantic Coast L. R. Co. v. I. C. C.*, (Com. Court 1911) 194 Fed. 449. Compare these cases with the following: *I. C. C. v. Louisville & N. R. Co.*, (1913) 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431; *Southern Pacific Co. v. I. C. C.*, (1911) 219 U. S. 433, 31 Sup. Ct. 288, 55 L. Ed. 283.

¹⁴⁶*I. C. C. v. United States*, (1912) 234 U. S. 474, 32 Sup. Ct. 556, 56 L. Ed. 849.

¹⁴⁷*Manufacturers R. Co. v. United States*, (1918) 246 U. S. 457, 38 Sup. Ct. 383, 62 L. Ed. 831; *Proctor & Gamble Co. v. United States*, (1912) 225 U. S. 282, 32 Sup. Ct. 761, 56 L. Ed. 1091; *Hooker v. Knapp*, (1912) 225 U. S. 302, 32 Sup. Ct. 769, 56 L. Ed. 1099.

define arbitrary action by the commission or just what they include by the term constitutional right, but the former is generally connected with cases where the action was beyond the authority of the commission, or was unsupported by evidence, or in some way amounted to an abuse of discretion. The latter term, namely, that of constitutional right, has to do especially with the fifth amendment to the constitution pertaining to the taking of property without due process or without compensation.¹⁴⁸

(d) *Due Process of Law Requires a Hearing and a Decision Based on Evidence.*

(1) Hearing, and the Consideration of Evidence.

In the next place we note that with a few exceptions,¹⁴⁹ the findings and orders of the commission must be the result of a hearing.¹⁵⁰ The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance therewith. It is well established that an order of the commission must be supported by evidence.¹⁵¹ To refuse to consider evi-

¹⁴⁸Ibid.

¹⁴⁹The transportation act of 1920, like the original act to regulate commerce, and earlier amendments, distinguished, by the language used and also in other respects, between those orders which can be made only after hearing and those in which no hearing is required. Thus, orders on applications for extension of line, for new construction, or for abandonment under section 1, pars. 18-20, can be made only after hearing. But in the case of applications concerning the issue of securities under section 20a par. 6, the commission may hold hearings "if it sees fit." See *Miller v. United States*, (D.C. S.D. 1921) 277 Fed. 95; and under the emergency provisions, section 1, pars. 15 and 16, and section 15, par. 4 an order may be issued without a hearing, but "terms" are fixed after "subsequent hearings." *Peoria & P. Union R. Co. v. United States*, (1924) 263 U. S. 528, 44 Sup. Ct. 194, 68 L. Ed. 427.

¹⁵⁰The *Chicago Junction Case* (*Baltimore & O. R. Co.*), (1924) 264 U. S. 258, 44 Sup. Ct. 317, 68 L. Ed. 667; *Manufacturers R. Co. v. United States*, (1918) 246 U. S. 457, 38 Sup. Ct. 383, 62 L. Ed. 831; *Peoria & P. U. R. Co. v. United States*, (1924) 263 U. S. 528, 44 Sup. Ct. 194, 68 L. Ed. 427; *I. C. C. v. Louisville & N. R. Co.*, (1913) 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431; *Lehigh Valley R. Co. v. United States*, (1917) 243 U. S. 412, 37 Sup. Ct. 397, 61 L. Ed. 819.

¹⁵¹*I. C. C. v. Chicago B. & Q. R. Co.*, (1902) 186 U. S. 320, 22 Sup. Ct. 824, 46 L. Ed. 1182; *The Chicago Junction Case* (*Baltimore & O. R. Co.*), (1924) 264 U. S. 258, 44 Sup. Ct. 317, 68 L. Ed. 667; *Manufacturers R. Co. v. United States*, (1918) 246 U. S. 457, 38 Sup. Ct. 383, 62 L. Ed. 831; *Lehigh Valley R. Co. v. United States*, (1917) 243 U. S. 412, 37 Sup. Ct. 397, 61 L. Ed. 819; *Louisville & N. R. Co. v. United States*, (1916) 242 U. S. 60, 37 Sup. Ct. 61, 61 L. Ed. 152; *Pennsylvania R. Co. v. United States*, (1915) 236 U. S. 351, 35 Sup. Ct. 370, 59 L. Ed. 616; *I. C. C. v. Atchison, T. & S. F. R. Co.*, (1914) 234 U. S. 294, 34 Sup. Ct. 814, 58 L. Ed. 1319; *I. C. C. v. Southern P. Co.*, (1914) 234 U. S. 315, 34 Sup. Ct. 820, 58 L. Ed. 1329; *United States v. Louisiana & P. R. Co.*, (1914) 234 U. S. 1, 34 Sup. Ct. 741, 58 L. Ed. 1185; *Florida E. C. R. Co. v. United States* (1914) 234 U. S. 167, 34 Sup. Ct. 867, 58 L. Ed. 1267; *I. C. C. v. Louisville & N. R. Co.*, (1913) 227 U. S. 88, 33 Sup.

dence introduced or properly offered for introduction, or to make an essential finding without supporting evidence is arbitrary action. If an order is not based on evidence it can be reviewed by the courts and the enforcement of the order can be enjoined.¹⁵² Where it is contended that an order whose enforcement is resisted was rendered without evidence to support it, and there is basis or apparent basis for such contention, the consideration of such a question involves not an issue of fact, but one of law, which is for the courts to examine and decide.¹⁵³

On the subject of hearing and evidence, the Supreme Court, in reference to the interstate commerce act, has said:

"But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. . . ." As to the contention that the order of the commission was conclusive even if the findings were not supported by evidence, the court said: "If the government's contention is correct, it would mean that the commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the constitution's condemnation of all arbitrary exercise of power."¹⁵⁴

Furthermore, lack of formal proof at the hearing essential to sustain an order of the commission cannot be supplied by indulging a presumption that its findings were supported by the information which the commission is required by the act to obtain in order to enable it to perform the duties and carry out the objects for which it was created.¹⁵⁵ But an order based on con-

Ct. 185, 57 L. Ed. 431; *I. C. C. v. Union P. R. Co.*, (1912) 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308; *M'Lean Lumber Co. v. United States*, (D.C. Tenn. 1917) 237 Fed. 460; *Michigan Cent. R. Co. v. Elliott*, (C.C.A. 2nd Cir. 1919) 256 Fed. 18; *Chestnut Ridge R. Co. v. United States*, (D.C. N.J. 1917) 248 Fed. 791; *Village of Hubbard, Ohio v. United States*, (D.C. Ohio 1922) 278 Fed. 754.

¹⁵²*Florida E. C. R. Co. v. United States*, (1914) 234 U. S. 167, 34 Sup. Ct. 867, 58 L. Ed. 1267; 154 *I. C. C. v. Louisville & N. R. Co.*, (1913) 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431.

¹⁵³*Florida E. C. R. Co. v. United States*, (1914) 234 U. S. 167, 34 Sup. Ct. 867, 58 L. Ed. 1267.

¹⁵⁴*I. C. C. v. Louisville & N. R. Co.*, (1913) 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431.

¹⁵⁵*Ibid.*

flicting evidence cannot be said to have been made without any evidence to support it;¹⁵⁶ and in determining whether or not there was sufficient evidence to sustain an order of the commission, the courts will not use that as an excuse to examine the facts. That is, they will not examine the facts further than to determine whether there was substantial evidence to support the order.¹⁵⁷ As such, an order of the commission reducing rates cannot be said to have been without substantial evidence to support it, where, although there was no direct testimony that the old rate was unreasonably high, there were facts in evidence from which experts could have named a rate.¹⁵⁸ Also, the courts will not support the claim by one of the parties that an order of the commission was not based on evidence where only a part of the evidence taken before the commission is available for the consideration of the court.¹⁵⁹

(2) Weight of Evidence.

The weight to be given to the evidence before the commission is a question of fact for the commission to pass upon, and as such is beyond the province of the courts to consider.¹⁶⁰ The same thing is true regarding the wisdom of the order made by the commission.¹⁶¹ Thus even though the evidence in a case would have warranted different findings by the commission and its first order was contrary to its later order, this does not warrant a disturbance of the findings by the courts.¹⁶² If the courts were to consider the record to decide whether too much weight had been given by the commission to some parts of the evidence and too little weight to other parts, it would assume to settle

¹⁵⁶Ibid.

¹⁵⁷*I. C. C. v. Union P. R. Co.*, (1912) 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308.

¹⁵⁸Ibid.

¹⁵⁹*Louisiana & P. B. R. Co. v. United States*, (1921) 257 U. S. 114, 42 Sup. Ct. 25, 66 L. Ed. 156; *Spiller v. Atchison, T. & S. F. R. Co.*, (1920) 253 U. S. 117, 40 Sup. Ct. 466, 64 L. Ed. 810.

¹⁶⁰*Akron, C. & Y. R. Co. v. United States*, (1923) 261 U. S. 184, 43 Sup. Ct. 270, 67 L. Ed. 605; *Manufacturers R. Co. v. United States*, (1918) 246 U. S. 457, 38 Sup. Ct. 383, 62 L. Ed. 831; *Louisville & N. R. Co. v. United States*, (1915) 238 U. S. 1, 35 Sup. Ct. 696, 59 L. Ed. 1177; *I. C. C. v. Diffenbaugh*, (1911) 222 U. S. 42, 42 Sup. Ct. 50, 56 L. Ed. 83; *Illinois C. R. Co. v. I. C. C.*, (1907) 206 U. S. 441, 27 Sup. Ct. 700, 51 L. Ed. 1128; *East Tenn., V. & G. R. Co. v. I. C. C.*, (1901) 181 U. S. 1, 21 Sup. Ct. 516, 45 L. Ed. 719.

¹⁶¹*I. C. C. v. Illinois C. R. Co.*, (1910) 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280; *Skinner, Eddy Corporation v. United States*, (1919) 249 U. S. 557, 39 Sup. Ct. 375, 63 L. Ed. 772; *Seaboard Air Line R. Co. v. United States*, (1920) 254 U. S. 57, 41 Sup. Ct. 24, 65 L. Ed. 129.

¹⁶²*Manufacturers R. Co. v. United States*, (1918) 246 U. S. 457, 38 Sup. Ct. 383, 62 L. Ed. 831.

questions that are, according to the cases, clearly questions of fact and not of law, and the courts would be called upon as a matter of original action to investigate numerous questions of fact which the commission is best qualified to decide.¹⁶³ Furthermore, the value of the evidence before the commission necessarily varies according to circumstances and hence it is necessary that the value and weight of the evidence should be left with a body that is experienced in the matters pertaining to the enforcement of the interstate commerce act, and familiar with the complexities, intricacies, and history of the problems in each section of the country.¹⁶⁴

(3) Additional Evidence

Prior to the amendment of the interstate commerce act of June, 1906, the courts held themselves open to the admission of new and additional evidence when the case came before them, to determine whether the commission's decision was correct.¹⁶⁵ But since that date additional evidence cannot be admitted to determine whether the commission reached the proper conclusions as to questions of fact.¹⁶⁶ However, where a judgment against a carrier, in a suit to enforce an award of damages by the commission for discrimination, was reversed by the Supreme Court on the ground of the insufficiency of the evidence to sustain the award, and the case has been remanded for a new trial, the court on the second trial may properly admit additional evidence, including the testimony of new witnesses.¹⁶⁷ This is partly, at least, on the ground that the findings and order of the commission in reparation cases constitute only prima facie evidence.

In a case where reparation is involved or where a party seeks to enjoin the enforcement of an order of the commission and it is contended that the commission based its order upon erroneous percentages, figures, or mistaken theories, the courts will review the findings of the commission to determine whether as a matter of law the commission's findings of fact sustain the order.¹⁶⁸ But

¹⁶³*East Tenn., V. & G. R. Co. v. I. C. C.*, (1901) 181 U. S. 1, 21 Sup. Ct. 516, 45 L. Ed. 719; *Illinois C. R. Co. v. I. C. C.*, (1907) 206 U. S. 441, 27 Sup. Ct. 700, 51 L. Ed. 1128.

¹⁶⁴*Louisville & N. R. Co. v. United States*, (1915) 238 U. S. 1, 35 Sup. Ct. 696, 59 L. Ed. 1177; *I. C. C. v. Louisville & N. R. Co.*, (1913) 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431.

¹⁶⁵*I. C. C. v. Alabama Midland R. Co.*, (1897) 164 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414.

¹⁶⁶*Manufacturers R. Co. v. United States*, (1918) 246 U. S. 457, 38 Sup. Ct. 383, 62 L. Ed. 831.

¹⁶⁷*Pennsylvania R. Co. v. Weber*, (C.C.A. 3rd Cir. 1920) 269 Fed. 111.

an order of the commission will not be set aside or enjoined even if based on improper percentages where there was no prejudicial error because of the erroneous calculation by the commission.¹⁶⁹

(e) *Questions of Law*.—Another limitation upon the finality of the findings and orders of the commission is where questions of law are involved. In such cases, the courts have a right to enter. Although this limitation is frequently stated as a separate one, it is generally tied up with the other limitations already referred to or is the result of one or more of them. Thus with respect to a finding of unreasonableness there is an error of law, for instance, when there is no evidence to support the findings; and in case of discrimination there is error of law, for example, when the act complained of is not attributable to the carrier against which the order lies.¹⁷⁰ Also the questions of jurisdiction and the authority of the commission are questions of law for the courts.¹⁷¹ Likewise, a question whether the facts found by the commission present a case of real or possible competition within the meaning of the statute is a question of law that could not be conclusively answered by the commission.¹⁷²

X. ORDERS NEGATIVE, LEGISLATIVE AND PERMISSIVE

Negative Orders.—Generally speaking the courts have no jurisdiction over negative orders of the commission. That is such orders where the commission dismisses the complaint and refuses to act further. As such, a shipper has no right to appeal to the courts from the commission's ruling that a rate is reasonable

¹⁶⁸*Louisville & N. R. Co. v. United States*, (1915) 238 U. S. 1, 35 Sup. Ct. 696, 59 L. Ed. 1177; *Pennsylvania R. Co. v. Jacoby & Co.*, (1916) 242 U. S. 89, 37 Sup. Ct. 49, 61 L. Ed. 165.

¹⁶⁹*Pennsylvania R. Co. v. Weber*, (1921) 257 U. S. 85, 42 Sup. Ct. 18, 66 L. Ed. 141; *Kansas City S. R. Co. v. United States*, (1913) 231 U. S. 423, 34 Sup. Ct. 125, 58 L. Ed. 296.

¹⁷⁰*Lehigh Valley R. Co. v. United States*, (1917) 243 U. S. 412, 37 Sup. Ct. 397, 61 L. Ed. 819; *United States v. Pennsylvania R. Co.*, (1916) 242 U. S. 208, 37 Sup. Ct. 95, 61 L. Ed. 251; *Louisville & N. R. Co. v. United States*, (1916) 242 U. S. 60, 37 Sup. Ct. 61, 61 L. Ed. 152; *Louisville & N. R. Co. v. United States*, (1915) 238 U. S. 1, 35 Sup. Ct. 696, 59 L. Ed. 1177; *United States v. Atchison T. & S. F. R. Co.*, (1914) 234 U. S. 476, 34 Sup. Ct. 986, 58 L. Ed. 1408; *Florida E. C. R. Co. v. United States*, (1914) 234 U. S. 167, 34 Sup. Ct. 867, 58 L. Ed. 1267; *East Tenn., V. & G. R. Co. v. I. C. C.*, (1901) 181 U. S. 1, 21 Sup. Ct. 516, 45 L. Ed. 719; *M'Lean Lumber Co. v. United States*, (D.C. Tenn. 1916) 237 Fed. 460.

¹⁷¹*United States v. Pennsylvania R. Co.*, (1916) 242 U. S. 208, 37 Sup. Ct. 95, 61 L. Ed. 251; *Louisville & N. R. Co. v. United States*, (1916) 242 U. S. 60, 37 Sup. Ct. 61, 61 L. Ed. 152.

¹⁷²*Lehigh Valley R. Co. v. United States*, (1917) 243 U. S. 412, 37 Sup. Ct. 397, 61 L. Ed. 819.

and from its dismissal of a complaint after due hearing. The reason is that there is no authority in the courts as an original question, without affirmative action by the commission, to deal with what is termed in a broad sense the administrative features of the act by determining as an original question whether there has been compliance or noncompliance with the provisions of the act.¹⁷³ Taking jurisdiction in such cases would involve determination by the courts whether relief denied by the commission, in the exercise of powers conferred upon it by statutes, should be granted.

The mere fact, however, that the order of the commission dismisses a complaint does not necessarily prevent judicial review. The case of the *United States v. New River Co.*¹⁷⁴ illustrates this. Here suit was brought to enjoin the carriers from applying rule four of the commission,¹⁷⁵ pertaining to the distribution of coal cars and to setting aside the decision and order of the commission, dismissing the complaint of a shipper against the rule. Rule four, promulgated during federal control of the railways, was continued in effect upon the recommendation of the commission until it decided in 1921 that the rule was unduly prejudicial of local mines and that the carriers should distribute cars to joint mines on the basis of a 150 per cent rule. The commission refrained from making an order that the 150 per cent rule should be filed as tariff schedule, but announced that it expected the carriers promptly to amend their car service rules to conform with its findings. Accordingly, the carrier ceased to apply rule four and applied the 150 per cent rule in its place.

When the case was reopened before the commission, the contest was between the operators of local mines attacking the 150 per cent rule and the operators of joint mines supporting that rule and objecting to rule four. The commission reversed its former findings and decided in favor of rule four and dismissed the complaints assailing that rule. The order expressly includes the findings and conclusions stated in the report. When the case

¹⁷³*Proctor & Gamble Co. v. United States*, (1912) 225 U. S. 282, 32 Sup. Ct. 761, 56 L. Ed. 1091; *United States v. New River Co.*, (1924) 265 U. S. 533, 44 Sup. Ct. 610, 68 L. Ed. 1165; *Hooker v. Knapp*, (1912) 225 U. S. 302, 32 Sup. Ct. 769, 56 L. Ed. 1099; *Lehigh Valley R. Co. v. United States*, (1917) 243 U. S. 412, 37 Sup. Ct. 397, 61 L. Ed. 819; *Louisville & N. R. Co. v. United States*, (1915) 238 U. S. 642, 35 Sup. Ct. 602, 59 L. Ed. 1502; *I. C. C. v. United States*, (1912) 234 U. S. 474, 32 Sup. Ct. 556, 56 L. Ed. 849.

¹⁷⁴(1924) 265 U. S. 533, 44 Sup. Ct. 610, 68 L. Ed. 1165.

¹⁷⁵Rule 4, Circular C s-31, revised.

came before the court, it was held that in this case the order of the commission was not merely negative, as the order authorized the carriers to apply rule four in preference to the 150 per cent rule; and if rule four was illegal, as alleged, there was nothing to sustain the order of the commission, and suit would lie to set it aside.¹⁷⁶

In some cases the courts refuse to review an order of the commission not because of the fact that the order may be negative in character, but because in place of having denied relief, the commission has merely refused to grant the particular relief applied for. Thus in the cases of *Proctor & Gamble v. United States*,¹⁷⁷ *Hooker v. Knapp*,¹⁷⁸ and *Lehigh Valley R. Co. v. United States*¹⁷⁹ judicial review was refused, not because the order was negative in character but because it was a denial of the affirmative relief sought.¹⁸⁰

(b) *Legislative and Permissive Orders*.—In some cases it has been contended that the judiciary has no power to review orders of the commission which are legislative in character, but it is clear that the legislative character alone does not preclude judicial review.¹⁸¹ Rate orders are legislative in character but such orders can be reviewed by the courts to determine whether they were unsupported by evidence, were made without hearing, exceeded constitutional or statutory limits, or for some other reason were the result of arbitrary or abusive action.

Nor does the fact that an order is permissive preclude review, when by that term is meant an order which, in contradistinction to one compelling performance, authorizes a carrier to do some act otherwise prohibited.¹⁸² Orders entered under the act of June 18, 1910,¹⁸³ amending section four of the interstate commerce act, are of this character. That section prohibits carriers from charging more for a short than for a long distance over the same line or route in the same direction without obtaining authority from the commission. A suit will lie to set aside an order granting such authority, and to enjoin action by the carrier thereunder.¹⁸⁴

¹⁷⁶See also *United States v. Atchison, T. & S. F. R. Co.*, (1914) 234 U. S. 476, 34 Sup. Ct. 986, 58 L. Ed. 1408.

¹⁷⁷(1912) 225 U. S. 282, 32 Sup. Ct. 761, 56 L. Ed. 1091.

¹⁷⁸(1912) 225 U. S. 302, 32 Sup. Ct. 769, 56 L. Ed. 1099.

¹⁷⁹(1917) 243 U. S. 412, 37 Sup. Ct. 397, 61 L. Ed. 819.

¹⁸⁰See also *The Chicago Junction Case* (*Baltimore & O. R. Co. v. United States*), (1924) 264 U. S. 258, 44 S. C. R. 317, 68 L. Ed. 667.

¹⁸¹*Ibid.*

¹⁸²*Ibid.*

¹⁸³36 Stat. at L. 539, 547.

XI. ORDERS DETERMINING "FINAL VALUE" OF RAILROAD
PROPERTY

By an act of March 1, 1913,¹⁸⁵ and as later amended,¹⁸⁶ the interstate commerce commission was directed to appraise the property of all common carriers subject to the Act to Regulate Commerce. The act, now section 19a of the Interstate Commerce Act, provides for both tentative and final reports on value by the commission, both of which are called orders. A remedy is provided in case a carrier should claim the existence of material errors in the commission's tentative report.¹⁸⁷

The act further provides that the final valuations shall be prima facie evidence of the value of the property in all proceedings under the act. When the final report is introduced in evidence, in a proceeding under the act, the opportunity to contest the correctness of the findings therein made is fully preserved to the carrier and errors may be corrected at the trial. Specific findings may also be excluded because of errors committed in making them. Furthermore, additional evidence may be introduced. Paragraph (j) of section 19a of the Interstate Commerce Act provides that, "if upon the trial of any action involving a final value fixed by the commission, evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto and substantially affecting said value," the proceedings shall be stayed so as to permit the commission to consider the same and fix a final value different from that fixed in the first instance, and to "alter, modify, amend or rescind any order which is made involving such final value . . ."

¹⁸⁵Skinner, Eddy Corporation v. United States, (1919) 249 U. S. 557, 39 Sup. Ct. 375, 63 L. Ed. 772; United States v. Merchants & M. T. Ass'n, (1916) 242 U. S. 178, 37 Sup. Ct. 24, 61 L. Ed. 233.

¹⁸⁶37 Stat. at L. 701.

¹⁸⁸By acts of Feb. 28, 1920, 41 Stat. at L. 456, 474, 493; and of June 7, 1922, 42 Stat. at L. 624. See section 19a of the Interstate Commerce Act.

¹⁸⁷Paragraphs (f), (h), and (i) of Section 19a of the act provide for and regulate the submission of tentative reports. When tentative reports are submitted, the carrier is authorized to file a protest and to be heard thereon. If such protest is filed, the commission is directed to make such changes in the report, if any, as it may deem proper. Even if no protest is filed, the commission may of its own motion upon due notice to parties in interest correct the tentative report. Compare *New York, Ontario & Western Ry. Co. v. United States*, (1927) 47 Sup. Ct. 334. See also *United States v. Los Angeles & S. L. R. Co.*, (1927) 47 Sup. Ct. 413.

Although these remedies are available to the carrier who is dissatisfied with a valuation order of the commission, the valuation orders themselves are not judicially reviewable; at any rate not to the extent that they will be annulled, enjoined, or declared invalid by the courts. There are several reasons why the courts will not or cannot sit in judgment upon valuation orders, but the outstanding reason seems to be that such orders are not determinations of rights, and that in place of being final orders they are estimates of value for use in subsequent proceedings. As such, the valuation orders are unlike the ones that are judicially reviewable.

In collecting its data and in making valuation orders, the commission did not act as a quasi judicial body determining controversies, or as a legislative agency fixing rates or laying down rules for the future. It simply acted as an administrative "tribunal appointed by law and informed by experience" in making preliminary investigations and reports; some of which might never have any material significance in any proceedings before the commission or a court. Furthermore, Congress has not even attempted to confer upon the courts power to supervise these administrative findings of the commission nor to substitute its judgment for that of the commission regarding the true value of railroad property.¹⁸⁸

In distinguishing such orders from those reviewable, the Supreme Court of the United States said:

"The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing anything which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the commission, through its employees. It is the exercise solely of the function of investigation."¹⁸⁹

XII. NECESSITY OF FINAL ACTION BY THE COMMISSION BEFORE THE COURTS CAN ACT

In order that a finding or decision by the commission can be reviewed, it is of course necessary that there has been final action

¹⁸⁸United States v. Los Angeles & S. L. R. Co., (1927) 47 Sup. Ct. 413.

¹⁸⁹Ibid.

in the proceedings by the administrative tribunal. As such the jurisdiction of the courts does not extend to a suit to set aside an order of the commission fixing a future day and place for a hearing.¹⁹⁰ Concerning such an order the Supreme Court said that it was nothing more than notice of a hearing and hence had no characteristic of an order as referred to in the interstate commerce act, either affirmative or negative.¹⁹¹

But this does not mean that all administrative remedies must be exhausted before judicial review can be invoked. In *United States v. Abilene & S. Ry. Co.*,¹⁹² an investigation and order relating to decisions of joint rates had been made, not by the whole commission but by one of its divisions. The statute provides¹⁹³ that the order of a division has the same force and effect as if made by the commission, subject to rehearing by the commission, and any party may apply for such rehearing of any order or matter so determined.¹⁹⁴ Meanwhile, the order may be suspended either by the division or by the commission. In the case in question the order, by its terms was not to become effective until thirty-seven days after its entry, so there was ample time within which to apply for a rehearing and a stay, before plaintiffs could have been injured by the order. The question before the Supreme Court was whether the district court had jurisdiction in a suit to enjoin enforcement of the order made by the division before there had been filed a petition for rehearing before the full commission.

The objections to the validity of the order urged were in part procedural. They included questions of joinder of parties, or the admissibility of evidence, and of failure to introduce formal evidence. In deciding the question of jurisdiction of the district court the Supreme Court noted that most of these objections did not appear to have been raised before the division and that if they had been alleged, errors might have been corrected by action of that body or by the full commission. The order also involved questions of administrative power and policy, which, apparently had never been passed upon by the full commission and were not discussed by the plaintiffs before the division. The Supreme

¹⁹⁰*United States v. Illinois Central R. Co.*, (1917) 244 U. S. 82, 37 Sup. Ct. 584, 61 L. Ed. 1007; see also *Detroit & T. S. L. R. Co. v. I. C. C.*, (D.C. App. 1921) 277 Fed. 535.

¹⁹¹*Ibid.*

¹⁹²(1924) 265 U. S. 274, 44 Sup. Ct. 565, 68 L. Ed. 1016.

¹⁹³Interstate commerce act as amended, sec. 17(4), being U. S. Comp. Stat. Ann. Supp., 1923, sec. 8586.

¹⁹⁴Section 16a (U. S. Comp. Stat. sec. 8585).

Court held that in view of these facts the trial court would have been justified in denying equitable relief until an application had been made to the full commission, and redress had been denied by it. But, since in the absence of a stay, the order of the division was operative, and the filing of an application for a rehearing would not have relieved the carrier from the duty of observing the order, the district court had jurisdiction to entertain the suit, despite the failure to apply for a rehearing. The court further stated that whether judicial relief should have been denied until all possible administrative remedies had been exhausted was a matter which called for the exercise of the judicial discretion of the district court and that the Supreme Court could not say that in denying the motion to dismiss, the discretion was abused.¹⁹⁵

It is also noteworthy that in proceedings before the courts under the act to enforce an order of the commission, the courts have no power to amend or modify such order, or to sever from the remainder a part which is illegal. On the other hand they must enforce the order if at all, in its entirety as made by the commission.¹⁹⁶

CONCLUSION

An outstanding test regarding the conclusiveness of administrative decisions is the adequacy of the process provided within the administrative tribunal. If there is adequate opportunity for notice and hearing, with an opportunity to summon witnesses, to present evidence, and to inspect or cross-examine the evidence of the opponent; if, in addition, there is a tribunal competent to pass upon the validity and weight of the evidence and to render a decision that comports with the rights and interests involved, a person will generally not be heard to complain on the ground that the process was administrative rather than judicial.

Where adequate administrative process exists, congestion in courts, because of judicial review of administrative decisions, is not only materially lessened but such review is also simplified where still preserved. Where such adequate process exists, judicial review is largely limited to a determination as to whether the advantages of the administrative process established by law have

¹⁹⁵See also *Prendergast v. New York T. Co.*, (1923) 262 U. S. 43, 43 Sup. Ct. 467, 67 L. Ed. 853. Compare with *Chicago R. Co. v. Illinois C. C.* (D.C. Ill. 1922) 277 Fed. 970.

¹⁹⁶*I. C. C. v. Lakeshore & M. C. R. Co.*, (C.C. Ohio 1905) 134 Fed. 942, affirmed without opinion by a divided court (1906) 202 U. S. 613, 26 Sup. Ct. 766, 50 L. Ed. 1171.

been allowed. If allowed, the duty of the court is ordinarily at an end. If not allowed, the case is generally remanded to the administrative tribunal for further proceedings. This relieves the courts from trying the case *de novo*.

Closely connected with adequacy of process is the need of a complete record of the proceedings so that the parties in interest, and others, may examine the evidence, the issues involved, the findings and conclusions, the decision and its supporting reasons, with some degree of facility. To accomplish this satisfactorily, it is generally necessary for the administrative tribunals to make memoranda or reports of their decisions that bear some resemblance, in form at least, to those of the federal or other superior courts.

In the federal government the interstate commerce commission is the outstanding administrative agency that deserves special credit regarding adequacy of process and adequate records and reports. The process before the commission and the competence of the tribunal is such that a party in interest generally has an opportunity there to defend, protect, or enforce his rights. As such, it is comparatively seldom that it is necessary for him to spend his time, money, and energy in procuring judicial review.

Regarding complete records and reports, the interstate commerce commission renders, records, and publishes its opinions in such a way that one, with reasonable ease, can ascertain the important facts, the issues involved, the decisions of the commission and the supporting reasons.

The interstate commerce commission has been in existence for forty years. During the latter half of this period, or since the passing of the act of 1906, which among other things gave the commission power to fix maximum rates, there has been a tendency on the part of the courts to consider this agency as a competent and to a large extent independent "tribunal appointed by law and informed by experience", and as such amply qualified to deal with intricate problems that require skill along specialized lines. As a partial result of this, the Supreme Court, in combining questions of fact with questions of discretion, has characterized a number of questions as administrative in nature, upon which it refuses to substitute its judgment for that of the commission, and into which it will not inquire until the commission has made its ruling.¹⁹⁷ This is apparent chiefly in non-reparation cases and regarding preliminary questions in reparation cases.

Because of the adequate process, the competence of the tribunal, and the complete records and reports, a uniform system of rules and decisions has been established by the commission, which rules and decisions stand as precedents, primarily for the commission, but also for the courts, particularly insofar as administrative questions are involved. The decisions or opinions of the interstate commerce commission are valuable both from the standpoint of substantive and procedural law, and a person or concern affected or about to be affected by its decisions has a fair chance to know his substantive rights and to what process he is entitled, as well as a reasonable basis upon which to predict the outcome of his case. It is submitted that several of the administrative agencies of our state and federal governments might improve by becoming familiar with the work of this administrative tribunal.

¹⁹⁷See footnote 100, *supra*.