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Direct Resort to the Courts to Recover Rate Overcharges for Utility Service

Charles H. Haden
West Virginia University College of Law

Wesley R. Tinker Jr.

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STUDENT NOTES

DIRECT RESORT TO THE COURTS TO RECOVER RATE OVERCHARGES FOR UTILITY SERVICE

The problem herein discussed may, for present purposes, be confined to the narrow question of whether, in a claim for overcharges, the effect of the Public Service Commission's order or orders presents a judicial or administrative question where the claim is based on a schedule of rates fixed by the Public Service Commission or where such claim is based on the determination of what duly enacted schedule of rates was in existence at a given time.

Any discussion of this nature necessitates determining the relative functions of administrative bodies and the courts. The jurisdiction of an administrative body depends entirely on the statutory grant. Such a body must act strictly within the limits of its jurisdiction and in the absence thereof its determinations

are void.¹ It may be said that not only legislative functions may be delegated to a commission, but executive and judicial functions may as well be so delegated.² One of the many reasons given for the creation of various commissions is said to be to relieve some of the congested traffic in the courts and it has been argued that if judicial power is so delegated to a commission, the determinations of that body should be made final.³ The Workman's Compensation Commission is cited as an example where judicial power has been granted to a commission, and an argument in favor of such delegation is that it has more time to deal rightly with the facts of each particular case and are not hampered by such iron clad rules as the "hearsay rule".⁴ In other words, a business man expects a body of business men who use common everyday methods to ascertain facts, to hear his cause, and give a decision based on the principle of friendly adjustment.⁵

The elementary formula that "questions of fact are for the commission and questions of law are for the court", has been the customary test of the functional division between commissions and courts. This dichotomy has at times been a convenient instrument in our judicial process, and yet in application the formula becomes somewhat nebulous when one remembers that there is fundamentally no inherent distinction between questions of fact and questions of law.⁶

In this general connection, Mr. Justice Holmes pointed out a practical distinction between legislative and judicial action when he said, "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end.

¹State Public Utilities Commission v. Illinois Cent. R. Co., 274 Ill. 36 113 N. E. 162 (1916); Cleveland C. C. & St. L. Ry. Co. v. Commerce Commission, 315 Ill. 461, 146 N. E. 606 (1925); People ex rel. New York Rys. Co. v. Public Service Commission of First Dist., 223 N. Y. 373, 119 N. E. 848 (1918); Cleveland Provision Co. v. Public Utilities Commission, 104 Ohio St. 253, 135 N. E. 612, 23 A. L. R. 404 (1922).

²Harriman, *The Development of Administrative Law in the United States* (1916) 25 YALE L. J. 658, 659.

³Hardman, *Judicial Review as a Requirement of Due Process in Rate Regulation* (1921) 30 YALE L. J. 681.

⁴Ross, *The Applicability of Common Law Rules of Evidence in Proceedings Before Workmen's Compensation Commissions* (1922) 36 HARV. L. REV. 263.

⁵Winslow, *Legislative Indictment of the Courts* (1916) 29 HARV. L. REV. 395.

⁶See Cook, *Statements of Fact in Code Pleading* (1921) 21 COL. L. REV. 416; Thayer, *Law and Fact in Jury Trials* (1890) 4 HARV. L. REV. 147; DICKINSON, *JUSTICE AND THE SUPREMACY OF THE LAW* (1927 50-55, 151-153, 167-170, 313-319; Cavers, "Questions of Law" in *Lake Cargo Rate Regulation* (1931) 37 W. VA. L. Q. 397 (1931).

Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some parts of those subject to the power."⁷

Rate-making is commonly said to be primarily a legislative function⁸ which has been delegated to commissions and is, of course, subject to review by the judiciary. Following out the idea of Mr. Justice Holmes, the commission may look only to the present or future, while the judiciary has jurisdiction to enforce liabilities as they stand on present or past facts.

Why has this function of rate-making been delegated to commissions? It appears to be the outcome of a political development, which, in the writers' minds has passed through four rather ill defined stages. The first, a pre-public service commission development, is expressed in the famous case of *Munn v. Illinois*,⁹ where it is said that regulation of utilities is a matter for final determination by the legislature. A few years later the Court said that regulatory power may be delegated by the Legislature to a commission, subject, however, to judicial review in case of any abuse of discretion.¹⁰ The next landmark is perhaps, *Chicago, M. & St. P. Ry. Co. v. Minnesota*,¹¹ where a question of confiscatory rates was held to be reviewable by the courts under the due process clause, but here the scope of review seems to be confined to a pure question of law. The last stage begins with, perhaps ends with, the much discussed case of *Ohio Valley Water Co. v. Ben Avon Borough*,¹² where the court enlarged the scope of review to include not only questions of law but an independent re-examination of the facts as well. Perhaps this final step may be justified by the consideration that the personnel of the various commissions changes frequently and sometimes is not composed of technically trained men, and by the fact that vast interests are very often at stake.

On the other hand, by the weight of authority, the legal construction of administrative orders, whether orders of the Public Service Commission,¹³ or orders of the Interstate Commerce Com-

⁷ *Prentis v. Atlantic Coast Line R. Co.*, 211 U. S. 210, 29 S. Ct. 67 (1908).

⁸ *Prentis v. Atlantic Coast Line R. Co.*, *supra* n. 7. *Contra*: *People v. Wilcox*, 194 N. Y. 383, 87 N. E. 517 (1909), discussed in Note (1909) 9 Col. L. Rev. 341.

⁹ 94 U. S. 113, 133, 24 L. ed. 597 (1876).

¹⁰ 116 U. S. 307, 331, 6 S. Ct. 334, 338, 1191 (1886).

¹¹ 134 U. S. 418, 10 S. Ct. 462 (1890).

¹² 253 U. S. 287, 40 S. Ct. 572 (1920).

¹³ *Alabama Power Co. v. Patterson*, 138 So. 417 (Ala. 1931). Here the plaintiff sought to recover overcharges for the use of electricity. Plaintiff

mission,¹⁴ have been held for the courts in the first instance. A conspicuous example is *Great Northern Ry. Co. v. Merchants' Elevator Co.*¹⁵ in which Mr. Justice Brandeis said, "It is true that uniformity is the paramount purpose of the Commerce Act. But it is not true that uniformity in construction of the tariff can be attained only through a preliminary resort to the Commission to settle the construction in dispute. Every question of construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of Federal law."

Between the two extremes of rate-making and construction of a tariff, lie cases calling for the exercise of the so-called "administrative discretion", where the court has refused to take jurisdiction because of no preliminary resort to the commission. Such in general, has been the holding in cases involving the reasonableness of a rule or practice of the public service corporation,¹⁶ or discrimination,¹⁷ or the classification of certain articles under different tariffs.¹⁸

The recent West Virginia case of *Natural Gas Co. of West*

resided in a city where current was furnished by company A, which used a steam plant. Company A merged with company B. Company B later merged with companies C and D to become a new company, E, which generated its current by means of water power. Company E charged a higher schedule of rates than the company originally serving the city. The question raised was: "What rate is the legal rate?" The court said, "The construction of rate schedules, and determination of which schedule is effective to a given state of facts, is purely a judicial function, one subject to exercise by the courts alone, and the Alabama Public Service Commission has no power nor authority to determine that issue. Its function is to fix rates for the future, to pass upon what is and what is not a reasonable rate, not to decide which of two tariffs is in effect at a given time and applicable to a given state of facts."

¹⁴ *Great Northern Ry. Co. v. Merchants' Elevator Co.*, 259 U. S. 285, 42 S. Ct. 477 (1922); *Louisville & Nashville R. R. Co. v. F. W. Cook Brewing Co.*, 223 U. S. 70, 32 S. Ct. 189 (1912); *Pa. R. R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 33 S. Ct. 893 (1912); *Pa. R. R. Co. v. Puritan Coal Co.*, 237 U. S. 121, 134, 35 S. Ct. 484 (1915); *Pa. R. R. Co. v. Sonman Coal Co.*, 242 U. S. 120, 37 S. Ct. 46 (1915); *Hite v. Central R. R. Co. of N. J.*, 171 Fed. 370 (C. C. A. 3rd, 1909); *Collins v. Davis*, 283 Fed. 837 (D. Conn., 1922); *Gimbel v. Barrett*, 215 Fed. 1904 (E. D. Pa., 1914); *Gustafson v. Michigan Central R. R. Co.*, 296 Ill. 41, 129 N. E. 516 (1921); *Wolverine Brass Works v. Southern R. R. Co.*, 187 Mich. 393, 153 N. W. 773 (1915); *Chesapeake & O. R. Co. v. Rogers*, 75 W. Va. 556, 84 S. E. 248, 249 (1915). *Contra*: *Cheney v. Boston & Maine R. R. Co.*, 227 Mass. 336, 116 N. E. 411 (1917).

¹⁵ *Great Northern Ry. Co. v. Merchants' Elevator Co.*, *supra* n. 14.

¹⁶ *State ex rel. Croy v. Bluefield Water Works Co.*, 86 W. Va. 260, 103 S. E. 340 (1920); *Northern Pacific Ry. Co. v. Solum*, 247 U. S. 477, 483, 38 S. Ct. 550 (1918).

¹⁷ *Morrisdale Coal Co. v. Pa. R. R. Co.*, 230 U. S. 304, 33 S. Ct. 938 (1910); *Robinson v. B. & O. R. Co.*, 222 U. S. 506, 32 S. Ct. 114 (1911).

¹⁸ *Director General v. Viscose Co.*, 254 U. S. 498, 41 S. Ct. 151 (1921).

Virginia v. Sommerville, Judge,¹⁹ presents an interesting angle of this problem. In that case the question was presented as to whether, in a consumers' action for overcharges, resort must first be had to the Commission, or whether the circuit court had jurisdiction in the first instance. An order had been entered effective April 15, 1920, fixing the rate at forty cents per thousand cubic feet of gas, subject to a discount of two cents per thousand cubic feet, if paid before the twelfth day of the month following. In 1922 the Gas Company petitioned for an increase in rates, and about the 15th day of June, 1924, an order was made fixing the rate at fifty-two cents per thousand cubic feet, with two cents discount. This latter order was to expire by its own terms about the 15th day of December, 1927, and was "granted for the extension of gas territory and for the production of additional gas". The Gas Company, after the expiration of this period, continued to charge the fifty-two cents less two cents discount for cash. A representative suit was commenced by the gas consumers against the Gas Company in the circuit court. The Gas Company then sought a Writ of Prohibition in the Supreme Court of Appeals, claiming, among other things, that the circuit court had no jurisdiction, but that resort must first be had to the Public Service Commission. The Supreme Court of Appeals, in denying the writ, said, "The question whether the charges made by the Gas Company were in excess of the legally prescribed rate in effect at the time the charges were made, presents a judicial problem of which the circuit court — has jurisdiction." The court further said, "The solution will depend not upon whether the charges were in excess of a reasonable rate, but whether they were in excess of the lawfully established rate."

Relative to this question of overcharges, there has always been a common law right to recover sums in excess of a reasonable rate or of a legally established rate.²⁰ Some states have by statute, however, made it necessary to apply to the commission in the first instance before resort may be had to the courts;²¹ others

¹⁹ 166 S. E. 852 (W. Va., 1932).

²⁰ *Southern Ry. Co. of Kansas v. Frankfort Distillery*, 233 Ky. 711, 26 S. W. (2d) 1025, certiorari denied 51 S. Ct. 75 (1930); *Centre County Lime Co. v. Public Service Comm'n. of Pa.*, 103 Pa. Super. Ct. 179, 157 Atl. 815 (1931).

²¹ *Centre County Lime Co. v. Public Service Comm'n. of Pa.*, *supra* n. 20: ". . . the right accruing to a shipper required to pay an excessive rate and to the procedure provided by our Public Service Company Law for its enforcement . . . payment, recognized and enforceable under the Common Law. Our Statute requires him to institute his claim for reparations before the commission in the first instance."

have permitted, or at least have purported to permit, relief to be sought either before the commission or before the courts.²³ If one looks solely to the language of the Interstate Commerce Act, it would appear that concurrent remedies exist, since it provides for going before either the Commission or the courts, although an election between the two must be made.²³ A study of a long line of cases interpreting this section discloses that they may be divided into two groups: namely, those involving an isolated question of overcharges, and those involving overcharges coupled with the construction of a tariff. Each in turn may be subdivided under two heads: (a) where a determination of the amount of overcharges involves also some phase of "administrative discretion", such as the case of *Texas, etc., R. Co. v. Abilene Oil Co.*,²⁴ where there was a pure question of overcharges, yet the court held that resort must first be had to the Commission, because there was present a question involving "administrative discretion", namely, unreasonableness of a rate, discrimination, and preference; (b) where a determination of the amount of overcharges involved no question of construction, or "administrative discretion", such as *Chesapeake & Ohio R. R. Co. v. Rogers*,²⁵ where the sole question was whether the complainant should be charged for nineteen or nine days demurrage, the tariff *per se* having nothing to do with the question as to how many days the cars were on the siding. There the court said that there was no question of "administrative discretion" and the trial court had jurisdiction in the first instance.

In the second group, namely, those involving questions of construction as well as overcharges, we have (a) the situation where the construction involves some phase of "administrative

²³ WIS. STAT. (1929) § 195.37 (3) "All claims provided for in subsection (1) *except* for straight overcharges, shall be filed with the Commission (4) For recovery of straight overcharges which mean charges in excess of those applicable under the lawful tariffs on file with the commission, neither this section or section 195.38 will be deemed *exclusive* remedies." (Italics ours.)

²⁴ 49 U. S. C. A. § 9 (1926): "Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

²⁵ 204 U. S. 426, 27 S. Ct. 350 (1907).

²⁶ 75 W. Va. 556, 84 S. E. 248, 249 (1915).

discretion". In *Texas & Pac. Ry. Co. v. The American Tie and Lumber Co.*,²³ a suit for overcharges involved the construction of the tariff which in turn depended on whether or not the word "lumber" as used in the published tariff included oak ties. The court held that this question was obviously not one solely of construction and it was, therefore, necessary that resort be had to the Commission for the determination of this fact. Then we have (b) the situation where the construction of a present or past tariff involves no question of "administrative discretion". It was decided in *Great Northern Ry. Co. v. Merchants' Elevator Co.*²⁴ that such determination is for the courts. From these cases it appears that under the Interstate Commerce Act, the remedy in all cases of reparation is not concurrent; and it is submitted that where a question of "administrative discretion" is involved, one must resort to the Commission in the first instance, while in all cases involving no such discretion resort may be had directly to the courts.

The section of the West Virginia Revised Code relative to the recovery of damages²⁵ corresponds, almost verbatim with the section of the Interstate Commerce Act set out in *footnote 23*, except that in the latter in dealing with jurisdiction, the disjunctive is used, while in the former the conjunctive appears. The West Virginia provision, however, standing alone, appears to the writers to be somewhat ambiguous in providing that (*italics ours*) ". . . . any person claiming to be damaged — *may* make complaint to the commission *and* bring suit for the recovery of the damages in any circuit court having jurisdiction."

The case of *Wheeling Steel Corporation v. Public Service Commission*,²⁶ throws considerable light on this section of the Code. In that case the Electric Company contracted with one S to furnish electricity for his building at a definite rate for a period of ten years. After nine years the Steel Company acquired the building together with the contract and was charged a greater newly established rate than that agreed to under the S contract. The Steel Company then sought an order of reparation before the Public Service Commission. The Commission refused to take jurisdiction and upon appeal to the court, it was held that a clear remedy at law existed, and, therefore, the Steel Company

²³ 234 U. S. 138, 34 S. Ct. 885 (1914).

²⁴ *Supra* n. 14.

²⁵ W. VA. REV. CODE (1931) c. 27, art. 4, § 7.

²⁶ 90 W. Va. 74, 110 S. E. 489 (1922).

must go to the court in the first instance. The case presented simply a question of overcharges depending on whether the rate prescribed by the S contract, or the rate prescribed by the Commission was the applicable one and was unassociated with any phase of "administrative discretion". Hence, it is submitted, that, on such a problem of overcharges, the jurisdiction of the commission and the courts is not concurrent, but that it is mandatory to go to the courts in the first instance,

In the *Gas* case³⁰ the court said that no problem of the reasonableness of rates was involved, and its final determination must therefore, at the most, involve no more than a question of overcharges depending upon the judicial determination of what rate was in existence after the expiration of the 1924 order, in other words, construction. The question of construction of a legally established tariff has been held clearly a matter for the courts in the *Merchants' Elevator*³¹ case, cited with approval by the West Virginia court in the *Gas* case. Construing the West Virginia statute in the light of the cases interpreting the Interstate Commerce Act³² and having regard to the *Wheeling Steel* case, and *Alabama Power Co. v. Patterson*,³³ there is no doubt that the holding on the application for a writ of prohibition in the *Gas* case was sound.

—CHARLES H. HADEN.

—WESLEY R. TINKER, JR.

³⁰ *Supra* n. 19.

³¹ *Supra* n. 14.

³² Due to the similarity between the provisions of the Interstate Commerce Act, *supra* n. 23, and of the Revised Code of West Virginia, and the fact that the West Virginia Supreme Court of Appeals has used the cases interpreting the Interstate Commerce Act, the writers feel justified in using those United States Supreme Court decisions in analyzing this problem.

³³ *Supra* n. 13.