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# Administrative Law-Primary Jurisdiction-Availability of Common-Law Reparations Remedy Following Commission Finding of Unreasonable Practice Under the Motor Carrier Act

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# RECENT DECISIONS

ADMINISTRATIVE LAW—PRIMARY JURISDICTION—AVAILABILITY OF COMMON-LAW REPARATIONS REMEDY FOLLOWING COMMISSION FINDING OF UNREASONABLE PRACTICE UNDER THE MOTOR CARRIER ACT—The petitioner delivered goods to respondent, a common carrier by motor vehicle, for shipment from Buffalo, New York, to New York City, with the route of shipment left unspecified. The goods were shipped over the carrier's interstate route at a higher tariff filed with the Interstate Commerce Commission rather than over its intrastate route at the lower tariff filed with the New York Public Service Commission. Alleging causes of action under the Motor Carrier Act[1] and at common law, the petitioner brought a postshipment action in a federal district court seeking reparation of the difference paid. The court, after a finding by the Interstate Commerce Commission that the carrier's routing practice was unreasonable,[2] dismissed the action on the ground that the act neither provided a reparations remedy nor preserved any cause of action existing at common law.[3] The court of appeals affirmed, on the same grounds, one judge dissenting.[4] On certiorari, *held*, reversed, three Justices dissenting. The complaint, coupled with the Commission's finding that the carrier's selection of the more costly route was an unreasonable practice, states a justiciable common-law claim preserved by the "savings clause"[5] of the act. *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962).

Congress has entrusted supervision of the nation's network of rail, marine, and motor vehicle transportation to the Interstate Commerce Commission. With respect to the relationship between carrier and shipper, the act simply provides that "unreasonable practices" are unlawful,[6] and leaves the formulation of standards of reasonableness to the Commission's discretion. A shipper or carrier can challenge the legality of a given practice along either of two avenues. He may bring a proceeding before the Commission alleging the perpetration of practices "unreasonable"

1 49 Stat. 543 (1935), as amended, 49 U.S.C. §§ 301-27 (1958). The complaint specifically alleged that the carrier's misrouting constituted a violation of 49 Stat. 558 (1935), as amended, 49 U.S.C. § 316 (1958), which imposes upon every common carrier by motor vehicle the duty to observe just and reasonable practices. A motor carrier, in the absence of routing instructions, is under a duty to select the least expensive route, unless it is an unreasonable one; this duty is not affected by the failure of the Motor Carrier Act to grant shippers the right to designate routes. See Murray Co. v. Morrow, Inc., 54 M.C.C. 442, 444 (1952). Such a right is given shippers by rail. See 36 Stat. 551 (1910), 49 U.S.C. § 15(8) (1958).

2 Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 302 I.C.C. 173 (1957).

3 187 F. Supp. 722 (S.D.N.Y. 1960).

4 293 F.2d 205 (2d Cir. 1961).

5 49 Stat. 560 (1935), 49 U.S.C. § 316(j) (1958), providing, "Nothing in this section shall be held to extinguish any remedy or right not inconsistent herewith."

6 24 Stat. 379 (1887), as amended, 49 U.S.C. § 1(5) (1958) (railroads); 49 Stat. 558 (1935), as amended, 49 U.S.C. § 316(d) (1958) (motor carriers); 54 Stat. 934 (1940), 49 U.S.C. § 905(a) (1958) (marine carriers).

within the contemplation of the act. If the Commission finds the practices unreasonable, typically it grants prospective relief by issuance of cease-and-desist orders enforceable, if necessary, by court injunction. Alternatively, as in the principal case, the injured party may bring an original judicial proceeding asserting a common-law or statutory cause of action. In this event the court, in applying the doctrine of primary jurisdiction, will refer the controlling determination as to whether a given practice is "unreasonable" to the Commission.[7] Once the Commission has decided that a particular practice is "unreasonable," the question of providing a remedy presents a further difficulty. As to rail and water transportation, the statute expressly provides that the Commission can award postshipment reparations.[8] But provision for such a remedy is conspicuously absent from the Motor Carrier Act.[9] In the principal case the Court tacitly conceded that the act did not create a statutory cause of action for reparations upon which relief might be granted.[10] The common-law claim, however, was viewed as providing a permissible alternative. The facts alleged—that the carrier had available two alternative routes, that the route taken was detrimental to the shipper and of advantage only to the carrier, and that the route selected demanded a higher tariff than the route avoided—appear to constitute a sufficient basis for recovery at common law.[11] The Court con-

7 See Federal Maritime Bd. v. Isbrantsen Co., 356 U.S. 481, 498 (1958); Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907). The practice of referring the resolution of issues within its special competence to an administrative agency is required by the doctrine of primary jurisdiction, first enunciated in the *Abilene* decision. The doctrine applies only to an original judicial action to enforce a common-law or statutory right, where an exercise of jurisdiction by the court, without reference to the agency, might produce non-uniformity of decision or possibly a less informed decision since the court lacks the agency's supposed qualifications. Primary jurisdiction is to be distinguished from the doctrine of exhaustion which requires a litigant to exhaust his administrative remedies before looking to the courts. There the claim is enforceable solely by administrative action, and the court is asked to give relief prior to the entry of a final order by the agency. See generally Jaffe, *Primary Jurisdiction Reconsidered*, 102 U. PA. L. REV. 577 (1954).

8 24 Stat. 382 (1887), as amended, 49 U.S.C. §§ 8, 9 (1958) (railroads); 54 Stat. 940 (1940), 49 U.S.C. §§ 908(b), (c) (1958) (marine carriers).

9 The Interstate Commerce Commission has indeed conceded its own inability to award reparations for past violations involving motor carriers. See *Hearings on S. 1194 Before the Senate Committee on Interstate and Foreign Commerce*, 80th Cong., 2d Sess. 11-12 (1948).

10 *Cf.* Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 251 (1951).

11 Relief appears to be available on several theories. At common law a carrier was under a duty not to charge an excessive sum, and the excess paid could be recovered in an action for money had and received. See CHITTY, CARRIERS 189 (1857). The shipper's theory here was that he had been injured because the carrier acted contrary to good faith and honesty, analogizing to the situation where a buyer is cheated by false weights and measures. See 3 BLACKSTONE, COMMENTARIES *165. The shipper also seems to have had a sufficient basis for restitutionary recovery. The complaint alleged that the carrier had received moneys which in good conscience should belong to the shipper. "This kind of equitable action, to recover back money, which ought not in justice to be kept . . . lies only for money which *ex aequo et bono*, the defendant ought to refund . . . upon a consideration which happens to fail; or for money got through . . . *an*

cluded that the act, because of its "savings clause," did not extinguish this common-law remedy, and that, once the Commission had found the practice "unreasonable," the shipper set forth a claim upon which reparations might be granted.[12]

The Court's decision is of interest because of its apparent neutralizing effect upon the doctrine enunciated in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*[13] and *T.I.M.E., Inc. v. United States.*[14] In *Montana-Dakota* the Court unanimously approved prior decisions[15] insofar as they held that, where Congress had conferred primary jurisdiction over a certain subject matter upon an administrative agency,[16] the statutory standard of reasonableness was for administrative rather than judicial determination. The majority in that case carried the primary jurisdiction doctrine a step further by holding that, where the issue of reasonableness is not severable from the issue of liability, and where Congress has withheld from the agency remedial power, it is to be presumed that a judicial remedy is not available or has been repealed by implication.[17] The decision in *T.I.M.E.* refined the *Montana-Dakota* concept in terms of the type of problem presented by the principal case.[18] Again a majority of five seemed convinced that, had Congress intended reparative relief to be available, it would have so provided in the statute and not have relied upon judicial improvisation.[19] The Court, moreover,

*undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.*" Moses v. Macferlan, 2 Burr. 1005, 1012, 97 Eng. Rep. 676, 680-81 (K.B. 1760). (Emphasis added.)

12 Principal case at 87.

13 341 U.S. 246 (1951).

14 359 U.S. 464 (1959).

15 *E.g.*, Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

16 In *Montana-Dakota* the statute in question was the Federal Power Act which, like the Motor Carrier Act, provides no reparations remedy to recover for rates paid in the past which are subsequently determined to be unreasonable.

17 If the majority in *Montana-Dakota* meant that a court could never properly refer controlling issues to a regulatory agency for an administrative determination and then grant relief on the basis of the agency's finding, the holding would seem so contrary to the original primary jurisdiction doctrine which the majority cited with approval as to be difficult to justify. *Cf.* Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907). If, on the other hand, the Court meant that, where there is seemingly no reason in the case presented why Congress should have intended a judicial improvisation, a court must exercise restraint, then the decision seems more tenable, albeit somewhat broad. For in the last analysis a court's approach should not turn upon an abstract distaste for judicial improvisation but an accommodation of the competing policies implicit in dispensing the judicial remedy. This was the approach of the Court in the principal case.

18 *T.I.M.E.* extended the *Montana-Dakota* doctrine to a setting almost identical to that of the principal case. The case concerned the Motor Carrier Act, the Interstate Commerce Commission and the question of a postshipment reparations remedy after a Commission finding that rates charged were unreasonable.

19 The Court in *T.I.M.E.* was helped by an additional consideration. Congress had provided a statutory procedure whereby rates could be challenged initially by the shipper. See 49 Stat. 561 (1935), 49 U.S.C. § 317(c) (1958), providing that proposed rate increases must be filed with the Commission thirty days in advance of effect, and

showed concern that the award of reparations would bring about a judicially created extension of the Commission's power. It concluded that when the administrator vested with primary jurisdiction has no authority to award reparations, he may not employ the courts as accomplices to effectuate by indirection what he might not do directly.[20]

The Court in the principal case, conceding that primary jurisdiction as to misrouting practices was in the Commission,[21] expressly distinguished *T.I.M.E.* and by implication its parent, *Montana-Dakota,* on the ground that they involved unreasonable rates, while the principal case presented the issue of unreasonable routing practices.[22] The Court then concluded that application of the primary jurisdiction doctrine did not result in the absence of a judicial remedy in every instance in which the Commission could not award reparations. Consequently, the Court has now acknowledged the existence of exceptions to the doctrine stated in *Montana-Dakota* and *T.I.M.E.* where an appraisal of the competing policy considerations convinces a court that relief is consistent with the legislative purpose.[23] The holding seems something of a turnabout. *Montana-Dakota,* insofar as it held that a court cannot grant relief if a substantial issue in the case is primarily within the jurisdiction of an administrative agency powerless to grant such relief, has clearly been overruled. It seems certain, as well, that the Court will not hesitate in the future to improvise an appropriate remedy in the interest of justice or a desirable result in a particular case, simply because there appears to be no reason to suppose that Congress did not contemplate such an improvisation. But even more strikingly, the continued vitality of the *T.I.M.E.* decision, decided only four terms ago, may be in doubt. The present departure from *T.I.M.E.* is explicable either because the route-rate distinction is sufficiently substantial so as to be controlling or because of a reversal in attitude attributable to intervening changes in the Court's personnel.[24] If the former

49 Stat. 559 (1935), as amended, 49 U.S.C. § 316(g) (1958), providing that proposed rate increases may be suspended for seven months pending determination of their reasonableness.

20 T.I.M.E., Inc. v. United States, 359 U.S. 464, 475 (1959).

21 See Northern Pac. Ry. v. Solum, 247 U.S. 477 (1918).

22 Principal case at 87.

23 The policies that the Court in the principal case found controlling appear persuasive. The Court noted that there exists no procedure for initially challenging route violations before the Commission as there is for rates charged. Rates typically are known to the shipper prior to carriage. Routes, however, are customarily determined by the shipper on an *ad hoc* basis. The Court also reasoned that the damage remedy will have a deterrent effect of minimizing litigation before the Commission and the courts. To deny relief, moreover, would leave the shipper at the carrier's mercy. In the two prior rate cases, *Montana-Dakota* and *T.I.M.E.*, the Court noted that the denial of reparations there would not work such an injustice.

24 Justices Brennan, Frankfurter, Harlan, Stewart, and Whittaker comprised the majority in *T.I.M.E.*, with Chief Justice Warren and Justices Black, Clark and Douglas dissenting. In the principal case Chief Justice Warren and Justices Black, Brennan, Clark, Douglas and Goldberg comprised the majority, while Justices Harlan, Stewart and White dissented.

is the correct explanation, clearly then the rule in *T.I.M.E.* will obtain in a case involving unreasonable rates or an analogous situation. If the latter sheds any light, then one can only infer that *T.I.M.E.* also has been sent to its demise,[25] and that a new approach to the question has been enunciated, not without problems of its own.[26]

The Court's route-rate distinction appears justified in that it reflects a functional distinction in the nature of the Commission's regulatory duties. The objective of the Interstate Commerce Act is the development and implementation of a national transportation policy[27] which the Commission was established to effectuate.[28] The Court, in evolving the primary jurisdiction doctrine, has recognized that, in the administration of national transportation policy, the normative standard of practice should be determined by the agency and not the courts.[29] The Court has reasoned that the Commission is supposedly more competent than the courts in making certain determinations,[30] and that, in other determinations where this is not necessarily the case, an administrative rather than a judicial determination would insure a uniform national rule.[31] In motor carrier cases, a court would appear to enjoy equal competence with the administrator in matters concerning undue preferences or unfair practices.[32] The court would also seem burdened but not unduly troubled by questions of safety regulation. Safety regulation arose from a technological law never made by judges, but clearly it is not of a complexity which would preclude

25 Presumably Chief Justice Warren and Justices Black, Clark and Douglas adhere to their former view, while Justice Brennan changed his position on the basis of the route-rate distinction. The continued vitality of the *T.I.M.E.* decision will depend upon the positions taken in the future by Justices White and Goldberg; a present appraisal of their viewpoint would be but conjecture.

26 The Court here holds that the Interstate Commerce Act by virtue of its "savings clause" preserves a common-law cause of action. Principal case at 87. On remand the district court will, under familiar principles, grant relief on the basis of the common law of the state where it sits. Conceivably, future actions of this kind will be brought in state courts after Commission determination, particularly if the federal jurisdictional amount of $10,000 is lacking. If this occurs, not only two trials in the same case—obviously an unwieldy and expensive procedure—will be generated, but also a new state participation in the regulation of interstate commerce, and possible local administration of an important national problem, might result.

27 54 Stat. 899 (1940), 49 U.S.C. preceding § 1 (1958), providing, "It is hereby declared to be the national transportation policy of the Congress to . . . foster *sound economic conditions in transportation and among the several carriers* . . . all to the end of developing, coordinating and preserving a national transportation system by water, highway and rail . . . adequate to meet the needs of the commerce of the United States . . . ." (Emphasis added.)

28 See Luckenbach S.S. Co. v. United States, 122 F. Supp. 824, 827 (S.D.N.Y. 1954).

29 See Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 448 (1907).

30 See, *e.g.*, Far East Conference v. United States, 342 U.S. 570, 574-75 (1952).

31 See Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 441 (1907).

32 See 49 Stat. 558 (1935), as amended, 49 U.S.C. § 316(d) (1958), which declares it unlawful for a motor carrier while engaged in interstate commerce "to subject any particular person . . . to any unjust discrimination, or any undue or unreasonable prejudice or disadvantage." The Court has given this provision the broadest possible social thrust by extending its scope to racial discrimination in interstate commerce. *Cf.* Boynton v. Virginia, 364 U.S. 454 (1960).

judicial determination. The decisional process in cases of this kind, which calls for a finding of fact, the application of existing authority, and, at times, a construction of the controlling statute or regulation, is as familiar to the court as to the administrator. The courts have deferred to the Commission in these matters not because they are less competent, but because they have realized that the administration of the statute presents a uniquely nationwide problem requiring uniform national rules. The judicial process, however, may not be possessed of an equal competence in other areas of regulation. While the resolution of such questions as misrouting, safety procedures, or undue preferences imports indirect economic incidents such as the effect upon the relative competitive positions of carriers who comply or evade, or the increased cost of equipment and operation attributable to safety devices and procedures, their economic ramifications seem clearly ancillary. Direct economic regulation, however, is exclusively a function of agency power. The Commission, for example, controls conditions of admission into the industry;[33] the type of service to be rendered;[34] the expansion or contraction of the carrier's routes;[35] compulsory insurance regulations;[36] the levels of rates and fares;[37] merger, consolidation and acquisition;[38] and the issuance of securities by companies within the industry.[39] In proceedings involving such matters, the courts have deferred to Commission decision, not only for the purpose of achieving uniform national regulation, but also for the paramount reason that they acknowledge the agency's expertise and appreciate the perils of judicial intrusion into these most technical and sensitive areas.[40] The administrator, in theory possessed of expert economic knowledge, aware to the moment of subtle problems of the industry, and free to ignore precedent in response to changing economic conditions, is unquestionably better equipped to be architect of national policy.

A careful examination of the reasons for reference by the judiciary to administrative tribunals provides a meaningful basis for decision in situations such as *Montana-Dakota, T.I.M.E.*, the principal case and similar future cases. *Montana-Dakota* and *T.I.M.E.* concerned a most vital element of direct economic regulation—the rate structure. The existence of a reparations remedy enforceable in the courts could well undermine the integrity of that structure by giving formulations of economic policy by

33 49 Stat. 551 (1935), as amended, 49 U.S.C. § 306 (1958), as amended, 49 U.S.C. § 306(a)(4) (Supp. III, 1961).

34 49 Stat. 552 (1935), 49 U.S.C. § 308 (1958).

35 *Ibid.*

36 49 Stat. 557 (1935), as amended, 49 U.S.C. § 315 (1958).

37 49 Stat. 558 (1935), as amended, 49 U.S.C. § 316 (1958).

38 49 Stat. 555 (1935), as amended, 49 U.S.C. § 312(b) (1958); 54 Stat. 905 (1940), as amended, 49 U.S.C. § 5(2) (1958). It is interesting that any consolidation authorized by the Commission relieves the carrier from the operation of the antitrust laws. See 54 Stat. 908 (1940), 49 U.S.C. § 5(11) (1958).

39 49 Stat. 557 (1935), as amended, 49 U.S.C. § 314 (1958).

40 *Cf.* Jaffe, *supra* note 7.

the Commission a congressionally unintended retroactive effect. The remedy, moreover, would augment the Commission's economic power by providing an additional coercive weapon in policy enforcement not sanctioned by Congress. The principal case, in sharp contrast, concerned a regulatory function of a different nature, one which the courts would seem equipped to perform equally as well as the Commission. The problem was not that of certificating a given route where the agency must make an economic judgment affecting the expansion of the carrier's activities; the complaint sounded in tort and nothing more. The approach, then, in cases of this type, should not be so broad as to require judicial inertia simply because Congress has delegated supervision of a segment of the economy to an administrative custodian. It is appropriate for a court to inquire into *why* it has referred the determination of questions arising under the act to the Commission. If the reason is that the Commission supposedly enjoys superior competence to deal with the problem because it involves rate making or some other economic determination, the courts should be as reluctant to tamper with the Commission's function by granting an improvised remedy as they have been as to passing on rights asserted under the act. If, however, it appears that court and agency have equal competence to determine the right, but the question has been referred to insure a uniform national rule, the courts should grant appropriate relief only after an administrative determination of the issues within its primary jurisdiction. Here the courts act in an area of traditional judicial competence, and where any economic effect is ancillary and minimal. The principal case seems entirely consistent with this analysis, as do the *Montana-Dakota* and *T.I.M.E.* decisions. If the Court adheres to its distinction between the principal case and *T.I.M.E.*, an appropriate refinement and clarification of the *T.I.M.E.* doctrine will continue to exist. If, however, in decisions to come, the view prevails that *T.I.M.E.* was overruled by the principal case, then the Court would appear to have undertaken an unfortunate invasion of congressional and administrative prerogative and to have perilously entered the dark area of economic planning, upon which even experts, in their disagreement, seem to shed a modicum of light.

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