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Union Pacific Railroad Co. v. Structural Steel & Forge Co. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

UNION PACIFIC RAILROAD CO.,
A corporation,

Plaintiff and Respondent,

v.

STRUCTURAL STEEL & FORGE
CO., a corporation,

Defendant and Appellant.

Case No. 8785

BRIEF OF APPELLANT

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Case No. 8785

BRIEF OF APPELLANT

STATEMENT OF FACTS

The Railroad commenced these actions in the District Court of the Third Judicial District against appellant for money allegedly due under contracts of rail carriage. Appellant is engaged in the business of fabricating structural iron and steel. The dispute involves construction of a “fabrication in transit” tariff filed by the Railroad (Union Pacific Tariff 7188-P).

This tariff, as all plaintiff’s tariffs, was originally drafted by the Tariff Bureau of the Union Pacific. Sub-

sequent revisions of a tariff are shown by a letter after the original tariff. The letter "P" in this tariff number shows that it is at least the sixteenth revision of this particular tariff. After being drafted by a Railroad a tariff is filed with the Interstate Commerce Commission which reviews it only to see if it has complied with certain technical requirements as to form. If no objections are made by shippers within thirty days from the date of filing with the Commission, the tariff becomes effective. No objections were made to the particular tariff.

The fabrication in transit tariff gives fabricating industries located at specified stations along the Union Pacific which receive, fabricate and then reship steel and iron products the lower through-rate (plus nominal handling costs) from the original point of departure of the unfabricated materials to their ultimate destination, rather than charging the fabricator the two more expensive short-haul rates into and out of the fabricating point. One of the results of such a tariff is to place Intermountain manufacturers in a more competitive situation with relation to manufacturers located either where steel originates or where the final shipment terminates.

This tariff is not what may be called a rate tariff (i.e., one establishing rates and charges for the transportation of particular classes of commodities). The tariff in dispute merely attempts to define the factual situations which must apply and the procedures which must be followed before a shipper will be entitled to the lower through-rate which rate is established for the various articles shipped by separate through-rate tariffs) as

opposed to the higher charges resulting from separate short-haul rates from origin to transit point and from transit point to final destination. The Railroad contends that the facts surrounding each of the shipments in question do not meet the conditions of the fabrication-in-transit tariff. The defendant shipper contends they do. The shipper does not contend here that the rates (either through-rate or short-haul) are unreasonable nor that improper classification of particular articles in the various shipments has resulted in the shipper improperly being charged too high a rate. The sole dispute is as to the application of Tariff 7188-P to particular operations of the defendant. For example, there is a dispute as to construction of the words "fabricate" and "rework," the Railroad contending that certain procedures followed by defendant do not qualify as "fabrication" or "reworking" within the meaning of the tariff. If the tariff is construed as allowing the procedures followed by defendant with regard to the particular shipments in question, the defendant is entitled to the through-rate and the Railroad's claims are invalid.

The record does not show whether the Railroad *ex parte* sought the assistance of the Interstate Commerce Commission before bringing these actions; it does show that the actions had been at issue for more than a year when the plaintiff Railroad petitioned the District Court "for continuance and referral to the Interstate Commerce Commission", alleging that the doctrine of "primary jurisdiction" enunciated in *United States v. Western Pac. R. Co.*, 352 U.S. 59, 77 Sup. Ct. 161,

1 L. Ed. 2d 126 (1956), was applicable to this case (R. P. 37-38). The petition asked that the court hold in abeyance the trial until five specific questions set forth in plaintiff's petition involving the construction of Tariff 7188-P "had been submitted to and determined by the Interstate Commerce Commission". The petition further asked the court to order plaintiff to institute a proceeding before the Interstate Commerce Commission but to retain jurisdiction "for all purposes".

On November 13, 1957, the Honorable Merrill C. Faux executed an order that the five questions set forth in the Railroad's petition be submitted to the Interstate Commerce Commission "for answer and determination by that body". The order further provided:

"IT IS THEREFORE ORDERED that the above numbered causes be held in abeyance, and they are hereby continued to permit a determination by the Interstate Commerce Commission of the issues of fact involved herein.

"IT IS FURTHER ORDERED that the Commission make such further report and determination on the issues of tariff interpretation and issues of fact as it may deem necessary or advisable for the further information of the court.

"IT IS FURTHER ORDERED that said proceedings be instituted before the Interstate Commerce Commission within thirty days from the date of this order.

"IT IS FURTHER ORDERED that a certified copy of this order be filed in the proceedings to be instituted before the Interstate Commerce Commission.

“The court hereby retains jurisdiction of said causes for all purposes.”

Defendant then petitioned for an intermediate appeal of this order of referral, and on April 22, 1958 this court granted the appeal.

STATEMENT OF POINTS

POINT I.

THE RAILROAD ^{IS} ~~IN~~ USING THE UTAH COURTS AS A DEVICE TO GAIN ACCESS TO A BODY OTHERWISE INACCESSIBLE TO IT.

POINT II.

THE RECORD IS NOT CLEAR AS TO WHETHER THE TRIAL COURT IS ASKING THE INTERSTATE COMMERCE COMMISSION TO DECIDE THE CASE OR GIVE ADVICE.

POINT III.

THE DOCTRINE OF PRIMARY JURISDICTION DOES NOT ARISE AND DOES NOT APPLY IN THIS CASE.

- (a) The history of the doctrine of primary jurisdiction.
- (b) Analysis of the doctrine of primary jurisdiction shows it does not arise in the instant case.
- (c) Even if the doctrine of primary jurisdiction did arise, it is not applicable in this case.

POINT IV.

THE SOLE ISSUE IS WHETHER THE COURTS OF THIS STATE WISH TO ABDICATE VOLUNTARILY SOME OF THEIR JURISDICTION AND WHETHER THEY CAN DO THIS.

ARGUMENT

POINT I.

THE RAILROAD ^{IS} ~~IN~~ USING THE UTAH COURTS AS A DEVICE TO GAIN ACCESS TO A BODY OTHERWISE INACCESSIBLE TO IT.

This is an action for breach of contract of carriage brought by a carrier against a shipper. The Railroad could have brought this action in either of two forums—either the United States District Court, *Berstein Bros. Pipe & Machine Co. v. Denver & R. G. RR. Co.*, 193 F. 2d 441 (10th Cir. 1951), or the Utah District Court. One thing is certain: *the Railroad could not have initiated this action before the Interstate Commerce Commission.*

The Interstate Commerce Act gives shippers certain rights to make complaint to the Commission against a carrier (49 U.S.C.A. Sec. 9 and Sec. 13) but the carrier is given no right under that act to commence any action against a shipper before the Interstate Commerce Commission.

But in this case the Railroad seeks to have its claim determined by the Interstate Commerce Commission, a right not given it by the Interstate Commerce Act. It seeks to do this, strangely enough, by commencing its action in the state court and by invoking the doctrine of “primary jurisdiction.” By this wondrous phrase, a plaintiff seeks to switch forums in midstream, and by bringing suit in one forum, to end up in the very forum that it could never have reached if it had tried to reach

it directly. The Railroad, a modern Perseus, cannot reach the Gorgon's head by looking directly at it, but by using the state court as a mirror, seek to attain its goal.

This case is unique. To appellant's knowledge there are no cases extant ruling on the questions posed here. It is also a significant case, as it deals with the construction of a tariff which has a direct bearing on the competitive situation of all Intermountain fabricators.

POINT II.

THE RECORD IS NOT CLEAR AS TO WHETHER THE TRIAL COURT IS ASKING THE INTERSTATE COMMERCE COMMISSION TO DECIDE THE CASE OR GIVE ADVICE.

Appellant has not been able, and is yet unable, to ascertain the role in which the instant Order casts the Interstate Commerce Commission. Are its determinations, which under the Order are unlimited in nature or scope, to bind the court?, or are they only advisory, to be accepted or rejected in the discretion of the court?, or both? The record and Order will support either theory. The appellant is unable to resolve the ambiguity.

The petition by which appellee asked for the order cited the *Western Pacific* case, *supra*. It stated that the action "presents a situation analogous to that dealt with in *Western Pacific*" (r.p. 37). *Western Pacific*, as will be noted hereafter, is a "primary jurisdiction" decision. The petition further asked that certain questions be submitted "by appropriate administrative procedure to the Interstate Commerce Commission for *determination* (r.p. 38, emphasis supplied). The cited ver-

bage leads appellant to believe that the Commission's findings are to be determinative. This belief is reinforced by the Order's language: that five specified questions "be submitted to the Interstate Commerce Commission for answer and determination by that body" (r.p. 42).

Other language, however, clouds the issue. The petition recites that the reference is "to assist this court in the determination of the issues" (r.p. 38). The Memorandum Decision states that, "Primary jurisdiction of that cause is in the Utah District Court" (r.p. 40), and the order requires that the Commission's report extend to "tariff interpretation" (r.p. 43), a subject matter, as will be seen, that is clearly for the courts. Taken alone, the quoted portions would lead appellant to believe that the Commission is to act as "a sort of master".

The mischief of the Order is apparent. Appellee will be able to argue to the trial court that any finding of the Commission favorable to appellee is conclusive. If, however, any answer is unfavorable, appellee will argue that it is merely advisory.

Certainly the Railroad should make clear which position it is taking. However, it is appellant's contention that neither reason would justify referral in this case.

POINT III.

THE DOCTRINE OF PRIMARY JURISDICTION DOES NOT ARISE AND DOES NOT APPLY IN THIS CASE.

(a) The history of the doctrine of primary jurisdiction.

To understand completely the issue here, it is first

necessary to review the doctrine of primary jurisdiction upon which the Railroad relies.

This doctrine is a common law development of the United States Federal Court system. In state courts little mention is made of it. Some states, in meeting similar problems, have reached similar results, while other state courts have expressly repudiated the doctrine. 42 A.M. JUR., *Public Administrative Law*, § 254, at 701. See this brief, *infra*, pp. 24-32.

“The fountainhead from which the entire primary jurisdiction doctrine flows is *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*,” 204 U.S. 426, 27 S. Ct. 350, 51 L. Ed. 553 (1907) DAVIS ADMINISTRATIVE LAW, 665 (1951). That case was one where a shipper, without resorting to the Interstate Commerce Commission, attempted to recover damages in a Texas state court from the Railroad for allegedly excessive charges for the transportation of freight. The shipper based his action on Section 9 and Section 22 of the Act. Section 9 provided in part:

“That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act 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 the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit 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 . . .”

Act to Regulate Commerce, c. 104, § 9, 24 STAT.
382 (1887)

Section 22 expressly stated that:

“Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies . . .”

Act to Regulate Commerce, c. 104, § 22, 24 STAT.
387 (1887)

The shipper relied on what was, from the legislative history of the Act, the unequivocal legislative intention that the courts should have original jurisdiction of some matters that might also be within the Commission’s province. See Convisser, *Primary Jurisdiction: The Rule and Its Rationalizations*, 65 YALE L. J. 315 at 317-328 (1956).

The trial court, while finding the rate in question unreasonable and excessive, nevertheless held that since the rate had been filed with the Interstate Commerce Commission it was the rate “established under the Interstate Commerce law” and gave judgment to the Railroad. The Texas Court of Civil Appeals reversed, *Abilene Cotton Oil Co. v. Texas & Pac. R. Co.*, 38 Tex. Civ. App. 366, 85 S. W. 1052 (1905). The Texas Appellate Court stated the issue as “whether in a state court a shipper in cases of interstate carriage can, by the principles of the common law, be accorded relief from unjust and unreasonable freight rates extracted from him, or

shall relief in such cases be denied merely because such unreasonable rate has been filed and promulgated by the carrier under the Interstate Commerce Act?", *Id.* at 368, 85 S.W. at 1053. The court found the answer in the common law right of action which it ruled had been preserved by the Act.

Mr. Justice White, speaking for a unanimous United States Supreme Court, reversed, holding that under what is now known as the Interstate Commerce Act a shipper seeking reparations from a railroad for excessive freight charges must "primarily invoke redress through the Interstate Commerce Commission." *Texas & Pac. R. Co. v. Abilene Cotton Oil Co.*, *supra* at 448.

The decision has not been without strong criticism. Davis terms it "one of the outstanding examples in all Supreme Court history of 'interpretation' which leads to a result diametrically opposed to clear and unambiguous statutory language," DAVIS *supra* 665. Another analyst has stated, "It did violence to the plain statutory language and purpose, ignored the legislative history and rested upon reasoning mainly notable for its comfortable insulation from reality." Convisser, *supra* at 316.

The doctrine has been applied by Federal courts from time to time since then, both in dealing with the Interstate Commerce Commission and with the National Labor Relations Board and most recently in the field of Federal anti-trust litigation; see, for example, von Mehren, *The Anti-trust Laws and Regulated Industries*;

The Doctrine of Primary Jurisdiction, 67 HARV. L. REV. 929 (1954).

The early rationale for such decisions was based upon the purported desire for uniformity, but later the reason given for invocation of the doctrine was the expertise of the administrative board in question. Nevertheless, as the United States Supreme Court stated in the *Western Pacific* case:

“No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes served will be aided by its application in the particular litigation.” *United States v. Western Pac. R. Co.*, *supra*, at 64.

Section 22 of the Interstate Commerce Act was not completely emasculated by the *Abilene* case. In *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U.S. 121, 35 Sup. Ct. 484, 59 L. Ed. 867 (1915) a shipper brought suit in the Pennsylvania state court against the railroad for damages caused by the carrier's failure to furnish cars for the transportation of coal. The railroad moved to dismiss because the state court was without jurisdiction. Both the trial court and the Pennsylvania Supreme Court held that the state court did have jurisdiction, and affirmed judgment against the carrier. The United States Supreme Court affirmed. That court held that while Section 9 standing alone might be construed as giving exclusive jurisdiction to either federal courts or agencies, this section was modified by Sec. 22, which

preserved all pre-existing common law and statutory remedies. In construing the Act as a whole, and citing the *Abilene* case, the court said:

“It did not supersede the jurisdiction of state courts in any case, new or old, where the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission, or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive.” (*Id.*, at 130, emphasis added)

The court made the sound distinction between an attack on a rule of practice itself (where the question of its fairness lay primarily within the judgment and discretion of the Commission), and an attack on the manner in which the carrier’s rule is enforced, where “there is no administrative question involved” *id.*, at 131-32. The court pointed out that rather than attack the rule, the plaintiff-shipper had “relied on the carrier’s own rule as evidence” *id.*, at 134, which of course is what appellant is doing in the instant case. Clearly, therefore, state courts still have jurisdiction of such cases.

The landmark cases set forth the limits of the doctrine of primary jurisdiction at the present time in the Federal courts. In *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 66 L. Ed. 943, 42 Sup. Ct. 477 (1922), the doctrine was not applied. This was a case commenced by the shipper against the carrier in a state court in Minnesota for an alleged overcharge. The issue was whether the Railroad was entitled to

make a charge for reconsignment of corn while en route. This turned on an interpretation of the tariffs which governed the contract of carriage. Mr. Justice Brandeis pointed out that in cases where a rate which was already fixed and agreed upon as being applicable was attacked as unreasonable or unjustly discriminatory, there must be preliminary resort to the Commission.

“But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute.” *Id.*, at 291.

The United States Supreme Court in that case held that the issues were properly within the jurisdiction of the Minnesota state court. In that case Brandeis rather effectively does away with the uniformity argument stating:

“The contention that courts are without jurisdiction of cases involving a disputed question of construction of an interstate tariff, unless there has been a preliminary resort to the Commission for its decision, rests, in the main, upon the following argument: The purpose of the Act to Regulate Commerce is to secure and preserve uniformity. Hence, the carrier is required to file tariffs establishing uniform rates and charges, and is prohibited from exacting or accepting any payment not set forth in the tariff. Uniformity is impossible if the several courts, state ~~and~~ Federal, are permitted, in case of disputed construction, to determine what the rate or charge is which the tariff prescribes. To insure uniformity

the true construction must, in case of dispute, be determined by the Commission.

“This argument is unsound. It is true that uniformity is the paramount purpose of the Commerce Act. But it is not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission to settle the construction in dispute. Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff, it is one of Federal Law. If the parties properly preserve their rights, a construction given by any court, whether it be Federal or state, may ultimately be reviewed by this court, either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured. Hence, the attainment of uniformity does not require that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission.”
Id. at 290-91.

In *Texas & P. Ry. Co. v. American Tie & Timber Co.*, 234 U.S. 138, 58 L. Ed. 1255, 34 Sup. Ct. 885 (1914), the doctrine of primary jurisdiction was applied. There the shipper had a contract with the Union Pacific to furnish it railroad cross-ties, and it claimed that the Texas-Pacific Railroad wrongfully refused to haul them. There was no tariff specifically covering cross-ties, but there was a tariff for “lumber, all kinds”, which the shipper claimed was applicable to its cross-ties. Thus the case was a dispute as to classification of a particular article. There the shipper, prior to commencement of its action against the carrier in the Federal court, had

made complaint to the Interstate Commerce Commission. Then as the Supreme Court said:

“By an amendment to the answer it was insisted (by the Railroad) that under Section 9 of the Act to regulate commerce the plaintiff could not prosecute its action because, by making the complaint as it had done, to the Interstate Commerce Commission, concerning the failure to treat the lumber tariff as embracing the rate on cross-ties, the plaintiff had *elected* to proceed before the Commission.” (*Id.*, at 145, emphasis added).

There was a conflict in the evidence as to whether the “all lumber” tariff covered cross-ties.

The motion to dismiss made by the Railroad was as follows:

“*Because under the facts and circumstances now disclosed by the record, and compatible with the act of Congress of the United States to regulate interstate commerce, this court has no power to consider and decide the subject matters which are complained of, or to award the relief prayed for by plaintiff.*” (*Id.*, at 141, emphasis added).

The Supreme Court ordered that the case be dismissed. This decision was eight years prior to the *Great Northern Railway* decision, in which the Supreme Court restricted the doctrine of primary jurisdiction by pointing out that questions of construction need not be referred, and in so doing the court distinguished the *American Tie* case.

One of the most recent pronouncements of the United

States Supreme Court, upon which the Railroad here so heavily relies, is *United States v. Western Pac. R. Co.*, *supra*. In this case the Railroad sued the shipper (the United States Government) in the United States Court of Claims for alleged undercharges. The questions raised *inter alia* were whether the articles in question fell within the tariff category of incendiary bombs, or whether they in fact had another classification^{which} would allow a lesser rate, and if the former category were held applicable, whether the resulting rate was unreasonable. It was thus a case involving a dispute as to classification. The shipper-defendant in that case requested that a referral be made to the Interstate Commerce Commission. The Court of Claims, relying on an earlier decision of its own, *Union Pacific R. Co. v. United States*, 125 Ct. Cl. 390, 111 F. Supp. 266 (1953), refused to do this and after interpreting the tariff, gave summary judgment to the Railroad, 132 Ct. Cl. 115, 131 F. Supp. 919 (1955). The Supreme Court in that case held that these matters should properly have been referred to the Interstate Commerce Commission, but it stated:

“By no means do we imply that matters of tariff construction are never cognizable in the courts. We adhere to the distinction laid down in *Great Northern R. Co. vs. Merchants Elevator Co.*, *supra*, which call for a decision based on the particular facts of each case.” *United States v. Western Pac. R. Co.*, *supra*, at 69.

This then is the history of the doctrine of primary jurisdiction as developed by the Federal Court system. While termed a valuable corollary in some senses, it has

also been stated that "it is . . . becoming a shibboleth". Jaffe, *Primary Jurisdiction Reconsidered*, 102 U. PA. L. REV. 577 (1954). The doctrine's principal function to date has been to *restrict* jurisdiction previously granted by statute. The Railroad in the instant case seeks to use it as a means of *creating* jurisdiction when none exists by statute. The Railroad has cited no case in the court below and the appellant here has been unable to find any case where referral from a state court to a Federal administrative agency was upheld over the objection of the defendant-shipper. The Railroad is thereby asking this court to sanction a procedure heretofore unauthorized by the very Federal court system which has erected this doctrine, and by so doing in effect to create the right of a carrier, by the device of commencing this action in the forum of this state, to invoke the jurisdiction of the Interstate Commerce Commission, which it cannot otherwise do.

- (b) Analysis of the doctrine of primary jurisdiction shows it does not arise in the instant case.

To determine whether this doctrine arises in the instant case an analysis should be made of its basic nature. Abstractly, the very term "primary jurisdiction" is comparative. From it one would assume that there would be a "secondary jurisdiction" (i.e., that there were *two* bodies which had jurisdiction, one of which was "primary" to another). Thus the very term assumes the existence of *concurrent* initial jurisdiction.

As one of the leading authorities on this question has stated:

Questions of primary jurisdiction arise *only* when the statutory arrangements are such that administrative and judicial jurisdiction are *concurrent* for the initial decision of some questions.” (DAVIS, *supra*, 664, emphasis added.)

The first question to be asked is obviously: is there here a *concurrent* jurisdiction between the Utah Court and the Interstate Commerce Commission? Section 9 of the Act (49 U.S.C.A. Sec. 9) expressly authorizes any person claiming to be damaged by any carrier to alternatively make complaint to the Commission or to a district court of the United States. Thus in the case of the shipper suing a carrier (the converse of our situation) the Interstate Commerce Commission does have concurrent jurisdiction with the United States District Court by the express terms of the statute. In such a case the doctrine of primary jurisdiction would apply, in certain fact situations, to limit the shipper’s alternative recourse to the courts.

But the Railroad has no right to commence its action before the Interstate Commerce Commission. The Act makes no provision for this procedure. No cases have been found even holding that such procedure would be implied by the Act. Thus quite obviously there is no concurrent jurisdiction and the doctrine does not come into play.

If Congress had intended to give the Railroad the right to bring proceedings ^{against} ~~against~~ its shippers before the Commission, it could have quite easily provided

for it, but since 1887 carriers have not been given this right and apparently have been content to bring their action for undercharges in either state or United States Federal courts. The policy reasons behind such a distinction are sound. Shippers are not the group that the Interstate Commerce Act intended to regulate and exercise supervision over. They should not be haled before a Federal administrative body at the election of the regulated industry merely because they happen to do business with this entity. Basic consideration of fairness urge that they should be allowed to defend such claims in the courts of their domicile where they are doing business.

The fact is, therefore, that this is not a case where a Federal agency and a state court exercise joint jurisdiction, where the powers of the state court may be expanded or contracted at the wish of Federal authority. The sole initial jurisdiction in this case is with the trial court.

The rule is well established that the power of a state court is pre-empted by Federal legislation only when the enactment in question expressly or by implication so states. This rule has been characterized as a manifestation of "due regard for the rightful independence of the states", *Healy v. Ratta*, 292 U.S. 263, 54 Sup. Ct. 700, 78 L.Ed. 1248 (1934), and as a reflection that Federal instrumentalities must "be ever mindful of the dignity of the states", *The Maccabees v. City of North Chicago*, 125 F. 2d 330 (7th Cir. 1942), *cert. denied*, 317 U.S. 693, 63 Sup. Ct. 432, 87 L. Ed. 555 (1943). The rationale underlying the principle has, however, been best expressed

in a relatively recent opinion, *Square D. Co. v. United Electrical, Radio & Mach. W'krs.*, 123 F. Supp. 776 (ED Mich, 1954), as a concern for "preservation of our Federal system." In other words, the basis of the rule is a recognition that our's is a Federal, not a unitary, form of government.

(c) Even if the doctrine of primary jurisdiction did arise, it is not applicable in this case.

This is not a case where it is alleged that a particular rate is ~~unreasonable~~ ^{unreasonable}. It is not a case where it is alleged that a particular article was not properly classified. It is not even a combination of these factors "where . . . the questions of construction and reasonableness are so intertwined that the same factors are determinative on both issues," which was the case in *United States v. Western Pac. R. Co.*, *supra* at 68. It is not a matter in which the cost-allocation factors that have to go into rate making are an issue. With only a few exceptions the shipments in question in the instant actions retained the same classification both before and after fabrication and even in the exceptional cases the shipper does not urge here that the charge was improper or unreasonable.

In this case the Railroad set forth certain rules governing fabrication of structural iron and steel in transit, which, if they were followed, would make the through rate applicable. The only question before the court is: what do these rules mean? What is their *construction*? As the United States Supreme Court made clear in

the *Western Pacific* case, matters of tariff *construction* are still cognizable by the courts without the need for referral. That court, in summing up its conclusion in that case, stated:

“We say merely that where, as here, the problem of cost allocation is relevant, and where therefore the questions of construction and reasonableness are so intertwined that the same factors are determinative on both issues, that it is the Commission which must first pass on them.”
(*United States v. Western Pac. R. Co.*, *supra* at 69, emphasis added).

“Cost-allocation”, of course, has to do with rates—the money to be charged which bears a reasonable relation to the class of product shipped which will earn a fair return for the carrier. To determine what is a reasonable rate, one must know about cost allocation, and this is unquestionably an esoteric field where expertise may well be the touchstone.

But this case does not deal with these factors. The cost allocation factors that went into the computation of a through-rate and a short-haul rate for iron bars, for example, will remain completely unaffected by a court’s determination of what the Railroad meant by “fabrication”. While in the *American Tie* case the court may have felt ~~it~~ ^{it} could not properly decide whether railroad cross ties were included in a “lumber, all kinds” classification without knowing what the cost-allocations were that lead to the establishment of the rate for that classification, there is no such problem here. The rates have been fixed and are uncontested.

Certainly the fact that the *words* of a tariff defining a certain classification might include railroad cross ties (or castings filled with napalm jel) may only be half of the picture, if the cost-allocation factors which went into the establishment of the rate covering this classification would make this conclusion an absurdity. The question there is, would the resulting rate, considering the cost factors involved in the transportation of the article, result in a fair and reasonable return to the Railroad? But whether an intermediate fabricator bends its steel bars, merely stores them, or ties them in knots, does not affect one particle the cost-allocation which goes into making up the rate for this classification (assuming that the fabrication does not change the class of the product). These steps have nothing to do with cost to the Railroad, but only cost to the shipper.

The United States Supreme Court has always recognized that disputed questions of construction, being one of the very basic things which courts were established to handle, remain untainted by its self-imposed doctrine of limited jurisdiction. It is difficult to imagine a purer case of disputed construction than the one before this court. Obscure and complex these rules may be. But, of course, it is usually the obscure and complex contract that leads to litigation. Surely the difficulty inherent for the Railroad in persuading the court to accept its interpretation of its own obscure and complex wording is not an argument for persuading this court that it is incapable of interpreting it. The United States Supreme Court said in the *Western Pacific* case, at 66-67, "There

the Court held that where the question is simply one of construction the courts may pass on it as an issue 'solely of law' ". There is quite a difference between a question which is "simply one of construction" and "one of simple construction". To argue that a court can retain jurisdiction only of the ~~later~~^{latter} is an affront to the court's basic capacity.

The *Western Pacific* case is not determinative, or even helpful to us in this particular case for two other reasons. First, it says nothing as to the correct procedure to be followed where a defendant shipper opposes the reference, rather than requests it.* Certainly this is a critical distinction where the plaintiff could not have brought it before the Commission of its own volition. Second, it was a case where both the trial court and the administrative agency were part of the same Federal political system. It does not help us in defining the relationship between state courts and Federal administrative bodies.

POINT IV.

THE SOLE ISSUE IS WHETHER THE COURTS OF THIS STATE WISH TO ABDICATE VOLUNTARILY SOME OF THEIR JURISDICTION AND WHETHER THEY CAN DO THIS.

It has been noted that state courts have been most reluctant in the absence of definitive legislative enact-

* This possibility does not even occur to most of the writers in the field. Thus one writer uses as subheadings to his article, "Plaintiffs' Efforts to Avoid the Doctrine" and "Defendants' Efforts to Invoke the Doctrine." von Mehren, *supra* at 941 & 947.

ment, to abdicate their jurisdiction (and in consequence, their judicial power and responsibility) to administrative bodies. This observation is equally true whether argument has been made that the jurisdiction of the executive agency is "exclusive", that there has been no "exhaustion of administrative remedy" or that executive jurisdiction, while "concurrent", is "primary". The policy which buttresses this approach is well stated in Papetti v. Alicandro, 317 Mass. 382, at 386, 58 N. E. 2d 155, at 157 (1944): "The burden is strongly on him who asserts that the fundamental right of all persons of access to the court has been taken away by legislation."

There are, of course, numerous state cases in which the *defendant* has resisted successfully the assertion of initial jurisdiction by the courts. These have been decided on the basis of explicit constitutional or legislative mandates. The converse, however, is equally true: the courts of the several states have not relinquished gratuitously their judicial prerogatives to their administrative cousins. If a valid written law has not so provided, the courts have retained the totality of their jurisdiction (their power) and their responsibility. *Main Realty Co. v. Blackstone Valley Gas & Electric Co.*, 59 R. I. 29, 193 A. 879 (1937) is typical. The realty company owned a multi-unit rental building. It, as well as each of its tenants, used electricity. Application was made to the electric company for the installation of a single meter for the building; the landlord company proposed to re-sell electricity to its tenants. The electric company refused, although it provided such service to other landlord users. Even after the electric

company was successful in obtaining, from the State Division of Public Utilities, a ruling prohibiting such an arrangement, the electric company continued to sell for resale to preferred customers. The realty company then brought action to recover damages for the unreasonable discrimination to which it had been subjected. The defendant sought the shelter of an administrative determination; it argued that the jurisdiction of the State Division of Public Utilities was concurrent with that of the court and that the administrative jurisdiction was primary to that of the judiciary. The court rejected this contention. It noted that the Division could not entertain an action for, and could not award, damages. There was no "election provision" in the applicable statutes. There was, hence, no basis of concurrent jurisdiction necessary to the invocation of the doctrine of "primary jurisdiction". The jurisdiction of the judiciary was, in short, exclusive. Another case illustrative of the proposition is *Houston Chamber of Commerce v. Railroad Commission* 19 S. W. 2d 583 (Tex. Civ. App. 1929), *aff'd* 124 Tex. 375, 78 S. W. 2d 591 (1935). Against the contention of the defendants that the plaintiffs, shippers, must apply, as a condition precedent to a judicial challenge of the validity of a rate, to the commission to undo or modify its action (an argument which was, technically, one of "exhaustion of administrative remedy", rather than of "primary jurisdiction"), the court held at 588.

"In rate making, the functions of the commission are legislative in character and its orders prospective in operation. . . Insofar as its orders

already made are concerned, the courts alone can give relief.”

Waukesha Gas & E. Co. v. Waukesha Motor Co., 175 Wis. 420, 184 N. W. 702 (1921) considers a demurrer, upheld by the trial court, founded upon the suggestion that a regulatory body, the Railroad Commission, had “exclusive jurisdiction”. The motor company had counter-claimed, alleging a breach of the electric company’s contract to supply gas to it. The court reversed. It held that such exclusive jurisdiction is dependent upon statute and that, where no statute confers such jurisdiction, it does not exist.

In the event that the written law of a state has explicitly bestowed quasi-judicial jurisdiction concurrent with that of the courts, upon an administrative agency, there has been adherence to the principle of separation of powers. In some instances, this adherence has led to the outright rejection, on the state plane, of the mechanics of “primary jurisdiction”. A group of California decisions exemplifies the approach, *Truck Owners, Inc., v. Superior Court*, 194 Cal. 146, 228 P. 19 (1924); *Vallejo Bus Co. v. Superior Court*, 19 Cal. App. 201, 65 P. 2d 86 (1937); *Miller v. Railroad Commission*, 9 Cal. 2d 190, 70 P. 2d 164 (1937). These cases construe the applicable law to be that, in a controversy regarding a question of fact, the Railroad Commission’s jurisdiction is not only concurrent with that of the courts, but, when invoked, primary. The cases do not, however, demonstrate a willingness on the part of the judiciary to divest itself of its responsibility. To the contrary, they hold that, until the

primary executive jurisdiction is actually exercised, the courts will adjudicate all questions, including those of fact.

The cardinal bulwark of state court rejection of the philosophy that admittedly quasi-judicial regulatory bodies should become more and more “judicial” and less and less “quasi” has been their steadfast refusal to abandon the principles enunciated in *Great Northern Ry. Co. v. Merchants Elevator Co.*, *supra*, and reiterated in *United States v. Western Pac. R. Co.*, *supra*. State courts, mindful of the importance of the separation of powers, have, as have Federal courts, held questions of law, as opposed to questions of fact, to be within their *exclusive*—not concurrent, not primary, but *exclusive* — jurisdiction. In *Main Realty Co. v. Blackstone Gas & Electric Co.*, *supra*, for instance, the court considered the probable character of its ruling had the Rhode Island statute provided for administrative primary jurisdiction. It opined that this circumstance would not alter its decision. It cited *Baltimore & Ohio R. Co. v. Brady*, 288 U. S. 448, 457, 53 Sup. Ct. 441, 77 L. Ed. 888 (1933) :

“But if the rule, regulation, or practice of the carrier is not attacked and the shipper’s claim is grounded upon its violation or discriminatory enforcement, there is no administrative question involved. In such cases the court is required merely to decide whether the carrier has departed from its established standard. The decision does not concern the reasonableness or validity of the rule itself and it has no tendency against uniformity or other purpose of the Act. Suits for damages upon

such grounds may be prosecuted without action or finding by the commissioner.”

In *Gardner v. Rich Mfg. Co.*, 68 Cal. App. 725, 158 P. 2d 23 (1945) the defendant shipper contended that the trial court was without jurisdiction to entertain the action of plaintiff carriers for additional freight charges. It was argued that the plaintiff must exhaust its administrative remedies before the Railroad Commission. The court, in rejecting the contention, held at 730-731, 158 P. 2d at 25-26:

“In making this argument defendants misconceives the nature of these actions. They are simply actions to recover a stated amount of money—the difference between the amount paid under the contract between the carriers and the shipper and that under the rates fixed by the railroad commission in the aforesaid decisions and orders. The court was called upon to decide what rate the railroad commission had established for a particular commodity transported by motor vehicle in specified quantities. It was then simply a question of the application of these rates to the facts as disclosed by the evidence. No question of fixing rates or rules or regulations is in any way involved. That had already been determined by the railroad commission in its decisions and orders. There is, therefore, no reason why the superior court should not have jurisdiction of these cases for the effect of the judgments, if properly rendered, is to enforce the rates already established by the Railroad Commission.”

Chicago City Ry. Co. v. Chicago and W.I.R.R. Co.,

331 Ill. 151, 162 N. E. 852 (1928) involved an action for damages incident to plaintiff's shifting of material and equipment consequential to defendant's repair of a viaduct. Defendant challenged jurisdiction. The court, at 158, 162 N. E. at 854, spoke as follows:

"The question involved is the duty of the parties to the contract under the admitted facts and the ordinances by which they operate in the city of Chicago. This question is purely one of law. Jurisdiction is authority to hear and decide a cause."

The Court of Appeals of the State of New York has taken the same view, *Kovarsky v. Brooklyn Union Gas Co.*, 279 N. Y. 304, 18 N. E. 2d 287 (1938). The action was one to restrain defendant company from collection of a "reconnection charge" on the ground that "service charges" were legislatively prohibited. Defendant questioned jurisdiction. Citing *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, *supra*, it was decided that, inasmuch as the issue was one of law, direct application to the judiciary for relief was available. In *Brentwood-McMechan Water Co. v. Wheeling*, 121 W. Va. 373, 4 S. E. 2d 300 (1939), a case involving respective rights under a contract between two water companies, it was stated at 378, 4 S. E. 2d at 303:

"The public service commission, under the broad powers given it by the legislature, has the right to pass upon the question of whether or not a public utility may enter into a given contract, because of the effect such contract may have upon the power of the utility to carry out its purposes;

but when a contract is once entered into, its construction and interpretation and the rights growing out of the same, including the right to terminate, are to be determined by the court.”

Transportation Co. v. Public Service Commission, 125 W. Va. 71, 23 S. E. 2d 53 (1942) reaffirmed emphatically the *Brentwood-McMechan* rule: it held nugatory the commission’s consent to the termination of a public utility contract. A final example of state court assertion of judicial prerogative, and the concomitant refusal to abdicate it to the executive branch, is *Madregano v. Wisconsin Gas & Electric Co.*, 181 Wis. 611, 195 N. W. 861 (1923). Plaintiff initiated an action to force defendant to furnish electric service. Defendant sought to remove the cause from original judicial scrutiny and into the hands of the Wisconsin Railroad Commission. The court, at 618, 195 N. W. at 264, reacted in the following fashion:

“The reasonableness of a rule established by a public utility for the conduct and management of its business should be first determined in a proceeding before the Railroad Commission. While this is true, when rules are once established, the parties may properly appeal to the Court to vindicate their rights in respect thereto. It should not be forgotten that the judicial power is under our Constitution vested in the courts and that it cannot by Act of the Legislature be withdrawn from the courts and conferred upon an administrative body. When reasonable rates and rules or regulations have been established, the enforcement of rights of parties in relation thereto presents matters which are properly a subject for judicial inquiry.”

Whenever, in these matters, administrative agencies have been found to lack jurisdiction, the courts have not thought of relinquishing that portion of their power which one of the litigants would prefer to have reside with the executive branch. The reason is apparent. Power, if it is not to constitute tyranny, must be joined with responsibility. If a regulatory body is not bestowed with an iota of such responsibility in a given matter, it should not be granted power, for its determinations will quite likely be a hindrance to the court, to the responsible body. In this connection, the language of *Waukesha Gas & E. Co. v. Waukesha Motor Co.*, *supra*, at 426-27, 184 N. W. at 704, is helpful:

“In this case the findings of the Railroad Commission can be of no assistance to the court. The obligations of the utility are measured by terms of its contract with the defendant. If that is a valid contract, and we now are so assuming, the only issue to be determined is whether there was a breach thereof on the part of the utility and the amount of the damages sustained because of such breach. This is a judicial question, pure and simple. It is a wrong sustained by the defendant which the Railroad Commission has no power to redress, neither can it be of any assistance to the court in determining the rights of the parties.”

This very court has previously ruled on questions of tariff construction without invoking the doctrine of referral. *Western Pac. R. Co. v. Wasatch Chemical Co.*, 117 Utah 411, 217 P. 2d 371 (1950). Evidently it felt at that time that the doctrine of primary jurisdiction was unnecessary in the State of Utah.

In light of these ~~authorities~~^{authorities}, serious question can be raised as to the desirability of referral. While the Federal courts have created their own body of common law on this matter, this court is perfectly free, within Utah's court system, to disregard it if it feels it either to be undesirable or jurisdictionally impossible. The criticism leveled at the Federal court doctrine by several learned authors previously referred to shows the many problems that the policy can create. (Jaffe, Convisser, *supra*.)

But, the particular problems before this court in this case raise the even more fundamental question—whether the trial court has the power to make such a referral.

The Railroad has asked that the Interstate Commerce Commission answer five different questions dealing with the construction and interpretation of Tariff 7188-P. For example, the Railroad asks:

“Under the provisions of UPRR Tariff 7188-P, effective May 15, 1952, and applicable supplements thereto: Is a transit operator entitled to the balance of through-rate on outbound straight car-load shipments of products listed in Item 5 of said tariff if said products have merely been stored at the transit station and have not been fabricated or reworked at the transit station?”
(r.p. 38)

This is clearly the referral of a question of law. (The order of referral of the trial court also orders determination of questions of fact, although this was not even requested in the Railroad's petition.) Aside from the

point that this is the very type of construction question that the United States Supreme Court in the *Great Northern* case has held should not be referred, it is urged that a Utah court cannot refer such a question to the Interstate Commerce Commission.

A trial court has a duty to determine the controversy presented to it. As the United States Supreme Court has said:

“It (the trial court) cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and to devolve that duty upon any of its ^{officers} ~~officers~~.” *Kimberly v. Arms*, 129 U.S. 512, 524, 32 L. Ed. 764 (1889)

The Utah Constitution provides that:

“The Judicial power of the State shall be vested in the Senate sitting as a court of impeachment, in a Supreme Court, in district courts, in justices of the peace, and such other courts inferior to the Supreme Court as may be established by law.” (Art. VIII, Sec. 1)

The Constitution further provides that:

“The district court shall have original jurisdiction in all matters civil and criminal, not excepted in this Constitution, and not prohibited by law.” (Art. VIII, Sec. 7.)

The Constitution in dealing with a judge pro tempore, provides that any cause in the district court may be tried before such a judge *only* when agreed upon by the parties or their attorneys of record. (Art. VIII, Sec. 5.)

There is no provision for relegation of questions of law to a non-judicial body of this state.

Nor do the Rules of Civil Procedure adopted by this court justify referral of these questions.

As Moore, the great authority on the Federal Rules of Civil Procedure, states, “But the court cannot, without the consent of the parties, refer the whole case to the master for final decision.” 5 MOORE’S FEDERAL PRACTICE 2950 (1951).

This principle is borne out by Rule 43(a) URCP which requires that all testimony of the witnesses should be taken orally in open court, unless otherwise provided for by the rules. Rule 53 deals with the question of referrals to a master. Rule 53(b) states that, “A reference to a master shall be the exception and not the rule.”

The reasons for the extreme reluctance to delegate such powers are well set forth in an opinion of the Court of Appeals for the Seventh Circuit:

“Litigants are entitled to a trial by the court, in every suit, save where exceptional circumstances are shown. It is a matter of common knowledge that references greatly increase the cost of litigation and delay and postpone the end of litigation. References are expensive and time-consuming. The delay in some instances is unbelievably long. Likewise, the increase in cost is heavy. For nearly a century, litigants and members of the bar have been crying against this avoidable burden of costs and this inexcusable delay. Likewise, the litigants prefer, and are en-

titled to, the decision of the Judge of the court before whom the suit is brought. Greater confidence in the outcome of the contest and more respect for the judgment of the court arises when the trial is by the Judge.” *Adventures in Good Eating v. Best Places to Eat*, 131 F. 2d 809 (7th Cir. 1942).

In the case of a jury trial (and defendants are here entitled to a jury trial) a “reference shall be made only when the issues are complicated.” Rule 53(b) URCP. The only effect of the findings of the master on the issues presented to him is that they are admissible as evidence on the matters found, and may be read to the jury. Rule 53(e)(3) URCP.

Even in cases of a non-jury trial the rule provides that “Reference shall, in the absence of written consent of the parties, be made only upon a showing that some exceptional condition requires it” Rule 53(b) URCP. The record is barren of any showing at all by the Railroad of exceptional conditions requiring such a referral.

Rule 53(f) gives a party the right to object to the appointment of any person as a master.

All of these arguments militate against referring these questions to *any* master. Defendant is entitled to have its cause heard before a jury if it so chooses. To refer these questions to a master is only to add an additional burden to the litigants, because at most the master’s findings, prepared after a tedious administrative process, will not be determinative.

It is obvious that the Railroad feels that a Utah trial court would be in sufficient awe of any recommendations of the Interstate Commerce Commission that it would merely act as a rubber stamp to the opinions of the experts.

But it is singular indeed that a Utah court, even if it felt the issues were proper for reference, would refer them to an administrative body completely outside the scope of its judicial system, and indeed an instrumentality of the Federal government. The reference, when not compelled by law, is not only violate of the principle of separation of powers but also of the principle, equally important to American government, of federalism. It is even more remarkable that it felt, as it did in the instant case, that it could order that the Interstate Commerce Commission make a report and determination (r.p. 43).

It is axiomatic that a master to whom a matter is referred by the trial court must be a person responsible to and accountable to the court.

“A master in chancery is an assistant of the chancellor, and his function is the performance of Acts, either judicial or ministerial in nature which the chancellor may see fit, in accordance with equity practice, to require of him. He acts as the representative of the chancery court, and his official conduct is subject to the court’s control and supervision.” 19 AM. JUR., *Equity*, § 365 (cf. 45 AM. JUR., *References*, § 17)

It is impossible to read Rule 53, URCP, which

pertains to the equivalent of the master in chancery, in any other light. It is, in fact, most difficult to imagine an administration of justice which would even smack of efficiency and good order if a master's status were in law *coordinate in power with or superior in power* to that of the trial judge. Such a "master" could, with impunity, transcend the limitations of the order of reference; he could, by caprice, refuse to carry out all of or a part of his mandate. Perhaps more important, he could not be disciplined or removed for prejudice, bias, misconduct or an expression of an opinion prior to the hearing. Such a "master", in short, would be *irresponsible*. *In this light, he would not be, and could not be, as a matter of law, a master. Any attempt by any court to so designate him would be ineffectual. A court cannot abdicate its duties to a "master" not responsible to and accountable to it.*

The instant order, if it is construed as a mere reference, is subject to the foregoing objection and, hence, invalid. By such construction, the Federal Interstate Commerce Commission occupies the role of "master." Can it? Is it responsible to the trial court?

② Can the trial court assure that its inquiry will not, on one hand, transcend the limitations of the reference or,

③ on the other, leave unfulfilled the reference's mandate?

④ Can the trial court discipline or remove the members of the Commission, individually or as a body, if they demonstrate prejudice or bias, misconduct themselves or express an opinion on the interpretation of the tariff prior to the hearing? Manifestly, the answer to each of this

series of interrogatories is in the negative. The Interstate Commerce Commission is a Federal instrumentality. It is an agent of the Federal government, not of any of the states. Its procedure conforms to Federal, not state, directives. Its members, as to their official actions, are cloaked with immunity from state direction or discipline. In *re Neagle*, 135 U.S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55 (1890). Under these circumstances, the Interstate Commerce Commission cannot, as a matter of law, be the trial court's master.

The answer to this absurdity is obvious. If the Railroad feels that the trial court is incapable of analyzing the terms of a contract which the Railroad evidently felt when it was filed were perfectly understandable to any shipper who wished to avail himself of it, and the Interstate Commerce Commission feels the matter of sufficient importance, the Interstate Commerce Commission can petition the court to appear as an *amicus curiae*. The court could then have the advantage of "expertise" as to questions of law. As to questions of fact, these matters would have to be presented before the court, or jury, in any event. If the Railroad feels that employees of the Commission are helpful to it on that score, there is no reason for a two-time appearance of these gentlemen, once before the master and once before the court. The ultimate trier of the fact should be able to see and observe these worthies at first hand.

CONCLUSION

The Railroad seeks, by bringing its action in the courts of this state, to gain access to a Federal administrative body not otherwise available to it. It thus seeks to extend the doctrine of "primary jurisdiction", a creature of common law of the Federal judiciary, so that it serves to create jurisdiction, instead of its historical role as a restriction on jurisdiction. The instant case comes within the well-defined exception to the doctrine of primary jurisdiction. The doctrine, however, does not even apply where the administrative agency in question does not have initial concurrent jurisdiction, which the Interstate Commerce Commission does not have here. The sole question remaining, therefore, is whether the state court should, and whether it can, abdicate some of its functions to such an agency. The policy against such abdication is great, and in any event, the court has no power to so refer.

Respectfully submitted,

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