

1958

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Bryan P. Leverich; M. J. Bronson; A. U. Miner; Howard F. Coray; Scott M. Matheson, Jr.; Attorneys for Respondent;

Recommended Citation

Brief of Respondent, *Union Pacific Railroad Co. v. Structural Steel & Forge Co.*, No. 8785 (Utah Supreme Court, 1958).
https://digitalcommons.law.byu.edu/uofu_sc1/3002

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In the
Supreme Court of the State of Utah

UNION PACIFIC RAILROAD COM-
PANY, a corporation,
Plaintiff and Respondent,

v.

STRUCTURAL STEEL & FORGE CO.,
a corporation,
Defendant and Appellant.

Case No.
8785

BRIEF OF RESPONDENT

BRYAN P. LEVERICH,
M. J. BRONSON,
A. U. MINER,
HOWARD F. CORAY,
SCOTT M. MATHESON, JR.,

Attorneys for Respondent.

404 Union Pacific Building,
Salt Lake City, Utah.

ARROW PRESS, SALT LAKE

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	1
STATEMENT OF POINTS	8
ARGUMENT	10
POINT I. THE UTAH DISTRICT COURT, A COURT OF GENERAL JURISDICTION, HAS THE POWER AND THE DUTY TO REFER ISSUES TO THE INTERSTATE COMMERCE COMMISSION WHEN THE DOCTRINE OF PRIMARY JURISDICTION IS APPLICABLE ..	10
A. The doctrine of primary jurisdiction	10
B. When primary jurisdiction applies, the is- sues for determination are within the ex- clusive province of the Interstate Commerce Commission	16
C. It is immaterial whether the referral is upon instigation of the carrier or the shipper	18
D. It is immaterial whether the referral in this case is from a state or federal district court, they being both courts of general and con- current jurisdiction	20
E. Referral to the Interstate Commerce Com- mission is not barred by the Statute of Lim- itations under 49 U. S. C. A. 16 (3) even though more than two years have elapsed since the causes of action accrued	34
POINT II. THE NECESSITY FOR DETERMINA- TION OF FACTS FROM EXTRINSIC EVI- DENCE AND THE PROBLEMS OF TARIFF CONSTRUCTION PRESENT ISSUES IN	

TABLE OF CONTENTS—Continued

	Page
THESE CAUSES WITHIN THE SPECIAL COMPETENCE OF THE INTERSTATE COMMERCE COMMISSION UNDER THE DOCTRINE OF PRIMARY JURISDICTION, AND THE DISTRICT COURT CORRECTLY ALLOCATED THE ISSUES IN THE SUITS	35
A. The questions referred to the Interstate Commerce Commission for construction raise issues of transportation policy which must be considered by the Commission in the interests of uniform and expert administration	36
B. Suspension of the judicial process and retention of jurisdiction by the district court for all purposes was proper since, upon return, the court must determine all remaining issues of fact and law, award damages, if proper, and enforce judgments, if any	49
CONCLUSION	50
APPENDIX	i

INDEX OF CASES AND AUTHORITIES

CASES CITED:

Arizona Sand & Rock Co. v. Southern Pacific Co., 280 I. C. C. 285 (1951)	34
Armour & Co. v. Alton R. Co., 312 U. S. 195, 61 S. Ct. 498, 85 L. Ed. 771 (1941)	17
Armour & Co. v. Chicago M., St. P. & P. R. Co., 188 F. 2d 603 (C. C. A.-7, 1951)	48
Beck & Gregg Hardware Co. v. Cook, 210 Ga. 608, 82 S. E. 2d 4 (1954)	28, 30

TABLE OF CONTENTS—Continued

	Page
Bernstein Bros. Pipe & Machine Co. v. Denver & R. G. W. R. Co., 193 F. 2d 441 (C. C. A.-10, 1951)	31, 34
Brown Lumber Co. v. L. & N. R. Co., 299 U. S. 393, 57 S. Ct. 265, 81 L. Ed. 301 (1937)	49
Chicago, M. St. P. & P. R. Co. v. Allouette Peat Prod- ucts, 253 F. 2d 449 (C. C. A.-9, 1957)	49
Chicago M. St. P. & P. R. Co. v. Ricketson Min. Color Works, 218 Wis. 37, 259 N. W. 722 (1935)	28
Crancer v. Lowden, 315 U. S. 631, 62 S. Ct. 763, 86 L. Ed. 1077 (1942)	49
Cudahy Packing Co. v. Baltimore & O. R. Co., 263 I. C. C. 503 (1945)	3
Director General (of Railroads) v. Viscoe Co., 254 U. S. 498, 41 S. Ct. 151, 65 L. Ed. 372 (1921)	47
Ellison v. Rayonier, Inc., 156 F. Supp. 214 (W. D., Wash., 1957)	12, 32
Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)	32
Far East Conference v. United States, 342 U. S. 570, 72 S. Ct. 492, 96 L. Ed. 576 (1952)	11, 49
Feinstein v. New York Central R. Co., 159 F. Supp. 460 (S. D., N. Y., 1958)	16
General American Tank Car Corp. v. El Dorado Terminal Co., 308 U. S. 422, 60 S. Ct. 325, 84 L. Ed. 361 (1940)	17, 50
Great Northern Ry. Co. v. Merchants' Elevator Co., 259 U. S. 285, 42 S. Ct. 477, 66 L. Ed. 943 (1922)	17, 22, 31, 36, 38, 41
Hewett v. New York, N. H. & H. R. Co., 284 N. Y. 117, 29 N. E. 2d 641 (1940)	27
Hudson & Manhatton R. Co. v. United States, 313 U. S. 98, 61 S. Ct. 884, 85 L. Ed. 1212 (1941)	49

TABLE OF CONTENTS—Continued

	Page
Illinois Central R. Co. v. N. T. Reed Const. Co., 51 So. 2d 573 (Miss., 1951)	28
International Pacific Co. v. Delaware & H. R. Corp., 73 F. Supp. 30 (N. D., N. Y., 1938)	47
Interstate Commerce Commission v. Jersey City, 322 U. S. 503, 64 S. Ct. 1129, 88 L. Ed. 1420 (1944) . .	49
Knight v. Pennsylvania R. R., 280 Ky. 191, 132 S. W. 2d 950 (1939)	28, 33
Levinson v. Spector Motor Co., 330 U. S. 649, 67 S. Ct. 931, 91 L. Ed. 1158 (1947)	49
Louisville, H. & St. L. Ry. Co. v. Johns & Patterson, 201 Ky. 752, 258 S. W. 312 (1924)	27
Louisville & N. R. Co. v. Rice, 247 U. S. 201, 38 S. Ct. 429, 62 L. Ed. 1071 (1918)	34
Miller v. Davis, 213 Ia. 1091, 240 N. W. 743 (1932) . .	28
New York, Susquehanna & Western R. Co. v. Foll- mer, 254 F. 2d 510 (C. C. A.-3, 1958)	47
Norge Corp. v. Long Island R. Co., 77 F. 2d 312 (C. C. A.-2, 1935)	47
Northern Pac. Ry. Co. v. Sauk River Lumber Co., 82 F. 2d 519 (C. C. A.-9, 1936)	33
Northern Pac. Ry. Co. v. Solum, 247 U. S. 477, 38 S. Ct. 550, 62 L. Ed. 1221 (1918)	17
Northern Pac. Ry. Co. v. United States, 213 F. 2d 366 (C. C. A.-8, 1954)	18, 20, 47
Northwestern Auto Parts Co. v. Chicago B. & Q. R. Co., 240 F. 2d 743 (C. C. A.-8, 1957)	17, 35
Pennsylvania R. Co. v. Puritan Coal Co., 237 U. S. 121, 35 S. Ct. 484, 59 L. Ed. 867 (1915)	22, 30
Porto Transportation, Inc., v. Consolidated Diesel Electric Corp., 20 F. R. D. 1 (S. D., N. Y., 1956) . .	48

TABLE OF CONTENTS—Continued

	Page
Propriety of Operating Practices—New York Warehousing, 216 I. C. C. 291 (1936)	3
Schwartzman v. United Air Lines Trans. Corp., 6 F. R. D. 517 (D., Neb., 1947)	48
Seaboard R. Co. v. Daniel, 333 U. S. 118, 68 S. Ct. 426, 92 L. Ed. 580 (1948)	29
South Carolina v. Bailey, 289 U. S. 412, 53 S. Ct. 667, 77 L. Ed. 1292 (1933)	33
St. Louis-San Francisco Ry. Co. v. Willard Mirror, 160 F. Supp. 895 (W. D., Ark., 1958)	34
Texas & Pac. Ry. Co. v. American Tie Co., 234 U. S. 138, 34 S. Ct. 885, 58 L. Ed. 1255 (1914)	36
Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553 (1907)	11, 21
Texas Steel Co. v. Missouri, K. & T. R. Co., 70 S. W. 2d 484 (Tex., 1934)	28
Thomas v. Chicago B. & Q. R. Co., 127 Kan. 326, 273 P. 451, 64 A. L. R. 322 (1929)	29
T. Mendelson Co. v. Pennsylvania R. Co., 332 Pa. 470, 2 A. 2d 820 (1938)	24
Transit on Cotton Seed at Quanah, Texas, 232 I. C. C. 183 (1939)	3
Union Pacific Railroad Co. v. Corneli Seed Co., 161 F. Supp. 52, (D., Idaho, 1948)	49
Union Transfer Co. v. Renstrom, 151 Neb. 326, 37 N. W. 2d 383 (1949)	25
United States v. Alaska S. S. Co., 110 F. Supp. 104 (W. D., Wash., 1952)	18
United States v. Apicella, 148 F. Supp. 457 (D., N. J., 1957)	17

TABLE OF CONTENTS—Continued

	Page
United States v. Canfield Driveaway Co., 159 F. Supp. 448 (E. D., Mich., 1958)	19
United States v. Chesapeake & Ohio R. Co., 352 U. S. 77, 77 S. Ct. 172, 1 L. Ed. 2d 140 (1956)	35, 47
United States v. Chesapeake & O. R. Co., 242 F. 2d 732 (C. C. A.-4, 1957)	47
United States v. Garner, 134 F. Supp. 16, (E. D., N. C., 1955)	31
United States v. Interstate Commerce Commission, 337 U. S. 426, 69 S. Ct. 1410, 93 L. Ed. 1451 (1949)	16, 21
United States v. Kansas City Southern Ry. Co., 217 F. 2d 763 (C. C. A.-8, 1954)	18, 47, 50
United States v. T. I. M. E., Inc., 252 F. 2d 178 (C. C. A.-5, 1958)	35
United States v. Western Pac. R. Co., 352 U. S. 59, 77 S. Ct. 161, 1 L. Ed. 2d 126 (1956) 6, 12, 16, 17, 31, 35, 36, 38, 42, 47, 50	
Walters v. Louisville & N. Ry. Co., 220 Ky. 813, 295 S. W. 1010 (1927)	26
Western Oil & Fuel Co. v. Great Lakes Pipe Line Co., 210 F. 2d 490 (C. C. A.-8, 1954)	18
Western Pac. R. Co. v. Wasatch Chemical Co., 117 Ut. 411, 217 P. 2d 371 (1950)	40

STATUTES CITED:

5 U. S. C. A., Sec. 1004 (d)	34
28 U. S. C. A., Sec. 1337	34
49 U. S. C. A., Sec. 9	15, 16, 18
49 U. S. C. A., Sec. 13	18

TABLE OF CONTENTS—Continued

	Page
49 U. S. C. A., Sec. 16 (3)	9, 18, 35
49 U. S. C. A., Sec. 22	22

ARTICLES AND TREATISES CITED:

11 Am. Jur., Commerce, Sec. 159	28
64 A. L. R. 333	28
97 A. L. R. 406	28
Convisser, Primary Jurisdiction: The Rule and Its Rationalizations, 65 Yale L. J. 315 (1956)	14
15 C. J. S., Commerce, Sec. 143	48
21 C. J. S., Courts, Sec. 524-526	29
Davis, Administrative Law (1951)	12, 14, 15, 42
Jaffe, Primary Jurisdiction Reconsidered, 102 U. Pa. L. Rev. 577 (1954)	14
von Mehren, The Doctrine of Primary Jurisdiction, 67 Harv. L. Rev. 929 (1954)	11, 14

In the Supreme Court of the State of Utah

UNION PACIFIC RAILROAD COM-
PANY, a corporation,
Plaintiff and Respondent,

v.

STRUCTURAL STEEL & FORGE CO.,
a corporation,
Defendant and Appellant.

Case No.
8785

BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

Believing appellant's statement of facts to be inadequate, we present to the Court our own statement.

STATEMENT OF FACTS

Respondent, Union Pacific Railroad Company, commenced four separate actions against appellant in the Third Judicial District Court of the State of Utah, in and for Salt Lake County, to recover undercharges on shipments of iron

and steel products. The four complaints contain 104 causes of action, and the damages sought by the Railroad amount to approximately \$50,000. Appellant denies that Union Pacific is entitled to the undercharges and alleges, *inter alia*, that it has paid all of the freight lawfully due on each cause of action.

At all times involved appellant was in the business of fabrication and manufacture of various iron and steel products. Respondent alleges that during the period between July 1, 1953 and August 1, 1955, appellant made numerous shipments of iron and steel articles from Salt Lake City, Utah, to various destinations. On each of these shipments appellant claimed the benefit of a through rate from point of origin, which had been outside the State of Utah, to the point of final destination, under the provisions of respondent's fabrication-in-transit tariff.

The tariff is UP 7188-P, effective May 15, 1952, entitled "Rules and Charges Governing Fabrication and Treating of Structural Iron or Steel in Transit at Stations in * * * Utah * * * on U. P. R. R., as Defined in Item No. 5."* It is published and maintained by respondent to give shippers the benefits of a through rate from origin to ultimate destination on carload shipments of iron and steel articles which are stopped in the course of transit at various stations on the Union Pacific Railroad for the purpose of reworking or fabricating. The tariff requires, among other things, the surrender of the inbound transit billing representative of the material actually used in fab-

*For material excerpts from this tariff and its supplements applicable to the issues in these cases, see Appendix.

rication or reworking the outbound commodity. To be eligible for the through transit rate the shipper is subjected to the rules and conditions of the transit tariff.**

The causes of action in the four lawsuits involve instances where appellant has shipped iron or steel products from its headquarters at Salt Lake City, Utah, to various points of destination, upon which it paid freight charges based upon the through transit rate from point of origin to final destination, claiming the fabrication-in-transit privilege set forth in 7188-P and applicable supplements. Respondent claims that appellant misconstrued the application of the transit privilege and that it does not apply, contending therefore that freight charges should be assessed on the shipments from Salt Lake City, Utah, to points of destination as separate movements.

The issue, then, is whether the tariffs asserted by Union Pacific and listed in the record in its answers to

**Transit is the right of a shipper to stop a carload shipment at an intermediate point and change the form or substance of the commodity shipped and afterwards reship the commodity to the point of final destination at a total charge for transportation not exceeding that which would have been applied if the changed commodity had been shipped from point of origin to final destination without being stopped in transit. The privilege of transit is a departure from the usual and ordinary transportation service of a carrier. Under it, shippers are afforded more favorable rates than would obtain if the inbound and outbound movement to transit points were treated as separate shipments. It is actually the stopping of a commodity for process or other purposes under an arrangement which by a fiction ties the inbound and outbound movement together so as to create, in law, a continuous through movement and not two separate movements. *Propriety of Operating Practices—New York Warehousing*, 216 I. C. C. 291, at 349 (1936); *Transit on Cotton Seed at Quanah, Texas*, 232 I. C. C. 183, at 188 (1939); *Cudahy Packing Co. v. Baltimore & O. R. Co.*, 263 I. C. C. 503, at 509 (1945).

interrogatories to each cause of action, should determine the rates to be applied to the shipments or whether the through rate based upon the privilege granted by 7188-P should control. This, in turn, depends upon the construction and interpretation given to the various Items of the transit tariff.

An examination of the pleadings and discovery in the record reveals that most of the causes of action are based upon three standard fact situations:

(1) In a majority of the causes of action the inbound shipment contains a product which is one of those listed in Item 5 of the tariff. The outbound shipment is a mixed carload containing some reworked material, but the unreworked products is another article listed in Item 5. An example of this situation may be found in the sixth cause of action in Case No. 106336. This raises the question of the proper meaning of the various words and phrases in Item 5 and Item 125 as to whether the outbound unfabricated transit articles in a mixed shipment is transit material entitling the transit operator to the balance of the through rate. The problem is contained in the order of referral to the Interstate Commerce Commission as Question No. 1.

(2) A majority of the causes of action also involve the situation where the inbound shipment consists of one of the articles listed in Item 5 as transit material, and the outbound shipment, or a part thereof, consists of a different product but also listed as transit material in Item 5. The outbound shipment consists merely of the second transit item, which has been reworked or fabricated. This situation and its variations bring into issue the meaning and

construction of the words and phrases of Item 100 of the tariff as to whether transit is proper on outbound reworked commodities which are not representative of the inbound product. An example involving this issue also may be found in the sixth cause of action in Case No. 106336. The referral order to the Interstate Commerce Commission presents this issue as Question No. 3.

(3) A number of the causes of action involve the situation where the inbound shipment of transit material is unloaded at a non-transit warehouse and the outbound shipment, which comes from appellant's warehouse, is supported by a freight bill or credit slip represented by the inbound shipment unloaded at the nontransit warehouse. An example involving these facts may be found in the sixty-seventh cause of action of Case No. 106671. The issue involves the proper construction and interpretation of Items 80 and 120 of the tariff. The referral order to the Interstate Commerce Commission presents this issue as Question No. 4.

A lesser number of the cases involve two additional fact situations: The first is whether the transit balance is applicable on outbound carloads after storage at the transit station, where no fabrication or reworking took place at the transit station. An example of this situation may be found in the fifty-second cause of action of Case No. 106671. The referral order to the Interstate Commerce Commission presents this issue as Question No. 2. The second situation is where transit credits covering inbound shipments of steel sheets are asserted as a basis for claiming transit balance rates on outbound shipments of coated and

wrapped pipe. There is no express language in the tariff providing for coating and wrapping of pipe fabricated from steel sheets at the transit point. This raises the question of the proper construction to be given to paragraph Three of Item 5, and Exceptions 2, 3 and 4. An example of this problem may be found in the first cause of action in Case No. 106336. It is listed in the referral order to the Interstate Commerce Commission as Question No. 5.

Recognizing the technicality and complexity of the terminology in the tariff and the lack of the court's jurisdiction to make a determination of its proper meaning as it is involved in these cases, respondent, in accordance with the mandate of the Supreme Court in *United States v. Western Pacific R. Co.*, 352 U. S. 59, 77 S. Ct. 161, 1 L. Ed. 2d 126, (1956), petitioned the district court on October 4, 1957, for an order of referral of five specific issues of fact and tariff construction to the Interstate Commerce Commission for determination and to hold the trials of the lawsuits in abeyance until this had been completed (R. 37-39). On November 8, 1957, by memorandum decision, the district court in granting said referral stated:

“The lawsuit primarily involves a recovery of charges for carriage of steel products. Primary jurisdiction of that cause is in the Utah District Court. Within the overall controversy are issues, the adequate consideration of which would require an acquaintance of many intricate facts of transportation. Settlement of these issues seems to involve an inquiry which is essentially one of fact and of discretion in technical matters. This, under the best reasoning of the cases cited, is for the Interstate Commerce Commission” (R. 40).

The order of referral, dated November 12, 1957 (R. 42-43) submitted the issues of tariff interpretation and issues of fact to the Interstate Commerce Commission and held the causes in abeyance during the interim and retained jurisdiction of the causes for all purposes.

The five questions involving the construction of Tariff 7188-P in the order of referral to the Interstate Commerce Commission are as follows:

“1. Is a transit operator entitled to the balance of through rate on the unfabricated and unreworked products contained in an outbound mixed shipment consisting of some transit fabricated or reworked products and some unfabricated and/or unreworked products, if the unfabricated and/or unreworked products are products listed in Item 5 of said tariff, assuming the transit operator has complied with all other essential provisions of said tariff?

“2. Is a transit operator entitled to the balance of through rate on outbound straight carload 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?

“3. Is a transit operator entitled to the balance of through rate on an outbound product which is fabricated or reworked but which could not have been fabricated in whole or in part from the commodity represented by the inbound billing surrendered, assuming that all other provisions of said tariff have been complied with by the transit operator?

“4. Is the transit operator entitled to the balance of through rate on commodities not unloaded

into the warehouse or manufacturing plant of the outbound shipper and not transferred to the outbound shipper together with the inbound freight bill or tonnage credit slip under certification?

“5. Is a transit operator entitled to surrender transit credits covering inbound shipments of steel sheets as a basis for claiming the balance of through rate on outbound shipments of coated and wrapped pipe?”

Appellant filed a petition for intermediate appeal on or about December 11, 1957, and respondent filed timely answer. On April 2, 1958, the Supreme Court denied the petition. However, on appellant's filing a motion for reconsideration of the petition and for oral argument, to which a motion to dismiss was filed, the Supreme Court, on April 22, 1958, vacated the order of April 2, 1958, and granted the interlocutory appeal.

STATEMENT OF POINTS

POINT I.

THE UTAH DISTRICT COURT, A COURT OF GENERAL JURISDICTION, HAS THE POWER AND THE DUTY TO REFER ISSUES TO THE INTERSTATE C O M M E R C E COMMISSION WHEN THE DOCTRINE OF PRIMARY JURISDICTION IS APPLICABLE.

- A. The doctrine of primary jurisdiction.
- B. When primary jurisdiction applies, the issues for determination are within the exclusive

province of the Interstate Commerce Commission.

- C. It is immaterial whether the referral is upon instigation of the carrier or the shipper.
- D. It is immaterial whether the referral in this case is from a state or federal district court, they being both courts of general and concurrent jurisdiction.
- E. Referral to the Interstate Commerce Commission is not barred by the Statute of Limitations under 49 U. S. C. A. 16 (3) even though more than two years have elapsed since the causes of action accrued.

POINT II.

THE NECESSITY FOR DETERMINATION OF FACTS FROM EXTRINSIC EVIDENCE AND THE PROBLEMS OF TARIFF CONSTRUCTION PRESENT ISSUES IN THESE CAUSES WITHIN THE SPECIAL COMPETENCE OF THE INTERSTATE COMMERCE COMMISSION UNDER THE DOCTRINE OF PRIMARY JURISDICTION, AND THE DISTRICT COURT CORRECTLY ALLOCATED THE ISSUES IN THE SUITS.

- A. The questions referred to the Interstate Commerce Commission for construction raise issues of transportation policy which must be

considered by the Commission in the interests of uniform and expert administration.

- B. Suspension of the judicial process and retention of jurisdiction by the district court for all purposes was proper since, upon return, the court must determine all remaining issues of fact and law, award damages, if proper, and enforce judgments, if any.

ARGUMENT

POINT I.

THE UTAH DISTRICT COURT, A COURT OF GENERAL JURISDICTION, HAS THE POWER AND THE DUTY TO REFER ISSUES TO THE INTERSTATE C O M M E R C E COMMISSION WHEN THE DOCTRINE OF PRIMARY JURISDICTION IS APPLICABLE.

- A. The doctrine of primary jurisdiction.

Primary jurisdiction is a principle which determines whether an administration agency or a court of general jurisdiction should decide certain questions. If applicable, it requires that those questions or issues in a claim be brought to the agency for determination before the entire controversy in the court of general jurisdiction is resolved. Its purpose is to provide a uniform application of rules, rates and regulations in regulated industries and to secure the aid of those who are trained and experienced in a particular technical field. The concept is frequently expressed

by reference to the wording of the Supreme Court in *Far East Conference v. United States*, 342 U. S. 570, 574, 72 S. Ct. 492, 96 L. Ed. 576 (1952) :

“* * * a principle, now firmly established, is that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.”

The doctrine was first conceived in *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, in 1907. Justice White, “its innovator, gifted in this instance with extraordinary prevision, underpinned the doctrine with a rationale which is still accepted.” von Mehren, *The Doctrine of Primary Jurisdiction*, 67 Harv. L. Rev. 929, at 932 (1954).

“The substance of the doctrine is that where by appropriate legislation an administrative agency is vested with jurisdiction under a regulatory scheme to set rules, regulations and standards of conduct and performance in technical, scientific and complicated matters of commercial and industrial activity, judicial process will not be exercised in damage

claims involving determination of the same rules, regulations and standards without reference to administrative action thereon. This means that even though court jurisdiction to entertain a common law right of action exists, exercise thereof will be suspended pending administrative determination of matters essential to the action as to which primary jurisdiction has been vested in an administrative agency by legislative action. Precise language to such effect is not always found in legislative acts to which courts have applied the primary jurisdiction principle." *Ellison v. Rayonier, Inc.*, 156 F. Supp. 214, at 218, 219 (W. D., Wash., 1957).

Since its origin primary jurisdiction has grown rapidly and although its first application was in the field of interstate commerce, "the principle is clearly applicable whenever courts and agencies have concurrent jurisdiction." Davis, *Administrative Law*, (1951) at 669.

The latest application of the doctrine by the Supreme Court was in *United States v. Western Pacific R. Co.*, supra, where a clear analysis is stated beginning at page 62 as follows:

"We are met at the outset with the question of whether the Court of Claims properly applied the doctrine of primary jurisdiction in this case; that is, whether it correctly allocated the issues in the suit between the jurisdiction of the Interstate Commerce Commission and that of the court. * * * because we regard the maintenance of a proper relationship between the courts and the Commission in matters affecting transportation policy to be of continuing public concern, we have been constrained to inquire into this aspect of the decision. We have concluded that in the circumstances here presented the

question of tariff construction, as well as that of the reasonableness of the tariff as applied, was within the exclusive primary jurisdiction of the Interstate Commerce Commission.

“The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. ‘Exhaustion’ applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. ‘Primary jurisdiction,’ on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, 433.

“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 it serves will be aided by its application in the particular litigation. These reasons and purposes have often been given expression by this Court. In the earlier cases emphasis was laid on the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions. See *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426. More recently the expert and specialized knowledge of the agencies involved has been particularly stressed. * * *

The doctrine of primary jurisdiction thus does 'more than prescribe the mere procedural time table of the lawsuit. It is a doctrine allocating the law-making power over certain aspects' of commercial relation. 'It transfers from court to agency the power to determine' some of the incidents of such relations."

Appellant has selected statements of various writers who have criticized the doctrine or its origin (App. Br. 11, 18), leaving an inference of its general disapproval. This is not the fact. Even these writers recognize the powerful reasons for the doctrine or its merit.* Others are outspoken in its favor; for example, von Mehren, *supra*, at 965, states:

"The doctrine of primary jurisdiction is essential to effective regulation. Without it members of regulated industries would be subject to the commands of two masters—the regulatory statute as administered by the agency and the * * * laws as administered by the courts. Although in some instances regulated companies should respond to the commands of both agency and court, they should not be required to do so until the agency has defined its interest in the matter to be considered by the court. This is all that primary jurisdiction doctrine seeks to achieve."

However, while writers have disagreed on some of its aspects, the doctrine is firmly integrated into the law, and the courts' only function is its proper application.

*Jaffe, *Primary Jurisdiction Reconsidered*, 102 U. Pa. L. Rev. 577, at 604 (1954).

Davis, *supra*, at 665.

Convisser, *Primary Jurisdiction: The Rule and Its Rationalizations*, 65 Yale L. J. 315 (1956).

Appellant, we submit, is in error in its analysis of the basic nature of the doctrine. (App. Br. 18-20.) It is there asserted that primary jurisdiction involves an initial concurrent jurisdiction between the administrative and judicial forums, and since the Railroad has no right to commence its initial action before the Commission, as contrasted to a shipper given the alternate recourse to the Commission or the federal court under Section 9 of the Act (49 U. S. C. A. Sec. 9), there is no initial concurrent jurisdiction and thus the doctrine does not come into play. The premise for appellant's conclusion is a statement by Davis, *supra*, at 664:

“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.”

An examination of Davis' analysis of Primary Jurisdiction (pp. 664-675), from which this statement was taken, reveals its proper meaning. It is merely to distinguish and contrast the doctrine of primary jurisdiction from other doctrines involved in the division of functions between the courts and administrative agencies, notably, exhaustion of administrative remedies. The latter controls the timing of judicial relief from agency action, and jurisdiction is in a single forum at all times. Primary jurisdiction, on the other hand, is not concerned with judicial review but decides whether the initial determination of some questions should be by the court in which the action was commenced and is pending or by the appropriate administrative agency. Thus there must be concurrent jurisdiction both in the court and the agency to hear and decide

certain questions in a given field, such as interstate commerce, but once the determination is made that the agency should make the decision of certain questions, its jurisdiction is exclusive.

Appellant has also applied the concurrent aspect of the doctrine of primary jurisdiction prematurely. The determination of whether the court or the agency should make the initial decision is not considered until after the original claim is cognizable in a court of general jurisdiction. *United States v. Western Pac. R. Co.*, *supra*, at 64.

The reference by appellant to Section 9 of the Act as an example of concurrent administrative and judicial jurisdiction between the Commission and the federal courts in the case of a shipper commencing the action, is also in error. That section merely gives a shipper alternative remedies in "suit(s) * * * for the recovery of the damages for which * * * (a) common carrier may be liable under the provisions of this chapter," (49 U. S. C. A., Sec. 9) and a shipper cannot file his action in the federal court under Section 9 where his claim for damages necessarily involves a question of reasonableness, calling for the exercise of the Commission's exclusive primary jurisdiction. *United States v. Interstate Commerce Commission*, 337 U. S. 426, 69 S. Ct. 1410, 93 L. Ed 1451 (1949) ; *Feinstein v. New York Central Railroad Co.*, 159 F. Supp. 460, at 464 (S. D., N. Y., 1958), and cases cited therein.

- B. When primary jurisdiction applies, the issues for determination are within the exclusive province of the Interstate Commerce Commission.

Where certain issues within an overall controversy must properly be referred to the Interstate Commerce Commission for its determination, the court loses its jurisdiction to hear and decide those issues, and the judicial process is suspended. The sole forum with the power to determine those issues is the agency.

“* * * Whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body” (*United States v. Western Pac. R. Co.*, supra, at 64), those issues are “*within the exclusive primary jurisdiction of the Interstate Commerce Commission.*” *Id.*, 63, (Emphasis added).

“The * * * language of the Supreme Court in the *Western Pacific* case is imperative in its effect. It held that as to question of tariff construction and reasonableness of rate as applied, that question ‘was within the *exclusive primary jurisdiction* of the Interstate Commerce Commission.’ * * * The word exclusive means ‘shut out,’ ‘debarring from participation.’ Black’s Law Dictionary notes, ‘These words preclude the idea of co-existence, and mean possessed to the exclusion of others.’” *United States v. Apicella*, 148 F. Supp. 457, 458, (D., N. J., 1957).

See also: *Armour & Co. v. Alton R. Co.*, 312 U. S. 195, 61 S. Ct. 498, 85 L. Ed. 771 (1941); *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, 60 S. Ct. 325, 84 L. Ed. 361 (1940); *Great Northern Ry. Co. v. Merchants’ Elevator Co.*, 259 U. S. 285, 42 S. Ct. 477, 66 L. Ed. 943 (1922); *Northern Pacific Ry. Co. v. Solum*, 247 U. S. 477, 38 S. Ct. 550, 62 L. Ed. 1221 (1918); *Northwestern Auto Parts Co. v. Chicago B. & Q. R. Co.*, 240 F. 2d 743,

749 (C. C. A.-8, 1957) ; *United States v. Kansas City Southern Railway Co.*, 217 F. 2d 763 (C. C. A.-8, 1954) ; *Northern Pac. Ry. Co. v. United States*, 213 F. 2d 366 (C. C. A.-8, 1954) ; *Western Oil & Fuel Co. v. Great Lakes Pipe Line Co.*, 210 F. 2d 490 (C. C. A.-8, 1954) ; and *United States v. Alaska S. S. Co.*, 110 F. Supp. 104 (W. D., Wash., 1952).

C. It is immaterial whether the referral is upon instigation of the carrier or the shipper.

Appellant has much to say about the fact that the petition for referral was by the carrier rather than by the shipper. It also makes the unfounded claim that Union Pacific is attempting, by a device, to gain access to the Interstate Commerce Commission (App. Br. 6).

It is not disputed that there is no statute allowing Union Pacific to initiate an original proceeding in these cases before the Interstate Commerce Commission. The Federal statute provides only for actions at law (49 U. S. C. A., Sec. 16 (3)). Nor is it disputed that a shipper has dual initial remedies in actions against carrier for damages (49 U. S. C. A., Sec. 9 and 13). But none of these statutes are concerned with primary jurisdiction.

Since the issues allocated to the Commission under the doctrine are exclusively within its jurisdiction, there is no court of general jurisdiction with the power to hear and decide such issues. Therefore, if the shipper does not ask for the referral, as was the case here, it is the duty of the carrier to do so. Otherwise the mandate of the Supreme Court laid down in the *Western Pacific* case would be ignored, and issues properly allocable to the agency would

remain in the court of general jurisdiction at the whim of the shipper.

This is not a reference for the specific purpose of having the Commission determine the respondent's claim (App. Br., 6) ; it is simply a reference of those issues within the lawsuit which call for the aid of an agency schooled in unraveling the mysteries of tariff construction. In such matters the Commission, under law, has preempted the field.

The Commission's determination will be equally binding on all parties to the suit, and the results may be favorable to shipper, a possibility which appellant has apparently ignored. Both parties are entitled to appear before the Commission to protect their interests and participate in the proceedings. The ultimate result is therefore the same regardless of which party seeks the initial referral.

The question of referral on petition of the carrier came before the court in *United States v. Canfield Drive-away Co.*, 159 F. Supp. 448 (E. D., Mich., 1958). In that case the court readily recognized the holding of the *Western Pacific* case and ordered that the referral be made. At page 455 the court stated:

"In this case, however, it is the carrier, whose charges have been paid in full, who insists that a reference be made. The Court cannot find a spelling out of procedure whereby a carrier situated as the defendant in this case, would initiate a proceeding before the Interstate Commerce Commission. I do not find any decided case in which the application of the doctrine of primary jurisdiction applies, with the procedural background of the case at Bar. Not-

withstanding, however, that there seems to be no well-defined procedural path to follow, if the doctrine of the *Western Pacific* case is to be followed, this Court should not be helpless merely because he does not find a Court rule or procedural statute which gives specific direction as to how to proceed."

The same situation gave no trouble to the court in *Northern Pac. Ry. Co. v. United States, supra*. There the carrier initiated the action and contended on appeal that the trial court could not make a preliminary determination of whether the words in the disputed tariff were used in a peculiar or extraordinary sense. The trial court had made the determination in favor of the shipper and the appellate court reversed, holding that the question was one of fact, which would have to be determined by the Interstate Commerce Commission.

- D. It is immaterial whether the referral in this case is from a state or federal district court, they being both courts of general and concurrent jurisdiction.

The main thrust of appellant's argument in this appeal is based upon the fact that the actions were commenced in the state rather than the federal district court. Appellant claims that referral to a federal administrative agency is beyond what the state tribunal should do voluntarily and, as a matter of law, cannot otherwise do. The reasoning for this argument seems to be: first, it is undesirable to refer because of the reluctance of the state courts to abdicate their jurisdiction; second, reference to an agency outside the scope of the state judicial and administrative system

violates both separation of powers and federalism; and third, the Interstate Commerce Commission has no responsibility to the state court.

It is interesting to note that the doctrine of primary jurisdiction resulted from a state court proceeding. In *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, *supra*, the shipper commenced its action in a state court of Texas to recover damages for excessive freight charges. The reasonableness of the rate was at issue, and the state appellate court held that such issue could be determined by the court even though the rate had been filed and promulgated by the carrier pursuant to the Interstate Commerce Act. The Supreme Court reversed, holding that the uniform application of rates to all required that the sole determination of unreasonableness of rates be vested solely within the Commission. Thus the doctrine of primary jurisdiction was born and a principle established which has not varied since: Whenever the issue before the court involves the question of unreasonableness of a rate, the exclusive primary jurisdiction is in the Commission, and no court, be it state or federal, has the power to proceed. *United States v. Interstate Commerce Commission*, *supra*.

It is apparent from the holding of the *Abilene* case that where issues are within the primary jurisdiction of the Commission, a state court has no jurisdiction. It also illustrates that appellant's argument that state courts are reluctant to give away jurisdiction, is without merit.

A question arose as to whether *Abilene* wholly superseded the concurrent jurisdiction of state courts in inter-

state commerce matters. That problem was solved in *Pennsylvania R. Co. v. Puritan Coal Co.*, 237 U. S. 121, 35 S. Ct. 484, 59 L. Ed. 867 (1915), involving a suit in a state court by a shipper for damages caused by the carrier's refusal to furnish cars. The Supreme Court held that Section 22 of the Act (49 U. S. C. A., Sec. 22), which preserved all common law and statutory remedies, thus allowing suits in state courts, was not superseded by the holding in the *Abilene* case; but the court pointed out that there was no jurisdiction in state, as well as federal courts under Section 9, where the issue involved was the "determination of matters calling for the exercise of administrative power and discretion of the Commission." *Id.*, at 130. Thus the state courts were retained in the operative scheme of primary jurisdiction in the same manner as it applied to federal courts.

In *Great Northern Ry. Co., v. Merchants' Elev. Co.*, *supra*, the problem for decision was tariff construction rather than reasonableness of rates. Here again the action was commenced in a state court of general jurisdiction. The Minnesota trial court construed the meaning of the tariff rather than referring the matter to the Commission, and the Supreme Court affirmed. The issue was: "whether any court had jurisdiction of the controversy, in view of the fact that the Interstate Commerce Commission had not passed upon the disputed question of construction." *Id.*, 290 The court held that the disputed question of construction, being one wholly of law, was properly a matter for the court to make the determination, and therefore referral to the Interstate Commerce Commission was unnecessary. The

jurisdiction to determine matters of tariff construction involving solely questions of law was thus left in the state courts. However, the Supreme Court recognized that whenever extrinsic evidence may be necessary to determine the meaning of words used in the tariff in a peculiar or technical sense, or to establish a usage of trade or locality which attaches provisions not expressed in the tariff, "the preliminary determination must be made by the Commission; and not until this determination has been made, can a court take jurisdiction of the controversy." *Id.*, 292. The meaning of the language is clear: If the state court proceeding had involved tariff construction where preliminary resort to the Commission was necessary, the Supreme Court would have directed the state court to withhold its proceeding until the matter of primary jurisdiction had been concluded. As Justice Brandeis states:

"If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained." *Id.*, 292.

The cases before the Court on this appeal involve nothing more than the situation described in the *Great Northern* case, requiring preliminary resort and determination by the Commission.

In its development, as the foregoing cases illustrate, primary jurisdiction was applied in two separate fields of interstate transportation: first, in the area of reasonableness of rates, practices and rules, where the jurisdiction of the Commission is also exclusive; and second, in tariff construction, where the jurisdiction of the Commission is

also exclusive, but only where the issue for determination is more than solely a question of law. It is helpful to have this in mind in examining the decisions of state courts confronted with the problem, since the determination of whether the court or the Interstate Commerce Commission should make the initial decision of certain questions, is the same in both fields.

In *T. Mendelson Co. v. Pennsylvania R. Co.*, 332 Pa. 470, 2 A. 2d 820, (1838), shippers attempted to enjoin the carrier from opening packaged perishable goods to determine the nature and extent of damage at the time of delivery, on the grounds that the practice was unreasonable. The trial court denied the injunction on the ground the exclusive jurisdiction was in the Interstate Commerce Commission. In affirming, the State Supreme Court, at page 822, said:

“The court below properly decided that the jurisdiction of the Commission is exclusive in matters of this character. When rules, regulations and practices in interstate commerce are attacked as being unreasonable in their operation, the law provides a forum, the Interstate Commerce Commission, for the settlement of this disputed question. That forum must be resorted to before the courts can interfere. *Great Northern Ry. Co. v. Merchants' Elevator Co.*, 259 U. S. 285, 291, 42 S. Ct. 577, 66 L. Ed. 943. *Though state courts may assume equitable jurisdiction in proper cases, when they attempt to invade a field occupied by Federal control under Federal laws, they will be prohibited from entertaining jurisdiction.* Under the facts as shown by the pleadings, the Interstate Commerce Commission had jurisdiction. Here the duty devolves on the carrier to determine the ‘practice.’ The commission polices the

carriers' rules and practices. It is an administrative matter of which the Commission has special knowledge; a technical problem better left to the initial study of transportation specialists. *The technical nature of the subject, and the peculiar ability of an administrative body to examine it, suffice as a matter of public policy to displace preliminary court action.* * * *” (Emphasis added.)

In *Union Transfer Co. v. Renstrom*, 151 Neb. 326, 37 N. W. 2d 383 (1949), a carrier commenced action for undercharges. The issue was whether the rate for finished or unfinished stampings applied. The shipper claimed the court lacked jurisdiction over the subject matter. However, the court pointed out at page 386:

“The Interstate Commerce Act, as adopted and thereafter amended from time to time, never purported to exclusively confine the field of jurisdiction to the Interstate Commerce Commission, but as a matter of fact was cumulative and actually reserved to the shipper and carrier all common law and statutory remedies not repugnant to its provisions. Title 49, s. 22, U. S. C. A. of the Interstate Commerce Act * * *.”

“It is generally the applicable rule that when the reasonableness, discriminatory character, or validity of approved, filed, and published tariff rates is not assailed, and no question affecting the power or administrative discretion or judgment of the Interstate Commerce Commission already exercised or to be exercised is involved, but the controversy merely involves the question of whether or not the carrier has exacted the rate prescribed in its tariff, courts have jurisdiction of the subject matter. * * *”

“* * * the applicable terms of plaintiff's published tariff were clearly unambiguous and without any peculiar trade usage or meaning. * * * Such a case presented factual and legal questions in nowise different from any other factual or legal issue determinable by courts and juries, and courts have original jurisdiction to try such cases.”

The court found jurisdiction based upon the rationale of the *Great Northern* case, while recognizing that state courts do not have jurisdiction of those issues allocable under the doctrine of primary jurisdiction.

Walters v. Louisville & N. Ry. Co., 220 Ky. 813, 295 S. W. 1010 (1927), involved a question of a mathematical calculation to determine the proper freight charges in dispute. The trial court dismissed the action upon the grounds the questions involved were administrative ones, and therefore exclusive jurisdiction was in the Interstate Commerce Commission. While recognizing the rule of primary jurisdiction, the Appellate Court reversed, holding that the only problem involved was a determination of mathematical computations and therefore resort to the Commission was unnecessary.

The court's basis for arriving at this conclusion, stated at page 1011, is as follows:

“In order, * * * for the question to be one for the exclusive consideration by the Interstate Commerce Commission there must be a disputed question affecting the classification, and, resultingly, the rates, and that question must be of such a nature as that courts and juries might reasonably disagree, and in the solution of which requires the exercise of expert knowledge of facts and practices

upon which the classification is based. It necessarily follows, therefore, that, if the question to be solved is not of the nature indicated and consists only in mathematical calculations, it does not become one *exclusively* for the Interstate Commerce Commission to solve. If only a mathematical calculation will solve the litigated question, there is nothing to deprive the proper court, state or federal, of its jurisdiction to find facts for the correct basis for the calculation and give judgment accordingly. As we have seen, there is no dispute in this case as to the correct classification, or as to the rates applicable to the classification. There is, therefore, no question requiring expert knowledge, nor one about which juries or courts might reasonably disagree."

Louisville, H. & St. L. Ry. Co. v. Johns & Patterson, 201 Ky. 752, 258 S. W. 312 (1924), involved the question of determining when used clothing ceased to be clothing and became rags. The defendant carrier claimed the proper classification and rating of the shipment involved administrative questions within the exclusive jurisdiction of the Interstate Commerce Commission. In considering this matter the court stated:

"This latter contention will be considered first, since, if true, ordinary courts, both *state and federal*, are without jurisdiction to determine the dispute." (Emphasis added.)

Upon consideration the state appellate court determined that the referral was necessary and therefore the trial court had no jurisdiction.

The foregoing cases are sufficient, we believe, to illustrate the uniform application of federal primary jurisdiction by state courts. See also *Hewett v. New York, N. H.*

& *H. R. Co.*, 284 N. Y. 117, 29 N. E. 2d 641 (1940); *Miller v. Davis*, 213 Ia. 1091, 240 N. W. 743 (1932); *Chicago M. St. P. & P. R. Co. v. Ricketson Min. Color Works*, 218 Wis. 37, 259 N. W. 722 (1935); *Knight v. Pennsylvania R. R.*, 280 Ky. 191, 132 S. W. 2d 950 (1939); *Beck & Gregg Hardware Co. v. Cook*, 210 Ga. 608, 82 S. E. 2d 4 (1954); *Illinois Central R. Co. v. N. T. Reed Const. Co.*, 51 So. 2d 573 (Miss., 1951); *Texas Steel Co. v. Missouri, K. & T. R. Co.*, 70 S. W. 2d 484 (Tex., 1934); and Anno. in 64 A. L. R. 333 et seq. and 97 A. L. R. 406 et seq.

There is not a single state court case above cited, or found by us, supporting the claim of appellant that the state court should not or cannot make a referral to the Interstate Commerce Commission when the doctrine of primary jurisdiction is applicable. On the contrary, they, together with the Supreme Court pronouncements heretofore cited and considered, fully support the referral in this case. In addition, the compelling reason for the establishment of primary jurisdiction in the *Abilene* case, i. e., uniformity is equally present here. See 11 Am. Jur., Commerce, Sec. 159.

Although in our court system there are separate state and federal forums, in many areas they both apply the same jurisprudence. It is true that federal courts have exclusive jurisdiction so far as the Constitution and the statutes of Congress enacted pursuant thereto so provide, and state courts have exclusive jurisdiction over matters not falling within the jurisdiction of federal courts. However, there are many fields involving federal matters such as interstate commerce, where there is concurrent juris-

diction in state and federal tribunals. See 21 C. J. S., Courts, Sec. 524-526.

“It is a general rule that where no inconsistency with the supremacy of the national government or its official agencies is concerned, the state courts have concurrent jurisdiction with federal courts of actions arising under federal statutes, just as federal courts, subject to limitations imposed by the federal law itself, have concurrent jurisdiction with state courts of actions arising under state law.” *Thomas v. Chicago B. & Q. R. Co.*, 127 Kan. 326, 273 P. 451, 64 A. L. R. 322, 328 (1929); see also, *Seaboard R. Co. v. Daniel*, 333 U. S. 118, 68 S. Ct. 426, 92 L. Ed. 580 (1948).

Neither party questions the basic concurrent jurisdiction in the state court in this case, but appellant alleges that since the general jurisdiction of the state court has been invoked, that court should not and, as a matter of law, cannot refer any part of that vested power to a federal administrative agency. But this argument has a fatal weakness. The source of the original state court jurisdiction in this matter is not the State Constitution and statutes, as appellant indicates, but is firmly lodged in the power of Congress in its exclusive right to regulate interstate commerce. Thus the power of the state court to step across the threshold and assume jurisdiction of any kind in these cases is wholly dependent on the federal law.

“The power to regulate interstate commerce is vested in the Congress by art. 1, § 8, par. 3 of the Constitution of the United States. * * * The historical background of this clause of the Constitution attests to the wisdom of thus giving the gen-

eral Government supreme authority in this field.
 * * * in section 22 of the original act, 49 U. S. C. A., § 22, it is also provided that 'nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies'. Thus the Congress plainly and unmistakably expresses its will and intention that rights of parties arising in interstate commerce transactions may be protected by the courts of the land, both Federal and State, so long as action in the courts are not inconsistent with the provisions of the act." *Beck & Gregg Hardware Co. v. Cook, supra*, at 7.

Simply by repealing Section 22 of the Interstate Commerce Act, Congress could completely remove concurrent jurisdiction from state courts in the field of interstate commerce*, and therefore the contention that the state court is being asked to abdicate some of its original power is wholly without merit. And, in granting to the state courts concurrent jurisdiction to deal with interstate commerce matters under Section 22, the state courts must have implied authority to fully perform their assignments by, among other things, referring matters of an appropriate nature to the Commission. Hence, any questions of invasion and abdication of state court power are not involved.

This is not a reference to an administrative body outside the scope of the state judicial system (App. Br. 37). It is a reference to a federal agency by a state court acting within the scope of the federal judicial system. Congress has delegated to the Commission the authority to determine

*See *Pennsylvania R. Co. v. Puritan Coal Co.*, *supra*, at page 130.

and decide matters within its primary jurisdiction and has delegated to the courts the right to entertain other actions involving interstate commerce. *United States v. Garner*, 134 F. Supp. 16 (E. D., N. C., 1955).

Therefore it would appear that Point IV of Appellant's Brief and the cases cited and discussed thereunder, are without application to any issue actually involved in these cases.

Any court construing an interstate tariff, whether it be state or federal, must apply the applicable federal law as outlined by the United States Supreme Court. *Great Northern Ry. Co. v. Merchants' Elevator Co.*, *supra*, at 290; *Bernstein Bros. Pipe & Machine Co. v. Denver & R. G. W. R. Co.*, 193 F. 2d 441 (C. C. A.-10, 1951). The basic purpose underlying this requirement is to insure uniform application of substantive rules throughout the entire field governed by federal law, regardless of whether the state or the federal forum is initially invoked. The issue presented in these cases goes one step beyond the mere application of federal substantive law. Here we have a federal jurisdictional doctrine and therefore, *a fortiori*, the state court must follow it.

"The doctrine of primary jurisdiction thus does 'more than prescribe the mere procedural timetable of the law suit. It is a doctrine allocating the *law-making power* over certain aspects' of commercial relations. 'It transfers from the court to agency the power to determine' some of the incidents of such relations." *United States v. Western Pac. R. Co.*, *supra*, at 65. (Emphasis added.)

A converse situation to these cases is diversity of citizenship actions. Since *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), federal courts have been bound to follow controlling rules of substantive law as declared by the state legislatures or highest state courts in all diversity cases, unless a Federal Constitution or statutory question is involved. Thus the ultimate decision of the case reached in the federal court is no different than if the case had been concluded in the state court. The same reasoning has equal force here. The state court's handling of a referral under the doctrine of primary jurisdiction must be the same as the corresponding handling in the federal court.

The doctrine of referral by federal courts to state administrative bodies to determine questions within their particular field was recognized by the federal district court in the state of Washington in *Ellison v. Rayonier*, *supra*. In that case actions were commenced by various tide land owners against a pulp and mill operator to recover damages for deterioration and death of oysters caused by water pollution. The basis of the court's jurisdiction was diversity of citizenship. The mill operator claimed that under the Washington Water Pollution Control Act primary jurisdiction to determine standards of actionable pollution of state waters was vested in the Pollution Control Commission provided for in the Act.

The federal court, applying Washington substantive law as it was bound to do, agreed, and there was no question that the federal court should not or could not make the referral to the state agency. Thus, even the federal courts

find no barrier to recognition of a state administrative agency when the states doctrine of primary jurisdiction applies. See also: *Northern Pac. Ry. Co. v. Sauk River Lumber Co.*, 82 F. 2d 519 (C. C. A.-9, 1936).

Proper heed must be given to the pronouncements of the United States Supreme Court concerning the doctrine of primary jurisdiction since it is the paramount authority over all legal matters predicated on the Federal Constitution and Statutes. And, where it has spoken, its words are not only entitled to great deference, they are entitled to "absolute obedience." *Knight v. Pennsylvania R. R.*, *supra*, at 953; *South Carolina v. Bailey*, 289 U. S. 412, 420, 53 S. Ct. 667, 77 L. Ed. 1292 (1933). From *Abilene* to *Western Pacific* the Supreme Court has reiterated time and time again that when the doctrine of primary jurisdiction is applicable, the *exclusive jurisdiction* of the question to be referred is in the federal administrative agency. The state or federal court of general jurisdiction is therefore not concerned with discretion or desire, and once the determination has been made that primary jurisdiction is applicable, a duty to refer arises. The court's failure to do so would render its own determination nugatory and void, because it has no authority to decide that question.

Appellant argues that the state court cannot make the referral because it has no control over the Commission. While it is true that there is no direct control by the state court over the agency, it does not follow that the court cannot make the referral. Primary jurisdiction is not concerned with control by the court over the agency to which referrals are made, because the power of determination

of the question referred is not in the court. For example, the Court of Claims had no control over the Interstate Commerce Commission in the *Western Pacific* case. In addition, adequate remedies are available against any federal agency in the federal courts to insure that they will properly perform in all referral matters.

The state court did not *order* the Interstate Commerce Commission to make the determination (App. Br. 37); it simply ordered referral of "questions involving construction to the Interstate Commerce Commission for answer and determination by that body" (R. 42). Any Interstate Commerce Commission determination would then be based on an independent petition by the respondent for a declaratory order pursuant to Section 5 (d) of the administrative Procedure Act. (5 U. S. C. A., Sec. 1004 (d).)*

From the foregoing reasons and authorities we conclude that whether Union Pacific Railroad Company commenced these proceedings in the United States District Court under 28 U. S. C. A., Sec. 1337**, rather than in the state court as it did in these cases, makes no material difference on the question of referral to the Interstate Commerce Commission under the doctrine of federal primary jurisdiction.

E. Referral to the Interstate Commerce Commission is not barred by the Statute of Limita-

*See *Arizona Sand & Rock Co. v. Southern Pacific Co.*, 280 I. C. C. 285 (1951).

***Bernstein Bros. Pipe & Machine Co. v. Denver & R. G. W. R. Co.*, supra; *Louisville & N. R. Co. v. Rice*, 247 U. S. 201, 38 S. Ct. 429, 62 L. Ed. 1071, (1918); c.f. *St. Louis-San Francisco Ry. Co. v. Willard Mirror Co.*, 160 F. Supp. 895 (W. D., Ark., 1958).

tions under 49 U. S. C. A. 16 (3) even though more than two years have elapsed since the causes of action accrued.

Little need be said on this point. In *United States v. Western Pac. R. Co.*, supra, the Supreme Court treats the matter of referral and the two-year statute of Limitations:

“Section 16 (3) does not deal with referral questions to the Commission incident to judicial proceedings. On its face it has to do only with the commencement of actions or reparation proceedings before the Commission. There is therefore no language which militates against the conclusion that the Statute does not apply to referrals.” *Id.*, at 72.

See also: *Northwestern Auto Parts Co. v. Chicago, B. & Q. R. Co.*, supra; *United States v. T. I. M. E., Inc.*, 252 F. 2d 178 (C. C. A.-5, 1958); and *United States v. Chesapeake & Ohio R. Co.*, 352 U. S. 77, 81, 77 S. Ct. 172, 1 L. Ed. 2d 140 (1956).

POINT II.

THE NECESSITY FOR DETERMINATION OF FACTS FROM EXTRINSIC EVIDENCE AND THE PROBLEMS OF TARIFF CONSTRUCTION PRESENT ISSUES IN THESE CAUSES WITHIN THE SPECIAL COMPETENCE OF THE INTERSTATE COMMERCE COMMISSION UNDER THE DOCTRINE OF PRIMARY JURISDICTION, AND THE DISTRICT COURT CORRECTLY ALLOCATED THE ISSUES IN THE SUITS.

- A. The questions referred to the Interstate Commerce Commission for construction raise issues of transportation policy which must be considered by the Commission in the interests of uniform and expert administration.

Referral of the questions of tariff construction to the Interstate Commerce Commission by the District Court is based upon the holdings of three Supreme Court cases: *Texas & Pac. Ry. Co. v. American Tie Co.*, 234 U. S. 138, 34 S. Ct. 885, 58 L. Ed. 1255 (1914); *Great Northern Ry. Co. v. Merchants' Elevator Co.*, *supra*; and *United States v. Western Pac. R. Co.*, *supra*. These cases clearly dispose of Appellant's arguments that the issues of tariff construction in the present cases are within the jurisdiction of the court.

In the *Tie* case the shipper sought damages from the carrier on the ground that its refusal to furnish cars for oak railroad cross ties was the cause of losing a contract with a third party. Shipper claimed the ties should have been shipped under a through rate provided in the carriers tariff T&P No. 8500-H, applying to lumber. The railroad contended the tariff did not apply to cross ties and therefore it could not legally ship the ties under that tariff. It asked the trial court for a dismissal on the grounds the court did not have jurisdiction inasmuch as the sole issue was the construction of the tariff and the Interstate Commerce Commission had exclusive jurisdiction to determine that issue. The motion was denied, and on appeal assigned as error.

In reversing, the Supreme Court stated at page 146:

“* * * It is not disputable that the pivotal question in the case was whether oak railway cross-ties were included in the filed tariff * * * and so far as the solution of that inquiry depended upon the views of men engaged in the lumber and railroad business * * * it is equally indisputable that there was an irreconcilable conflict. And this conflict at once leads to a consideration of the principle which dominates the controversy and upon which its decision therefore depends.

“* * * it is * * * clear that the controversy as to whether the lumber tariff included crossties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute. Indeed, we think it is indisputable that that subject is directly controlled by the authorities which establish that for the preservation of the uniformity which it was the purpose of the Act to Regulate Commerce to secure, the courts may not as an original question exert authority over subjects which primarily come with(in) the jurisdiction of the Commission. (Citing cases.)

“The foundation upon which the doctrine rests * * * is the necessity of a uniform enforcement of the Interstate Commerce Act and the danger of diversity and conflict arising if questions concerning the existence of tariffs or their reasonableness, of discriminations and preferences were left to be originally determined by courts of general jurisdiction, thus giving rise to the possibility of one rule in one jurisdiction and another in another * * *.”

“The effect of the holding is clear: The courts must not only refrain from making tariffs, but, under certain circumstances, must decline to con-

strue them as well.” *United States v. Western Pac. R. Co.*, *supra*, at 65.

In *Great Northern Ry. Co. v. Merchants' Elevator Co.*, *supra*, at 293, Justice Brandeis analyzes the *Tie* case. He points out that it was a dispute as to whether the word “lumber” was used in its ordinary meaning or in a peculiar meaning, and therefore the question was not one of legal construction but of fact, upon which there was “irreconcilable conflict” among “the views of men engaged in the lumber and railroad business.” Brandeis concluded that referral of the question of fact to the Commission was necessary “to ensure uniformity.”

Part of the dispute in this case is whether the words of the transit tariff are used in their ordinary meaning or in a peculiar meaning. The filing of the lawsuits and the objections to referral by the shipper alone show that the views of men engaged in the fabrication-in-transit and railroad business are in “irreconcilable conflict.” Under such circumstances extrinsic evidence will be necessary to determine whether peculiar or extraordinary meanings are used, and construction of the transit tariff must therefore, “to ensure uniformity,” be referred to the Commission.

Great Northern Ry. Co. v. Merchants' Elevator Co., *supra*, is a landmark decision on the question of interstate tariff construction. The holding was adhered to by the Supreme Court in the *Western Pacific* case, where it was described as a “particularization” of the circumstances in the *Tie* case.

There a shipper commenced action in a state court to recover charges exacted by the carrier under a reconsignment or diversion tariff. Plaintiff had shipped corn to Willmar, Minnesota, for inspection, and then rebilled the shipments to Anoka, a station beyond. Naming Willmar in the bills of lading as destination point was to facilitate inspection of the loadings as required by law. After inspection, disposition orders were given and the original bills of lading exchanged for billing to Anoka. For this exchange the railroad added a charge of \$5 per car pursuant to Rule 10 of its tariff. The rule provided that "if a car is diverted, reconsigned or reforwarded * * * after arrival of the car at original destination, * * * a charge of \$5.00 per car will be made * * *." The shipper claimed to be within an exception to Rule 10, which provided that it would not apply to "grain * * * carloads, held in cars on track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto." The issue was to determine whether Rule 10 or the exception applied, a question solely of construction. Over the carrier's objection the trial court construed the exception to mean that cars were exempt if held on the track at billed destination for inspection and for "disposition orders" incident thereto. It held that the disposition order could be a reconsignment to another destination and forwarding to Anoka was such a disposition.

The Supreme Court, in affirming the state court, held that under the facts of this case the issue of tariff construction could be decided by the court and it did not have to be referred to the Interstate Commerce Commission because

there was no dispute concerning the facts and the words of the tariff were used in “their ordinary meaning.” Thus the construction presented a question “solely of law” and, like the construction of any other legal document in dispute, was a proper question for the court.

“Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. That question was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary.” *Id.*, 294.

Deciding the issue of whether “disposition order” meant a “reconsignment” in the *Great Northern* case required only three readily available sources of information: first, the tariff; second, the dictionary; and third, the abstract rules of legal construction.*

Brandeis then considers the problem where the issue is more than one “solely of law” and at page 291, states:

“* * * But words are used sometimes in a peculiar meaning. Then extrinsic evidence may be necessary to determine the meaning of words appearing in the document. This is true where technical words or phrases not commonly understood are employed. Or extrinsic evidence may be necessary to establish a usage of trade or locality which attaches provisions not expressed in the language

*Another example is the Utah case of *Western Pac. R. Co. v. Wasatch Chemical Co.*, 117 Utah 411, 217 P. 2d 371 (1950), where the court determines the meaning of words by merely referring to Webster. In addition, the question of primary jurisdiction was never considered.

of the instrument. Where such a situation arises, and the peculiar meaning of words, or the existence of a usage, is proved by evidence, the function of construction is necessarily preceded by the determination of the matter of fact. * * * where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made, can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained. * * *

It is difficult to imagine issues so ripe for reference as the ones before us. U. P. Tariff 7188-P is replete with "technical words or phrases not commonly understood." Only a casual reading of the applicable Items of the tariff is necessary to forcefully illustrate the complexity and technicality of the document. For these matters extrinsic evidence for proper determination is indispensable to insure the uniformity "which it is the purpose of the Commerce Act to secure."

Appellant states that "Brandeis rather effectively does away with the uniformity argument" (App. Br. 14) by his language appearing in *Great Northern Ry. Co. v. Merchants' Elevator Co.*, at 290, as follows:

"This argument [for uniformity] 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.” (Emphasis added.)

An examination of the case reveals that this language is only applicable to questions solely of law, because uniformity may be secured through Supreme Court review. However, where facts must be found and specialized judgment is necessary, the unifying influence of that Court cannot be reached and therefore preliminary referral to the Commission is necessary to insure proper uniformity. See *Davis, supra*, at 666.

In *United States v. Western Pac. R. Co., supra*, the United States shipped a number of carloads of steel aerial bomb cases filled with napalm gel, which is gasoline thickened by the addition of aluminum soap powder. The carriers involved, billed the government at the first-class rate established in Item 1820 of Consolidated Freight Classification No. 17 for “incendiary bombs.” The Government contended that since the commodity did not include the burster and fuse and thus was not a completed bomb, the

shipments should be carried at the fifth-class rate applicable to gasoline in steel drums.

Action was originally commenced in the Court of Claims under the Tucker Act, where the court entered summary judgment for the carriers upon determining that the shipments in question were “incendiary bombs.”

Although the parties had not raised the issue of tariff construction, the court inquired into that aspect of the decision and “concluded that in the circumstances * * * presented the question of tariff construction, as well as that of the reasonableness of the tariff as applied, was within the exclusive primary jurisdiction of the Interstate Commerce Commission.” *Id.*, at 63.

The determination that the Commission should first pass upon the construction of the disputed tariff, was based upon “whether the question raises issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by that Act.” *Id.*, at 65.

The court turned for its answer to that question to the holdings of the *Tie* and *Great Northern* cases:

“* * * Where the question is simply one of construction, the courts may pass on it as an issue ‘solely of law.’ But where words in a tariff are used in a peculiar or technical sense, and where extrinsic evidence is necessary to determine their meaning or proper application, so that ‘the inquiry is essentially one of fact and of discretion in technical matters,’ then the issue of tariff application must first go to the Commission. The reason is plainly set

forth: Such a ‘determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts.’ * * * We must therefore decide whether a determination of the meaning of the term ‘incendiary bomb’ in Item 1820 involves factors ‘the adequate appreciation of which’ presupposes an ‘acquaintance with many intricate facts of transportation.’ We conclude that it does.” *Id.*, at 66.

There were actually two matters which were initially for the Commission’s determination: first, the issue of tariff construction and, second, the issue of the reasonableness of the tariff as applied. The court reasoned that both the technical meaning of the phrase “incendiary bomb,” and the reasonableness of the rate were dependent upon the same extrinsic background factors and were therefore so intertwined that a single investigation into the same factors was determinative of both issues. Thus, “complex and technical cost allocation” had to be considered not only in determining the rate, but also in determining the meaning of “incendiary bomb,” to which the rate would apply.

“In other words, there were obviously commercial *reasons* why a higher tariff was set for incendiary bombs than for, say, lumber. It therefore follows that the decision whether a certain item was intended to be covered by the tariff for incendiary bombs [a question of construction] involves an intimate knowledge of these very reasons themselves. *Whether steel casings filled with napalm gel are incendiary bombs is, in this context, more than simply a question of reading the tariff language or apply-*

ing abstract 'rules' of construction. For the basic issue is how far the reasons justifying a high rate for the carriage of extra-hazardous objects were applicable to the instant shipment. Do the factors which make for high costs and therefore high rates on incendiary bombs also call for a high rate on steel casings filled with napalm gel? To answer that question there must be close familiarity with these factors. Such familiarity is possessed not by the courts but by the agency which had the exclusive power to pass on the rate in the first instance. And, on the other hand, *to decide the question of the scope of this tariff without consideration of the factors and purposes underlying the terminology employed would make the process of adjudication little more than an exercise in semantics.*" *Id.*, at 66, 67. (Emphasis added.)

The court aptly concludes:

"* * * For the court here to undertake to fix the limits of the tariff's application * * * is tantamount to engaging in judicial guesswork." *Id.*, at 68.

There being no question that the determination of the reasonableness of a tariff is always within the exclusive primary jurisdiction of the Interstate Commerce Commission, the basic precedent established in the *Western Pacific* case is in the field of tariff construction. The opinion itself cites only those cases dealing with that issue, and the analysis of the court is based wholly thereon.

The issues in the cases presently before the Court are as properly referable to the Interstate Commerce Commission as was the issue in the *Western Pacific* case. The

terminology of the tariff is highly technical and numerous words and phrases are in dispute. For example, in Item 100, there is dispute over the meaning of "identity," "the integrity of the through rate" and "substitution of structural iron or steel"; in Item 5, there is a dispute over "re-working or fabricating"; in Item 125, of "transit material and unfabricated articles." This is only a partial list in the overall disagreement as to the proper construction of the tariff.

In these cases the reasons for the existence of the doctrine are readily apparent, and the purposes it serves will be aided by its application. Fabrication in transit of steel products is an important business and is highly competitive. Therefore uniform treatment of all shippers throughout the country requires a uniform interpretation of all fabrication-in-transit tariffs. To allow the effect given such tariffs to be based upon variable findings of fact by courts, would defeat the uniformity sought by the Interstate Commerce Act. Therefore such uniformity can only be accomplished by referring such issues to the Commission. In addition to properly understand 7188-P—a complex and technical document—(even appellant concedes the tariff is complex (App. Br. 23), there is need for the assistance of those having "an acquaintance with many intricate facts of transportation" to supply their specialized competence and expertness. Thus the construction of this tariff raises questions which ought to be considered by the Commission in the interests of a "uniform and expert administration of the regulatory scheme laid down by the Act."

Returning to the Brandeis test: Could this transit tariff be properly construed by simply referring to the tariff, the English language and the general abstract rules of legal construction? We cannot see how. Although a tariff is made up of words intending to convey some basic conclusion or conclusions, it is not, as Justice Harlan states in the *Western Pacific* case, "an abstraction." Extrinsic evidence is necessary to establish the following facts: the proper meaning of the technical terminology, to determine what factors were considered in drafting and publishing the tariff, to examine its basic purpose and to determine the Commission's reasons for granting the tariff privilege initially. Only with this background in mind can it be fairly determined to what extent the fabricator is required or not required to work the article, the extent to which he may or may not make substitutions of inbound and outbound articles, his rights to store the articles listed in Item 5 and whether he may wrap pipe fabricated from steel sheets at the transit point. To construe the tariff without making such findings "is tantamount to engaging in judicial guesswork." *United States v. Western Pac. R. Co.*, supra, 68.

See also: *New York, Susquehanna & Western R. Co. v. Follmer*, 254 F. 2d 510 (C. C. A.-3, 1958) ; *United States v. Chesapeake & O. R. Co.*, supra; *United States v. Chesapeake & O. R. Co.*, 242 F. 2d 732 (C. C. A.-4, 1957) ; *International Pacific Co. v. Delaware & H. R. Corp.*, 73 F. Supp. 10 (N. D., N. Y., 1938) ; *Director General (of Railroads) v. Viscoe Co.*, 254 U. S. 498, at 504, 41 S. Ct. 151, 65 L. Ed. 72 (1921) ; *Northern Pacific R. Co. v. United States*, supra; *United States v. Kansas City Southern Ry. Co.*,

supra; *Norge Corp. v. Long Island R. Co.*, 77 F. 2d 312 (C. C. A.-2, 1935); *Porto Transportation, Inc., v. Consolidated Diesel Electric Corp.*, 20 F. R. D. 1 (S. D., N. Y., 1956); *Armour & Co. v. Chicago M., St. P. & P. R. Co.*, 188 F. 2d 603 (C. C. A.-7, 1951); *Schwartzman v. United Air Lines Trans. Corp.*, 6 F. R. D. 517 (D., Neb., 1947); 15 C. J. S., Commerce, Sec. 143.

Appellant is concerned with the effect the Utah Court may give to a determination of the Interstate Commerce Commission of the five issues of tariff construction listed in the order of referral (App. Br. 7, 8). Since the trial court has not yet given any effect to an Interstate Commerce Commission determination, the matter is premature and is not before the court on this appeal. However, if appellant is merely seeking information as to respondent's position on this matter, we are happy to oblige.

There is really no "mischief" in the order of referral. Its form is designed to present the issues to the Commission in the proper legal manner. It is a request by the state court for a determination of certain questions. This will involve a "report * * * on the issues of tariff interpretation and issues of fact" (R. 43). Upon referral to the Commission the introduction of extrinsic evidence and findings will be necessary before the interpretation of the tariff itself may be accomplished. Thus both findings of fact and conclusions of law would be returned to the trial court.

We cannot say what effect the trial court would give to such findings and conclusions. Precedent should control such effect. However, findings by the Commission, if sup-

ported by substantial evidence, are binding on the court. *Hudson & Manhattan R. Co. v. United States*, 313 U. S. 98, 61 S. Ct. 884, 85 L. Ed. 1212 (1941) ; *Interstate Commerce Commission v. Jersey City*, 322 U. S. 503, 64 S. Ct. 1129, 88 L. Ed. 1420 (1944) ; *Crancer v. Lowden*, 315 U. S. 631, 62 S. Ct. 763, 86 L. Ed. 1077 (1942) ; *Chicago, M. St. P. & P. R. Co. v. Allouette Peat Products*, 253 F. 2d 449 (C. C. A.-9, 1957). Conclusions of law, on the other hand, although entitled to respectful consideration by the court, do not have the same finality as findings of fact, and the court is not bound thereby. *Brown Lumber Co. v. L. & N. R. Co.*, 299 U. S. 393, 57 S. Ct. 265, 81 L. Ed. 301 (1937) ; *Levinson v. Spector Motor Co.*, 330 U. S. 649, 672, 67 S. Ct. 931, 91 L. Ed. 1158 (1947) ; *Chicago M. & St. P. & P. R. Co. v. Allouette Peat Products*, *supra*; *Union Pacific Railroad Co. v. Corneli Seed Co.*, 161 F. Supp. 52, (D., Idaho, 1958).

- B. Suspension of the judicial process and retention of jurisdiction by the district court for all purposes was proper since, upon return, the court must determine all remaining issues of fact and law, award damages, if proper, and enforce judgments, if any.

Retention of jurisdiction by the state court rather than dismissal of the proceeding depends upon whether any "purpose will * * * be served to hold the * * * action in abeyance in the District Court * * *." *Far East Conference v. United States*, *supra*, at 577. If the only issue is entirely within the scope of the agency's dominion, the matter should be dismissed ; however, if there are certain

issues within the overall suit which are within the power of the court to adjudicate, or where the dismissal may affect a remedy upon which the cause of action is based, a stay is proper. *General American Tank Car Corp. v. El Dorado Terminal Co.*, *supra*, at 433; *United States v. Western Pac. R. Co.*, *supra*, at 64; *United States v. Kansas City Southern Ry. Co.*, *supra*, at 769.

In the cases before us there are issues within the general jurisdiction of the state court, such as, when and where each carload was shipped and when each arrived at point of destination. There is an issue in each cause of action as to whether or not the Statute of Limitations has run on the carrier's claim. There is the matter of awarding and enforcing judgments in favor of respondent, if proper. Under these circumstances a "purpose will be served" in holding the actions in abeyance, and the trial court properly did so.

CONCLUSION

The District Court committed no error in referring the five questions of tariff construction to the Interstate Commerce Commission. Its action should be affirmed on this interlocutory appeal.

Respectfully submitted,

BRYAN P. LEVERICH,
M. J. BRONSON,
A. U. MINER,
HOWARD F. CORAY,
SCOTT M. MATHESON, JR.,
Attorneys for Respondent.

APPENDIX

Items 5, 60, 65, 80, 100, 110, 120 and 125
of U. P. R. R. Tariff No. 7188-P, with supplements

Item No. 5

(Effective May 15, 1952)

FABRICATION AND TREATING OF
STRUCTURAL IRON OR STEEL AND OTHER
COMMODITIES IN TRANSIT.

APPLICATION

Carload shipments of Iron or Steel, viz.:

Angles, Bars, Beams, Channels, Columns, Culverts, set-up or knocked down, Ells, Girders, Masts, Plates, Rods (Except Coiled Rods), Sheets, Tees, and Zees, Tubular Iron or Steel (See Exception 1), castings (when shipped in the rough not fitted, painted, Japanned, bronzed, coppered, acid coppered, plated, tinned or galvanized), Iron or Steel Articles to be converted into Iron or Steel Roofing or Siding, Iron or Steel Ceiling, and Iron or Steel Shingles, and other Iron and Steel Articles, may be stopped in transit at stations on the Union Pacific Railroad, viz.: (1) Stations Nos. 2390 Ogden, Utah and 5560 Salt Lake City, Utah to 9580 Huntington, Ore., 16670 Ironton, Utah, to 16715 Cutler, Utah, and 16780 Mount, Utah, to 16807, Officer, Utah, inclusive, when such stations are directly intermediate between point of origin and final destination, for the purpose of reworking or fabricating, subject to the rules and conditions published in Items 10 to 130, inclusive, as follows:

Provisions of this item will not apply where the transit point and destination are both within the same switching limits.

Iron or steel pipe, fabricated from iron or steel plate or sheet, standard gauge No. 16 or thicker, may be coated with or dipped in asphalt or a compound having tar or asphalt base, only at the fabricating point. The weight of the asphalt or compound applied to the pipe at the fabricating point to be treated as non-transit material and subject to the existing rules governing non-transit material as provided in the fabricating in transit tariffs (See Exceptions 2 and 3).

* * *

EXCEPTION 1—Threading or rethreading in transit of Iron or Steel Pipe or Tubular Iron or Tubular Steel will not be permitted under the provisions of this tariff.

EXCEPTION 2—Iron or Steel Pipe moving under rates named in Pacific Southcoast Freight Bureau Tariff No. 260-B, Agent J. P. Haynes, I. C. C. No. 1552, from points taking Groups 2, 2-A or 4 rates may be stopped at Salt Lake City, Utah, for privilege of dipping or wrapping. The weight of the asphalt and/or other materials applied to the pipe at transit point to be treated as non-transit material.

EXCEPTION 3—Iron or Steel Pipe moving under rates named in Pacific Southcoast Freight Bureau Tariff No. 2-K, Agent J. P. Haynes, I. C. C. No. 1362, from points taking Group 5, 5-A, 5-B or 5-C rates, may be stopped at Salt Lake City, Utah, for dipping or wrapping. The weight of the asphalt and/or other materials applied to the pipe at transit point shall be treated as non-transit material.

EXCEPTION 4—Effective December 30, 1953. Carload shipments of Iron or Steel Pipe may be stopped in transit at Salt Lake City, Utah on the U. P. R. intermediate (see also Items 15 to 50 inclusive) between point of origin and point of des-

tionation for the purpose of dipping or wrapping at a transit charge of $3\frac{1}{2}$ cents per 100 pounds. The weight of asphalt or compound, also the wrapping applied to the pipe at Salt Lake City, Utah to be treated as non-transit material as provided in Item 125. (98-580-2.)

Item No. 60

(Effective May 15, 1952)

TRANSIT CHARGE

On shipments accorded transit privileges under this tariff, an additional charge of $3\frac{1}{4}$ cents per 100 lbs., will be made for the transit privilege, this charge to be assessed on the actual outbound weight of the transit portion of the shipment, or on the minimum carload weight applicable to the transit portion of the shipment, whichever is higher.

Item No. 65

(Effective May 15, 1952)

PROTECTION OF THROUGH RATE

Except as provided in Note 1, the through rate to be applied is that in effect on the outbound transited article on the date shipment left point of origin from point of origin to the transit destination or from the point of origin to the transit station or from the transit station to the transit destination, whichever is highest, plus transit charge as per Item 60, except that where the rate from point of origin to transit destination, on the inbound material to transit point, in effect on date shipment left point of origin, is higher than any of the above rates such rate will apply, plus transit charge as per Item 60.

In no case will the total charge exceed the combination of tariff rates to and from transit station.

The minimum carload weight to be used is that governing the through rate applied.

NOTE 1—On export shipments rate to apply will be the through rate on the finished product from point of origin to port of export, in effect on date shipment leaves point of origin, plus transit charge of $3\frac{1}{4}$ cents per 100 pounds.

Item No. 80

(Effective May 15, 1952)

RESHIPMENT FROM PROPER WAREHOUSE

These rules will apply only when the commodities are reshipped from the warehouse, storeroom or manufacturing plant into which they were originally unloaded, except in the case of the actual transfer of the commodity, in which case the seller must certify on the back of the tonnage credit slip that the commodity was actually transferred, giving the date and method of transfer.

Item No. 100

(Effective May 15, 1952)

PRESERVING IDENTITY OF IRON AND STEEL

The identity of structural iron or steel, as defined in Item 5, unloaded in a warehouse, storeroom or at a manufacturing plant, cannot be preserved, and the integrity of the through rate being preserved by the requirements as to the surrender of inbound tonnage credit slips, verification of records or receipts and shipments by authorized representatives of the railroad, substitution of structural iron or steel as defined in Item 5, originating on one line, for a like commodity originating on other lines, will be permitted.

Item No. 110
(Effective May 15, 1952)

**SUBSTITUTION OF INBOUND FREIGHT BILLS
AND TONNAGE CREDIT SLIPS**

At time billing instructions are given for shipment from transit station, unexpired inbound billing shall be surrendered to the carriers' agent. When such billing is not surrendered, flat rate from transit station will apply.

To correct errors due to surrender of non-applicable freight bills or tonnage credit slips, proper freight bills or tonnage credit slips may be exchanged for those surrendered.

No readjustment may be made in cases where the freight bills or tonnage credit slips originally surrendered were applicable or where there was no surrender of billing.

Non-applicable freight bills or tonnage credit slips are those, the surrender of which does not result in the shipper securing the benefit of a lower rate than the flat rate from transit point to final destination.

Item No. 120
(Effective May 15, 1952)

TRANSFER OF TONNAGE OR OWNERSHIP

Freight bills on commodities to be accorded transit privileges may be transferred when tonnage represented thereby is sold, or sold and transferred from one transit house to another at the transit station, or transferred at the transit station from one transit house to another transit house of the same ownership. In connection with tonnage which has

been sold or transferred, one of the following forms of assignment must be endorsed on each freight bill:

- (a) The tonnage represented by this freight bill has been sold to_____ and the transit privileges thereof, if any, transferred to_____

Signed_____

- (b) The tonnage represented by this freight bill has been transferred to_____ and the transit privileges thereof, if any, transferred to_____

Signed_____

Any additional switching charges performed at transit station must be charged for in accordance with tariffs, lawfully on file with the Interstate Commerce Commission.

Item No. 125

(Effective May 15, 1952)

MIXED SHIPMENTS OF PART TRANSIT AND PART NON-TRANSIT ARTICLES

When outbound shipments consist of a mixture of transit material and non-transit material in the same car, charges will be assessed as follows:

- (a) On the transit material, at rates indicated in Item 55.

- (b) On the non-transit material, at the carload rate on the non-transit material, re-shipped from fabrication point to final destination (see Note).

The entire carload will be subject to the highest carload minimum weight of any kind of fabricated material contained in the car (actual weight, if in excess thereof). Any deficiency in minimum weight will be added to the non-transit portion, unless shipper surrenders freight bill to cover the deficit in the carload minimum weight, in which event the deficit will be treated as transit tonnage and charges assessed accordingly. The weight of the non-transit portion may be used in making up carload minimum weight.

The term transit material referred to in this Item is understood to include unfabricated articles enumerated in Item 5.

The term non-transit material referred to in this Item is understood to cover all other Iron or Steel articles other than those enumerated in Item 5, also accessories and appurtenances necessary to complete the finished article.

NOTE—On a shipment to a destination located in the same state as the transit station, the flat carload rate or rates from the transit station on the non-transit portion and/or commodities not entitled to transit, will be the interstate flat rate or rates from the transit station to destination, when any or all of the inbound billing surrendered represents tonnage originating at points outside of the state in which the transit station is located.