

1960

Thermoid Western Co. et al v. Union Pacific Railroad Co. : Brief of Respondents

Utah Supreme Court

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In the Supreme Court of the State of Utah

THERMOID WESTERN CO., NORMAN THOMPSON LUMBER & HARDWARE CO., INC., UTAH POULTRY & FARMERS COOPERATIVE, UTAH LUMBER CO., and STOKERMATIC CO., on their own behalf and on behalf of other persons, corporations, and associations similarly situated,

Plaintiffs and Appellants,

vs.

UNION PACIFIC RAILROAD COMPANY, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, THE WESTERN PACIFIC COMPANY and BAMBERGER RAILROAD COMPANY,

Defendants and Respondents.

FILED
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Clerk, Supreme Court, Utah

Case
No. 9324

BRIEF OF RESPONDENTS

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vs.

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Defendants and Respondents.

Case
No. 9324

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

This is an action to recover amounts paid by plaintiffs, representing a general increase of 15 per cent in freight rates on traffic moving wholly within the State of Utah between June 22, 1956, and August 28, 1958.

The Interstate Commerce Commission will be sometimes referred to herein as I.C.C. and the Public Service Commission of Utah as P.S.C.U. Emphasis is supplied unless otherwise indicated.

Defendants and respondents can only agree partially with appellants' Statement of the Case and Statement of Facts as contained in plaintiffs' brief. In appellants' "Introduction" as well as throughout the majority of appellants' brief counsel assumes and states as fact the main point in issue. He assumes that the I.C.C. order was void and that the "proper and valid charges" were the lower rates for which he contends, although the rates as increased pursuant to the I.C.C. order were "the tariffs on file with" the P.S.C.U. The question of the validity and effect of the I.C.C. order pursuant to which tariffs setting such rates or charges were filed with the P.S.C.U., is the most important and controlling question which must be here decided.

Appellants refer to the decision of the United States Circuit Court of Appeals in *Structural Steel & Forge Co. v. Union Pacific RR.*, 269 F. 2d 714, saying such court held that there was no federal question involved. Reference to the opinion in that case will show that the court held merely that a removable case had not been stated in the complaint, in spite of the fact that plaintiff had referred to the I.C.C. order and characterized it as void. That court said at page 718:

"Stripped of its irrelevancies, the removed claim is that the defendant railroads exacted a

rate for intrastate shipments in excess of those established and on file with the competent state regulatory body, and the prayer is for restitution of the same. * * * The reference then to the void or vacated order of the Interstate Commerce Commission as a basis for the charges, was not an essential ingredient of the claim for restitution. As a gratuitous anticipation of a *defense founded in federal law*, it will not suffice to confer federal court jurisdiction. * * *.”

Although the reference to the I.C.C. order may not have been essential in plaintiff’s pleadings and therefore gave no basis for removal, nevertheless the effect of that I.C.C. order and whether or not it was void is “an essential ingredient of the claim for restitution” and is fundamental to plaintiff’s right to recover.

The Circuit Court held that the validity of the I.C.C. order was a matter of defense and further stated: “But even though a valid rate order does emerge to ultimately condition the right of recovery in these actions * * * at most, federal law lurks in the background to *determine the result of this litigation.*”

It is thus defendant’s position that federal law, which must be referred to in order to determine the validity and effect of the I.C.C. order and whether or not it was void *ab initio* “must determine the result of this litigation.”

STATEMENT OF FACTS

During the Second World War and the years following, with the resulting inflationary spiral, the entire United States — including the State of Utah — expe-

rienced successive and repeated increases in wages and costs in materials; in costs of living and costs of doing business generally. As these increased costs of operating a business pyramided one upon another, the railroads had to make successive requests of the I.C.C. and the various state commissions for authority to increase their rates and charges to meet such increased costs. With respect to interstate traffic the proceedings were not adversary proceedings but were designated by what is known as "ex parte" numbers. In the case at bar there will be six of these ex parte proceedings referred to. These are Ex Parte 162, Ex Parte 166, Ex Parte 168, Ex Parte 175, Ex Parte 196 and Ex Parte 206. In each ex parte proceeding the I.C.C. after lengthy investigative hearings ordered increases in freight rates on interstate commerce. In comparable proceedings the railroads asked the P.S.C.U. for similar increases within the State of Utah. The P.S.C.U. granted some in Ex Parte 162 and 166, denied others, and completely denied the increases asked comparable to those granted in Ex Parte 168. In denying the latter increase, the Utah Commission stated that the evidence did not "afford the commission sufficient information upon which it can determine whether or not the revenue derived by the railroads from Utah intrastate traffic is inadequate," or whether it would or would not justify the requested increase. (See Exhibit 7, page 3.)

Upon such denial the railroads made application to the I.C.C., asking the I.C.C. to investigate such rates pursuant to the provisions of the Interstate Commerce Act, 49 U.S.C. 13 (3) (4). After such 13th Section investi-

gation the I.C.C. found that intrastate rates discriminated against interstate rates and directed the P.S.C.U. to authorize increases intrastate up to the level of Ex Parte 168 interstate increases in absence of which P.S.C.U. action the I.C.C. itself would issue an order requiring such increases. The P.S.C.U. made no finding as to justification for such increases other than referring to the I.C.C. findings and directions and, pursuant thereto, the P.S.C.U. authorized the increases intrastate which had theretofore been denied by them up to the Ex Parte 168 level. (See Exhibit 8.)

Later, interstate rates were further increased by the I.C.C. in an additional amount of 15 per cent in Ex Parte 175. The P.S.C.U. in corollary proceedings again refused to authorize the further increases. In so refusing, they stated exactly as they had done in the prior case — that they did not consider the evidence sufficient to enable them to determine whether or not the increases were justified. (See Exhibit 2C, page 43.)

At the request of the railroads the I.C.C. again undertook an investigation pursuant to Section 13 (3) (4) of the Interstate Commerce Act, in a proceeding designated by its Docket Number 31484 and found discrimination resulting from existing Utah intrastate rates and again directed the P.S.C.U. to authorize the increases, in absence of which the I.C.C. would order them into effect. (See Exhibit 9.) This time the P.S.C.U. declined to order the increases, and under date of February 8, 1956, the I.C.C. issued its order (Exhibit 10) requiring the increases

to be put into effect on intrastate traffic within the State of Utah. This is the order under attack in the case at bar. Tariffs providing for such increases were duly published and filed with the Public Service Commission of Utah and stamped as received and “filed” by the Commission. (See K-19—Sheet 14 of Exhibit 4.) Under the tariff so filed pursuant to such I.C.C. order, increased intrastate rates became effective June 22, 1956. Court proceedings as referred to by plaintiff were undertaken, and in *Public Service Commission of Utah v. United States*, 356 U.S. 421, 2 L.Ed. 2d 886, 78 S. Ct. 796, the United States Supreme Court held the evidence to be deficient in certain particulars and entered its decision directing that the I.C.C. order of February 8, 1956, be set aside and that the matter be remanded to the Interstate Commerce Commission “for further proceedings in conformity with” the Supreme Court’s opinion.

Immediately upon entry of judgment by the Federal District Court remanding the matter to the I.C.C. for “further proceedings” this case was filed by plaintiffs herein based upon the assumption — not otherwise proven or shown — that the I.C.C. Report (Ex. 9) and Order (Ex. 10) were entirely void *ab initio*.

During the two-year interim, as a result of increased wages and costs, further increases had been ordered by the I.C.C. in Ex Parte 196 and Ex Parte 206. Comparable requests had been filed with the P.S.C.U., which the P.S.C.U. did not even set for hearing. On remand to the I.C.C. by the United States District Court for the District

of Utah pursuant to the Supreme Court's direction for "further proceedings consistent with" its opinion, further hearings were conducted by the I.C.C. and consolidated with additional 13th Section hearings on Ex Parte 196 and Ex Parte 206 increases as they affected Utah intrastate traffic. After such further hearing the I.C.C., under date of December 7, 1959, issued its further report, finding discrimination still to exist and directing that increases be allowed by the P.S.C.U. (See Exhibit 11.) When the P.S.C.U. declined, the I.C.C., under date of March 17, 1960, issued its order directing such increases to be made effective on Utah intrastate traffic as of May 13, 1960 (Exhibit 12). This latter order is now under consideration by a three-judge federal court for the District of Utah.

Counsel for plaintiff in his Statement of Facts stated, re I.C.C. Docket No. 31484, "After hearing, the Interstate Commerce Commission issued its order *taking jurisdiction* of the Utah intrastate rates and granting the increases sought." He thereby attempts to mislead the court. Not only at that point but several other places in his brief he refers to the I.C.C. "taking jurisdiction" of intrastate rates. Nowhere in any investigation by the I.C.C. or any order issued by it has there been any statement that it was "taking jurisdiction" of intrastate rates. In no law on the subject is there any reference to "taking jurisdiction" and no case has referred in terms to "taking jurisdiction." In this particular case the I.C.C. issued no "order taking jurisdiction." On "petition of the carriers concerned" (49 U.S.C. 13 (3)) it undertook an "in-

vestigation” as Section 13 of the Act imposed a duty on it to do. On the first page of its report (Exhibit 9) it states, “This proceeding is an investigation under Section 13 of the Interstate Commerce Act into the lawfulness of Utah intrastate freight rates and charges.” In that investigation it held a full hearing and “made findings” as the federal act directs it to do. It found discrimination, and in a subsequent document (Exhibit 10) it ordered the increases to remove the discrimination. Nowhere, and at no time, was there any “order taking jurisdiction,” and the increased rates did not become effective automatically by virtue of its order but only upon publication of tariffs which were “filed” with, and stamped “filed” by the P.S.C.U. (K19, Exhibit 4, Sheet 14)

Again, on page 7, appellant states, “The mandate of the Supreme Court was filed in the United States District Court on August 27, 1958, on which date the Utah intrastate rates ‘reverted’ to their former level.” The rates did not so automatically *revert*, but the increases had to be cancelled by the filing of a supplemental tariff, which, upon judgment of the federal court, was issued, published and “filed” with the P.S.C.U. (K36, Sheet 2 of Exhibit 4)

STATEMENT OF POINTS

POINT ONE

THE I.C.C. HAD AMPLE JURISDICTION
AND ACTED WITHIN ITS JURISDICTION
IN ISSUING ITS ORDER OF FEBRUARY 8,

1956 (EXHIBIT 10), AND SUCH ORDER WAS NOT VOID BUT, AT MOST, SUBJECT TO BEING CANCELLED AND SET ASIDE, AND THEREFORE VOIDABLE.

POINT TWO

THE TARIFFS CHARGED AND COLLECTED BY THE DEFENDANT RAILROADS DURING THE PERIOD IN QUESTION WERE EFFECTIVELY "FILED" AND WERE THE TARIFFS "ON FILE AND IN EFFECT" AND HAD TO BE COMPLIED WITH UNDER BOTH FEDERAL AND UTAH STATE LAW.

POINT THREE

THE FURTHER FINDINGS AND REPORT OF THE I.C.C. OF DECEMBER, 1959 SUPPLEMENT AND SUPPORT THE ORIGINAL FINDINGS ON WHICH THE ORDER OF FEBRUARY 8, 1956, WAS BASED AND DETAIL EVIDENCE WHICH THE SUPREME COURT SAID WAS LACKING.

POINT FOUR

APPLICATION TO THE PUBLIC SERVICE COMMISSION OF UTAH FOR REPARATIONS IS A PREREQUISITE TO ANY RIGHT OF REPARATION OR RESTITUTION, REGARDLESS OF THE EFFECT OF ANY I.C.C. ORDER.

POINT FIVE

PLAINTIFFS HAVE NO BASIS IN EQUITY
FOR ANY RECOVERY.

ARGUMENT

POINT ONE

THE I.C.C. HAD AMPLE JURISDICTION
AND ACTED WITHIN ITS JURISDICTION
IN ISSUING ITS ORDER OF FEBRUARY 8,
1956 (EXHIBIT 10), AND SUCH ORDER
WAS NOT VOID BUT, AT MOST, SUBJECT
TO BEING CANCELLED AND SET ASIDE,
AND THEREFORE VOIDABLE.

For purposes of argument appellants combined their Point One and Point Two as stated, and respondents have thus combined the two in their statement of Point One.

Appellant states that the I.C.C. “was without jurisdiction to enter the contested order” and that “such order was void from its inception.” Having so stated, counsel throughout the major portion of plaintiff’s brief assumes such point to have been proved and argues as to the effect of void orders or void judgments. The statements from American Jurisprudence and Corpus Juris Secundum therefore beg the issue, because they merely refer to the effect of void orders, but before such statements can be applicable it must be shown that any order in question is void. If it is an order which is “liable to be vacated or set aside for irregularity or other cause,” then, as stated

in 49 C.J.S. 878, it is “merely voidable” and the order in question here as shown by the very course of the proceedings was one which was “liable to be vacated or set aside for irregularity or other cause” and therefore, at most, voidable. If it was void from its inception, it could have been disregarded completely and the Supreme Court would have so stated and there would have been no reason for the Supreme Court to set it aside nor to refer the matter back to the I.C.C. “for further proceedings.”

Counsel refers to the case of *Houston E. & W. T. Ry. Co. v. United States*, 234 U.S. 342, 58 L.Ed. 1341, 34 S. Ct. 833. This is normally referred to as the “Shreveport Case.” Again counsel states that there the court held that the I.C.C. “could take jurisdiction” of intrastate freight rates. No such holding nor wording is used anywhere in that case. In that case railroad rates for movement of traffic between points wholly within Texas were lower than for similar traffic movements interstate between Texas points and Shreveport, Louisiana. This discrimination affected competition in commerce to and from Shreveport. The I.C.C. found that the interstate rates between Shreveport and Texas points were unjust and unreasonably high, and its order specified maximum rates above which the carriers could not go. There were some commodity rates in Texas which required lower charges for movement in one direction than for movement of a similar commodity in an opposite direction. The effect of the I.C.C. order was to allow the railroads to increase within Texas the lesser of these commodity rates and to reduce interstate rates between Texas and Shreve-

port to the higher of these Texas commodity rates. This thus had the effect of increasing some intrastate rates. On this point it was contended that Congress had no authority to control intrastate traffic and intrastate rates and that the I.C.C. had no authority to issue any order affecting the level of intrastate rates. The word "jurisdiction" was not mentioned.

In sustaining the power of Congress and the authority of the I.C.C., the United States Supreme Court said that the essence of power given to Congress to regulate commerce among the several states was such that (page 350) "interstate trade was not left to be destroyed or impeded by the rivalries of local governments."

Page 353:

"Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce.

"* * * We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms. * * * The use of the instruments of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for federal intervention. Nor can the attempted exercise of state authority alter the matter, where Congress has acted, for a state may not authorize the carrier to do that which Congress is entitled to forbid and has forbidden."

Page 355:

“* * * We conclude that the order of the commission now in question cannot be held invalid upon the ground that it exceeded the authority which Congress could lawfully confer.”

The court then referred to the provisions of the Interstate Commerce Act as it then existed and added (page 356):

“This language is certainly sweeping enough to embrace all of the discriminations of the sort described which it was in the power of Congress to condemn.”

Page 358:

“Here, the Commission expressly found that unjust discrimination existed under substantially similar conditions of transportation and the inquiry is whether the Commission had power to correct it. * * *. We are convinced that the authority of the Commission was adequate.”

The cases of *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 88 L.Ed. 635, and *Palmer v. Massachusetts*, 308 U.S. 79, 84 L.Ed. 93, cited on pages 11 and 12 of plaintiffs' brief, are not in point. There are sufficient cases involving freight rates and proceedings by and before the I.C.C. to show controlling law in this matter and appellants cannot find support for their erroneous assumptions nor any comfort from such cases.

The *Davies Warehouse* case involved the Federal Emergency Price Control Act. The question was whether or not the Davies Warehouse Co. was a public utility; if a

public utility, the provisions of the Federal Act itself said it would not come under nor be subject to the federal law at all. Warehouse business such as was carried on by the Davies Co. was declared to be a public utility both by the California Constitution and the California Public Utilities Act. Therefore, the court did not hesitate in saying that the Emergency Price Control Administrator had no authority at all to deal in any way with warehouse rates as set by the California Public Utilities Commission.

The cases of *Palmer v. Massachusetts*, *Yonkers v. U. S.* 320 U.S. 685, 80 L.Ed. 400, and *Alabama Public Service Commission v. Southern Ry Co.*, 341 U.S. 341, 95 L.Ed. 1002, all involved discontinuance or abandonment of local train service with respect to which the I.C.C. had been given no jurisdiction or authority of any kind. Such cases cannot be considered in any way applicable to I.C.C. action in matters where the law specifically says that on request the I.C.C. *shall* make an investigation and issue findings.

The case of *Arkansas Railroad Commission v. Chicago, R. I. & P. R. R. Co.*, 274 U.S. 597, 71 L. Ed. 1224, did involve rates where the I.C.C., after hearing, had ordered increases in rates in Oklahoma, Texas and New Mexico, and without anything further and with no hearing at all it ordered increases in Arkansas rates. Appellants can find nothing in that case to vary or dispute the law as set forth in *Atlantic Coast Line R. Co. v. Florida*, 295 U.S. 301, 79 L.Ed. 1451, 55 S. Ct. 713, referred to later in this brief, which case is directly parallel on its facts with the case at bar.

On page 11 of his brief counsel numbers as “1” and “2” questions which he says the Commission must determine in every Section 13 case. He cites neither statute nor case law to support the position claimed by him, and neither the statute nor the cases pose any such questions in any such manner nor say anything about the I.C.C. “taking jurisdiction” of intrastate rates.

Section 13 of the Interstate Commerce Act is headed “Complaints to and Investigations by Commission,” and provides, “It shall be the duty of the Commission to investigate the matters complained of.” Subparagraph (3) of Section 13, under which these proceedings are instituted, authorizes a petition to be filed by any carrier requesting an investigation, and requires the Commission to notify the state or states interested of the proceedings. Subparagraph (4) provides that whenever in such an investigation the Commission after full hearing finds any undue, unreasonable or unjust discrimination against, or undue burden on interstate commerce, “it shall prescribe the rate * * * thereafter to be charged, in such manner as, in its judgment, will remove such * * * discrimination.” Nowhere is the word “Jurisdiction” used.

There is no question, and at this date it cannot be doubted but what Congress was within its rights in enacting such legislation and the validity of such legislation has been many times upheld. *Florida v. United States*, 282 U.S. 194 @ 210, 75 L.Ed. 291, 51 S. Ct. 119, “The power of the Congress to authorize the Interstate Commerce Commission to establish intrastate rates in order

to remove an unjust discrimination against interstate commerce is not open to dispute.” (See *Wisconsin R. R. Commission v. C. B. & Q. R. R. Co.*, 257 U.S. 563, 66 L.Ed. 371, 42 St. Ct. 232; *Florida v. United States*, 292 U. S. 1, 78 L.Ed. 1077, 54 S. Ct. 603; *King v. United States*, 344 U.S. 254, 97 L.Ed. 301, 73 S. Ct. 259; *Atlantic Coastline R. Co. v. Florida*, 295 U.S. 301, 79 L.Ed. 1451, 55 S. Ct. 713).

An analysis of this federal law clearly demonstrates that carriers are entitled to request an investigation. On request, it is the duty of the I.C.C. to institute an investigation. A *full hearing* was had and no argument has been, or could be made to the contrary. As a result of the hearing the I.C.C. made findings as it was required to do and found discrimination to exist. Under such circumstances there cannot be any valid argument that said Commission acted without or in excess of jurisdiction granted to it — in fact, imposed upon it — by federal law.

The question of whether the I.C.C. may have erred in the exercise of that jurisdiction is another matter, but there is a difference between power and authority to act in the first instance and error that will subject such action to being set aside after that jurisdiction or authority granted has been pursued. Upon this point we would like to refer to the case of *Atwood v. Cox*, 88 Utah 437, 55 P. 2d 377, wherein this court distinguishes between lack of jurisdiction, which is referred to as “lack of power to proceed” with a case, and acting erroneously where proper jurisdiction exists but where in such action a

court or other body may err in the exercise of that jurisdiction. The court refers to numerous definitions of jurisdiction and states: (at Page 447)

“ ‘Of the various definitions of jurisdiction perhaps the most satisfactory is as follows: Jurisdiction is authority to hear and determine a cause. Since jurisdiction is the power to hear and determine, it does not, as will be pointed out later, depend upon the regularity of the exercise of that power or upon the rightfulness of the decisions made.’ ”

Page 450:

“ ‘It cannot be said that if the court correctly decides a question he is acting within his jurisdiction, but if he erroneously decides it and determines it contrary to the evidence he is acting without jurisdiction.’ ”

In *Wasatch Oil Refining Co. v. Wade*, 92 Utah 50, 63 P. 2d 1070, in upholding jurisdiction and refusing to grant requested prohibition, this Court again said: (at P. 60)

“* * * Jurisdiction does not depend upon the regularity of the exercise of power or on the rightfulness or correctness of decisions made, but is the power to hear and determine the matter in hand.”
(Citing *Atwood v. Cox*)

Page 71:

“* * * We are satisfied that the trial court has acted within jurisdiction and if it has proceeded wrongly that it has merely committed error which may be reviewed and corrected upon appeal.”

There is hardly any dissent from the law as above stated, and the Supreme Court of the United States has on various occasions repeated the same. In *General Investment Co. v. New York Central R. Co.*, 271 U. S. 228, 70

L. Ed. 920, 46 S. Ct. 496, the Supreme Court stated: (at P. 230)

“* * * By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff’s right to relief sought. There may be jurisdiction and yet an absence of merits. * * * Whether a plaintiff seeking such relief has the requisite standing is a question going to the merits, and its determination is an exercise of jurisdiction. * * * If it be resolved against him the appropriate decree is a dismissal for want of merits, not for want of jurisdiction.”

The United States Supreme Court (356 U. S. 421), in passing on the I.C.C. order in question in the case at bar, did not declare the order to be void for want of jurisdiction as it might have done had there been any question about jurisdiction, but it set the order aside and directed that the matter be referred back to the I.C.C. for further proceedings in the same matter. This clearly shows that the Supreme Court had some question as to the “merits” of the case but not as to “jurisdiction.”

In *Thompson v. Terminal Shares*, 89 F. 2d 652, the Eighth Circuit Court stated:

“Jurisdiction does not depend upon the rightfulness of the decision. It is not lost because of an erroneous decision, however erroneous that decision may be. * * * In such case whether the court decided correctly or incorrectly could not affect the question of jurisdiction *nor the duty of all persons having notice to obey the order until reversed by a court of competent jurisdiction.* * * *”

See also *Binderup v. Pathe Exchange*, 263 U.S. 291, 60 L.Ed. 308, 44 S. Ct. 96; *National Benefit Life Insurance Co. v. Shaw-Walker Co.*, 111 F. 2d 497, Cert. den. 311 U.S. 673, 85 L.Ed. 432, 61 S. Ct. 35; *Ex Parte Roe*, 234 U.S. 70, 58 L.Ed. 1217, 34 S. Ct. 722.

In *West Coast Exploration Co. v. McKay*, 213 F. 2d 582, the court in the course of a long and learned opinion written by Chief Judge Harold M. Stevens stated:

“* * * A court is said to have jurisdiction, in the sense that its erroneous action is voidable only, not void, when the parties are properly before it, the proceeding is a kind or class which the court is authorized to adjudicate and the claim set forth in the paper writing invoking the court's action is not obviously frivolous. * * *”

Certiorari on that case was denied, 347 U.S. 989, 98 L. Ed. 1123, 74 S. Ct. 850. See also *Dix v. Dix*, 222 S.W. 2d 839 (Ky.).

There is no question but what the I.C.C. had the power under the Interstate Commerce Act to undertake the investigation as it did and to issue the order which it issued. With respect to the issuance of such orders the Interstate Commerce Act further provides under Section 15 that whenever in any such investigation after full hearing the Commission finds any rate to be discriminatory, it is authorized and empowered to prescribe rates to be thereafter charged and to order that the carrier shall not thereafter charge any rate other than that so prescribed.

Subparagraph (2) of Section 15 of the Interstate Commerce Act reads :

“Except as otherwise provided in this part, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction.”

This statutory provision very definitely contemplates that an order entered by the I.C.C. under the provisions of Section 13 may be suspended or set aside by the Commission itself or may be suspended or set aside by a court of competent jurisdiction, but it specifically provides that the order “shall take affect” and “shall continue in force” until or unless set aside by the Commission itself or “suspended or set aside by a court.” From these provisions it cannot even be inferred that if there may be error in the receipt of evidence or in the findings or issuance of the order, that such order should be void and of no effect at all. The contrary is conclusively indicated by such statute. It cannot be argued in the face of such a statute that the I.C.C. in any way exceeded the power or authority granted to it by law in holding the hearing, making findings and issuing the orders as issued herein. (Exhibits 9, 10, 11 and 12)

In the case at bar the order of the I.C.C. (Exhibit 10) and tariffs thereunder (Exhibit 4) took effect and remained in effect until set aside by the court’s order.

In addition to the provisions of Section 15 above referred to, which provides that the Commission's order under Section 13 shall take effect and continue in force until modified or suspended by the Commission itself or by a court of competent jurisdiction, Section 16 of the Act is headed "Orders of Commission and Enforcement Thereof." It refers to what should be done "after hearing on a complaint made as provided in Section 13 of this part" and provides:

"Section 16 (7). It shall be the duty of every common carrier, its agents and employes, to observe and comply with such orders so long as the same shall remain in effect."

Subparagraph 8 of the same section then goes on to provide a penalty of \$5,000 for each offense, stating that each day shall be deemed a separate offense, and then follow provisions providing for the enforcement of penalty provisions by the Attorney General of the United States and various United States District attorneys.

It will thus be seen that a provision has been made in the statute itself for the eventuality of the setting aside of these I.C.C. orders but it requires that they shall remain in effect until so set aside, and carriers and others are compelled to comply strictly therewith so long as they are so in force or be subject to extreme penalties. As so stated by Justice Cardoza in *Atlantic Coast Line v. Florida*, 295 U.S. 301, 79 L.Ed. 1451, 55 S. Ct. 713:

"The carrier was not at liberty to take the law into its own hands and refuse submission to the order without the sanction of the court. It

would have exposed itself to suits and penalties, both criminal and civil, if it had followed such path. See e.g. Interstate Commerce Act, 49 U.S.C., sec. 16 (8), (9), (10), (11). Obedience was owing while the order was in force.”

On page 13 of appellant’s brief counsel refers to the case of *North Carolina v. United States*, 325 U.S. 507, 89 L.Ed. 1760, 65 S. Ct. 1260, and again confuses the terms “jurisdiction” and “justification” and italicizes a quotation in that case from *Florida v. United States*, 282 U.S. 194, wherein Chief Justice Hughes says that before the I.C.C. can nullify a state rate, justification for the “exercise of federal power must clearly appear.” It will be noted that Chief Justice Hughes did not say “jurisdiction” must be shown but said that “*justification for the exercise*” of power or jurisdiction must appear. There is a distinction between jurisdiction to act and *justification* for the exercise of that jurisdiction and that is what makes a difference between orders or judgments which will be “void” for want of jurisdiction, or “voidable” because of error in the exercise of that jurisdiction.

Both the North Carolina case and the recent opinion of the United States Supreme Court in 356 U.S. 421 refer to the fact that the evidence must meet a “high standard of certainty.” If there is no “jurisdiction,” then the question of evidence becomes immaterial. If there is jurisdiction, then we would ask: When, during the course of presentation of evidence, would a court or commission lose jurisdiction *because* the evidence does not meet the high standard of certainty? If the evidence is insufficient

after it is all in, then the court or commission errs in issuing a judgment or order. But such is error making the judgment or order voidable and giving a basis for setting it aside on appeal and does not make the entire proceedings void.

In the very case last referred to and quoted from, Chief Justice Hughes said (282 U.S. at page 211):

“The question in the present cases then *is not one of authority but of its appropriate exercise.* * * *”

In reversing the lower court and setting the I.C.C. order aside, the United States Supreme Court in *Public Service Com. of Utah v. United States*, 356 U.S. 421, 2 L.Ed. 2d 886, 78 S. Ct. 796, concluded as follows (page 429):

“The judgment of the District Court is reversed and the cause is remanded to that court with instructions to set aside the order of the Commission and remand the cause to the Commission for further proceedings in conformity with this opinion.”

Counsel for appellants argue that in view of that court's decision the “jurisdiction” of the I.C.C. failed and it had no further power to do anything. In other words, it is counsel's position, and he has at all prior stages in this proceeding argued, that the I.C.C. had no power to do anything save to dismiss the proceeding. Why then, we will ask, would the Supreme Court direct that the matter be remanded to the I.C.C. “for further proceedings in conformity with this opinion”? The Supreme Court was not directing a useless thing, but it was

sending the matter back to the I.C.C. in the self-same proceeding in which the I.C.C. had originally acted, to give the I.C.C. an opportunity to correct any errors and give proper validity to the order which the Court had thus set aside because of errors in the proceedings.

In *Erie R. Co. v. United States*, 64 F. Supp. 162, a three-judge federal court had before it an order of the Interstate Commerce Commission with respect to rates, and in that case the argument was advanced as by plaintiff's counsel here, that the original order was void and on remand the I.C.C. had no authority but to dismiss. In that case reference was made to Section 15 (2) of the Interstate Commerce Act, providing that such order should take effect and remain in effect "unless the same shall be suspended or set aside by a court of competent jurisdiction." On the point of authority of the Commission to further proceed, it was argued, "Since this court set aside the Commission's order the plaintiffs contend that the Commission had no authority to proceed in the case."

To this argument the three-judge federal court answered:

"We think this contention has no merit. The statute specifically provides that the Commission is authorized to 'suspend or modify its orders upon such notice and in such manner as it shall deem proper.' Section 16 (6). *This provision invests the Commission with a continuing jurisdiction, and the provision in Section 15 (2) above quoted does not create nor contemplate any limitation upon the continuing jurisdiction.* It provides that after

an order of the Commission is suspended or set aside by a court, it is no longer effective. But neither expressly nor by necessary implication does it provide that after the court has set aside one of its orders the Commission can take no further action with reference to the subject matter of the order. In this case the construction contended for would result in the *absurd conclusion that when a court has determined that the Commission erred in issuing an order not based on evidence, the Commission is not empowered to acquiesce in the court's ruling and to re-open the case for the taking of evidence.* Such a result is neither required nor authorized by the statute.

“We are strengthened in this conclusion by the fact that the Supreme Court has sustained the action of the Commission in instances where an order has been set aside because of inadequate findings and thereafter the Commission has heard additional evidence and made additional findings. (Cases Cited)

“We conclude that the Commission was clearly authorized to proceed with the rehearing in this case.”

The Supreme Court of North Carolina recently had occasion to reverse an order of its State Commission with respect to increases in freight rates similar to the matter involved here. The matter was sent back for further proceedings to the State Commission, and after further hearing the Commission issued the same order as issued before, which was then approved by the Supreme Court. It was argued that the new order involved retroactive rate making, which the Commission could not do. The Supreme Court of North Carolina did not agree with

such contention and characterized its prior decision remanding the case, saying such opinion “as interpreted by this court had the effect of remanding this cause to the Commission for further hearings; this being a continuation of the same cause, the principle of *res judicata* and the rule of law which forbids retroactive rate making are not applicable to the order of the Commission under review by this court.” See *State of North Carolina v. Department of Agriculture*, 109 S.E. 2d 368 at 374. (June 12, 1959)

We confidently assert that counsel for appellant is urging an erroneous position when he argues that the action of the Supreme Court in setting aside the I.C.C. orders was equivalent to a decision that such order was void. Not only is counsel in error in so assuming, but he makes no attempt to cite authorities to sustain such a proposition. We have already pointed out that the fact that the Supreme Court remanded the matter for further proceedings indicates that they did not hold the order void but sent it back to allow the I.C.C. to correct the evidentiary deficiencies if possible.

The Supreme Court of the United States has itself on more than one occasion held that remand of a case as was done in this instance does not terminate the right of the inferior tribunal to proceed further and does not make either the prior or subsequent proceedings void. The I.C.C. itself on pages 4 and 5 of its last report (Exhibit 11) so answers counsel on the same argument made by him before that body.

In the case of *Securities & Exchange Commission v. Chenery Corp.*, 322 U.S. 194, 91 L.Ed. 1955, 67 S. Ct. 1575, the United States Supreme Court, referring to such a remand, stated at page 250:

“This obviously meant something more than the entry of a perfunctory order.”

Also, in the case of *Ford Motor Co. v. Labor Board*, 305 U.S. 364, 83 L.Ed. 221, 59 S. Ct. 301, the Supreme Court stated at page 374:

“Such a remand does not dismiss or terminate the administrative proceeding. If findings are lacking which may properly be made on the evidence already received, the court does not require the evidence to be reheard. * * * *If further evidence is necessary and available to supply the bases for findings on material points, that evidence may be taken.* * * *.”

As is stated by appellants on page 16 of their brief, the railroads do place considerable reliance upon the case of *Atlantic Coast Line R. Co. v. Florida*, 295 U.S. 301, 79 L.Ed. 1451, 55 S. Ct. 713. Counsel then says that such case is “basically entirely different.” The only “basic” difference which counsel even attempts to point out is the question as to whether jurisdiction to hear the present controversy should be in the state court or the federal court. It is not a question of “jurisdiction” of the I.C.C., and the question of “jurisdiction” to hear the matter now before this court is outside the issues of this case. As far as this court is concerned, it has jurisdiction to hear the matter presently before it. In the Florida case the matter of restitution was heard before the federal

court, where there was “conceded jurisdiction.” No question at all was raised there as to whether the matter should be heard in the federal or in the state court, but that in no manner distinguishes or makes “basically different” the right or absence of a right on the part of the plaintiffs to have restitution in this case. In fact, in the *Structural Steel* case to which counsel for appellants likes to refer, the Circuit Court stated that even if it should be finally determined that the rates in question were “unsupported by any valid order,” that in such event “the right to prevail would depend upon traditional notions of equity as in *Atlantic Coast Lines v. Florida*, 295 U.S. 301.”

The report of litigation involved in the *Atlantic Coast Line R. Co. v. Florida* cases is much too long to make more than very brief reference to here, but we do commend the court to a study of the various proceedings involved in that case, a study and analysis of which will show a complete parallel with the situation now involved before this court. That case went to the United States Supreme Court three times. In the first hearing the I.C.C. concluded that intrastate rates discriminated against interstate commerce and ordered intrastate rates increased. A three-judge federal court sustained the order, but, on appeal, the United States Supreme Court held the findings insufficient to support the Commission’s order and set the order aside. *Florida v. United States*, 282 U.S. 194, 75 L.Ed. 291, 51 S. Ct. 119. On remand the I.C.C. re-opened the proceedings and, after full hearing, issued another order, again requiring said intrastate rates to

be increased. A three-judge court again sustained the order, and, on a second appeal, the United States Supreme Court sustained such second order. *Florida v. United States*, 292 U.S. 1., 78 L.Ed. 1077, 54 S. Ct. 603. Chief Justice Hughes was the writer of the opinion in each of these two appeals.

During a period of two years after the original I.C.C. order and before its reversal by the Supreme Court on the first appeal, the railroads had collected the increased rates. After the reversal the shippers who had intervened in the federal district court proceedings petitioned that court for a decree requiring the railroads to repay the increases so paid. The matter was referred to a master, who recommended restitution of only part of the increases, on the basis that the original state rates had been too low. The three-judge court affirmed his report and recommendation and both parties appealed.

The Supreme Court sustained the last order of the Commission, reversed the holding of the court and the master with respect to repayment of part of the increases collected, held that the orders of the Commission were not void and that the shippers were not entitled to restitution of any of the amounts so paid. The court, speaking through Justice Cardoza, said (*Atlantic Coast Line v. Florida*, 295 U.S. 301 at 310, 79 L.Ed. 1451, 55 S. Ct. 713) :

“* * * ‘Restitution is not of mere right. It is *ex gratia*, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it, nor where the process is set aside for a mere slip.’ * * * ‘In

such cases the simple but comprehensive question is whether the circumstances are such that equitably the defendant should restore to the plaintiff what he has received' * * *''

“* * *. An order declaring the discrimination to be excessive and unjust was made by the Commission before the carrier attempted to collect the higher charges. Thereafter the order was adjudged void by a decision of this court * * * but void solely upon the ground that the facts supporting the conclusion were not embodied in the findings. *Void in such a context is the equivalent of voidable.* * * * The carrier was not at liberty to take the law into its own hands and refuse submission to the order without the sanction of a court. It would have exposed itself to suits and penalties, both criminal and civil, if it had followed such a path. See e.g., Interstate Commerce Act, 49 U.S.C. sec. 16 (8) (9) (10) (11). Obedience was owing while the order was in force.

“By the time that the claim for restitution had been heard by the master and passed upon by the reviewing court, the Commission had cured the defects in the form of its earlier decision. During the years affected by the claim there existed in very truth the unjust discrimination against interstate commerce that the earlier decision had attempted to correct. If the processes of the law had been instantaneous or adequate, the attempt at correction would not have missed the mark. It was foiled through imperfections of form, through slips of procedure * * *, as the sequel of events has shown them to be. Unjust discrimination against interstate commerce, ‘forbidden’ by the statute, and there ‘declared to be unlawful.’ * * * does not lose its unjust quality because the evil is without a remedy until the Commission shall have spoken. The word when it goes forth invested with

the forms of law may fix the consequences to be attributed to the conduct of the carrier in reliance upon an earlier word, defectively pronounced, but aimed at the self-same evil, there from the beginning. The Commission was without power to give reparation for the injustice of the past, but it was not without power to inquire whether injustice had been done and to make report accordingly. Indeed, without such an inquiry and appropriate evidence and findings, its order could not stand, though directed to the years to come. Obedient to this duty, the Commission looked into the past and ascertained the facts. In particular it looked into the very years covered by the claims for restitution and found the inequality and injustice inherent in the Cummer rates during the years they were in suspense and during those they were in force.

* * *. What it had stated in its first report * * * was thus supplemented and confirmed by what it stated in the second. The two sets of findings tell us, when read together, that restitution is without support in equity and conscience, whatever support may come to it from procedural entanglements."

We confidently urge upon the court that this Florida case, on its facts, is a close parallel to the case at bar and ample precedent and authority to guide the court herein. If more were needed, we could cite a number of cases wherein the Florida case has been followed on the point of restitution, wherein the courts have held that it is allowable only upon an equitable basis.

Counsel for appellants, at page 17 of his brief, tries to distinguish this *Atlantic Coast Line* case by saying: "There was no holding of any *lack of evidence* to give

rise to the federal jurisdiction'' and again, page 20, where he says the defect in that case was in the findings and ''not in the evidence.'' Lack of evidence or lack of findings would, either one, affect only the *merits* and not jurisdiction or power to act. However, counsel does not read the *Atlantic Coast Line* case closely enough. On the first appeal the court, through Chief Justice Hughes, said (282, at page 215) :

''* * * The Commission is the fact finding body and the court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported. * * *.''

If there are not adequate findings, the court does not go further to examine the evidence. As was said by Justice Cardoza in 295 U.S. at 306, further quoting from the prior opinion by Chief Justice Hughes :

''In the absence of such findings we are not called upon to examine the evidence in order to resolve opposing conditions as to what it shows. * * *.''

Regardless of what the evidence may have been on the first hearing, on the final appeal Justice Cardoza states (295 U.S. at 307) :

''* * * After the mandate of reversal the Interstate Commerce Commission *listened to new evidence*, made a new set of findings and prescribed the same rate that it had put into effect before * * * and * * * both the findings of the Commission and the evidence back of the findings were now held to be sufficient.''

Counsel on page 19 of appellant's brief, referring to the second report and order of the I.C.C. in the case at bar (Exhibits 11 and 12) said: "They do not make any attempt to make either their order or their findings retroactive." Neither did the Commission in the Florida case, but in both cases the second report and order referred to periods of time covered by the first order.

A case involving another federal agency but which followed interstate commerce law and procedure, is *Morgan v. United States*, which case the United States Supreme Court had occasion to have before it four times, the first time at 298 U.S. 468, 80 L.Ed. 1288, 56 S. Ct. 906.

The law prescribing powers of the Secretary of Agriculture in setting rates to be charged by market agencies was similar to provisions of the Interstate Commerce Act. The law provided that on complaint or request the Secretary of Agriculture should investigate the rates charged, and if, after a full hearing, he found questioned rates to be unreasonable or discriminatory, he should prescribe reasonable rates thereafter to be charged. Under this law the Secretary of Agriculture did undertake an investigation into the reasonableness of existing rates and issued an order prescribing maximum rates thereafter to be charged, which maximum rates were lower than existing rates.

The law governing procedural matters provided that in proceedings undertaken by the Secretary of Agriculture and with respect to orders issued by him, the pro-

visions of all laws relating to “enforcing,” “suspending,” or “setting aside” orders of the I.C.C. would be applicable. It was under such laws that the order was attacked before a three-judge federal court. The three-judge court issued its decree sustaining the Secretary’s order, but on appeal the United States Supreme Court reversed. In the original complaint before the three-judge court it was alleged that no proper or full hearing had been held, but the court, on motion of the government attorneys, struck out such allegations and the government was not required to answer them, and the district court took no evidence on the question as to whether or not a full hearing had been accorded. On this basis the Supreme Court reversed, saying the district court erred in striking the allegations re lack of a full hearing; — that on that point the government should be required to answer and the court take evidence — and the Supreme Court said:

“The decree is reversed and the cause is remanded for further proceedings in conformity with this opinion.”

On rehearing the three-judge court took evidence with respect to the manner in which the Secretary had conducted the investigation and the type of hearing that had been held and again sustained the Secretary’s order. On a second appeal, *Morgan v. United States*, 304 U.S. 1, 82 L.Ed. 1129, 58 S. Ct. 773, the Supreme Court discussed the requisites for a full hearing and concluded that a full hearing had not been given before the Secretary. It again reversed the district court and remanded the matter “for

further proceedings in conformity with our opinion.''
(304 U.S. 26)

As was later referred to by the Supreme Court, the order of the Secretary at this time was set aside without consideration on the merits but solely for failure of the Secretary to follow the procedure prescribed by the statute. (See 307 U.S. 185.)

In the meantime, while the matters were pending before the Supreme Court and before the matter got back to the Secretary for further hearing, monies representing charges in excess of the rates prescribed by the Secretary's order were being impounded with the district court.

On remand after the second appeal the Secretary of Agriculture re-opened the original proceedings for further hearings. He served his findings in the investigation upon the market agencies and gave them a time limit in which to file exceptions and have oral arguments on such exceptions to his findings. The market agencies declined to join further in the original proceedings as re-opened and made a motion before the three-judge court to distribute the impounded monies among them. The Secretary and government attorneys moved for a stay to await the outcome of further proceedings before the Secretary. The three-judge court denied the stay and thereupon entered a decree setting aside the Secretary's order, permanently enjoined its enforcement and directed that the impounded monies be distributed among the market agencies. From such decrees of the three-judge court the

government and the Secretary brought the third appeal to the Supreme Court. See *United States v. Morgan*, 307 U.S. 183, 83 L.Ed. 1211, 59 S. Ct. 795. The original order of the Secretary was dated June 14, 1933, and this third appeal got to the Supreme Court in October, 1938.

The basis of the district court's order distributing the impounded funds was that the Secretary of Agriculture could not now by further order prescribe rates and make them effective as of June, 1933, the date of his original order and the start of the impounding of the monies. This issue brought the question of the merits of the Secretary's decision before the Supreme Court for the first time.

This time the Supreme Court sustained the Secretary's order. The court referred to the fact that the law required that all such rates be "just, reasonable and nondiscriminatory," and that even if it be conceded that the Secretary might not now make a retroactive rate order, "* * * he was free to make an order fixing rates for the future and for that purpose or any other within the purview of the Act he is now free to determine a reasonable rate for the period antedating any order he may now make." (Page 192) (Citing *Atlantic Coast Line R. Co. v. Florida*, 295 U.S. 301, 312)

The court at page 195 referred to *Atlantic Coast Line R. Co. v. Florida*, saying, "This court" in that case "went much further" and then added re the Florida case:

"The final result of the litigation was that the railroads were permitted to collect and retain the

higher rates for a period during which there was no lawful order of the Commission superseding the state commission rates. * * * *But there as here the first administrative order was not a nullity.* * * * *Though voidable it could not be ignored* without incurring the penalties for disobedience inflicted by the applicable provisions of the statute. The rates did not lose their unjust and unreasonable quality in the one case, or cease to be unjustly discriminatory in the other, merely because the administrative orders in each were *voidable for procedural defects* or because a second order could operate only for the future. * * *

The Court reversed the district court for the third time and ordered the impounded funds held until the Secretary had completed his further proceedings.

The Secretary proceeded with further hearing and used his earlier findings "as a working basis" for a further hearing. But he took new evidence and gave the market agencies the opportunity of offering any evidence they desired. After his final order the three-judge court, by a two to one decision, set the order aside and again directed the monies impounded to be returned to the market agencies. On a fourth and final appeal, the United States Supreme Court again reversed and upheld the Secretary's order as it affected the rate from June, 1933, forward and refused to order the moneys to be refunded. See *United States v. Morgan*, 313 U.S. 409, 85 L.Ed. 1429, 61 S. Ct. 999.

POINT TWO

THE TARIFFS CHARGED AND COLLECTED BY THE DEFENDANT RAILROADS DURING THE PERIOD IN QUESTION WERE EFFECTIVELY "FILED" AND WERE THE TARIFFS "ON FILE AND IN EFFECT" AND HAD TO BE COMPLIED WITH UNDER BOTH FEDERAL AND UTAH STATE LAW.

Under his Point Four, counsel for appellant argues that the "mailing" of the tariffs to the P.S.C.U. was not a "filing" of the tariffs. We will ask, how are tariffs normally filed and what was done and not done in filing the tariffs in question which should have been done?

Plaintiffs produced as their witness Keith E. Sohm, Commerce Attorney and head of the Rate and Tariff Department of the P.S.C.U. (R. 54) He identified the master tariffs of increased rates under Ex Parte 175, (R. 57) and the several tariffs produced by him included a number of supplements which had been filed. Included in these supplements was a sheet designated as "K-19" (Page 14 of Exhibit 4), concerning which he said (R. 58): "The particular supplement which was *filed to make effective* in Utah certain rates is called K-19, I believe." Even plaintiff's counsel's question asked: "These are the copies of the tariffs *filed* pursuant to the Interstate Commerce Commission order with your Commission?" (R. 38) To which Mr. Sohm answered, "Correct." (R. 59) The original Ex Parte 175 tariffs were not in-

tended to become effective on Utah intrastate traffic until a subsequent supplement was published. "That subsequent supplement is called K-19. It was stamped *received* on June 21, 1956. It was stamped *filed* on June 21, 1956. It states an effective date of June 22, 1956." (R. 59)

With respect to "mailing" or "filing" no distinction is made by the P.S.C.U. between tariffs filed for "information" and "effective tariffs." These tariffs — including the supplement K-19 — were "made a part of our regular file and all of the tariffs were put together. There was no distinction in the handling of this tariff and other regular tariffs." (R. 65)

With respect to supplement K-19 Mr. Sohm said: "As far as I know it was *filed* with our commission and the increases were charged." (R. 66)

Appellant's counsel tries to make a point of the fact that the P.S.C.U. issued no orders approving such tariffs, but Mr. Sohm said he knew of no instance when the P.S.C.U. had ever issued any order approving tariffs which had been filed pursuant to I.C.C. order. (R. 66) The K-19 supplement was similar to numerous tariffs and supplements filed with the P.S.C.U. almost daily "and by such filing become effective to control the transportation of Utah intrastate traffic if they affect you in intrastate traffic as K-19 did?" Answer: "Yes." (R. 68) Mr. Sohm further testified that the railroads "published a successive supplement which * * * cancels supplement K-19." (R. 6) Tariff "Supplement K-36" (Sheet 2 of

Exhibit 4) “is the supplement which took the effectiveness of the Ex Parte 175 increases out of effect.” (R. 74)

Mr. Sohm also testified (R. 79): “Were these rates that were made effective under the supplement K-19 such that the railroads could not have lowered or charged less on any freight affected by that without authority either from the Public Service Commission or the Interstate Commerce Commission?” Answer: “I believe that is true. * * *.”

We would here pose the question: Suppose the I.C.C. order had not been set aside, what then would have been the result of this filing? There would then have been no possible question as to the propriety and effectiveness of the filing of such rates and no further filing would have been necessary. The controlling issue, then, is what was the effect of the Supreme Court’s decision setting the I.C.C. order aside? Did it make such order and everything done under it void *ad initio* or only voidable, so that it should be set aside as was done by the Supreme Court and sent back for further proceedings? This action of the Supreme Court was like a reversal for insufficient evidence in a court of law where a matter is sent back for a new trial, and on the new trial, if proper evidence is produced, the original judgment or a subsequent one identical in terms may be supported and affirmed.

Respondents respectfully urge that under the circumstances here shown the increased tariffs were the “tariffs on file and in effect at the time” and had to be complied with under both state and federal law.

Utah Code Annotated, 54-3-2 (1). “Every common carrier *shall file with the Commission* * * * schedules showing the rates, fares and charges * * * for transportation. * * *”

U.C.A. 54-3-6 (1) provides that no common carrier shall engage in transportation within the state until its schedules shall have been filed and published, and then provides in subparagraph (2):

“No common carrier shall charge * * * a greater or less or different compensation for * * * transportation * * * than the rates and fares * * * as specified in its schedules *filed and in effect at the time*; nor shall any carrier refund or limit * * * any portion of the rates, fares or charges so specified except upon order of the Commission as hereinafter provided. * * *”

U. C. A. 54-3-7:

“No public utility shall charge, demand, collect or receive a greater or less or different compensation * * * than the rates * * * and charges applicable to such * * * service as specified in its schedules *on file and in effect at the time*.”

U. C. A. 54-3-11 prohibits rebates and says carriers must not allow any transportation “at less than the rates and fares then established and in force *as shown by the schedules filed and in effect at the time*.”

From these statutes it is clear that *filed tariffs* have the force of law and must be complied with until or unless suspended or changed. See *Keogh v. C. & N. W. R. Co.*, 260 U.S. 156, 67 L.Ed. 183, 43 S. Ct. 47.

We are mindful of U.C.A. 54-7-12, referred to by appellant's counsel, which provides that no utility may raise any rate except upon a showing before and finding by the Commission. That provision is contained in subparagraph (1). But what if such rates are filed? What is the purpose of subparagraph (2) of U.C.A. 54-7-12, which says that whenever any tariff *is filed* "increasing or resulting in any increase in any rate" the Commission may "enter upon a hearing concerning the propriety of such rate"? During the period of investigation the Commission may suspend the effectiveness of such rate up to six months. The statute does not say such filed rate making an increase is or should be considered a nullity. This very definitely shows the legislative intent that the publishing and filing of a rate was intended to make such rate effective and applicable. If done by order of the Commission after a hearing, clearly the Commission would have no basis for suspending and entering upon a hearing concerning its propriety. It has been held that rates which have been published and filed containing a mistake nevertheless are considered binding and an increased rate so contained in a filed tariff by mistake must be paid and then application can be made for reparations with respect to it. See *Louisville Cement Co. v. Interstate Commerce Commission*, 246 U.S. 638, 62 L.Ed. 914, 38 S. Ct. 408.

The scheme of the entire Utah Public Utilities Act, which is very comprehensive, contemplates that rates may be set by Commission order or may be set by a voluntary filing by a carrier, in which latter event the Commis-

sion may suspend and hold an investigative hearing. But a filed rate is considered to have the force of law until suspended, cancelled or set aside, and extreme penalties are provided by both state and federal law for disregarding such filed tariffs. See statement by Justice Cardoza in *Atlantic Coast Line v. Florida*, 295 U.S. at 311.

POINT THREE

THE FURTHER FINDINGS AND REPORT OF THE I.C.C. OF DECEMBER, 1959 SUPPLEMENT AND SUPPORT THE ORIGINAL FINDINGS ON WHICH THE ORDER OF FEBRUARY 8, 1956, WAS BASED AND DETAIL EVIDENCE WHICH THE SUPREME COURT SAID WAS LACKING.

Counsel for appellants, in arguing under his Point Five, at page 26, again tries to distinguish the *Atlantic Coast Line* case by saying that in that case the I.C.C. “merely corrected the defective findings in the original order.” Justice Cardoza in that case makes two references to this point. At the beginning of his opinion he said that the I.C.C., “upon *new evidence* and *new findings*, made the same order it had made before.” (295 U.S. 305) Again, at page 307, he says, “After the mandate of reversal the Interstate Commerce Commission listened to new evidence, *made a new set of findings* and prescribed the same rate that it had put into effect before.” We ask, how can counsel, or anyone else, distinguish that from the case at bar?

On page 26 appellant's brief also intimates that the I.C.C. in the second report and order (Exhibits 11 and 12) does not purport to cover any of the conditions existing prior to its first order, and he refers to findings on pages 25 to 29 of Exhibit 11, saying, "They make no reference to conditions existing prior to December 7, 1959." Why should counsel limit reference to pages 25 to 29? The first 25 pages of the report (Exhibit 11) were intended by the Commission to have some effect in detailing the evidence which they considered and what it showed. The I.C.C. again did just as Justice Cardoza in the *Atlantic Coast Line v. Florida case*, 295 U. S. at 312, said that the I.C.C. did in that case: "* * * in particular it looked into the very years covered by the claims for restitution and found the inequality inherent in the Cummer rates during the years they were in suspense and during those they were in force. * * * What it had stated in its first report * * * was thus supplemented and confirmed by what is stated in the second. * * *." In the case at bar (Exhibit 11, page 5) the I.C.C. states: "The evidence on further hearing, for the most part *covers the entire period* within which the Ex Parte Nos. 175, 196 and 206 increases became applicable on intrastate rates. To avoid duplication of discussion as much as possible, the evidence generally will be considered as a whole. * * * Data for 1954 will indicate the situation with respect to the increase in Ex Parte 175 and (data for) 1956 and 1957 with respect to Ex Parte 196 and 206 increases."

For the next several pages the Commission then goes on to detail evidence covering the entire period, both

before the order of February, 1956 as well as subsequent thereto, and this continues from pages 6 to 15, inclusive. In some places comparisons are made with averages of 1935 to 1939, and in some places with averages of 1947 to 1949. On page 7 the increases in railroad material costs and wages from 1939 up to 1954 were shown, covering the period prior to the first order; also, material costs and wage increases as further increased by 1956. At the same time, comparative increases in freight rates up to 1954, and again also to 1956, were shown; also, farmers' prices, wholesale prices, consumers' prices and per capita income payments as they had increased over previous base period up to 1954, which would cover a period included in the first order, and also further increases up to 1956 which would be involved in Ex Parte 196 and 206. At pages 10 to 12 it referred to main line and branch line grades and curvatures, showing steeper grades and excess curvatures on branch lines; also, wages and overtime, showing higher wages and more overtime paid on branch lines, where the majority of the intrastate traffic moved. These all affected the period prior to the order of 1956 as well as giving figures for the additional years of 1956 and 1957.

The United States Supreme Court, in reversing the prior order, mentioned and placed considerable reliance upon density figures and operating ratios, referring to evidence which had been introduced by plaintiffs as protestants in that prior case (356 U.S. at 426).

In the prior hearing evidence as to density and ratios had been introduced in an exhibit prepared by the Public

Service Commission of Utah, attempting to show a comparison between density of intrastate traffic and density of interstate traffic on the theory that where the greater amount of traffic moves, the overall costs are spread thinner. Admittedly, the figures introduced at that time included some interstate traffic, and the railroads did not introduce actual figures showing only intrastate density. On the rehearing the railroads did introduce actual density figures and very definitely proved — in fact, the P.S.C.U. Auditor admitted — that the “intrastate” density figures which they had used included not only intrastate traffic, which would be traffic moving wholly within Utah, but also included all traffic originating in Utah and moving out, all traffic originating outside and moving into Utah, and all traffic neither originating nor terminating in Utah, but which moved across Utah and which is termed “bridge” or “overhead” traffic. For their interstate figures they used railroad system statistics outside of Utah. Upon the further hearing after remand from the federal court, to counteract this, the railroads introduced actual figures showing what was purely Utah intrastate traffic and what was actually interstate traffic already bearing higher rates. The very years — 1953 and 1954 — which were included in the P.S.C.U. exhibit in the prior hearing, showing the evidence upon which the United States Supreme Court relied, were again covered; and the actual figures show interstate traffic density to be at least three times that of intrastate traffic density. Similar actual density figures were also shown for the years 1956 and 1957. The I.C.C. referred in detail to these figures on pages 13 and 14 of the Exhibit 11 and

concluded that all of such figures, both with respect to the years prior as well as after the order of February, 1956, show “the more favorable density of the interstate traffic compared with the intrastate traffic.” The I.C.C. also, at the bottom of page 14 of Exhibit 11, refers to the density figures as produced by the protestants (plaintiffs) and definitely state that the value of such evidence was “impaired” because it included “heavy overhead movement,” which was all interstate and not proper in intrastate figures at all. It will thus be seen that not only did the I.C.C. “make reference to conditions existing prior to December 7, 1959,” but referred to the very evidence that applied to the points which the Supreme Court said was lacking in its prior order, to show the facts which existed at the time of and previous to that prior order, as well as to show that such facts continued to exist as of the date of its last order (Exhibit 11). Here again we say that this shows a parallel to the *Atlantic Coast Line* case and the decision of the court in that case should be controlling here because, as in that case so also in this, the I.C.C. “looked into the very years covered by the claims for restitution and found the inequality and injustice” still to exist and “what it had stated in its first report * * * was thus supplemented and confirmed by what it stated in the second.”

POINT FOUR

APPLICATION TO THE PUBLIC SERVICE COMMISSION OF UTAH FOR REPARATIONS IS A PREREQUISITE TO ANY RIGHT OF REPARATION OR RESTITU-

TION, REGARDLESS OF THE EFFECT OF ANY I.C.C. ORDER.

Counsel for appellant in his brief admits the statutory provision concerning reparation but tries to argue against its application by saying that the permissive word “may” is used, and says, “Suppose the Commission does not want to take jurisdiction.” We think that such an argument has no merit whatsoever. By *comparison* we refer to Utah Code Annotated, 54-4-1, which says that the Commission is *vested* with power and jurisdiction to supervise and regulate every public utility in the state. This again is a statement that the Commission has been granted the *power* to do certain things but does not directly say that they have the obligation to exercise that power. Would counsel, with respect to such provisions, say, “Suppose the Commission does not want to regulate a public utility.” Could we say that it does not have to under the law?

He argues that the statute is silent on the question of whether or not the statutory remedy is exclusive. The statute is broad, and with such broad coverage provides numerous remedies without reserving the common law remedy. The concluding sentence of sec. 54-7-20 reads:

“The remedy in this section provided shall be cumulative and in addition to any other remedy or remedies *under this title* in case of failure of a public utility to obey an order or decision of the Commission.”

The limiting of remedies to those “under this title” shows the intent of the framers of the statute to lodge the

exclusive power to determine the right to reparations in the Commission, with the right then to go to any court of competent jurisdiction to enforce the reparation order. We think such would be a situation where the maxim would apply "*inclusio unius est exclusio alterius*." With such a broad coverage in the statute, if it had been the intent of the legislators to preserve the common law remedy, we think they would have so stated; but the Utah Act was passed within approximately ten years after issuance from the Supreme Court of its decision in the case of *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, which will be referred to presently and which construed the Interstate Commerce Act with respect to such a matter.

It is admitted that in absence of a statute which may be controlling there was a right at common law to recover against a carrier who had exacted *unreasonable* or *exorbitant* rates from a shipper. In order to so recover it was necessary for the shipper to plead and prove, and for the court to adjudge, that the rates which had been exacted were unreasonable. Plaintiffs never attempted such in the case at bar.

With the enacting of the Interstate Commerce Act and the numerous public service commission acts in the various states, it has been held generally that these acts supersede the right at common law as far as any common law right of recovery is concerned. There are one or two exceptions, but the jurisdictions so holding are in the minority and are based upon specific statutory provisions

saying that the common law remedy is retained or still available, or words of some similar purport. The Interstate Commerce Act itself provided:

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

In spite of that provision, the Supreme Court of the United States, in a case now considered a landmark case and cited and followed extensively, *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 51 L.Ed. 553, 27 S. Ct. 350, held that such provision was so repugnant to the other provisions and purpose of the Interstate Commerce Act to require uniformity in rates, that it could not stand in the face of other provisions, and the rule established in that case has since been followed — that the Interstate Commerce Act superseded and abolished all common law remedies with respect to reparations as far as interstate rates were concerned.

In referring to the provisions and purposes of the Interstate Commerce Act, the Supreme Court in the *Abilene* case said at page 437:

“The act made it the duty of carriers subject to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations, made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the act, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of

the act and the punishments which it imposed were directed not only against carriers but against shippers, or any person who, directly or indirectly, by any machination or device in any manner whatsoever, accomplished the result of producing the wrongful discriminations or preferences which the act forbade. It was made the duty of carriers subject to the act to file with the Interstate Commerce Commission created by that act copies of established schedules, and power was conferred upon that body to provide as to the form of the schedules, and penalties were imposed for not establishing and filing the required schedules. The Commission was endowed with plenary administrative power to supervise the conduct of carriers, to investigate their affairs, their accounts and their methods of dealing, and generally to enforce the provisions of the act.

* * * Power was conferred upon the Commission to hear complaints concerning violations of the act, to investigate the same, and if the complaints were well founded, to direct not only the making of reparation to the injured persons, but to order the carrier to desist from such violation in the future. In the event of the failure of a carrier to obey the order of the Commission that body, or the party in whose favor an award of reparation was made, was empowered to compel compliance by invoking the authority of the courts of the United States in the manner pointed out in the statute, *prima facie* effect in such courts being given to the findings of fact made by the Commission.”

It is apparent that the Public Utilities Act of Utah was patterned after the Interstate Commerce Act, and the foregoing quote from the *Abilene* case could be re-

peated verbatim as fully applicable to the Public Utilities Act of the State of Utah.

A comparison of the provisions in the various sections of Title 54, Utah Code Annotated, 1953, definitely confirms this to be a fact. 54-3-1 says all charges shall be just and reasonable and every unjust or unreasonable charge is prohibited and declared unlawful. 54-3-2 imposes a duty on every carrier of filing with the P.S.C.U. its schedules of rates, and 54-3-6 prohibits a carrier from engaging in any transportation until its rates and charges have been filed and published. 54-3-6 (3) prohibits preferences, discriminations or reduced or free transportation. 54-3-7 makes it unlawful to depart from the rates established in tariffs on file and in effect, and forbids refunds and rebates. 54-3-8 again forbids preferences. At the end of the title, 54-7-25 to 28 refers to violations of any part of Title 54 and provides numerous and severe penalties, and 54-7-24 gives a right of injunction to stop threatened violations. 54-3-11 again forbids rebates or preferences which might be accomplished by any machination or falsification. In connection with the requirement of filing schedules of rates with the P.S.C.U., sec. 54-3-2 (2) confers power upon the P.S.C.U. to prescribe "the form of the schedules." Chapter 4 of Title 54 gives the P.S.C.U. broad and plenary powers to supervise all utilities, to investigate their affairs (54-4-2), prescribe and investigate their accounts and records (54-4-22 to 24) (54-7-19), regulate rules, equipment and service (54-4-7) and require improvements, extensions and repairs (54-4-8). Even track connections, spurs and switch-

ing service (54-4-10 and 11) and regulation of safety appliances and joint use of facilities (54-4-13 and 14) is included. Power is conferred upon such commission to hear complaints and to make investigations either upon complaint of any party (54-7-9) or upon its own motion (54-4-2). Power is given to hear and determine reparations (54-7-20) and to have the help of the courts, the Attorney General and district attorneys in enforcing its orders and all laws affecting public utilities (54-7-21).

It would be hard to conceive a law giving more discretion and broader coverage than does such Utah law.

The quotation at the bottom of page 31 and top of page 32 of appellant's brief taken from the case of *Southern Pac. v. Superior Court*, 150 Pac. 397, can be paraphrased and is very apropos here because, as there said, referring to interpretation of the Interstate Commerce Act and similar state acts, "It is evident that the system of regulation of rates and fares" as provided by Utah law was "modeled upon the federal Act for the regulation of commerce between the states," and "this being so it will be assumed that the people" of the State of Utah "in enacting the same or similar terms of their written law, intended to express the same meaning as that established as the true meaning of the law from which these laws of the state have been derived."

Referring specifically to reparations and the paramount requirement (which exists in both the federal and the Utah Act) that all rates must be reasonable and uniform in their application, and in holding that applica-

tion must first be made to the commission, the United States Supreme Court in the *Abilene* case said (at page 441):

“* * * This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible.”

(Page 442):

“* * * This becomes particularly cogent when it is observed that the power of the courts to award damages to those claiming to have been injured, as provided in the section, contemplates only a decree in favor of the individual complainant, redressing the particular wrong asserted to have been done, and does not embrace the power to direct the carrier to abstain in the future from similar violations of the act; in other words, to command a correction of the established schedules, which power, as we have shown is conferred by the act upon the Commission in express terms. * * * Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force.”

The Court further stated (at page 446) :

“* * * When the Commission is called upon on the complaint of an individual to consider the reasonableness of an established rate, its power is invoked not merely to authorize a departure from such rate in favor of the complaint alone, but to exert the authority conferred upon it by the act, if the complaint is found to be just, to compel the establishment of a new schedule of rates applicable to all. * * *”

The foregoing quotations consist of only a part of the enlightening discussion by the Court in the *Abilene* case, but the reasons therein contained apply just as strongly, if not more so, to the Utah Act as to the Interstate Commerce Act. We commend the court to a thorough study of that *Abilene* case.

On page 30 of their brief appellants argue: “In this case the question of whether or not the tariffs are too high or too low is beside the point.” The question of the reasonableness of such rates is not beside the point but a necessary part of plaintiffs’ case if plaintiff claims under a common law theory. The Supreme Court in the *Abilene* case with respect to this said :

“* * * Even under plaintiffs’ own theory, recovery could not be had unless the rates as charged and collected were unreasonable and excessive. * * *”

Under the common law right of action it had to be alleged and proved that the rates as charged and collected were unreasonable and excessive and plaintiffs never even attempted to so show.

The only case which counsel cites in an attempt to support appellants' claimed common law right is the case of *Jeremy Fuel & Grain Co. v. Denver & R. G. R. Co.*, 60 Utah 153, 207 Pac. 155, which he says confirms the existence of a common law right of action, and he adds that the annotator of the Utah Code also thought this case reserved common law right. Such would be true with respect to the law involved in that case, but an annotator does not go further to analyze changes which may be made in statutes and their effect after such changes, and we have never understood that an annotator's opinion should be considered as binding precedent, otherwise annotator's opinions might give binding interpretative law upon our whole body of statutes.

In that first *Jeremy* case there was no Public Service Commission or Public Utilities Commission to apply to during the period there involved. The rates and charges there involved were paid during the period between November 20, 1914, and March 7, 1917. The Utah Public Utilities Act, Chapter 47, Session Laws, 1917, became effective on approval on March 8, 1917. Thus we have no need to quarrel with the statement that a common law right of action was available as set forth in the *Jeremy* case in 60 Utah 153, but such common law right was no longer available after that date. It will be noted that that *Jeremy* case was decided in May of 1922, and the complaint in that case, as stated in the first paragraph of the opinion, was filed in March, 1919, two years after the Public Utilities Act went into effect. In view of this we want to call attention of court and counsel to the fact that

the Jeremy Fuel Co. filed a subsequent case, which is reported in 63 Utah, beginning at page 392, and that in the second case the period covered by the excessive charges as claimed was from March 8, 1917, to December 31, 1917. We will ask *why was the period from March 8, 1917, to Dec. 31, 1917, not included in the first action, which was not filed until 1919?* In the second Jeremy Fuel action, which covered the period from March 8, 1917 on, the Fuel Co. filed its petition with the Public Utilities Commission, wherein it “asked for reparations” covering the period following March 8, 1917.

The statute as originally enacted and as worded at the time of the second *Jeremy* case, merely allowed reparations where charges were made “in excess of the schedules, rates and tariffs on file with the Commission” or where the carrier had “discriminated *under said schedules* against the complainant. * * *” See Section 19, Chapter 47, Laws of Utah, 1917. Because of the fact that the carrier had not charged rates “in excess of schedules, rates and tariffs on file,” reparation was denied, and it was apparently assumed by all concerned that there was no common law right which could be then invoked.

After the case of *Denver & R. G. W. R. Co. v. Public Utilities Commission*, 73 Utah 139, 273 Pac. 939 (1928), the law was amended by Session Laws of 1929, since which time, and at the present time, the statute provides that the Commission can grant reparations for charges “in excess of the schedules, rates and tariffs on file with the Commission” or where the carrier “has charged an un-

just, unreasonable or discriminatory amount against the complainant.” Thus, if there were any question before, it cannot now be doubted that the power is lodged definitely in the Commission to the exclusion of any common law right to have the Commission hear and determine whether a carrier has charged any “unjust, unreasonable or discriminatory amount,” and the Commission is given power to order that the utility “make due reparation.” If the reparation order is not complied with, “suit may be instituted in any court of competent jurisdiction to recover the same.”

It is interesting here to point out that since the enactment of the Utah Public Utilities Act there has been no case (at least this counsel has found none) wherein this court has held such a common law right to exist, although there have been several where it might properly have been urged if anyone thought it available, but instead, as in the second *Jeremy* case, relief has been sought under the reparations provision of the statute. See *Jeremy Fuel & Grain Co. et al. v. Public Utilities Commission*, 63 Utah 392, 226 Pac. 456; *Utah-Idaho Central Ry. Co. v. Public Utilities Commission*, 64 Utah 54, 227 Pac. 1025; *Denver & R. G. W. R. Co. v. Public Utilities Commission*, 73 Utah 139, 272 Pac. 939.

Other states having statutes similar to the Utah statutes have held that the state statute supersedes and leaves no common law remedy available.

Hewitt Logging Co. v. Northern Pac. Ry. Co., 166 Pac. 1153 (Washington). The plaintiff company sued for

what it claimed was an overcharge. It had not made any previous application to the State Public Utilities Commission. The Washington Public Utilities Act was very similar to the Utah Act, including the section providing for reparations. The Washington statute also provided (at page 1155):

“This act shall not have the effect to release or waive any right of action by the state or any person for any right, penalty or forfeiture which may have arisen or may hereafter arise under any law of this state.”

This provision is practically identical with the provisions of U. C. A. sec. 54-7-23 (1).

In the Washington case there was in addition a provision in the State Constitution which re-affirmed all common law rights; however, in holding that an application to the public utilities commission was a prerequisite to any action at law to recover for excessive rates, the Supreme Court of the State of Washington said at page 1154:

“We may grant that the Constitution declares the common law, but it does not follow that the Legislature may not occupy its acknowledged field and define procedures and fix limitations upon the assertion of the right preserved. * * *”

“To define procedure, to make a condition precedent, and to fix a limitation does not destroy the force of the Constitution. On the contrary, a law so providing makes it efficient, certain, and uniform in its operation. The substantive right remains; that is all the citizen can insist upon, for it is held, under authority without limit, that no

litigant has a vested right in procedure so long as his right of action is not abolished.”

At page 1156:

“The claim for the overcharge was not made by respondent’s assignor within the time fixed by law. The condition precedent to the right to sue is non-existent. The complaint does not state a cause of action.”

The State of North Dakota likewise has a statute similar, if not identical, to the Utah statute. *Woodrich, et al v. Northern Pac. Ry. Co.*, 71 F. 2d 732. In this case the plaintiffs sought to claim under a common law right damages for “alleged unreasonable, extortionate and discriminatory freight rates.” The court stated that there was no claim or allegation in the complaint that the rates were not those regularly filed and published with the Commission. “* * * It is the claim of plaintiffs that under the North Dakota laws a common law action may be maintained to recover damages because of the exaction of unreasonable and discriminatory rates, even though such rates be those named in the published tariffs of the carrier approved by the Railroad Commission.” In denying this claim and holding that application to the Commission for reparation was a condition precedent, the three-judge federal court hearing the case stated at page 734:

“It seems clear that the entire subject of intra-state freight rates in the state of North Dakota is under the exclusive control of the Board of Railroad Commissioners. The powers vested in the North Dakota Board of Railroad Commissioners

are even broader and more sweeping than those conferred on the Interstate Commerce Commission. Manifestly, the main purpose of these regulatory statutes was to compel the establishment of uniform rates for all persons entitled to transport goods over the railroads, and to afford convenient facilities for ascertaining what are the established rates, and to prevent preferences and discriminations. By the very provisions of the statutes, the carriers are prohibited from collecting from any person a greater or less rate than is specified in the published schedule. The carrier in this case, having adopted, filed, and published schedules of rates applicable to the shipments involved, was bound to charge and collect that rate and no other."

The Montana Supreme Court has held that under its statutes no common law right of action remains, even though it also holds that under its state law the state commission cannot grant reparations for past charges — this on the theory that all rates in the state of Montana must be set and prescribed by the commission, and having been so set by the commission, the commission cannot grant reparation with respect to rates it has set or approved. See *Doney v. Nor. Pac. Ry. Co.*, 199 Pac. 432. In spite of the fact that the commission can grant no reparations, Montana said that under its statute the commission first must be authorized to determine the reasonableness or unreasonableness of the rate in question and thus an application to the commission is a prerequisite, and the Montana Supreme Court affirmed the lower court in sustaining a demurrer to a complaint where application had not been first made to the commission to consider the reasonableness of the rates.

The case of *Frank A. Graham Ice Co. v. Chicago M. St. Ry Co.*, 140 N.W. 1097, involved a Wisconsin statute similar to the Utah statute wherein an action for reparations was filed with the court without first applying to the state commission. The court in that case refers to the various sections of its statute which will bear out the comparisons to the Utah statute and says (page 1099):

“It is plain from the statutes upon the subject that the legislature intended to and did provide an exclusive remedy for the fixing of freight charges. * * *”

Page 1101:

“* * * The statutes referred to show that the whole matter of fixing rates and the remedies for excessive charges is lodged with the Railroad Commission. * * *”

“* * * The plaintiff had no standing in any court for reparation until it first applied to the Railroad Commission for relief in the manner provided by the statutes.”

From the various cases cited it will appear that rates are sometimes set voluntarily by carriers and sometimes by the commission and sometimes, as with Montana, are set exclusively by the commission, with the commission having no power itself to grant reparations but still being required to determine reasonableness. Here we would ask, if Utah rates should be considered as being required to be set by the commission in all instances, then why should we have a reparation statute? We have such a statute, and some field in which it may function must be found in the fabric of our statutory law. That field

can only be in instances where tariffs are filed and become effective, which have not been prescribed by or approved by the commission; and in such instances if a shipper seeks to attack, then he should do so, after such rates have been paid, by application under the reparations provisions of the statute to allow the commission to do its duty in maintaining uniformity. See *State v. Public Service Commission of Kansas*, 11 P. 2d 999.

We would also like to refer here to the case of *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.* 284 U.S. 370, 76 L.Ed. 348, 52 S. Ct. 183, wherein the United States Supreme Court referred to the Interstate Commerce Act but stated law that is applicable to the Utah Public Utilities Act, saying at page 384:

“The Act altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate. If the finding on this question was against the carrier, reparation was to be awarded the shipper, and only the enforcement of the award was relegated to the courts.”

See also *Southern Pacific v. R. R. Commission*, 231 Pac. 28 (Cal.).

The only conclusion that can be drawn from the authorities is that under Utah law there may be commission-prescribed rates, and there may be carrier-established rates. If such rates as established by a carrier either voluntarily or involuntarily are unjust or unreason-

able, they still have the force of law and before any shipper can disregard them or require restitution for amounts paid thereunder, the Commission in the first instance must hear and determine the fact of their reasonableness and whether they are either excessive, inadequate or otherwise; and after such determination by the Commission the courts can then enforce any order made where the Commission has found reparations to be due.

The case of *Southern Pac. v. Superior Court*, 150 Pac. 397, cited by counsel on page 31 of appellants' brief is not in point to the contrary. That case arose under the "long and short-haul" clause of the California State Constitution, and with respect thereto the California District Court of Appeal said at page 403:

"* * * But the plaintiff's claim in this action was that the Constitution of the State of California prohibited the defendant from collecting a higher freight charge on transportation of goods from Oakland to Bakersfield, than the established rate for a like kind of goods shipped from Oakland to Los Angeles. * * * *If the charge was thus in conflict with the Constitution, it was a charge beyond the jurisdiction of the Railroad Commission.* * * *"

POINT FIVE

PLAINTIFFS HAVE NO BASIS IN EQUITY FOR ANY RECOVERY.

Plaintiffs in this action have throughout the proceedings attempted to avoid any considerations of equity at all. At page 20, appellants' brief says, "This is not the theory upon which this case is brought at all." Under

our law and practice in this day we no longer have the distinction between law cases and equity cases, and courts are required to administer both law and equity in one form of action. If the facts show that on equitable considerations plaintiffs are not entitled to recover, the courts are required to consider such equity regardless of how plaintiffs try to “duck” it.

Referring to equity considerations and the duties of courts and commissions, the United States Supreme Court said in *United States v. Morgan*, 307 U.S. at 191:

“* * * Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice. * * *”

The plaintiffs in this case neither pleaded nor attempted to prove any equity but frankly admitted that the charges paid by plaintiffs, for which they now seek reimbursement, had been passed on to the plaintiffs’ customers. (R. 95 to 98) Very obviously any recovery now would thus amount to a windfall to plaintiffs, with no equitable basis therefor in face of an original and reaffirming order by the I.C.C. that except for the rates charged the defendants had been discriminated against and denied needed revenues.

Appellants’ brief on pages 21 and 22 refers to the *Arizona Grocery Co.* case, and we refer to the following wording taken from that case, (284 U.S. 384) wherein the United States Supreme Court said that the Interstate Commerce Act (after which the Utah Act is patterned)

“* * * expressly affirms the common law duty to charge no more than a reasonable rate and left upon the carrier the burden of conforming its charges to the standard. * * * Under section 6 the shipper was bound to pay the legal rate; but if he could show that it was unreasonable, he might recover reparation.” The burden thus was on the shipper to show that the rate paid was unreasonable.

Appellants’ brief, page 23, referring to the Florida case, said that there,

“* * * The shippers were attempting to recover on an equitable basis and not on a legal basis. * * *”

We ask, where, in either report of such case, can he point to for such a conclusion? The case says that after the reversal by the Supreme Court, the shippers petitioned the federal court for restitution of the difference in rates which they had paid. (295 U.S. at 307) In the case at bar plaintiffs filed a complaint in the state court asking for restitution of the difference. What reason is there to apply equitable principles in deciding the Florida case and refusing to apply them in the case at bar?

The Circuit Court of Appeals in the *Structural Steel* case, 269 F. 2d at 718, referred to alternatives, one of which was that in the final event the I.C.C. might not find facts to support their past conclusions and that thus their findings and report might be prospective only, leaving their order unsupported; after which the court added: “in which event the right to prevail would depend

upon traditional notions of equity as in *Atlantic Coast Line R. Co. v. Florida*.”

We submit the plaintiffs are not in equity entitled to the relief sought.

CONCLUSION

The plaintiffs confidently urge that the I.C.C. had ample jurisdiction to make the investigation and to issue findings and an order pursuant thereto. The order as issued by it was not void, but under “such a context” was at most voidable as subject to being set aside for error in the proceedings through which the I.C.C. had exercised its jurisdiction. It was set aside by the Supreme Court and the matter remanded for further proceedings, indicating that the Supreme Court considered that the matter was subject to correction in further proceedings. The order was in force for two years, and valid tariffs were filed and maintained “on file and in effect” for that period of time. While the order was in force and in effect before being set aside and while tariffs were on file and in effect, the order and the tariffs filed pursuant to it had to be complied with under severe penalties of law. The further proceedings by the I.C.C. have confirmed and given support to the prior order. The discrimination has continued to exist over the entire period, even though the railroads were unable to collect the increased rates during the period of time after the tariffs were cancelled (K-36, Exhibit 4) pursuant to the reversal and order remanding the matter to the I.C.C. If

the rates were in excess of what could have been considered a reasonable rate during the period they were paid, the plaintiffs had ample statutory authority to file proceedings with the Public Service Commission of Utah, giving that body a chance to pass on the reasonableness of the rates and to grant reparation if justified. Defendant submits that the judgment of the trial court should be affirmed in toto.

Respectfully submitted

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