

1960

Thermoid Western Co. et al v. Union Pacific Railroad Co. : Brief of Plaintiffs and Appellants

Utah Supreme Court

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Calvin L. Rampton; Attorney for Plaintiffs and Appellants;

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IN THE SUPREME COURT of the STATE OF UTAH

THERMOID WESTERN CO., NORMAN
THOMPSON LUMBER & HARD-
WARE CO., INC., UTAH POULTRY
& FARMERS COOPERATIVE, UTAH
LUMBER CO., and STOKERMATIC
CO., on their own behalf and on behalf
of other persons, corporations, and asso-
ciations similarly situated,

Plaintiffs and Appellants,

vs.

UNION PACIFIC RAILROAD COM-
PANY, THE DENVER AND RIO
GRANDE WESTERN RAILROAD
COMPANY, THE WESTERN PA-
CIFIC COMPANY and BAMBERGER
RAILROAD COMPANY,

Defendants and Respondents.

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Case No.
9324
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Brief of Plaintiffs and Appellants

CALVIN L. RAMPTON
*Attorney for Plaintiffs
and Appellants*

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PANY, THE DENVER AND RIO
GRANDE WESTERN RAILROAD
COMPANY, THE WESTERN PA-
CIFIC COMPANY and BAMBERGER
RAILROAD COMPANY,

Defendants and Respondents.

Case No.
9254

Brief of Plaintiffs and Appellants

INTRODUCTION

The plaintiffs and appellants are firms and associations doing business within the state of Utah and which ship freight

intrastate by railroad within the state of Utah. The defendants are railroads operating through and within the state of Utah.

This is an action to recover the difference between the freight rates charged by the defendant railroads to the plaintiffs and proper and valid charges as established by the tariffs on file with and approved by the Public Service Commission of Utah. The period of time covered by this action is from June 22, 1956 to August 28, 1958.

This action concerns only the liability of the defendants for the overcharges. The parties have stipulated that the amount of the overcharges shall be determined in a subsequent accounting if the issue of liability is found against the defendants.

The action was filed in the Third Judicial District Court in Salt Lake County. The defendants filed notice of removal to the federal court on the alleged grounds that the plaintiffs' recovery depended upon an interpretation of a federal law. Judge Willis W. Ritter denied the motion of the plaintiffs to remand and restrained counsel for the plaintiffs from bringing any like actions for other clients in the state courts. On appeal, the United States Circuit Court, Tenth Circuit, decided that there was no federal question involved, ordered the injunction dissolved and ordered the case remanded to the state court.*

*This decision is reported at 269 Fed. 2nd 714. The case is entitled *Structural Steel & Forge Co. et al v. Union Pacific RR, et al*, because the appeal was actually taken by Structural Steel and Forge Co., which, although not a party to the action, was restrained by the federal district court from bringing an action of its own in the state courts allegedly because the court had to do that to protect its jurisdiction

Upon trial of the issues affecting liability in the state court, the Hon. Ray VanCott held in favor of the defendants and against the plaintiffs on the question of liability.

STATEMENT OF FACTS

In the year 1951 the major railroads operating in the United States made application to the Interstate Commerce Commission for an increase of 15% in interstate freight rates and charges. This permission was granted by the Interstate Commerce Commission in a proceeding known as Ex Parte 175.

At the same time the major railroads operating in and through Utah made application to the Public Service Commission of Utah for an increase of 15% in Utah intrastate freight rates and charges. After a hearing before the Public Service Commission of Utah on this application, the application was denied for lack of sufficient evidence without prejudice to the rights of the railroads to reopen and introduce additional evidence.

The railroads took no further proceedings before the Public Service Commission of Utah, but made application to the Interstate Commerce Commission to increase the Utah intrastate rates under the provisions of 49 U.S.C. 13 (3) (4) on the alleged ground that the Utah rates were so low as to cast a burden on interstate commerce. After hearing, the Interstate Commerce Commission issued its order taking jurisdiction of the Utah intrastate rates and granting the increase

of this case—the Thermoid case. However, the issues involved in the Structural Steel & Forge case in the 10th Circuit are the issues of this case now being tried by this court.

of 15% sought. In this Order the Interstate Commerce Commission ordered the 15% increase and informed the Public Service Commission of Utah that it would have 30 days within which to make the rates effective, otherwise the Interstate Commerce Commission would, on its own order, place said increased rates into effect.

The Public Service Commission declined to make the rates effective on its order, and a final order was issued by the Interstate Commerce Commission making the 15% increase effective as to Utah intrastate traffic.

Thereafter the Public Service Commission and the Utah Citizens Rate Association, of which organization some of the plaintiffs herein are members, instituted an action in the United States District Court for the District of Utah to set aside the order of the Interstate Commerce Commission above referred to. The case was heard by a Three-Judge court which granted a temporary restraining order pending a final decision of the case. The Three-Judge court decided in a two to one decision that the action of the Interstate Commerce Commission was valid and legal and lifted the temporary restraining order allowing the 15% increase to become applicable to Utah intrastate rates effective as of the 22nd day of June, 1956. The Public Service Commission and the Utah Citizens Rate Association then appealed to the Supreme Court of the United States from the order of the Three-Judge federal district court. The United States Supreme Court, after hearing, reversed the Three-Judge court with instructions to set aside the order of the Interstate Commerce Commission and to remand the matter to the Interstate Commerce Commission for further proceed-

ings in conformity with the Supreme Court decision.* 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.

This action is to recover the additional 15% charged by the railroads during the time the higher rates were in effect between the date of the removal of the injunction by the United States District Court and the filing of the mandate from the Supreme Court of the United States.

Judge Van Cott held that the plaintiffs were not entitled to recover. In seeking a reversal of this decision the plaintiffs rely upon the following points:

STATEMENT OF POINTS

POINT ONE

THE TRIAL COURT ERRED IN HOLDING THAT THE INTERSTATE COMMERCE COMMISSION HAD JURISDICTION TO ISSUE THE ORDER INCREASING UTAH INTRASTATE RATES.

POINT TWO

THE TRIAL COURT ERRED IN HOLDING THAT THE ORDER OF THE INTERSTATE COMMERCE COMMISSION RAISING UTAH INTRASTATE RATES WAS NOT VOID BUT ONLY VOIDABLE.

*Public Service Commission of Utah et al v. United States of America et al, 356 U. S. 421, 2 L.ed. (2nd) 886.

POINT THREE

THE COURT ERRED IN HOLDING THAT THE PLAINTIFFS MUST SHOW A BASIS FOR RECOVERY UPON EQUITABLE PRINCIPLES BEFORE JUDGMENT COULD BE ENTERED IN FAVOR OF THE PLAINTIFFS.

POINT FOUR

THE TRIAL COURT ERRED IN HOLDING THAT THE ACT OF THE RAILROADS IN MAILING THE TARIFFS EFFECTUATING THE INCREASE TO THE PUBLIC SERVICE COMMISSION AS AUTHORIZED BY THE INTERSTATE COMMERCE COMMISSION, BUT AS DENIED BY THE PUBLIC SERVICE COMMISSION OF UTAH WAS AN EFFECTIVE FILING UNDER THE LAWS OF THE STATE OF UTAH.

POINT FIVE

THE TRIAL COURT ERRED IN HOLDING THAT THE SUBSEQUENT ORDER OF THE INTERSTATE COMMERCE COMMISSION ISSUED IN DECEMBER, 1959, REPAIRED THE DEFECTS FOUND BY THE SUPREME COURT IN THE EARLIER ORDER.

POINT SIX

THE TRIAL COURT ERRED IN HOLDING THAT AN APPLICATION TO THE PUBLIC SERVICE COMMISSION OF UTAH FOR REPARATIONS IS A PREREQUI-

SITE TO THE BRINGING OF AN ACTION IN THE COURTS TO RECOVER AN OVERCHARGE.

ARGUMENT

POINT ONE

THE TRIAL COURT ERRED IN HOLDING THAT THE INTERSTATE COMMERCE COMMISSION HAD JURISDICTION TO ISSUE THE ORDER INCREASING UTAH INTRASTATE RATES.

POINT TWO

THE TRIAL COURT ERRED IN HOLDING THAT THE ORDER OF THE INTERSTATE COMMERCE COMMISSION RAISING UTAH INTRASTATE RATES WAS NOT VOID BUT ONLY VOIDABLE.

As these two points are closely related, we will consider them together for purposes of argument. It follows as a matter of course that if the Interstate Commerce Commission was without jurisdiction to enter the contested order, such order was void from its inception.

The cases establishing the above principle are numerous. Most of them are collected in the annotations contained in American Jurisprudence and Corpus Juris Secundum. Without citing the cases, the following statements are the summary drawn from these numerous cases by the authors of these two works:

“The rendition of a judgment without jurisdiction is a usurpation of power and makes the judgment

itself coram non judice and ipso facto void.” (31 Am. Jur. 68).

“A judgment which is void, as distinguished from one which is merely voidable, or liable to be vacated or set aside for irregularity or other cause, or reversed for error, is a mere nullity and has no force or effect. It is not binding on anyone; it raises no lien or estoppel; and it does not impair or affect the rights of anyone. It confers no rights on the party in whose favor it is given and affords no protection to persons acting under it * * * *.” (49 C.J.S. 878).

The jurisdiction of the Interstate Commerce Commission in this case depends upon the fundamental division of governmental powers between the state and the federal government. Article I, Section 8 of the Constitution of the United States gives to Congress the right to regulate interstate and foreign commerce. The 10th Amendment to the Constitution of the United States reserves to the states or the people all powers not expressly granted to the federal government. Prior to the year 1919 the uniform holding of the courts was to the effect that the agencies of the federal government had no power to regulate or control intrastate rates, the rationale of the decision being that such powers were powers reserved to the states by the federal constitution.

In 1919 the landmark case of *Houston E & W T RR Co. v. U. S.*, 234 U.S. 242, 58 L.ed. 1541, made a significant change in the case law in this regard. This case held that under certain circumstances an agency of the federal government could take jurisdiction of intrastate freight rates. The rationale of this case is to the effect that because the railroads which handle both intrastate and interstate shipments are a single

economic unit, the federal government has the power to make certain that the intrastate rates are not so low that they cast a burden on interstate commerce. If they are so low that they cast a burden on interstate commerce, then the federal government has jurisdiction, incident to its power to protect interstate commerce, to step in and remove this burden. However, unless and until the burden is made to appear, there is no jurisdiction in the federal agencies to touch the intrastate rates.

On February 28, 1920, Section 13 of the Interstate Commerce Act was passed. (49 U.S.C. 13 (3) (4)). This act merely codifies the holding in the Houston case.

In every Section 13 case, therefore, the Interstate Commerce Commission must determine two distinct questions:

1. The Jurisdictional Question.

Are the intrastate rates so low that they do cast a burden on interstate commerce; and

2. The Discretionary Question.

How high must these intrastate rates be raised to remove the discrimination.

If the first question, the jurisdictional question, is answered in the negative, the Interstate Commerce Commission has no power to proceed further.

Subsequent cases from the United States Supreme Court make abundantly clear the fact that before a federal regulatory agency may step in and issue any order touching a matter ordinarily within the scope of state jurisdiction, the relationship to the federal jurisdiction must clearly appear.

In the case of *Davies Warehouse Co. v. Bowles*, 321 U.S.

144; 99 L.ed. 35, the Supreme Court in considering a matter where an attempt was being made to extend a federal regulation to certain matters in contravention of a state statute, stated:

“It also is contended that an interpretation must prevail as a matter of principle which will give the exemption a general and uniform operation in all states irrespective of local law. It is, of course, true that uniform operation of a federal law is a desirable end and, other things being equal, we often have interpreted statutes to achieve it. But in no case relied upon did we achieve uniformity at the cost of establishing overlapping authority over the same subject matter in the state and in the federal government.”

In interpreting the power of the Interstate Commerce Commission to interfere in intrastate matters, the Supreme Court time and again has reiterated the principle that this power should be exercised with extreme caution and should be exercised only where every element of federal jurisdiction appears clearly of record. In the case of *Palmer v. Massachusetts*, 308 U.S. 78, 84 L.ed 93, the Court stated:

“To be sure, in recent years Congress has from time to time exercised authority over purely intrastate activities of an interstate carrier when, in the judgment of Congress, an interstate carrier constituted, as a matter of economic fact, a single organism and could not effectively be regulated as to some of its interstate phases without drawing local business within the regulated sphere. But such absorption of state authority is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions. Therefore, in construing legislation this court has disfavored inroads by implication on state authority and

resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress. *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U.S. 352, 57 L.ed., 1511, 33 S. Ct. 729, 48 LRA (NS) 1151, Ann. Cas. 1916A, 18; cf. *Kelly v. Washington*, 302 U.S. 1, 82 L.ed. 3, 58 S. Ct. 87.”

This principle has been reiterated in other cases. See *Yonkers v. United States*, 320 U.S. 685; 88 L.ed 400; *Alabama Public Service Commission v. Southern Ry.*, 341 U.S. 341; 95 L.ed 1022, and *Arkansas R.R. Commission v. Chicago, Rock Island and Pac. R.R. Co.*, 274 U.S. 597, 71 L.ed 1224.

A landmark case in this field is the case of *North Carolina v. United States*, 325 U.S. 507, 89 L.ed 1760, wherein the Supreme Court makes it very clear that before the Interstate Commerce Commission may issue an order raising intrastate rates, its jurisdiction must clearly appear. The language of that case is as follows:

“Intrastate transportation is primarily the concern of the states. The power of the Interstate Commerce Commission with reference to such intrastate rates is dominant only so far as necessary to alter rates which injuriously affect interstate transportation. *American Express Company v. South Dakota*, 244 U.S. 617, L.ed. 1352. A scrupulous regard for maintaining the power of the state in this field has caused this court to require that the Interstate Commerce Commission’s orders giving precedence to Federal rates must meet ‘a high standard of certainty.’ *Illinois Central Railroad v. State Public Utilities Commission*, 245 U.S. 493, 62 L.ed. 425. *Before the Commission can nulify a state rate, justification for the ‘exercise of Federal power must clearly appeal.’* *Florida v. U.S.* 282 U.S. 194, 75 L.ed. 291.” (Emphasis added).

When the railroads, therefore, allege that the Interstate Commerce Commission has blanket jurisdiction to investigate and raise intrastate rates and that any order made after the investigation begins may be attacked only on the basis of an abuse of discretion, they are ignoring these well-established rules. The evidence must first establish the jurisdiction and then if that is established, the evidence must establish the amount of the rate raise justified. However, if the evidence does not establish the jurisdiction, the Commission may not proceed further, and any attempt to do so is a nullity.

In the case of *Public Service Commission of Utah et al v. United States of America, et al*, 356 U.S. 421, 2 L.ed (2d) 886, the Supreme Court held that the evidence was not sufficient to show that Utah intrastate rates were so low as to cast a burden on interstate commerce. Therefore, the power of the federal government under the Commerce Clause, as interpreted by *North Carolina v. United States, supra*, did not arise and the power to regulate intrastate rates still lay exclusively with the state of Utah under the provisions of the 10th Amendment to the Constitution of the United States. Any attempt of the federal government to exercise a jurisdiction which it did not have under the Constitution and which the Congress had not attempted to confer on it under the Interstate Commerce Act, was a nullity and void.

Section 54-3-7, Utah Code Annotated 1953, provides in part as follows:

"Except as in this chapter otherwise provided, no public utility shall charge, demand, collect or receive a greater or less or different compensation for any product or commodity furnished or to be furnished

or for any services rendered or to be rendered than the rates, tolls, rentals and charges applicable to such products or commodity or services as specified in its schedules on file and in effect at the time * * * .”

It is conceded by all in this case that the rates charged were in excess of the tariffs on file with the Public Service Commission, which had been approved and authorized by that commission. It is conceded that the Public Service Commission did not at any time authorize the filing and making effective of the schedules effectuating the increase. In fact, the Public Service Commission expressly refused to authorize such increase at the time application was made to the Public Service Commission by the railroads (Exhibit 2, Page 43) and at the time the Interstate Commerce Commission issued its ultimatum to the Utah Commission (Exhibit 10). Therefore, if the increased rates are to have any validity at all, they must depend upon the Interstate Commerce Commission order.

Although the ultimate issue was different when this case was before the United States Circuit Court of Appeals on the motion to remand, many of the subsidiary issues were related. In that case (*Structural Steel and Forge Company, et al. v. Union Pacific Railroad Company, et al.*, 269 Fed. 2d 714) the Circuit Court states:

“Stripped of its irrelevancies, the removed claim is that defendant railroads exacted a rate for intra-state shipments in excess of those established and on file with the competent state regulatory body, and the prayer is for restitution of the same. In substance, it is the same as the Structural Steel claim in the state court. Surely both complaints state a claim on which relief can be granted under the laws of the State of Utah,

i.e., the right not to be required to pay a higher rate on intrastate shipments than that prescribed by applicable state law, rule or regulation. 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. * * *.” (Emphasis added.)

In asserting that they were protected by the void Interstate Commerce Commission order prior to the time that it was set aside, the railroads rely heavily upon the case of *Atlantic Coast Line Railroad Company v. Florida*, 79 L. ed 1451, 295 U.S. 301. The Atlantic Coast Line case has certain superficial points of similarity with this case, but it is basically entirely different. In both cases the Interstate Commerce Commission took jurisdiction of intrastate rates and authorized an increase. In both cases the order was later set aside. In both cases the plaintiffs were seeking to recover the higher rate collected between the date of the Interstate Commerce Commission order and the date it was set aside. These are the points of similarity between the two cases. The points of difference, however, completely distinguish these two cases. As was pointed out by the Circuit Court of Appeals in *Structural Steel and Forge Company v. Union Pacific Railroad Company* (*supra*):

“Jurisdiction wise, our case is wholly unlike *Atlantic Coast Line v. Florida* (*supra*) and *United States v. Morgan*, 313 U.S. 409, where restitution was sought in a federal court with conceded jurisdiction to review the administrative rate-making process.”

In the Atlantic Coast Line case the Interstate Commerce Commission order was set aside because of a defect in the findings of the Interstate Commerce Commission. The court

held that the specific findings as to the evidence were not sufficient to sustain the general findings. There was no holding of any lack of evidence to give rise to the federal jurisdiction.

In the case now before this court, the Supreme Court in *Public Service Commission of Utah v. United States*, supra, found the evidence insufficient to sustain the federal jurisdiction. The language of the court is as follows:

“In the face of this proof, the evidence as to the general similarity of conditions falls short of the high standard of certainty required.”

This difference is illustrated in the *Atlantic Coast Line* case by the definite holding of the court to the effect that the order was not void but voidable. This is in contrast to the case of *North Carolina v. United States* above cited, in which case as here, the court found that the evidence was not sufficient to give rise to the jurisdiction of the federal body.

The principal distinction between this case and the *Atlantic Coast Line* case, however, is the basis on which the recovery was sought and the method by which it was sought. Here we have come into the state court and are seeking recovery on the grounds that the rates charged were in excess of those permitted by a state statute. In the *Atlantic Coast Line* case no such procedure was followed. There no state statute was involved. In that case the plaintiffs made application to the federal court on a supplemental motion in the very action in which they had the Interstate Commerce Commission order set aside. Their theory of recovery was that the federal district court should have set aside the Interstate Commerce Commission order when application was made to it. If it had set

the order aside at that time the Interstate Commerce Commission order would never have gone into effect. Having failed to do this, the plaintiffs alleged, the federal court had an equitable obligation to make the petitioners whole. The Supreme Court held that there was no such equitable obligation on a district court. Furthermore, the court held that as the plaintiffs were proceeding in equity, the basic consideration would be whether or not the rates which were actually charged were unreasonably high, not whether they were in excess of the schedules filed. In other words they held that the issue was not whether the rates were "illegal," but whether they were "unlawful." The distinction between these two terms as it applies to freight rate matters will be discussed in the next succeeding section.

The Supreme Court further held in the Atlantic Coast Line case that as the Interstate Commerce Commission had had a further hearing and had found that during all of the period in question the railroads were actually in need of the higher rates to have adequate compensation, the equitable basis for recovery could not stand. The language of the court is as follows:

"In the absence of such a showing, the carrier does not offend against equity or conscience in standing on its position and keeping what it got."

In the case now before this court, as we previously pointed out, we are not proceeding in equity on the grounds that the rates charged were higher than were necessary to yield a fair return to the railroads. This is an extraneous matter. We are proceeding on the grounds that the rates were "illegal" because they exceeded the only valid and effective tariffs on file.

Furthermore, in this case the Interstate Commerce Commission in its subsequent report and order does not say anything which would indicate an attempt or desire to make the new rates retroactive. The orders of the Interstate Commerce Commission dated in December, 1959 and April, 1960 (Exhibits 11 and 12) do not find that during the period in question, i.e. June 22, 1956 to August 28, 1958, the railroads needed more revenue from intrastate rates. They find that they do need more revenue from intrastate rates as of the date of December 7, 1959. However, they do not make any attempt to make either their order or their findings retroactive. The situation resulting from this new Interstate Commerce Commission Order is exactly what the Circuit Court of Appeals indicated it might be when on July 8, 1959 they issued their opinion in *Structural Steel & Forge Co. v. Union Pacific Railroad Co.*, *supra*. There the court stated:

“Moreover, any final order establishing prevailing rates after further hearing before the Interstate Commerce Commission may very well be prospective in effect, leaving the subject matter of these actions unsupported by any valid order.”

We wish to point out that this subsequent order of the Interstate Commerce Commission is now under attack in the United States Court for the District of Utah, the action challenging that order having been argued and submitted to that court on the 8th day of August, 1960.

The Interstate Commerce Commission having been without jurisdiction to issue the order raising Utah intrastate rates, the order was void from the beginning. The situation is entirely different from the *Atlantic Coast Line* case where the

defect was not in the evidence and only in the findings and the order therefore only voidable. The order having been void the Interstate Commerce Commission could not make any subsequent order retroactive even if it had tried to do so, as can be seen by an examination of the subsequent order, it did not attempt to do. The lower court therefore erred in holding that the Interstate Commerce Commission had jurisdiction to issue the increased rates. It had the power to enter upon the hearing for the purpose of determining the matter of jurisdiction, but when the evidence establishing jurisdiction failed, it had no further power and the order which it issued was void.

POINT THREE

THE COURT ERRED IN HOLDING THAT THE PLAINTIFFS MUST SHOW A BASIS FOR RECOVERY UPON EQUITABLE PRINCIPLES BEFORE JUDGMENT COULD BE ENTERED IN FAVOR OF THE PLAINTIFFS.

The trial court in its conclusions of law appears to imply that the plaintiffs could recover if, but only if, they proved that the rates actually charged were unreasonably high. This is not the theory upon which this case is brought at all.

In the field of transportation law, there are two terms which have come to have definite meaning in regard to excessive rates. These terms are "illegal rates" and "unlawful rates." An illegal rate is one in excess of the tariffs of the carrier on file and in effect. Generally the filing of tariffs is done pursuant to statutory requirement and as a usual thing the governmental unit requiring the filing of the tariffs will also have a statute

prohibiting the charging of more than the amounts established by the tariff. Such a statute is Sec. 54-3-7, U.C.A., 1953.

An "unlawful" rate is one which, while in accordance with the tariff on file and in effect, is unreasonably high. In other words, it much more than compensates the carrier for the cost of hauling plus a reasonable return on its investment. Rates which are "legal" may be "unlawful" as a result of a number of situations. First, the tariff may have been filed without hearing, which may be done under certain circumstances, or second, conditions may have changed with the passage of time so that a rate which was, when filed, both legal and lawful has become unlawful even though it is still legal. A good discussion of the distinction between legal and lawful rates is found in the case of *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U. S. 370; 76 L.ed 349.

It is not necessary that a rate be both unlawful and illegal in order to enable the shipper to recover the excess. He may recover if it is either unlawful or illegal. In this regard the following language is found in 13 C.J.S. at pages 770 and 771:

"Practically any charge in excess of the amount which the carrier is entitled to collect, under the rules stated in §§ 312-314 supra, constitutes an overcharge to the extent of the excess, while sums which the carrier was lawfully entitled to collect cannot ordinarily be recovered as an overcharge, although they were in excess of the rate charged a favored shipper. Thus, there may be an overcharge because the rate or charge applied violates a contract between the parties, is unreasonable, *is above the lawful tariff rate* or in excess of the rate fixed by law, because an error was made by the carrier in the figuring of the mileage

covered by the carriage, more goods were charged for than were actually carried, the charges were computed on the basis of a weight which was inaccurate and improper, the charges included an additional charge for an item or service for which the carrier is not entitled to be compensated, or because the carrier has shipped the goods over a longer route and charged the tariff rate therefor when a shorter and cheaper route was available.”

The Arizona Grocery Company case *supra* in holding that there was a right to recover in the event of the charging of either an illegal or unlawful rate holds at 284 U.S. 384:

“In order to render rates definite and certain, and to prevent discrimination and other abuses, the statute required the filing and publishing of tariffs specifying the rates adopted by the carrier, and made these the *legal* rates, that is, those which must be charged to all shippers alike. Any deviation from the published rate was declared a criminal offense, and also a civil wrong giving rise to an action for damages by the injured shipper. Although the Act thus created a legal rate it did not abrogate, but expressly affirmed, the common-law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard. In other words, the legal rate was not made by the statute a lawful rate,—it was lawful only if it was reasonable. Under § 6 the shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation.”

It is obvious that an action to recover reparations on the basis that the rate charged was unlawful places a much greater burden of proof on the shipper than does an action for an overcharge on an illegal rate. An action to recover under an

unlawful rate is purely an equitable action; almost in the nature of an unjust enrichment action. The shipper must show that the rate charged gave excessive returns to the carrier. In such a proceeding, of course, carrier earnings and carrier costs must be gone into, a thing which is very difficult for a shipper to do. The Atlantic Coast Line case which we discussed in the next preceding section was such an action. The shippers were attempting to recover on an equitable basis and not on a legal basis, and the court held that the shippers had not shown that the rates charged "offend against equity or conscience."

An action to recover an excess under an illegal rate is purely a legal action, generally based upon statute. The carrier does not have to show the shipper's earnings, nor the cost of rendering the service of hauling the shipper's merchandise. The shipper need only show that the amount charged by the carrier was in excess of the legal tariffs on file and in effect. As is stated in the Arizona Grocery Case *supra*, "Any deviation from the published rate was declared a criminal offense, and also a civil wrong giving rise to an action for damages by the injured shipper."

The trial court erred therefore in holding that there was any obligation on the plaintiffs in this case to show that the rates charged were "unlawful" or "unreasonable."

POINT FOUR

THE TRIAL COURT ERRED IN HOLDING THAT THE ACT OF THE RAILROADS IN MAILING THE TARIFFS EFFECTUATING THE INCREASE TO THE PUBLIC SERVICE COMMISSION AS AUTHORIZED BY

THE INTERSTATE COMMERCE COMMISSION, BUT AS DENIED BY THE PUBLIC SERVICE COMMISSION OF UTAH WAS AN EFFECTIVE FILING UNDER THE LAWS OF THE STATE OF UTAH.

The holding of the court to the effect that the higher tariffs were legally filed and in effect depends upon the most tenuous reasoning. Let us review the facts regarding the filing as established by the evidence in this case. Sec. 54-3-6, U.C.A. 1953, requires common carriers to file their schedules of rates and charges with the Public Service Commission of Utah. Sec. 54-3-7 prohibits a carrier from charging more or less than the schedules "on file and in effect." Sec. 54-7-12 U.C.A. 1953 provides that no public utility shall raise any fare "except upon a showing before the Commission and a finding by the Commission that such increase is justified." Certainly the term "commission" as set forth refers to no other commission than the Public Service Commission of Utah.

The railroads did make application to the Public Service Commission of Utah for permission to increase their rates. The Commission, however, did not make a finding that the increases were justified, but expressly held that the evidence presented did not warrant an increase (Ex. 2c, Page 43). The railroads thereupon went to the Interstate Commerce Commission which issued the void order. Once again the Public Service Commission, in answer to the ultimatum of the Interstate Commerce Commission, refused to find that the rates were justified and could go into effect (Ex. 10). The Interstate Commerce Commission then issued its order declaring the rates were in effect. The railroads, in addition to filing

the new and higher tariffs on Utah intrastate rates with the Interstate Commerce Commission, also mailed copies of the new and higher schedules to the Public Service Commission. Rather than dropping these schedules in the waste basket, as they no doubt could have done, the Public Service Commission placed them in a file. It was the position of the railroads in the court below, and the holding of the court in its conclusions of law that such placing of these schedules in the file constituted them as legal and valid rates. This was held despite the fact that they were filed in direct contravention of the laws of the State of Utah above quoted and in violation of the orders of the Public Service Commission of Utah. So novel is this contention that as might be expected, there are no cases on the point. However, no cases are necessary. As the increased rates as filed were in direct contravention of the statutes of the state of Utah and of the order of the Public Service Commission of Utah, they certainly had no force and effect under the laws of the state of Utah.

POINT FIVE

THE TRIAL COURT ERRED IN HOLDING THAT THE SUBSEQUENT ORDER OF THE INTERSTATE COMMERCE COMMISSION ISSUED IN DECEMBER, 1959, REPAIRED THE DEFECTS FOUND BY THE SUPREME COURT IN THE EARLIER ORDER.

Following the entry of the mandate of the Supreme Court, under the direction of which the district court set aside the Interstate Commerce Commission order raising the Utah intrastate rates, the Interstate Commerce Commission entered on

further hearings involving Utah intrastate rates. They held hearings in October of 1958 and January of 1959. On December 7, 1959, they issued an order which became effective in March of 1960, once again raising Utah intrastate rates. As has been previously stated, that order is now being attacked in the federal courts. The case has been argued but as of this writing no decision has been rendered. However, whether the subsequent order is set aside or not can have no bearing on this case. The complete order of the Commission is in this record as Exhibit No. 11, and it does not purport to have any retroactive effect. All of the findings as appear in the report on pages 25 to 29 of that exhibit are couched in the present tense. They make no reference to conditions existing prior to December 7, 1959. These findings are just as the Circuit Court, in *Structural Steel & Forge Co. et al v. Union Pacific RR et al*, said they might be "prospective in effect leaving the subject matter of these actions unsupported by any valid order."

We do not have a case here such as we had in the Atlantic Coast Line case where the subsequent order of the Interstate Commerce Commission merely corrected the defective findings in the original order and made the finding that the higher rates should have been in effect during the crucial period. In our case the Interstate Commerce Commission could not have made any retroactive finding and did not try to make any retroactive finding. Therefore, the order of December 7, 1959, whether valid or invalid as will be determined in the federal court action, is prospective in effect only.

POINT SIX

THE TRIAL COURT ERRED IN HOLDING THAT AN APPLICATION TO THE PUBLIC SERVICE COMMISSION OF UTAH FOR REPARATIONS IS A PREREQUISITE TO THE BRINGING OF AN ACTION IN THE COURTS TO RECOVER AN OVERCHARGE.

Section 54-7-20 U.C.A. 1953 makes administrative provision for applying to the Public Service Commission of Utah for reparations in the case of the charging by the carrier to the shipper of either an unlawful or illegal rate. The court below held that this remedy was exclusive and abrogated any right which a shipper might have to direct recourse to the courts. In the first place it should be pointed out that the language of 54-7-20 is inconsistent with any theory that it is the exclusive remedy. The statute says that when an excessive rate has been charged, "the Commission *may* order that the public utility make due reparation." An election is therefore left to the Public Service Commission as to whether it will or will not issue a reparations order even when the circumstances justify it. The statute is silent on the question of whether or not the statutory remedy is exclusive. If it is held to be exclusive it must be on the basis of implication. Certainly it would not be consistent to say that the statute by implication takes away a *right* which the shipper had at common law merely because the Public Service Commission may in its discretion take jurisdiction of a reparations case. Suppose the Commission does not want to take jurisdiction, and it appears it does not have to under the law, then the shipper has been deprived of a right in the courts and has not been given an equal administrative right.

It is the position of the appellants that the Utah case of *Jeremy Fuel & Grain Co. v. Denver & R.G. RR. Co.*, 60 Utah 153, 207 P. 155, is determinative in this matter. In the Jeremy case the statute involved is a different statute from 54-7-20. However, the principles are the same. In that case the shipper brought action for an overcharge. The defendant railroads alleged that as Section 454, Compiled Laws of Utah 1907, provided a statutory remedy for shippers who were overcharged, the common law right of action was abrogated. The court discussed this matter at some length as follows:

“It is contended that this statute gives a complete remedy to a shipper who has been overcharged, and, being in force when plaintiff’s cause of action accrued, the shipper has no remedy at common law. *Winsor v. C. & A. R.R.* (C.C.) 52 Fed. 716, and *Beadle v. Railroad*, 51 Kan. 248, 32 Pac. 910, squarely support the proposition advanced by appellant. The same rule is laid down in *I Rorer on Railroads*, p. 570. There is, however, a contrariety of opinion upon this subject. In *2 Elliott on Railroads*, § 711, the rule is asserted to be that—

‘Unless the common-law right of action is thereby taken away in express terms or by necessary implication, the penalty imposed by a penal statute is cumulative only, and the common-law right of action continues to exist unimpaired.’

“In 10 C.J. p. 451, § 709, it is said:

‘The common-law remedy for excessive freight charges is not abrogated by a statute authorizing recovery of the charges collected in excess of the rates properly chargeable under a railroad commission law.’

“Se also, 4 R.C.L. 654 § 131.

" In *Heiserman v. B., C.R. & N.R.R.*, 63 Iowa, 732, 18 N.W. 903, it is held that:

'The liability of defendant for money collected for the transportation of property, in excess of reasonable charges, existed at common law. The enactment of a statute imposing penalties for excessive charges, recoverable by the party injured, or providing that for exacting and collecting them the agent of the railroad company shall be guilty of a misdemeanor, does not take away the right existing at common law to recover money paid in excess of reasonable charges. * * * The injured party may waive the tort created by statute, and sue upon the implied contract raised by the law, whereby the carrier is obliged to repay the consignee or consignor of the property all sums exacted in excess of reasonable compensation.'

"See, also, *Fletcher Paper Co. v. D. & M.R.R.*, 198 Mich. 469, 164 N.W. 528; *Smith v. C. & N.W. Co.*, 49 Wis. 443, 5 N.W. 240; *Goodridge v. U.P.R.R. Co. (C.C.)* 35 Fed. 35; *La Floridienne v. A.C.L.R.R.*, 63 Fla. 208, 212, 58 South 182; *Sullivan v. Railroad*, 121 Minn 488, 142 N.W. 3, 45 L.R.A. (N.S.) 612.

"The statute of this state which was in force when plaintiff's cause of action accrued did not suspend other remedies and did not abrogate the common-law remedy. As plaintiff's cause of action was not based upon the statute, the court committed no error in overruling appellant's demurrer which raised the question of the statute of limitations."

The existence of Section 54-7-20 was not raised as a defense by the railroads in the Jeremy case, even though that section was in force and effect in 1919 when the Jeremy case was tried and decided. It was not in effect between November of 1914 and November of 1917 when the excessive rates were

charged. However, if it was a good defense it could have been raised because it is a too well established point of law to require comment that while substantive rights are determined by the law in effect at the time the cause of action arises, procedural remedies are governed by the law in effect when the action is commenced. Therefore, the Jeremy case was tried with the exact provisions in effect that are relied upon here.

In the Annotations to Sec. 54-7-20 under the heading Remedies is found the following footnote:

“Under subd. (2) of this section the shipper may invoke any common-law remedies he may have to recover excessive and discriminatory freight charges. In other words, the statutory remedies are cumulative. *Jeremy Fuel & Grain Co. v. Denver & R. G. R. Co.*, 60 U. 153, 207 P. 155.”

Clearly, therefore, the compilers of the code regarded the Jeremy case as controlling in regard to Sec. 54-7-20.

There are a number of cases from other jurisdictions which hold that where reparation is sought on the ground that the rate charges is an “unlawful rate,” as we have above described that term, application should first be made to the administrative body. The basis of the holding in these cases is to the effect that recourse should first be had to the commission because the determination of what was fair and just rates is a complicated matter which requires a certain amount of expertness. Therefore when reparations are sought on the basis that public tariffs are too high, recourse should first be had to the commission which has the jurisdiction to approve the tariffs to determine whether in fact the tariffs are too high. In this case the question of whether or not the tariffs are too

high or too low is beside the point. We are seeking reparations on the ground that the rates charged are in excess of the legally published rates. A court is as well equipped as a commission to determine that question. Furthermore the commission has already determined by approving the filings that are in effect, that the filed rates are just and reasonable. We have a statute requiring that no charges shall be made in excess of these established rates. There appears to be nothing, therefore, which the court cannot do in a common law action as expeditiously as the commission could do in an application made to the commission for reparations.

The Interstate Commerce Act has a provision conferring jurisdiction on the Interstate Commerce Commission to hear applications for reparation in the case of interstate rates. This provision of the Interstate Commerce Act, however, expressly reserves to shippers their common law rights and therefore is not directly in point here. However, a California case interpreting the California statute in light of the Interstate Commerce Act is in point. Sec. 71 of the Public Utilities Act of California confers jurisdiction on the Public Utilities Commission to hear reparations claims. That statute, like ours, is silent on the question of whether the statutory remedy is exclusive or cumulative. In holding that it is cumulative, the Supreme Court of California in the case of *Southern Pacific v. Superior Court*, 150 Pac. 397, reasoned as follows, from the provisions of the Interstate Commerce Act:

“That the interpretation which has been placed upon the Interstate Commerce Act by the highest court of the land should be followed by this court, when like questions arise out of state laws, results not because

of any compelling authority, since for the most part these are questions for local determination. But it is evident that the system of regulation of rates and fares provided in the Constitution and statutes of California, to which we have referred, has been modeled upon the federal act for the regulation of commerce between the states. This being so, it will be assumed that the people of California, 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."

In the above case an action for reparations was sought on the grounds that the railroad had charged the shipper \$28.97 for a certain shipment, whereas in fact the tariffs on file and in effect provided for a charge of \$15.98. The action was for the difference of \$12.99. The railroad in that case, as have the railroads here, maintained that the common law action was abrogated by the statutes providing the statutory remedy. The court concluded as follows:

"Our sole concern is to ascertain and to determine whether the subject-matter of the case was within the jurisdiction of the court which rendered the judgment. In view of the several provisions of the written law to which we have referred and some of which are fully set forth herein, and in the light of the decisions to which reference has been made, we are of the opinion that the superior court had jurisdiction to hear and determine the case presented to it and to render the judgment."

The basis of all the cases holding that recourse may be had either to the courts or to the commission, where a statutory method of gaining reparation is provided, is that the statute

creates a tort action and, to use the language quoted with approval in the Jeremy case, "the injured party may waive the tort created by statute, and sue upon the implied contract raised by the law, whereby the carrier is obliged to repay the consignee or consignor of the property all sums exacted in excess of reasonable compensation."

Furthermore, we would like to point out here that if the statutory remedy with its short statute of limitations was exclusive, the statute of limitations would have run on a substantial portion of the plaintiff's claims in this case prior to the time that they were able to get the Supreme Court of the United States to act and declare void the invalid order of the Interstate Commerce Commission under which the railroads purported to be collecting the illegal rates.

CONCLUSION

Counsel submits that the lower court interpreted the law erroneously in this case. The order of the Interstate Commerce Commission relied upon by the defendants was issued without jurisdiction and was void from its inception. The rates charged were clearly illegal under the laws of the State of Utah. The plaintiffs had the right to proceed in this court to recover the amount over and above the legal rates. This matter, therefore, should be returned to the District Court with orders to enter judgment in favor of the plaintiffs and to proceed to determine the amount of the overcharges.

Respectfully submitted,

CALVIN L. RAMPTON
*Attorney for Plaintiffs
and Appellants*