

## THE EXERCISE OF CONSTITUTIONAL POWERS BY COMMON CARRIERS

Notwithstanding the provisions of the federal constitution that "All legislative powers herein granted shall be vested in a Congress of the United States" (Art. I, Sec. 1), that "the executive power shall be vested in a President of the United States of America" (Art. II, Sec. 1) and "the judicial power of the United States shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish" (Art. III, Sec. 1), at the present through certain legislation and by virtue of judicial decisions these powers are in part at least exercised by agencies other than those provided for in the constitution. Common carriers subject to the act to regulate commerce, as amended, have committed to them the making, altering and repealing of laws (rules of action), the enforcing of those laws and initially deciding as to the reasonableness of rates and charges and the interpretation and construction of the laws promulgated by them,—duties imposed by the constitution on the congress, the president and the federal judiciary.

That an appeal from the carriers lies with respect to the rates and charges, rules and regulations, to determine whether they are in harmony with the mandates of congress does not change the fact stated.

There can be little doubt at this late day of what is confided to the three grand divisions of the federal government, nor of the limits of the powers conferred. The duty of the legislature is to make, alter and repeal laws; of the executive to execute and enforce those laws; of the judiciary to interpret the laws, and as well determine controversies; or, to put it as did Chief Justice Marshall in *Wyman v. Southard*, 10 Wheat. 1, 46: "The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law."

Not all common carriers are to-day endowed with, nor can all exercise, the legislative, executive and judicial powers. It is only those subject to the act to regulate commerce, as amended. These include "any corporation or any person or persons engaged in the transportation of oil or other commodity, except water

and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, . . . telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one state, territory, or district of the United States, to any other state, territory, or district of the United States, or to any foreign country, . . . and common carrier or carriers engaged in the transportation of passengers and property wholly by railroad (or partly by railroad and partly by water) when both are used under a common control, management, or arrangement, for a continuous carriage or shipment from one state or territory of the United States or the District of Columbia, to any other state or territory of the United States or the District of Columbia, or from one place in a territory to another place in the same territory, or from any place in the United States to an adjacent foreign country, or from one place in the United States through a foreign country to any other place in the United States."<sup>1</sup>

The term "common carrier" includes express and sleeping car companies, and the term "railroad" includes "bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation and delivery of said property."<sup>2</sup>

Without considering what carriers are and what carriers are not subject to the act to regulate commerce, as amended,<sup>3</sup> and what is or is not within the statutory definitions as above given, suffice it now to say that those subject to the act and within the definitions probably exceed 8,000 in number.

The manner in which these carriers exercise legislative functions is through their tariffs, schedules of rates and charges, and classifications. These documents are the result of the work

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<sup>1</sup>Sec. 1, Act to Regulate Commerce, approved February 4, 1887, as amended.

<sup>2</sup>Sec. 1, Act to Regulate Commerce, as amended.

<sup>3</sup>Those interested may consult *U. S. v. Louisiana & Pacific Ry. Co.*, 234 U. S. 1; *U. S. v. Butler Co. Ry.*, 234 U. S. 29.

of individual carriers (other carriers concurring) and of committees and associations<sup>4</sup> of carriers; relatively there are less of the latter than of the former, but the latter are more comprehensive. The committees or associations are composed of representatives of carriers from the freight or passenger departments as the duties of the committee or association may require. The work of the committees or associations includes classification of freight, rates, demurrage, etc., one committee confining its work to one subject. The *modus operandi* in committee or association is a proposal by one or more representatives of a change in an existing rating in a classification, or a change in rate, or the initiation of a new classification or rate; similar procedure is followed concerning rules and regulations. Recently it has been the practice of classification committees to have a docket of these proposals; through this medium public notice is given of subjects to be considered and shippers upon request are permitted to present to meetings their views respecting the proposed changes. In rate committees no such opportunity is afforded. What these various committees and associations determine become part of the tariffs or schedules of rates filed and published in pursuance of law.

These several committees and associations have "jurisdiction" over particular matters such as classification, rates, etc., over definite territory.

Whatever provision is in a tariff or schedule of rates it must as long as it is in force and effect be strictly observed and followed.<sup>5</sup> In no case or under no circumstances can any provision be deviated from, unless one subject himself to the penalty provided. Those provisions become and are the law in the particular matter. The Elkins Law (Act February 19, 1903, as amended by Act June 29, 1906), makes it a misdemeanor to wilfully fail

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<sup>4</sup>The legality of these committees and associations under the Sherman Anti-trust Act and similar acts is doubtful.

<sup>5</sup>In addition to the wording of the Elkins Law (Act February 19, 1903, as amended by Act June 29, 1906) the Supreme Court has held that tariffs when filed and published must be observed and not deviated from. In a recent case, after citing a number of cases, the Supreme Court said: "We regard these cases as settling the proposition that the shipper as well as the carrier is bound to take notice of the filed tariff rates, and that so long as they remain operative they are conclusive as to the rights of parties, in the absence of facts or circumstances showing an attempt at rebating or false billing." *Atchison, Topeka & Santa Fe Ry. v. Robinson*, 233 U. S. 173.

to strictly observe filed and published tariffs until changed according to law, the corporation being subject to a fine of from \$1,000 to \$20,000, and the individual to fine and imprisonment.

Subject to the exercise of the extraordinary power of the Commission to suspend the operation of a tariff or schedule of rates and postpone the effective date, these documents and the provisions thereof take effect on the date named therein, thirty days after filing. The power of the Commission just referred to was given it by the act of 1910; it now appears as a part of section 15. The exercise of the power has not been frequent, for in the five years since the enactment there have been less than 700 cases. It may therefore be said that as a practical matter all schedules and tariffs take effect as and when the committees or associations of carriers choose.

Neither contracts made in good faith prior to tariff provisions nor verbal agreements can change them.<sup>6</sup> They are immutable, unless and until through a proceeding before the Commission it shall have determined that the rate or charge, or the rules and regulations, are in contravention of the inhibitions of the act. Such proceeding usually requires a year, during which the tariff rates and charges, rules and regulations must be observed.

It is thus seen that common carriers subject to the act to regulate commerce by and through their committees and associations legislate in respect to interstate transportation, make rules of conduct equal in force and effect to and as binding as any statute which congress has ever enacted.

And it is the duty of these carriers to enforce and execute these tariff provisions, these laws which they have made. They are not at liberty to waive any provision, nor to promise any service not provided for in the tariff.<sup>7</sup> They must collect undercharges, even to the extent of bringing suits for small amounts.<sup>8</sup>

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<sup>6</sup> *Armour Packing Co. v. U. S.*, 209 U. S. 56; *Louisville & Nashville Ry. Co. v. Mottley*, 211 U. S. 149; *Kansas City Sou. Ry. Co. v. Carl*, 227 U. S., 573; *Chicago & Alton Ry. v. Kirby*, 225 U. S. 513.

<sup>7</sup> *Chicago & Alton Railroad Co. v. Kirby*, 225 U. S. 155.

<sup>8</sup> Conf. Rul. 314: "The law requires the carrier to collect and the party legally responsible to pay the lawfully established rates without deviation therefrom. It follows that it is the duty of carriers to exhaust their legal remedies in order to collect undercharges from the party or parties legally responsible therefor. It is not for the Commission, however, to determine in any case which party, consignor or consignee, is legally liable for the undercharge, that being a question determinable only by a court having jurisdiction and upon the facts of each case."

Failure to compel obedience to tariff provisions subjects carriers to punishment; the failure of the President to execute and enforce faithfully the laws of the United States subjects him to impeachment. Thus are the carriers called upon to exercise executive powers.

Tariffs or schedules contain more than rates and charges; they contain rules and regulations. With respect to rates and charges, the carriers almost uniformly decide that they are just, reasonable and non-discriminatory. It is a common saying that no one can properly interpret and construe a tariff except the man who wrote it and he is dead! While tariffs and schedules should be unambiguous, plain and simple,<sup>9</sup> yet many thousands contain language of uncertain meaning. Who shall promptly and properly perform the judicial task of interpretation and construction? The shipper does not want a ruling next week; he wants it at once. The carrier necessarily performs this service. However captious, however unreasonable, however discriminatory the interpretation it must stand until the matter has been passed upon by the Commission. Rules and regulations may be inharmonious with the provisions of the statute; the power of the Commission must be invoked; *pendente lite* the rule or regulation prevails and must be obeyed whatever the inconvenience or cost. The judicial power of the carriers has been invoked and their decision is in force until they have been overruled, as it were, by the Commission. Thus do carriers exercise the judicial powers; and not infrequently, to their own profit, advantage and benefit.

As the law is to-day, common carriers subject to the act to regulate commerce legislate through their tariffs or schedules in respect to rates and charges and rules and regulations for interstate transportation; the same agencies perform the executive function of executing and enforcing those mandates which they have promulgated; and the same public utilities perform for a time at least with respect to their publications the judicial duties of decision concerning rates and charges and interpretation and

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<sup>9</sup> A tariff should not be ambiguous and uncertain and place upon some clerk the burden of construing it. *Standard Oil Co. v. I. T. R. R.*, 23 I. C. C. 369. Also, *Pacific Coast Biscuit Co. v. S. P. & S. Ry. Co.*, 20 I. C. C. 546; *Sweeney, Lynes & Co. v. N. Y. P. & N. Ry.*, 20 I. C. C. 600. The duty rests on the carrier to clearly state its rates and charges in its tariffs. *Ford Co. v. M. C. Ry.*, 19 I. C. C. 507. There are numerous cases to the same effect.

construction of rules and regulations. The powers so exercised result in part from the power of initiating rates which the carriers have and from the statutory provisions requiring the strict observance of the filed and published tariffs; and in part, from the carriers arrogating to themselves the right to interpret and construe that which they have enunciated. And, notwithstanding the supposed rule that no one agency can exercise other than the one power granted it, the common carriers subject to the act to regulate commerce exercise all three of the powers of the federal government.

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