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icc Vs. Cincinnati, N.O. and Texas Pacific Ry. Co.

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Court : US Supreme Court

Decided On : May-24-1897

Appeal No. : 167 U.S. 479

Appellant : icc

Respondent : Cincinnati, N.O. and Texas Pacific Ry. Co.

Judgement :

ICC v. Cincinnati, N.O. & Texas Pacific Ry. Co. - 167 U.S. 479 (1897)
U.S. Supreme Court ICC v. Cincinnati, N.O. & Texas Pacific Ry. Co., 167 U.S. 479 (1897)

Interstate Commerce Commission v. Cincinnati,

New Orleans and Texas Pacific Railway Company

No. 733

Argued March 22-23, 1897

Decided May 24, 1897

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CERTIFICATE FROM THE COURT OF

SYLLABUS

Congress has not conferred upon the Interstate Commerce Commission the legislative power of prescribing rates either maximum or minimum or absolute; and, as it did not give the express power to the commission, it did not intend to secure the same result indirectly by empowering that tribunal to determine what in reference to the past was reasonable and just, whether as maximum, minimum or absolute, and then enable it to obtain from the courts a peremptory order that in the future the railroad companies should follow the rates thus determined to have been in the past reasonable and just.

New Orleans & Texas Pacific Railway v. Interstate Commerce Commission, 162 U. S. 184 , affirmed and followed.

This case is before us on a question certified by the Court of Appeals for the Sixth Circuit. On May 29, 1894, the Interstate Commerce Commission entered an order, of which the following is a copy:

"At a general session of the Interstate Commerce Commission held at its office in Washington, D.C., on the 29th day of May, A.D. 1894."

"Present: Hon. William R. Morrison, chairman; Hon. Wheelock G. Veazey, Hon. Martin A. Knapp, Hon. Judson C. Clements, and Hon. James D. Yeomans, commissioners."

"The Freight Bureau of the Cincinnati Chamber of Commerce v. The Cincinnati, New Orleans and Texas Pacific Railway Company, lessee of the Cincinnati Southern Railway; The Louisville and Nashville Railroad Company; The East Tennessee, Virginia and Georgia Railway Company; The Western and Atlantic Railroad Company; The Alabama Great Southern Railroad Company; The Atlanta and West Point Railroad Company; The Central Railroad

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and Banking Company of Georgia; The Georgia Railroad Company; The Georgia Pacific Railway Company; The Norfolk and Western Railroad Company; The Port Royal and Augusta Railway Company; The Richmond and Danville Railroad Company; The Savannah, Florida and Western Railway Company; The Seaboard and Roanoke Railroad Company; The South Carolina Railway Company; The Western Railway of Alabama; The Wilmington and Weldon Railroad Company; The Wilmington, Columbia and Augusta Railroad Company; The Baltimore, Chesapeake and Richmond Steamboat Company; The Clyde Steamship Company; The Merchants' and Miners' Transportation Company; The Ocean Steamship Company; The Old Dominion Steamship Company."

"The Chicago Freight Bureau v. The Louisville, New Albany and Chicago Railway Company; The Chicago and Alton Railroad Company; The Chicago and Eastern Illinois Railroad Company; The Cincinnati, Hamilton and Dayton Railroad Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; The Evansville and Terre Haute Railroad Company; The Illinois Central Railroad Company; The Louisville, Evansville and St. Louis Consolidated Railroad Company; The Peoria, Decatur and Evansville Railway Company; The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company; The Terre Haute and Indianapolis Railroad Company; The Wabash Railroad Company; The Cincinnati, New Orleans and Texas Pacific Railway Company, Lessee of the Cincinnati Southern Railway; The Louisville and Nashville Railroad Company; The East Tennessee, Virginia and Georgia Railway Company; The Western and Atlantic Railroad Company; The Alabama Great Southern Railroad Company; The Atlanta and West Point Railroad Company; The Central Railroad and Banking Company

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of Georgia; The Georgia Railroad Company; The Georgia Pacific Railway Company; The Norfolk and Western Railroad Company; The Port Royal and Augusta Railway Company; The Richmond and Danville Railroad Company; The Savannah, Florida and Western Railway Company; The Seaboard and Roanoke Railroad Company; The South Carolina Railway Company; The Western Railway of Alabama; The Wilmington and Weldon Railroad Company; The Wilmington,

Columbia and Augusta Railroad Company; The Baltimore, Chesapeake and Richmond Steamboat Company; The Clyde Steamship Company; The Merchants' and Miners' Transportation Company; The Ocean Steamship Company; The Old Dominion Steamship Company."

"These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved herein having been had, and the commission having on the date hereof made and filed a report and opinion containing its finding of fact and conclusions thereon, which said report and opinion is hereby referred to and made a part of this order, and the commission having, as appears by said report and opinion, found and decided, among other things, that the rates complained of and set forth in said report and opinion as in force over roads operated by carriers defendant herein, and forming routes or connecting lines leading southerly from Chicago or Cincinnati to Knoxville, Tenn., Chattanooga, Tenn., Rome, Ga., Atlanta, Ga., Meridian, Miss., Birmingham, Ala., Anniston, Ala., and Selma, Ala., are unreasonable and unjust, and in violation of the provisions of the Act to Regulate Commerce:"

"It is ordered and adjudged that the above-named defendants, and each of them, engaged or participating in the transportation of freight articles enumerated in the Southern Railway and Steamship Association classification as articles of the first, second, third, fourth, fifth, or sixth class, do from and after the tenth day of July, 1894, wholly cease and desist and

thenceforth abstain from charging, demanding, collecting, or receiving any greater aggregate rate or compensation per hundred pounds for the transportation of freight in any such class from Cincinnati, in the State of Ohio, or from Chicago, in the State of Illinois, to Knoxville, Tenn., Chattanooga, Tenn., Rome, Ga., Atlanta, Ga., Meridian, Miss., Birmingham, Ala.. Anniston, Ala., or Selma, Ala., than is below specified in cents per hundred pounds under said numbered classes, respectively, and set opposite to said points of destination; that is to say:"

image:a

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"And said defendants, and each of them, are also hereby notified and required to further readjust their tariffs of rates and charges so that from and after said 10th day of July, 1894, rates for the transportation of freight articles from Cincinnati and Chicago to Southern points other than those hereinabove specified shall be in due and proper relation to rates put into effect by said defendants in compliance with the provisions of this order."

"And it is further ordered that a notice embodying this order be forthwith sent to each of the defendant corporations, together with a copy of the report and opinion of the commission herein, in conformity with the provisions of the fifteenth section of the Act to Regulate Commerce."

The railroad companies having failed to comply with the order, the Interstate Commerce Commission instituted this suit in the Circuit Court of the United States for the Southern District of Ohio to compel obedience thereto. The court, upon a hearing, entered a decree dismissing the bill (76 F. 183), from which decree an appeal was taken to the court of appeals, and that court, reciting the order, submits to us the following question:

"Had the Interstate Commerce Commission jurisdictional power to make the order hereinbefore set forth; all proceedings preceding said order being due and regular, so far as procedure is concerned? "

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MR. JUSTICE BREWER, after stating the facts in the foregoing language, delivered the opinion of the Court.

A similar question was before us at the last term, in *Cincinnati, New Orleans & Texas Pacific Railway v. Interstate Commerce Commission,* 162 U. S. 184 , and

in the opinion, on pages 162 U. S. 196 and 197, we said:

"Whether Congress intended to confer upon the Interstate Commerce Commission the power to itself fix rates was mooted in the courts below, and is discussed in the briefs of counsel."

"We do not find any provision of the act that expressly, or by necessary implication, confers such a power."

"It is argued on behalf of the commission that the power to pass upon the reasonableness of existing rates implies a right to prescribe rates. This is not necessarily so. The reasonableness of the rate in a given case depends on the facts, and the function of the commission is to consider these facts and give them their proper weight. If the commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the commission to be reasonable."

"We prefer to adopt the view expressed by the late Justice Jackson, when circuit judge, in the case of *Interstate Commerce Commission v. Baltimore & Ohio Railroad Co.,* 43 F. 37, and whose judgment was affirmed by this Court. 145 U. S. 145 U.S. 263:"

" Subject to the two leading prohibitions, that their charges shall not be unjust or unreasonable and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers as they were at the common law -- free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted, in other trades and pursuits. "

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The views thus expressed have been vigorously and earnestly challenged in this and in other cases argued at the present term. In view of its importance and the full arguments that have been presented, we have deemed it our duty to reexamine the question in its entirety, and to determine what powers Congress has given to this commission in respect to the matter of rates. The importance of the question cannot be overestimated. Billions of dollars are invested in railroad properties. Millions of passengers, as well as millions of tons of freight, are moved each year by the railroad companies, and this transportation is carried on by a multitude of corporations working in different parts of the country and subjected to varying and diverse conditions.

Before the passage of the act, it was generally believed that there were great abuses in railroad management and railroad transportation, and the grave question which Congress had to consider was how those abuses should be corrected, and what control should be taken of the business of such corporations. The present inquiry is limited to the question as to what it determined should be done with reference to the matter of rates. There were three obvious and dissimilar courses open for consideration. Congress might itself prescribe the rates, or it might commit to some subordinate tribunal this duty, or it might leave with the companies the right to fix rates, subject to regulations and restrictions, as well as to that rule which is as old as the existence of common carriers, to-wit, that rates must be reasonable. There is nothing in the act fixing rates. Congress did not attempt to exercise that power, and, if we examine the legislative and public history of the day, it is apparent that there was no serious thought of doing so.

The question debated is whether it vested in the commission the power and the duty to fix rates, and the fact that this is a debatable question, and has been most strenuously and earnestly debated, is very persuasive that it did not. The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions,

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the language by which the power is given had been so often used, and was so familiar to the legislative mind, and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication. Administrative control over railroads through boards or commissions was no new thing. It had been resorted to in England and in many of the states of this Union. In England, while control had been given in respect to discrimination and undue preferences, no power had been given to prescribe a tariff of rates. In this country, the practice has been varying. It will be interesting to notice the provisions in the legislation of different states. We quote the exact language, following some of the quotations with citations of cases in which the statute has been construed:

Alabama.Code 1886, p. 295, 1130:

"Exercise a watchful and careful supervision over all tariffs and their operations, and revise the same, from time to time, as justice to the public and the railroads may require, and increase or reduce any of the rates, as experience and business operations may show to be just."

California. In the constitution going into effect January 1, 1880, art. 12, sec. 22:

"Said commissioners shall have the power, and it shall be their duty, to establish rates of charges for the transportation of passengers and freight by railroad or other transportation companies, and publish the same from time to time, with such changes as they may make."

Florida, Sess.Laws 1887, p. 119, 5:

"Make and fix reasonable and just rates of freights and passenger tariffs, to be observed by all railroad companies doing business in this state, on the railroads thereof."

Railroad Commissioners v. Pensacola & Atlantic Railroad, 24 Fla. 417.

Georgia, Code 1882, c. 7, 719:

"Make reasonable and just rates of freight and passenger tariffs, to be observed by all railroad companies doing business in this state on the railroads thereof."

Georgia Railroad v. Smith, 70 Ga. 694.

Illinois,

statutes 1878 (Underwood's ed.), c. 114, 93:

"To make, for each of the railroad corporations doing business in this state, as soon as practicable, a schedule of reasonable

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maximum rates of charges for the transportation of passengers and freights on cars on each of said railroads."

Iowa, Laws 1888, p. 42:

"Make for each of the railroad corporations doing business in this state, as soon as practicable, a schedule of reasonable maximum rates of charges for the transportation of freight and cars on each of said railroads."

Burlington &c.; Railway v. Dey, 82 Ia. 312.

Minnesota, Laws 1887, c. 10, 6:

"In case the commission shall at any time find that any part of the tariffs of rates, fares, charges or classifications so filed and published as hereinbefore provided are in any respect unequal or unreasonable, it shall have the power, and is hereby authorized and directed to compel any common carrier to change the same and adopt such rate, fare, charge or classification as said commission shall declare to be equal and reasonable."

State v. Chicago, Milwaukee &c.; Railway, 40 Minn. 267.

Mississippi, Laws 1884, c. 23, 6:

"Shall so revise such tariffs as to allow a fair and must return on the value of such railroad, its appurtenances and equipments, . . . and to increase or reduce any of said rates according as experience and business operations may show to be just."

New Hampshire, Laws 1883, c. 101, 4:

"Fix tables of maximum charges for the transportation of passengers and freight upon the several railroads operating within this state, and shall change the same from time to time, as in the judgment of said board the public good may require, and said rates shall be binding upon the respective railroads."

Merrill v. Boston & Lowell Railroad, 63 N.H. 259.

North Dakota, Laws 1890, p. 354:

"In case the commissioners shall at any time find that any part of the tariffs of rates, fares, charges or classifications, so filed and published, as herein provided, are in any respect unequal of unreasonable, they shall have the power and are hereby authorized and directed to compel any common carrier to change the same and adopt such rate, charge or classification as said commissioners shall declare to be equitable and reasonable."

South Carolina, Laws 1888, p. 65:

"Authorized and required to make for each of the railroad corporations doing

business in this state, as soon as practicable, a schedule of reasonable and just rates of charges for the transportation of freights and cars on each of said railroads."

On the other hand, in --

Kansas, Laws 1883, p. 186, section 11, reads:

"No railroad company shall charge, demand or receive from any person, company or corporation, an unreasonable price for the transportation of persons or property, or for the hauling or storing of freight, or for the use of its cars, or for any privilege or service afforded by it in the transaction of its business as a railroad company. And upon complaint in writing, made to the board of railroad commissioners, that an unreasonable price has been charged, such board shall investigate said complaint, and if sustained shall make a certificate under their seal, setting forth what is a reasonable charge for the service rendered, which shall be *prima facie* evidence of the matters therein stated."

Section 18 authorized an inquiry upon the application of parties named in reference to freight tariffs, and an adjudication upon such inquiry as to the reasonable charge for such freights. Section 14 required a notice of the determination to be given to the railroad company, and a communication of a failure to comply with such determination in a report to the governor, and section 19 reads:

"Any railroad company which shall violate any of the provisions of this act shall forfeit for every such offense, to the person, company, or corporation aggrieved thereby, three times the actual damages sustained by the said party aggrieved, together with the costs of suit, and a reasonable attorney's fee, to be fixed by the court, and if an appeal be taken from the judgment, or any part thereof, it shall be the duty of the appellate court to include in the judgment an additional reasonable attorney's fee for services in appellate court or courts."

The effect of these provisions was to make the determination of the commission *prima facie* evidence of what were reasonable rates, and to subject the railroad company failing to respect such determination or to prove error therein to the large penalties prescribed in section 19.

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Kentucky. The Act of April 6, 1882, c. 90, 1 (General Stat. p. 1021), provided that

"if any railroad corporation shall willfully charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this state . . . , it shall be guilty of extortion,"

etc. Further sections created a commission, and by section 19 the commissioners were authorized to hear and determine complaints under the first and second sections of this act, and upon such complaint and hearing file their award with the clerk of the circuit court, which might be traversed by any party dissatisfied, and the controversy thereafter submitted to the court for consideration and judgment.

Massachusetts. Pub. Stat. 1882, c. 112, 14: "The board shall have the general supervision of all the railroads and railways, and shall examine the same." Section 15: if it finds that any corporation has violated the provisions of the act, or any law of the commonwealth, it shall give notice thereof in writing, and if the violation shall continue after such notice shall present the facts to the Attorney General, who shall take such proceedings, thereon as he may deem expedient. By 193 special authority is given to the board to revise the tariffs and fix rates for the transportation of milk. *See Littlefield v. Fitchburg Railroad,* 158 Mass. 1.

New York. Vol. 6, Rev.Stat. c. 39, contains the railroad law of the state. By section 157, the board of railroad commissioners "shall have general supervision of all railroads." By section 161, if in the judgment of the board it appears necessary that

"additional terminal facilities shall be afforded, or that any change of rates of fare for transporting freights or passengers or in the mode of operating the road or conducting its business, is reasonable and expedient in order to promote the security, convenience and accommodation of the public, the board shall give notice and information in writing to the corporation of the improvements and changes which they deem proper,"

and by section 162,

"the supreme court at special term shall have power in its discretion in all cases of

decision and recommendations by the board which are just and reasonable to compel compliance therewith by mandamus, subject to appeal,"

etc.

This last section was enacted in 1892 (Laws 1892, c. 676), and prior thereto, in *People v. Lake Erie & Western Railroad,* 104 N.Y. 58, it was held that the judgment of the commissioners was not binding on the railroad company in respect to certain terminal facilities ordered, and could not be enforced by mandamus.

Vermont. Laws 1886, No. 23, 7, provided that if any railroad company

"unjustly discriminates in its charges for transporting passengers or freight, or usurps any authority not granted by its charter, or willfully refuses to comply with any reasonable recommendations of said board of commissioners, or enters into any combination or conspiracy with any other person, persons, or corporation, whereby the rates of change for the transportation of freight or passengers, or the cost of commodities is unduly increased, said commissioners shall give notice thereof in writing to such corporation, or person, and if the act complained of is continued after such notice the board shall report the same to the then next session of the General Assembly, and if in their judgment such action is irregular, may at any time make application to the supreme or county court for any remedy warranted by law."

The legislation of other states is referred to in the Fourth Annual Report of the Interstate Commerce Commission, Append. E., pages 243 and following. It is true that some of these statutes were passed after the Interstate Commerce Act, but most were before, and they all show what phraseology has been deemed necessary whenever the intent has been to give to the commissioners the legislative power of fixing rates.

It is one thing to inquire whether the rates which have been charged and collected are reasonable -- that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future -- that is a legislative act. *Chicago,*

Milwaukee &c.; Railway v. Minnesota, 134 U. S. 418 , 134 U. S. 458 ; *Reagan v. Farmers' Loan & Trust Co.,* 154 U.S.

362, 154 U. S. 397 ; *St. Louis & San Francisco Railway v. Gill,* 156 U. S. 649 , 156 U. S. 663 ; *Cincinnati, New Orleans &c.; Railway v. Interstate Commerce Commission,* 162 U. S. 184 , 162 U. S. 196 ; *Texas & Pacific Railway v. Interstate Commerce Commission,* 162 U. S. 197 , 162 U. S. 216 ; *Munn v. Illinois,* 94 U. S. 113 , 94 U. S. 144 ; *Peik v. Chicago & Northwestern Railway,* 94 U. S. 164 , 94 U. S. 178 ; *Express Cases,* 117 U. S. 1 , 117 U. S. 29 .

It will be perceived that in this case the Interstate Commerce Commission assumed the right to prescribe rates which should control in the future, and their application to the court was for a mandamus to compel the companies to comply with their decision -- that is, to abide by their legislative determination as to the maximum rates to be observed in the future. Now nowhere in the Interstate Commerce Act do we find words similar to those in the statute referred to, giving to the commission power to "increase or reduce any of the rates," "to establish rates of charges," "to make and fix reasonable and just rates of freight and passenger tariffs," "to make a schedule of reasonable maximum rates of charges," "to fix tables of maximum charges," to compel the carrier "to adopt such rate, charge or classification as said commissioners shall declare to be equitable and reasonable." The power therefore is not expressly given. Whence then is it deduced? In the first section, it is provided that "all charges . . . shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful." Then follow sections prohibiting discrimination, undue preferences, higher charges for a short than for a long haul, and pooling, and also making provision for the preparation by the companies of schedules of rates, and requiring their publication. Section 11 creates the Interstate Commerce Commission. Section 12, as amended March 2, 1889 (25 Stat. 858), gives it authority to inquire into the management of the business of all common carriers, to demand full and complete information from them, and adds, "and the commission is hereby authorized to execute and enforce the provisions of this act." And the argument is

that, in enforcing and executing the provisions of the act, it

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is to execute and enforce the law as stated in the first section, which is that all charges shall be reasonable and just, and that every unjust and unreasonable charge is prohibited; that it cannot enforce this mandate of the law without a determination of what are reasonable and just charges, and, as no other tribunal is created for such determination, therefore it must be implied that it is authorized to make the determination, and, having made it, apply to the courts for a mandamus to compel the enforcement of such determination. In other words, that though Congress has not, in terms, given the commission the power to determine what are just and reasonable rates for the future, yet, as no other tribunal has been provided, it must have intended that the commission should exercise the power. We do not think this argument can be sustained. If there were nothing else in the act than the first section, commanding reasonable rates, and the twelfth, empowering the commission to execute and enforce the provisions of the act, we should be of the opinion that Congress did not intend to give to the commission the power to prescribe any tariff, and determine what for the future should be reasonable and just rates. The power given is the power to execute and enforce, not to legislate. The power given is partly judicial, partly executive and administrative, but not legislative. Pertinent in this respect are these observations of counsel for the appellees:

"Article II, Section 3, of the Constitution of the United States ordains that the President 'shall take care that the laws be faithfully executed.' The Act to Regulate Commerce is one of those laws. But it will not be argued that the President, by implication, possesses the power to make rates for carriers engaged in interstate commerce. . . ."

"The first section simply enacted the common law requirement that all charges shall be reasonable and just. For more than a hundred years, it has been the affirmative duty of the courts 'to execute and enforce' the common law requirement that 'all charges shall be reasonable and just,' and yet it has never been claimed

that the courts, by implication, possessed the power to make rates for carriers. "

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But the power of fixing rates under the Interstate Commerce Act is not to be determined by any mere considerations of omission or implication. The act contemplates the fixing of rates, and recognizes the authority in which the power exists. Section 6 provides, among other things,

"that every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. . . . Such schedule shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places, in every depot, station or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. . . ."

"No advance shall be made in the rates, fares, and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares or charges will go into effect, and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. Reductions in such published rates, fares or charges shall only be made after three days' previous public notice, to be given in the same manner that notice of an advance in rates must be given."

"And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of

passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force. "

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"Every common carrier subject to the provisions of this act shall file with the commission hereinafter provided for, copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said commission of all changes made in the same. Every such common carrier shall also file with said commission copies of all contracts, agreements or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said commission. Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said commission, insofar as may, in the judgment of the commission, be deemed practicable, and said commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares, and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published."

"No advance shall be made in joint rates, fares, and charges, shown upon joint tariffs, except after ten days' notice to the commission, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares or charges will go into effect. No reduction shall be made in joint rates, fare and charges except after three days' notice, to be given to the commission as is above provided in the case of an advance of joint rates. The commission may make public such proposed advances or such reductions in such manner as may in its judgment be deemed practicable, and may prescribe from

time to time the measure of publicity which common carriers shall give to advances or reductions in joint tariffs."

"It shall be unlawful for any common carrier party to any

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joint tariff to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare, or charge is named thereon than is specified in the schedule filed with the commission in force at the time."

"The commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged, and may change the form from time to time as shall be found expedient."

Finally, the section provides that if any common carrier fails or neglects or refuses to file or publish its schedules as provided in the section, it may be subject to a writ of mandamus issued in the name of the people of the United States at the relation of the commission. Now but for this act, it would be unquestioned that the carrier had the right to prescribe its tariff of rates and charges, subject to the limitation that such rates and charges should be reasonable. This section 6 recognizes that right, and provides for its continuance. It speaks of schedules showing rates and fares and charges which the common carrier "has established and which are in force." It does not say that the schedules thus prepared, and which are to be submitted to the commission, are subject in any way to the latter's approval. Filing with the commission and publication by posting in the various stations are all that is required, and are the only limitations placed on the carrier in respect to the fixing of its tariff. Not only is it thus plainly stated that the rates are those which the carrier shall establish, but the prohibitions upon change are limited in the case of an advance by ten days' public notice, and on reduction by three days. Nothing is said about the concurrence or approval of the commission, but they are to be

made at the will of the carrier. Not only are there these provisions in reference to the tariff upon its own line, but, further, when two carriers shall unite in a joint tariff (and such union is nowhere made obligatory, but is simply permissive), the requirement is only that such joint tariff shall be filed with the commission,

and nothing but the kind and extent of publication thereof is left to the discretion of the commission.

It will be perceived that the section contemplates a change in rates, either by increase or reduction, and provides the conditions therefor, but of what significance is the grant of this privilege to the carrier if the future rate has been prescribed by an order of the commission, and compliance with that order enforced by a judgment of the court in mandamus? The very idea of an order prescribing rates for the future, and a judgment of the court directing compliance with that order, is one of permanence. Could anything be more absurd than to ask a judgment of the court in mandamus proceedings that the defendant comply with a certain order unless it elects not to do so? The fact that the carrier is given the power to establish in the first instance, and the right to change, and the conditions of such change specified, is irresistible evidence that this action on the part of the carrier is not subordinate to, and dependent upon the judgment of, the commission.

We have therefore these considerations presented: First. The power to prescribe a tariff of rates for carriage by a common carrier is a legislative, and not an administrative or judicial, function, and, having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attaching to such carriage, is a power of supreme delicacy and importance. Second. That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood, and have been frequently used, and, if Congress

had intended to grant such a power to the Interstate Commerce Commission, it cannot be doubted that it would have used language open to no misconstruction, but clear and direct. Third. Incorporating into a statute the common law obligation resting upon the carrier to make all its charges reasonable and just, and directing the commission to execute and enforce the provisions of the act, does not by

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implication carry to the commission, or invest it with the power to exercise, the legislative function of prescribing rates which shall control in the future. Fourth. Beyond the inference which irresistibly follows from omission to grant in express terms to the commission the power of fixing rates is the clear language of section 6 recognizing the right of the carrier to establish rates, to increase or reduce them, and prescribing the conditions upon which such increase or reduction may be made, and requiring, as the only conditions of its action, first, publication, and, second the filing of the tariff with the commission. The grant to the commission of the power to prescribe the form of the schedules and to direct the place and manner of publication of joint rates, thus specifying the scope and limit of its functions in this respect, strengthens the conclusion that the power to prescribe rates or fix any tariff for the future is not among the powers granted to the commission.

These considerations convince us that under the Interstate Commerce Act, the commission has no power to prescribe the tariff of rates which shall control in the future, and therefore cannot invoke a judgment in mandamus from the courts to enforce any such tariff by it prescribed.

But has the commission no functions to perform in respect to the matter of rates, no power to make any inquiry in respect thereto? Unquestionably it has, and most important duties in respect to this matter. It is charged with the general duty of inquiring as to the management of the business of railroad companies, and to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the manner in which such carriers are transacting their business. And, with this knowledge, it is charged with

the duty of seeing that there is no violation of the long- and short-haul clause; that there is no discrimination between individual shippers, and that nothing is done, by rebate or any other device, to give preference to one as against another; that no undue preferences are given to one place or places or individual or class of individuals, but that in all things that equality of right which is the great purpose of the Interstate Commerce

Act shall be secured to all shippers. It must also see that that publicity which is required by section 6 is observed by the railroad companies. Holding the railroad companies to strict compliance with all these statutory provisions and enforcing obedience to all these provisions tends, as observed by Commissioner Cooley in *In re Chicago, St. Paul & Kansas City Railway,* 2 I.C.C. 231, 261, to both reasonableness and equality of rate, as contemplated by the Interstate Commerce Act.

We have not overlooked the statute of Nebraska, nor the decision of the supreme court of that state in respect thereto. This statute was approved March 31, 1887, a few weeks after the passage of the Interstate Commerce Act (Laws Nebraska, 1887, p. 540), and was obviously largely patterned upon that act. The general obligations incorporated into that act in respect to reasonableness of rates, prohibitions of discrimination, undue preferences, etc., are all in the Nebraska statute. A commission, called "a board of transportation," is also provided for (section 11), and is charged with the general duty of enforcing the act and supervising the railroad companies in the state. Section 17, which is more full and specific than any to be found in the Interstate Commerce Act, provides that

"said board shall have the general supervision of all railroads operated by steam in the state, and shall inquire into any neglect of duty or violation of any of the laws of this state by railroad corporations. . . . It shall carefully investigate any complaint made in writing, and under oath, concerning any lack of facilities, . . . or against any unjust discrimination against either any person, firm, or corporation or locality, either in rates, facilities furnished or otherwise, and whenever, in the judgment of

said board . . . any change in the mode of conducting its business or operating its road is reasonable and expedient in order to promote the security and accommodation of the public, or in order to prevent unjust discriminations against either persons or places; it shall make a finding of the facts, and an order requiring said railroad corporation to make such repairs, improvements,"

etc.

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In *State v. Fremont, Elkhorn &c.; Railroad,* 22 Neb. 313, it appeared that the board of transportation had found that certain rates enforced upon the road of the defendant company were excessive, and that certain other rates, less than those in force, were reasonable and just. On application to the supreme court, it was held that the state was entitled to a mandamus compelling obedience to such determination, the court observing p. 329:

"In the case under consideration, the board found that the rates and charges of the respondent were excessive -- in other words, that there was unjust discrimination against that part of the state, and, having so found, the board is clothed with ample power to require such railway company to reduce its rates and charges. The power of the board, therefore, to establish and regulate rates and charges upon railways within the State of Nebraska is full, ample, and complete."

Without criticizing in the least the logic of this decision, it is enough to say that it is based upon a section which gives wider and more comprehensive power to the supervising board than is given in the Interstate Commerce Act to the commission, and does not justify the inference that the latter has the same power in respect to prescribing rates that, by such decision was declared belonging to the Nebraska board of transportation.

Some reliance was placed in the argument on this sentence, found in the opinion of this Court in *Cincinnati, New Orleans &c.; Railway v. Interstate Commerce Commission,* 162 U. S. 184 , 162 U. S. 196 :

"If the commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the commission as reasonable."

And it is thought that this Court meant thereby that, while the commission was not in the first instance authorized to fix a rate, yet that it could, whenever complaint of an existing rate was made, give notice and direct a hearing, and upon such hearing determine whether the rate established was reasonable or unreasonable, and also what would be a reasonable rate if the one prescribed was found not to be, and that such order could be made the basis of a judgment

in mandamus requiring the carrier thereafter to conform to such new rate. And the argument is now made, and made with force, that while the commission may not have the legislative power of establishing rates, it has the judicial power of determining that a rate already established is unreasonable, and with it the power of determining what should be a reasonable rate, and enforce its judgment in this respect by proceedings in mandamus.

The vice of this argument is that it is building up indirectly, and by implication, a power which is not, in terms, granted. It is not to be supposed that Congress would ever authorize an administrative body to establish rates without inquiry and examination -- to evolve, as it were, out of its own consciousness, the satisfactory solution of the difficult problem of just and reasonable rates for all the various roads in the country. And if it had intended to grant the power to establish rates, it would have said so in unmistakable terms. In this connection, it must be borne in mind that the commission is not limited in its inquiry and action to cases in which a formal complaint has been made, but, under section 13, "may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made." By section 14, whenever an investigation is made by the commission, it becomes its duty to make a report in writing, which shall include a finding of the facts upon which its conclusions are based, together with a recommendation as to what reparation, if any, ought to be made to any party or

parties who may be found to have been injured. And by sections 15 and 16, if it appears to the satisfaction of the commission that anything has been done or omitted to be done in violation of the provisions of the act, or of any law cognizable by the commission, it is made its duty to cause a copy of its report to be delivered to the carrier, with notice to desist, and, failing that, to apply to the courts for an order compelling obedience. There is nothing in the act requiring the commission to proceed singly against each railroad company for each supposed or alleged violation of the act. In this very case, the order of the commission was directed against a score or more of companies, and determined

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the maximum rates on half a dozen classes of freight from Cincinnati and Chicago, respectively, to several named Southern points and the territory contiguous thereto, so that, if the power exists, as is claimed, there would be no escape from the conclusion that it would be within the discretion of the commission, of its own motion, to suggest that the interstate rates on all the roads in the country were unjust and unreasonable, notify the several roads of such opinion, direct a hearing, and upon such hearing make one general order, reaching to every road and covering every rate. It will never do to make a provision prescribing the mode and manner applicable to all investigations and all actions equivalent to a grant of power in reference to some specific matter not otherwise conferred.

Again, it is said that this Court, in *Interstate Commerce Commission v. Baltimore & Ohio Railroad,* 145 U. S. 263, 145 U. S. 276, declared that "the principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit," etc. But this by no means carries with it any suggestion that the way by which unjust and unreasonable rates were to be prevented was by entrusting to the commission the power to prescribe what should be charged.

Still again, it is urged that the commission has decided that it possesses this power, and has acted upon such decision, and an appeal is made to the rule of contemporaneous construction. But it would be strange if an administrative body

could, by any mere process of construction, create for itself a power which Congress had not given to it. And indeed, an examination of the decisions of the commission discloses this curious fact. In the early case of *Thatcher v. Delaware & Hudson Canal Company,* 1 I.C.C. 152, 156, a case heard and decided in July of the year in which the commission was created, the commission declined, for lack of evidence, to fix certain rates, saying:

"It is therefore impossible to fix them in this case, even if the commission had power to make rates generally, which it has not. Its power in respect to rates is to determine whether those which the roads impose are for any reason in conflict with the statute."

Again, it will be perceived that nowhere in the act is there

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any suggestion of a maximum or minimum rate. The first section declares that the rates shall be reasonable and just, and prohibits every unreasonable and unjust charge. Now the rate may be unreasonable because it is too low as well as because it is too high. In the former case, it is unreasonable and unjust to the stockholder, and in the latter, to the shipper. It was declared by this Court in *Covington & Lexington Turnpike Road Co. v. Sandford,* 164 U. S. 578 , 164 U. S. 597 , that in determining the question of reasonableness, "its duty is to take into consideration the interests both of the public and of the owner of the property," but in the matter of *Chicago, St. Paul & Kansas City Railway, supra,* the commission held that it had no power to order rates to be increased upon the ground that they were so low that persistence in them would be ruinous. The opinion in that case, prepared by Commissioner Cooley, and with his usual ability, while seeking to prove that, under the provisions of the statute the commission has no power to prescribe a minimum or to establish an absolute rate, but only to fix a maximum rate, goes on further to show how the operation of other provisions of the act tends to secure just and reasonable rates. Were it not for its length, we should be glad to quote all that he says on the subject. We think that nearly all of the argument which he makes to show that the commission has no power to fix a

minimum or establish an absolute rate goes also to show that it has no power to prescribe any tariff, or fix any rate to control in the future.

Our conclusion, then, is that Congress has not conferred upon the commission the legislative power of prescribing rates, either maximum or minimum or absolute. As it did not give the express power to the commission, it did not intend to secure the same result indirectly by empowering that tribunal to determine what in reference to the past was reasonable and just, whether as maximum, minimum, or absolute, and then enable it to obtain from the courts a peremptory order that, in the future, the railroad companies should follow the rates thus determined to have been in the past reasonable and just.

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The question certified must be answered in the negative, and it is so ordered.

MR. JUSTICE HARLAN dissented.

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