

ATCHISON, TOPEKA & SANTA FE RAILWAY CO.
ET AL. v. UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 287. Argued December 3, 4, 1931.—Decided January 4, 1932.

1. Pursuant to the "Hoch-Smith Resolution," of January 20, 1925, c. 120, 43 Stat. 801, the Interstate Commerce Commission made a general investigation of rate structures in the Western District, including those on grain. Exhaustive hearings, productive of a very voluminous record, were closed in September, 1928. Later the Commission made its order, prescribing maximum rates on grain and grain products, the effective date of which was postponed from time to time. In February, 1931, before the order became effective, the carriers petitioned for a reopening of the case, setting up in detail, and offering to prove, that, since the closing of the record, in 1928, economic changes had seriously impaired their earnings and their credit; that the order would reduce their revenues greatly, and regardless of the question of its validity and propriety when made, it would no longer be valid and proper in the existing circumstances, and would threaten the maintenance of an adequate system of transportation. They insisted upon the reopening as a right guaranteed to them not only by the Act of Congress but by the Constitution itself. *Held*:

(1) The petition was not an ordinary petition for rehearing, but was of the nature of a supplemental bill, presenting a new and radically different situation, which had supervened since the record before the Commission had been closed. P. 259.

(2) The Court takes judicial notice of the economic depression amounting to a changed economic level, severely affecting the railroads, which has come about since the Commission closed its hearings in this case in September, 1928; and of the existence of this depression in February, 1931, when the carriers' petition was filed. P. 260.

(3) Denial of the petition exceeded the permitted range of the Commission's discretion and can not be sustained. P. 262.

2. While in fixing future rates the Commission doubtless must act upon the conditions disclosed in the record before it and can not accurately provide for future fluctuations, this does not justify denial of a petition to reopen a case when overruling economic forces have produced a new economic level to which the record before the Commission is irresponsive. P. 261.

3. The prospect that the hearing before the Commission may be long does not justify its denial, if the hearing be required by the essential demands of justice. P. 262.
 4. The legal standards governing the Commission in determining the reasonableness of rates were not altered by the "Hoch-Smith Resolution"; and a fair hearing is a fundamental requirement. *Id.*
- 51 F. (2d) 510, reversed.

APPEAL from a decree denying applications for a preliminary injunction to restrain the enforcement of an order of the Interstate Commerce Commission.

Mr. Frederick H. Wood, with whom Messrs. Walter McFarland, Elmer A. Smith, P. F. Gault, H. H. Larimore, J. N. Davis, A. B. Mason, R. J. Hagman, M. L. Countryman, Jr., R. S. Outlaw, Leslie Craven, A. B. Enoch, Frank A. Leffingwell, William D. Whitney, and G. Howland Chase were on the brief, for appellants.

The report discloses that the Commission proceeded upon the assumption that it was required by the Hoch-Smith resolution to establish the lowest possible lawful rates on agricultural products, affected by depression.

The effect of the order is materially to reduce the general level of the rates on a major description of traffic without any finding that the carriers' rate of return was, or, in the near future, would be in excess of that contemplated by § 15a, but, on the contrary, at a time when such rate of return was materially below the statutory requirement, and without any finding, or basis for finding, that such reduction would result in increased revenues through stimulating an increased volume of traffic.

The purpose of § 15a was to insure the receipt of an aggregate revenue by the carriers as a whole sufficient to support an adequate system of transportation. Congress itself fixed the standard by which such adequacy is to be determined, viz., the Fifth and Fourteenth Amendments.

The Commission may not consistently with the requirements of § 15a prescribe the lowest possible lawful rates

in the absence of a finding that the group rate of return received by the carriers exceeds the statutory standard, or at a time when it is materially below the same, where the effect of such action is to deprive the carriers *pro tanto* from earning such rate of return.

The Commission's misconstruction of § 15a and of the effect of the resolution upon its duties thereunder appears on the face of the report.

The Commission, if it did not wholly misconceive its duties under § 15a, proceeded upon the erroneous assumption that because of the resolution it was directed to establish the lowest possible lawful rates in this proceeding, although at or after the conclusion of the general investigation, of which it was a part, it might be required to advance the general level of all rates, including grain rates, in order to discharge the duty imposed by § 15a.

The Commission is not empowered by the Act to establish the lowest possible lawful rates, because of a depression in the industry affected, and certainly not at a time when the carriers' rate of return is far below the statutory standard.

The order of the Commission cannot be sustained by reason of the fact that the Commission at the same time readjusted many inequalities in rates, thereby removing discrimination.

The action of the Commission in overruling the carriers' petitions for rehearing and thus requiring the order to become effective, and in failing to discharge the affirmative duty imposed by § 15a to protect the carriers' revenues, is so arbitrary and unreasonable as to render its order void and as to entitle the petitioners to enjoin its enforcement.

If there ever was a case in which the action of the Commission may be set aside because arbitrary and unreasonable, although taken within the form of its delegated powers, *Interstate Commerce Comm. v. Illinois Central*

R. Co., 215 U. S. 452, 470; *Interstate Commerce Comm. v. Union Pacific R. Co.*, 222 U. S. 541, 547, this would appear to be such a case. If the facts set forth in the petition are true, and they must be taken to be so, the making of these reductions effective at this time is a palpable disregard of the continuing duty imposed upon the Commission by § 15a.

Rate orders of the Commission operate *in futuro*. It is contemplated that they should be responsive to present and future conditions and not to those of the past, when unrepresentative of present and future conditions. While the granting or refusing of a petition for rehearing rests, in the first instance, within the discretion of the Commission, that discretion must not be abused. The substance of the allegations in the petition for rehearing was matter of common knowledge, although the precise figures were not. In such a case, to refuse to rehear and reconsider, and in the meantime to postpone the effective date of the order, puts the Commission in the position of declaring that, despite the provisions of § 15a, the Commission may reduce the net railway operating income of the carriers \$20,000,000 per year, at a time when their rate of return is approximately but 3%, and their net railway operating income \$234,000,000 less than the return contemplated by that section, and at a time when their gross and net revenues are still falling, and notwithstanding that the credit as well as the financial condition of the carriers has been adversely affected. If the Commission in any report should so state this conception of its duties under § 15a, an order based thereon would be clearly void. Cf. Fifteen Per Cent. Case, 178 I. C. C. 539.

Mr. Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, with whom *Solicitor General Thacher*, Assistant to the Attorney General *O'Brian* and *Messrs. E. M. Reidy* and *H. L. Underwood* were on the brief, for the United States et al., appellees.

The Commission did not base its orders upon a misconception of powers conferred by the Hoch-Smith Resolution.

The Commission's statement of the issues to be determined and the findings made upon those issues are responsive to applicable provisions of the Interstate Commerce Act, and neither they nor any discussions in the report suggest that other than the usual standards of rate reasonableness and relations entered into the determination.

The changes in rates and practices effected by the orders afford positive showing that the determination was reached under the Interstate Commerce Act.

There was no abuse of discretion in denying the several motions for rehearing and reconsideration.

In most of its larger proceedings the Commission is confronted with petitions for rehearing and reconsideration based (as here) on alleged changed conditions. The statute necessarily leaves the matter of reopening to the discretion of the Commission. See § 16a. Sound reasons must appear therefor, because reopening may mean further long drawn-out proceedings with the possibility that when the Commission again reaches a determination it will be again petitioned on the same grounds.

The special reason advanced by appellants for rehearing was the falling off of their revenue due to diminishing traffic, which in turn was due to sharp general industrial depression. At the same time appellants call attention to the Fifteen Per Cent. Case, 178 I. C. C. 539, in which the Commission, although denying the horizontal increase asked for, suggested to the carriers certain measures to meet the situation. The contention is, then, in reality that, with respect to a situation calling for general emergency relief, the Commission abused its discretion in not reopening a particular docket wherein a determination had been reached after regularly conducted hearings. The

question involved in the Fifteen Per Cent. Case was how general emergency relief could best be given without further depressing business, traffic, and revenues, and without disturbing rate relationships, interstate and state, which to many shippers are more important than the level of rates. That question of general emergency relief is not the question here.

The determination here involved was reached after more than a year of hearings, and another of study, and on a record in the making of which carriers and shippers throughout western territory coöperated to the full. The readjustment was urgently needed, correcting as it did not only the level but the relation of rates, and discriminatory and wasteful practices under the rates. The increases in coarse-grain rates went generally where most needed. Unquestionably, reopening would have meant further lengthy proceedings, since the very condition of diminishing traffic would have been used in evidence and argument against a higher level of rate; and when a new determination had been reached, general conditions might again have become normal.

In performing its legislative function of prescribing reasonable rates, the Commission necessarily projects into the future the results of a decision based on the conditions disclosed in the record. That determination can not accurately reflect fluctuating conditions.

Even in the record brought here there is much to show that the petitions for rehearing were rightly denied; and in view of the absence of the evidence before the Commission, it would seem that it should be concluded, not only that the Commission did not abuse the discretion reposed in it, but that the evidence as a whole impelled denial of the petitions for rehearing.

Mr. John E. Benton, with whom *Mr. Clyde S. Bailey* was on the brief, for the Arizona Corporation Commission et al., interveners and appellees.

Mr. Hugh LaMaster, Assistant Attorney General of Nebraska, with whom *Mr. C. A. Sorensen*, Attorney General, was on the brief, for the Nebraska State Railway Commission, appellee.

Messrs. Charles W. Steiger and *Ralph Merriam* submitted for the Public Service Commission of Kansas, appellee.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

These suits, which were consolidated, were brought by carriers by railroad in the Western District, and by certain shippers, to restrain the enforcement of an order of the Interstate Commerce Commission made July 1, 1930, as amended by a supplemental order of April 10, 1931. The order prescribed maximum rates for the transportation of grain and grain products on domestic shipments within the Western District¹ and for export, as described, and directed the carriers to desist from certain practices (164 I. C. C. 619; 173 *id.* 511). Other carriers were permitted to intervene as parties petitioners, and state commissions and certain state organizations were admitted as intervening defendants. This appeal is from the order of the District Court, as specially constituted,² denying the applications of the petitioners for an interlocutory injunction. 51 F. (2d) 510.

Following the passage of the Joint Resolution of the Congress of January 30, 1925³ known as the Hoch-Smith Resolution, the Interstate Commerce Commission insti-

¹ The Western District was defined in the order of July 1, 1930, as that part of continental United States "on and west of the Mississippi River, west of Lakes Superior and Michigan, and west of and including Illinois."

² U. S. C., Tit. 28, § 47.

³ C. 120, 43 Stat. 801.

tuted a general investigation⁴ of the rate structures of common carriers to determine whether their rates, charges, regulations and practices were unjust, unreasonable, unjustly discriminatory or unduly preferential, or otherwise in violation of law. The investigation was divided into separate parts, and the proceeding in one of them (Part VII) terminated in the order under review. In connection with this proceeding there were a large number of formal complaints and suspension proceedings which, considered together, brought into issue all phases of the grain rate structure involved in the Commission's general investigation. Many state commissions, chambers of commerce, and trade and traffic associations participated in the proceeding. Hearings were held in many cities and extended over a year. The record was closed on September 22, 1928, and after protracted argument the matter was submitted, on July 1, 1929, to the Commission for its decision. The first report of the Commission, made on July 1, 1930, emphasized the magnitude of its task, in dealing with "three score and more of major issues, affecting every part of a vast territorial domain," and the thorough examination that had been made of the exceptionally voluminous record. The order of July 1, 1930, was to go into effect on October 1, 1930, but because of mechanical difficulties in the preparation and printing of the tariffs, containing the great number of the revised rates, the effective date was postponed from time to time.

In September, 1930, the carriers asked for a rehearing, which was denied in November, 1930. Prior to its denial, a statement was submitted to the Commission on behalf of the Western Association of Railway Executives, directing attention to the serious financial condition of the carriers. A further petition for rehearing was pre-

⁴Docket No. 17,000.

sented to the Commission on February 18, 1931. This petition described in great detail the situation then existing. The carriers alleged that since the closing of the record before the Commission in September, 1928, there had been material and important changes in the operating, traffic and transportation conditions in the Western District, which affected adversely the revenues of the carriers, and that, regardless of the question of the validity and propriety of the order when made, it would no longer be valid and proper in the light of the existing circumstances. The carriers alleged and offered to prove that, if the order became effective, it would reduce the gross and net operating revenues of the carriers in the Western District not less than \$20,000,000 annually; that their aggregate revenues in the first eleven months of 1930 were 14.92 per cent. lower than in the corresponding period of 1929; that the complete figures in respect of the revenues for December, 1930, were not yet available but that the volume of traffic then carried was substantially less than that of December, 1929; that the revenue freight car loadings in January, 1931, showed a substantial decline (14.06 per cent.) from those of 1930 and an even greater decline (20.98 per cent.) as compared with those of 1929; that the net operating income of these carriers for 1930 was over \$100,000,000 less than their average annual net operating income for the five preceding years; that the changes in conditions since the record before the Commission was closed had been such as seriously to impair the credit of the carriers; that not only had the market price of their common and preferred stock declined to such a level that it would be impossible for them to secure additional capital through the sale of stock, but that their bond issues also, in many instances, had ceased to command the credit which they formerly enjoyed; that the decrease of railroad earnings had been such as to jeopardize the eligibility of these bonds for savings bank investments, and that there had been a large decline in the holdings of the secu-

rities of these carriers by both savings banks and life insurance companies; and that if the order of the Commission should become effective, it would, under the conditions then present, threaten the maintenance of an adequate system of transportation. In support of their allegations as to changed conditions, the petitioners submitted many other facts and statistical tables of traffic and revenues.

The Commission denied the application for rehearing on March 3, 1931. On April 10, 1931, the Commission made its supplemental report and order, modifying and supplementing in certain particulars its original report and order, and provided that the order as thus modified should become effective on June 1, 1931. Thereupon, these suits were brought.

The petition in the carriers' suit challenged the order as having been made in disregard of the provisions of the Interstate Commerce Act. The original and supplemental reports of the Commission, and the above-mentioned petitions for rehearing, were annexed to the petition and made a part of it. Reference was made to the statement of the Commission, in its special report of January 21, 1931, to the Senate Committee on Interstate and Foreign Commerce, that the railroads had "never been able, since 1920, to obtain the aggregate earnings contemplated by section 15a" (of the Interstate Commerce Act) "and they are faced with continually increasing competition from other forms of transportation." Reciting earlier orders of the Commission bearing upon rates for the transportation of grain and grain products,⁵ the carriers averred that the order of

⁵ Increased Rates, 1920, 58 I. C. C. 220; Rates on Grain, Grain Products and Hay, 64 I. C. C. 85; Reduced Rates, 1922, 68 I. C. C. 676; Rates on Grain, Grain Products and Hay, 80 I. C. C. 362; Kansas Public Utilities Commission v. A. T. & S. F. Ry. Co., 83 I. C. C. 105; Rates and Charges on Grain and Grain Products, 91 I. C. C. 105.

the Commission was a complete reversal of its previous action; that the Commission had found that the revenue of the carriers for the Western District from the carriage of grain and grain products amounted to 12.1 per cent. of their total revenues in 1924, that year being used in the report as representative, and that the effect of the order in question would be to reduce the general level of rates on this traffic approximately 13 per cent., causing a serious diminution (to the amount of \$20,000,000 annually) in the gross and net operating income of these carriers. The petition set forth the passage of the Hoch-Smith Resolution and the order of the Commission in relation to the rates on deciduous fruits from California, which had been held by this Court to be invalid because based upon an erroneous construction of the Resolution,⁶ and the carriers charged that, in making the reports and order here in question, the Commission had proceeded upon a like misconception of its powers. Stating the substance of their petition (February, 1931) for rehearing, the carriers further charged that the denial of that petition, in view of changed conditions, was itself an abuse of administrative discretion and, by depriving the carriers of the hearing to which they were entitled, constituted a denial of due process in violation of the Fifth Amendment of the Constitution of the United States.

In their answers, the United States and the Commission denied that the action of the Commission was in any respect unauthorized or unlawful, and on the contrary alleged that the Commission had carefully considered the evidence before it in the light of its experience and that the evidence fully supported its order.

⁶ *California Growers' and Shippers' Protective League v. Southern Pacific Co.*, 129 I. C. C. 25; 132 *Id.* 582; *Ann Arbor R. Co. v. United States*, 281 U. S. 658.

On the application for an interlocutory injunction, the evidence taken before the Commission was not presented to the District Court. Affidavits were submitted by the carriers which were addressed to the effect of the order upon their revenues. The District Court made findings of fact, reciting the findings set forth in the report of the Commission and, in the view that these were conclusive in the absence of the evidence, and that no errors of law had been committed, the application was denied.

The appellants contest this conclusion, contending that the report of the Commission and concurring opinions of Commissioners disclosed that the Commission had misapprehended its authority under the Hoch-Smith Resolution and that the Commission had failed to make the findings which were essential to support its decision under the applicable law; that this was shown by the special and extended consideration given by the Commission to the depression of agriculture and the lack of other and proper foundation for the order; that the Commission had not performed its duty to consider and apply the provisions of § 15a of the Interstate Commerce Act and had exceeded its power by resorting to different standards from those established by §§ 1 and 15 of the Act; and that the ultimate finding of the Commission, expressed in the words of the statute, that the existing rates were unreasonable to the extent that they exceeded the rates prescribed, was not in itself sufficient to support the order, as it otherwise appeared to have been erroneously based.

We do not find it to be necessary to consider these contentions, and the counter arguments advanced on behalf of the Commission, or to review the Commission's reports, as it is sufficient for the present purpose to deal with the fundamental question presented by the action of the Commission in denying the appellants' second application for a rehearing. Ordinarily, a petition for rehearing is for

the purpose of directing attention to matters said to have been overlooked or mistakenly conceived in the original decision and thus invites a reconsideration upon the record upon which that decision rested. The second petition for rehearing, in this proceeding, was not of that character. It was of the nature of a supplemental bill. It presented a new situation, a radically different one, which had supervened since the record before the Commission had been closed in September, 1928. It asserted that whatever might be the view of the order when made, and upon that record, a changed economic condition demanded reopening and reconsideration. The carriers insisted upon this reopening as a right guaranteed to them not only by the Act of Congress but by the Constitution itself.

There can be no question as to the change in conditions upon which the new hearing was asked. Of that change we may take judicial notice. It is the outstanding contemporary fact, dominating thought and action throughout the country. As the Interstate Commerce Commission said in its recent report to the Congress,⁷ "a depression such as the country is now passing through is a new experience to the present generation." The Commission also recognized in that report "the very large reductions in railroad earnings which have accompanied the economic depression," and stated that "the chief cause of these reductions has been loss of traffic." For "in such depressions the railroads suffer severely. Their traffic is a barometer of general business conditions."⁸

It is plain that a record which was closed in September, 1928—relating to rates on a major description of the traffic of the carriers in a vast territory—cannot be regarded as representative of the conditions existing in

⁷ 45th Annual Report, December 1, 1931; House Doc. No. 30, 72d Cong., 1st Sess., p. 114.

⁸ *Id.*

1931. That record pertains to a different economic era and furnishes no adequate criterion of present requirements. While the effects of the widespread economic disturbance have had a progressive manifestation, they had been sufficiently revealed in February, 1931, when the second petition for rehearing was made, to compel the conclusion that the record of 1928 afforded no sufficient basis for the order of the Commission. The facts were set forth in the carriers' petition. They pointed out the grave reductions, in traffic and earnings, from which they were suffering, that their net operating income for 1930 was over \$100,000,000 less than their average annual net operating income for the five years preceding, and that their credit was seriously impaired. At the time of this petition, the order revising the rates on grain and grain products in the Western District had not yet become effective, but the Commission stood upon the record of 1928 and, without reopening the proceeding or taking further evidence, provided that its order should become effective on June 1, 1931. In justification of this course, it is urged on behalf of the Commission that its determination had been reached after regularly conducted and protracted hearings in which carriers and shippers had coöperated and that the adjustments related not only to the level of rates but to the relation of rates and to discriminatory and wasteful practices, and that a reopening would have meant further lengthy proceedings. It is said that 'in performing its legislative function of prescribing reasonable rates, the Commission necessarily projects into the future the results of a decision based on the conditions disclosed in the record,' and that its determination 'cannot reflect accurately fluctuating conditions.' These suggestions would be appropriate in relation to ordinary applications for rehearing, but are without force when overruling economic forces have made

the record before the Commission irresponsive to present conditions. This is not the usual case of possible fluctuating conditions, but of a changed economic level. And the prospect that a hearing may be long does not justify its denial if it is required by the essential demands of justice.

We are thus brought to the fundamental considerations governing the authority of the Commission. It has broad powers and a wide extent of administrative discretion, with the exercise of which, upon evidence, and within its statutory limits, the courts do not interfere. The important and salutary functions of the Commission to enforce public rights are not to be denied or impaired. But the Commission, exercising a delegated regulatory authority which does not have the freedom of ownership, operates in a field limited by constitutional rights and legislative requirements. Its duty under §§ 1 (5), 3 (1) and 15 (1) of the Interstate Commerce Act with respect to the prescribing of reasonable rates and the preventing of unreasonable or unjustly discriminatory or unduly preferential practices, has not been changed by the Hoch-Smith Resolution. *Ann Arbor R. Co. v. United States*, 281 U. S. 658, 669. The legal standards governing the action of the Commission in determining the reasonableness of rates are unaltered. In the discharge of its duty, a fair hearing is a fundamental requirement. *Interstate Commerce Comm. v. Louisville & Nashville R. Co.*, 227 U. S. 88, 91. In the instant proceeding, the hearing accorded related to conditions which had been radically changed, and a hearing, suitably requested, which would have permitted the presentation of evidence relating to existing conditions, was denied. We think that this action was not within the permitted range of the Commission's discretion, but was a denial of right. The order of the Commission which was thus made effective, and the ensuing supplemental order, cannot be sustained.

The order of the District Court refusing an interlocutory injunction is reversed, and the cause is remanded with direction to grant the injunction as prayed.

Reversed.

MARINE TRANSIT CORP. ET AL. *v.* DREYFUS ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 172. Argued December 10, 11, 1931.—Decided January 4, 1932.

Cargo was lost through the alleged fault of the carrier while being towed in a canal—a navigable water of the United States—under a maritime contract providing that all disputes under it should be arbitrated before a designated board, whose decision should be final and binding. The cargo owners, proceeding in a District Court of the United States in admiralty, filed a libel for damages against the carrier and also libeled the tug belonging to the carrier which was charged with having occasioned the loss. The carrier answered as respondent and also as claimant of the tug, and released the latter by a stipulation for value. *Held:*

1. The proceedings were within the jurisdiction of the court of admiralty. P. 271.

2. Under the United States Arbitration Act, the court had authority to direct that the issues arising under the contract between the cargo owners and the carrier be arbitrated, as provided by the contract, and to confirm the award of the arbitrators. Pp. 274, 276.

3. Under the agreement that the award should be “final and binding,” the carrier was bound by the award against it, both as respondent and as owner and claimant of the tug, and a decree against it upon the award was authorized by § 8 of the Act. P. 276.

4. The fact that the award in this case was signed by only four of the five arbitrators is not a valid objection to the decree enforcing it, since it does not appear by the record that the agreement required unanimity (the statute being silent on the subject,) or that any specific objection raising the point was made on the motion for confirmation. P. 276.

5. Whether the admiralty court committed error in decreeing against the stipulator as well as the respondent-claimant, will not be decided when the stipulator has not sought review in this Court. P. 277.