

we think that it did so. The Court there held that, in the issuance of a certificate of public convenience and necessity, the Commission need not determine with mathematical exactness the extent of the burden imposed upon interstate commerce by the operation of a branch line; that such burden might involve various elements, and that if upon the whole proof the conclusion was warranted that continued operation would in fact unreasonably burden the interstate commerce of the carrier, the Commission was justified in authorizing abandonment. There, as here, the system lay wholly within the state and was prosperous, and no claim was made that immediate abandonment of the local branch was necessary to enable the carrier to earn a reasonable return on its investment. Here, as in the *Colorado* case, the Commission had regard for the needs of intrastate as well as interstate commerce. The evidence was ample to give a comprehensive view of the entire situation, and due weight was accorded all of the proofs in the light of the conflicting requirements. The contention that the Commission went upon the theory that it might authorize abandonment in disregard of the evidence is not supported by the record. The judgment must be

Affirmed.

ARIZONA GROCERY CO. *v.* ATCHISON, TOPEKA
& SANTA FE RAILWAY CO. ET AL.

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

No. 98. Argued December 8, 1931.—Decided January 4, 1932.

1. Where the Commission has, upon complaint and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous

order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceedings to be a reasonable rate. Pp. 383-390.

2. When the Commission by its authority under the Transportation Act declares a specific rate to be the reasonable and lawful rate for the future, it exercises a legislative function and its pronouncement has the force of a statute. This is well established as to the fixing of specific rates by state commissions, and in this respect there is no difference between authority delegated by a state legislature and that conferred by Congress. P. 386.
 3. When the Commission fixes a maximum rate, or maximum and minimum rates, the carrier is not obliged at its peril to see that the rates it maintains within the limits so authorized are reasonable. Pp. 386, 387.
 4. In declaring a maximum rate the Commission exercises a delegated power legislative in character, and may act only within the scope of the delegation; its authority is to fix a maximum reasonable rate, and it is precluded by the statute from fixing one which is unreasonable. P. 387.
 5. When the carrier establishes a rate within the limits of the Commission's order, that rate becomes a lawful—that is, a reasonable—rate. *Id.*
 6. The prescription of a maximum rate, or maximum and minimum rates, is as legislative in quality as the fixing of an exact rate. P. 388.
 7. The action of the Commission in fixing rates for the future is subject to the same tests as to its validity as would be an act of Congress intended to accomplish the same purpose. *Id.*
 8. Where the Commission has made an order having a dual aspect, it may not in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed. P. 389.
- 49 F. (2d) 563, affirmed.

CERTIORARI, *post*, p. 600, to review a judgment reversing a judgment in favor of a shipper in a suit to enforce an order of the Interstate Commerce Commission awarding reparations.

Messrs. Frank L. Snell, Jr., and R. C. Fulbright, with whom Mr. Samuel White was on the brief, for petitioner.

The Interstate Commerce Act confers jurisdiction upon the Commission to award reparation against rates which were charged under an order prescribing a maximum rate if the rate charged was in fact unreasonable.

Section 15 (1) provides that the Commission may prescribe four types of rates: (1) just and reasonable; (2) maximum; (3) minimum; and (4) maximum and minimum.

A maximum rate is not necessarily a just and reasonable rate. The fact that the Commission prescribed a maximum rate does not relieve the carrier of the duty to file and publish a reasonable rate. That duty is a continuing one which must be complied with by the carriers; otherwise the Act will be violated and the shipper entitled to damages because of such violation. *News Syndicate Co. v. New York Cent. R. Co.*, 275 U. S. 179, 187.

Section 16 (1) gives the Commission the right, as a judicial body, to act retroactively and award reparation whenever damages arise, as provided in §§ 8 and 9. Section 15 (2) gives it the power to set aside a previous order.

It is fundamental in this case that a carrier is entitled only to a just and reasonable rate and not permitted to charge more. *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Dayton-Goose Creek R. Co. v. United States*, 263 U. S. 456; *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U. S. 531.

The shipper is compelled to pay the duly filed and published tariff whether such tariff is Commission-made or railroad-made; and if it is unreasonable he must seek recovery before the Commission, acting as a judicial body. To hold that the shipper would be foreclosed in such a proceeding because of the prior finding and order of the Commission acting as a legislative body, would amount

to depriving him of his property without due process of law, if in fact the rate charged was unreasonable.

The right to a reasonable rate is a vested property right of the shipper. *Missouri, K. & T. R. Co. v. Interstate Commerce Comm.*, 164 Fed. 645; *McLean Lumber Co. v. United States*, 237 Fed. 460, 466.

The Commission, acting in a judicial capacity, has a right to determine, in view of the facts then before it, whether the rate in question was in fact just and reasonable and in compliance with the Act. The fact that the rate had been previously prescribed as a maximum rate by the Commission, acting in a legislative capacity, can not be conclusive in such a judicial proceeding. *Baltimore & O. R. Co. v. United States*, 279 U. S. 781.

The only method provided by the Act for a shipper to attack an unjust and unreasonable rate is to file a complaint before the Commission in accordance with §§ 9 and 13. The fact that the Act took from the shipper the right to a proceeding in court does not mean that the shipper forfeited his lawful rights to a just and reasonable rate. Only the remedy and method of procedure were changed.

Allowance of reparation to plaintiff does not violate the Fifth Amendment. There can be no vested right in a rate fixed by the Commission for the future. *Skinner & Eddy Corp. v. United States*, 249 U. S. 557, 568; *Interstate Commerce Comm. v. Louisville & N. R. Co.*, 73 Fed. 409, 428. Distinguishing *Blodgett v. Holden*, 275 U. S. 142; *Fletcher v. Peck*, 6 Cranch 87. The carrier acquires no vested right in any income in excess of a reasonable return on its investment. *Dayton-Goose Creek R. Co. v. United States*, 263 U. S. 456.

Decisions of state courts relied upon by the court below do not support the conclusions reached. See *Eagle Cotton Oil Co. v. Southern Ry. Co.*, 51 F. (2d) 443; *Mathieson Alkali Works v. Norfolk & W. Ry. Co.*, 147 Va. 426; *Young Heading Co. v. Payne*, 127 Miss. 48.

These state courts clearly point out the distinction between the Interstate Commerce Act, in which the Commission is given broad and comprehensive powers including the right to prescribe a maximum rate, and the state acts, in which commissions are given limited and restricted powers and the right to fix only the exact rate. *Eagle Cotton Oil Co. v. Southern Ry. Co.*, 46 F. (2d) 1006. See especially s. c., 51 F. (2d) 443.

The decision conflicts with the principles of interpretation and application of the Interstate Commerce Act previously laid down by this Court. *Reagan v. Farmers L. & T. Co.*, 154 U. S. 362, 367; *Mitchell Coal & C. Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 259; *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 442; *Smith v. Townsend*, 148 U. S. 490; *Interstate Commerce Comm. v. Baltimore & O. R. Co.*, 145 U. S. 265; *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155.

Mr. Burton Mason, with whom *Messrs. L. H. Chalmers, Thomas G. Nairn, E. W. Camp, R. S. Outlaw, and J. E. Lyons* were on the brief, for respondents.

The rates assessed, and the charges collected, upon petitioner's shipments, were conclusively established as just and reasonable, and in conformity with the requirements of the Act and of the Commission's valid findings and valid continuing order. The Commission's findings and order in the First Case were continuously in effect without modification throughout the period of movement of petitioner's shipments, and were fully and literally complied with by the respondents.

In the very nature of things, the voluntary publication of rates less than the reasonable maximum fixed by the Commission must have resulted in rates just as properly to be termed "Commission-made," as the exact rate named in the Commission's findings and order. It is conceded that the order fixed only a reasonable maximum

rate, and not the exact or only rate thereafter to be charged. Admittedly, the carriers did exactly as they were directed. Since the greater includes the less, it follows that the resulting rates were just as completely within the terms of the Commission's order, and thus just as much "Commission-made," as if the 96½ cent rate and no other had been published. *Eagle Cotton Oil Co. v. Southern Ry. Co.*, 51 F. (2d) 443, is not in point upon the issue here discussed, and does not sustain the Commission's position at all.

The findings and order in the First Case, whereby the rate to be observed in future was determined, were made by the Commission in the exercise of its quasi-legislative power. *Prentis v. Atlantic Coast Line R. Co.*, 211 U. S. 210; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 8; *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 305; *Baer Bros. v. Denver & R. G. R. Co.*, 233 U. S. 479, 486; *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 291.

The primary issue presented to, and necessarily decided by, the Commission in the First Case, was whether the rate then in effect was reasonable. *Atchison, T. & S. F. Ry. Co. v. United States*, 232 U. S. 199, 221.

The Commission has no power to prescribe a maximum rate which is other than just and reasonable. *Southern Pac. Co. v. Interstate Commerce Comm.*, 219 U. S. 433, 443, 444; *Interstate Commerce Comm. v. United States*, 224 U. S. 474; *Interstate Commerce Comm. v. Dffenbaugh*, 222 U. S. 42, 47; *United States v. New York Cent. R. Co.*, 263 U. S. 603, 610; *Ann Arbor R. Co. v. United States*, 281 U. S. 658, 668; *Brimstone R. & C. Co. v. United States*, 276 U. S. 104, 109; *Akron, C. & Y. Ry. Co. v. United States*, 22 F. (2d) 199, 203; *Anchor Coal Co. v. United States*, 25 F. (2d) 462. See McVeagh, Transportation Act of 1920, pp. 356-358; Congressional Record, Vol. 58, pp. 8309-8318.

Orders of the Commission precisely similar in every essential respect to the order in the First Case have been held by this Court and the inferior federal courts to be orders prescribing reasonable rates. *Chicago, R. I. & P. Ry. Co. v. United States*, 274 U. S. 29, affirming 6 F. (2d) 888; *Houston Cotton Exchange v. A. & A. R. R. Corp.*, 87 I. C. C. 392; 93 I. C. C. 268; *Montrose Oil Rfg. Co. v. St. Louis-San Francisco Ry. Co.*, 25 F. (2d) 750, affirmed, 25 F. (2d) 755; *Mellon v. World Publishing Co.*, 20 F. (2d) 613; s. c., 53 I. C. C. 491.

Having been validly made, and in full force and effect at the time petitioner's shipments moved, the findings and order in the First Case constituted a conclusive determination that the rates established and charged in compliance therewith were just and reasonable. *Interstate Commerce Comm. v. Union Pac. R. Co.*, 222 U. S. 541, 547, 548; *Western Paper Co. v. United States*, 271 U. S. 268, 271; *Atchison, T. & S. F. Ry. Co. v. United States*, 234 U. S. 294, 311; *Virginian R. Co. v. United States*, 272 U. S. 658, 665; *Keogh v. Chicago & N. W. Ry. Co.*, 260 U. S. 156.

The Interstate Commerce Act does not confer jurisdiction upon the Commission to award reparation for the charging of rates maintained and applied in conformity with the Commission's valid outstanding findings and valid continuing formal order. The Act confers upon the Commission jurisdiction to award reparation (damages) only for violations of the Act by carriers. *News Syndicate Co. v. New York Cent. R. Co.*, 275 U. S. 179, 187; *New Pittsburgh Coal Co. v. H. V. Ry. Co.*, 26 I. C. C. 121, 126; *Pitwood v. N. P. Ry. Co.*, 51 I. C. C. 535.

The Commission's determination of the reasonableness of a particular rate, if validly made, is absolutely conclusive. By the terms of the statute it fixes the rate "to be thereafter observed" as long as its order is effective. Certainly if the carrier has no option to advance a rate, except

by approval of the Commission, it should not be required, as an affirmative obligation imposed by § 1 of the Act, voluntarily to reduce a rate below a standard set by the Commission "to be thereafter observed."

Phillips v. Grand Trunk W. Ry. Co., 236 U. S. 662, 665; *Mitchell Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 258, make it quite clear that findings of the Commission as to the reasonableness of a particular rate, when properly made as the foundation for awards of reparation, are conclusive and binding, not merely upon the shippers and carriers directly involved in the proceeding, but upon all shippers and carriers who may be affected by the ruling. But if such conclusive effect is given to rulings of the Commission as relating to past rates, equally its rulings as to rates to be observed for the future should be regarded as constituting the conclusive measure of the rights of the shippers, as long as those rulings continue in effect. The carrier's obedience to a conclusive and continuing order prescribing the maximum reasonable rate thereafter to be charged, necessarily results in the maintenance and application of rates which, as measured by the only final standard which the law of the land recognizes, are just and reasonable. There can be no violation of the Act, under such circumstances; and consequently, there is nothing to which the Commission's jurisdiction to award reparation may attach. Cf. *Atlantic Coast Line R. Co. v. Powe*, 283 U. S. 401; *United States v. New River Co.*, 265 U. S. 533, 541.

All the reported court decisions declare and sustain the proposition that a regulatory tribunal, exercising functions similar to those of the Interstate Commerce Commission, cannot award reparation for the charging of rates which such tribunal has itself prescribed or approved. There is no reported decision holding to the contrary. *Keogh v. Chicago & N. W. Ry. Co.*, 260 U. S. 156; *Southern Pac. Co. v. Interstate Commerce Comm.*, 219 U. S. 433, 452;

Winsor Coal Co. v. C. & A. R. Co., 52 Fed. 719; *El Paso & S. W. R. Co. v. A. C. C.*, 51 F. (2d) 573; *Northern Pac. Ry. Co. v. Dept. of Pub. Wks.*, 136 Wash. 389; *Missouri, K. & T. Ry. Co. v. Railroad Comm.*, 3 S. W. (2d) 489; s. c. 13 S. W. (2d) 680; *Mathieson Alkali Works v. Norfolk & W. Ry. Co.*, 147 Va. 426; *Miller Coal Co. v. Louisville & N. R. Co.*, 207 Ala. 252; *Young Co. v. Payne*, 127 Miss. 48; *Texas & Pac. Ry. Co. v. Railroad Comm.*, 137 La. 1059; *Bonfils v. Public Utilities Comm.*, 67 Colo. 563. Distinguishing cases referred to by petitioner and the Commission.

If the Act were so construed as to confer upon the Commission power to award reparation under the circumstances here presented, it would, to that extent, contravene the due process clause of the Fifth Amendment.

The Commission, in awarding reparation, exercises quasi-judicial power, as an agency of the judicial arm, and not of the Congress. In so doing, it is bound by its prior legislative determinations and must act with reference only to the law and the facts as they existed at the time the asserted right to damages arose. *Baer Bros. v. Denver & R. G. R. Co.*, 233 U. S. 479; *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 291; *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 430; *Prentis v. Atlantic Coast Line R. Co.*, 211 U. S. 210.

The due process clause prohibits any action on the part of the Commission the effect of which would be to divest respondents of property theretofore properly acquired in direct conformity with the Commission's own prior valid legislative pronouncement. *Fletcher v. Peck*, 6 Cranch 87; *Forbes Boat Line v. Commissioners*, 258 U. S. 338; *Blodgett v. Holden*, 275 U. S. 142; *Untermeyer v. Anderson*, 276 U. S. 440; *Calder v. Bull*, 3 Dall. 385, 388, 391; *Murray's Lessee v. Land Co.*, 18 How. 272, 276, 277; *Hurtado v. California*, 110 U. S. 516, 535, 536; *Twining v. New Jersey*, 211 U. S. 78, 101, 102.

Messrs. Daniel W. Knowlton and H. L. Underwood, by special leave of Court, filed a brief on behalf of the Interstate Commerce Commission, as *amicus curiae*.

Section 1 (4) requires carriers subject to the Act to "establish . . . just and reasonable rates, fares, and charges," and § 1 (5) declares that "all charges made for any service rendered . . . in the transportation of . . . property . . . shall be just and reasonable," and that "every unjust and unreasonable charge for such service . . . is prohibited and declared to be unlawful." There is a continuing duty upon carriers to observe these mandates and the prescription of maximum rates by the Commission does not absolve them from that obligation or authorize the continuance of a charge which by reason of changed conditions has become unreasonable and unjust. *Baer Bros. Co. v. Denver & R. G. R. Co.*, 233 U. S. 479. Such an order is not *res judicata*. *Tagg Bros. v. United States*, 280 U. S. 420, 445.

The basis upon which reparation is awarded is that a carrier has been guilty of a violation of the Act by exacting of an unreasonable rate—a tort. *Louisville & N. R. Co. v. Sloss-Sheffield Co.*, 269 U. S. 217, 234; *Lewis-Simas-Jones Co. v. Southern Pac. Co.*, 283 U. S. 654, 660. If the Commission finds the rate exacted unreasonable, it matters not that the rate at some prior time was held to be reasonable by the Commission.

A contrary conclusion would deny to shippers the right to a reasonable rate during all the time the question of reasonableness is being litigated before the Commission, as well as prior thereto, although the Commission finds that the rate had become and was unreasonable during the entire period covered by the award.

In the present case, there are the added considerations that the finding of the Commission as a result of which reparation was awarded, was made upon a comprehensive record, as distinguished from a partial one, on which the

prior maximum rates had been authorized, and that the rates here involved were repeatedly under fire of the shippers.

The action of the Commission in awarding reparation was consistent with that in other cases.

Subsequent reduction of the rates by the voluntary action of the carriers warrants a conclusion that such reduced rates were not prescribed by the Commission. *Brimstone R. & C. Co. v. United States*, 276 U. S. 104, 122; *Eagle Cotton Oil Co. v. Southern Ry. Co.*, 51 F. (2d) 443.

When the language of § 1 (4) and (5) is contrasted with that of § 15 (1), it will be seen that there is no duty imposed upon the Commission such as that imposed upon the carriers. The provisions of § 15 (1) are that the Commission may, upon its own motion, and must, upon complaint, inquire into the reasonableness of rates and prescribe reasonable rates when deemed proper. That falls far short of making it the duty of the Commission to see that rates are kept currently reasonable. But § 1 (4) and (5), as we have seen, does impose that duty upon the carriers. There are good reasons for this.

We think there is no difference, with respect to reparation, between a rate established by the carrier and one established by order of the Commission. The Act makes none. The sole question is whether, for the period for which reparation is sought, the rate exacted was unreasonable, that is, has there been a violation of the Act? Reparation is allowed for the collection by a common carrier of exorbitant charges, which constitutes a tort. *Lewis-Simas-Jones Co. v. Southern Pac. Co.*, 283 U. S. 654. The wrong for which the statute renders the carrier liable is the exacting of payment pursuant to an unlawful rate. *Louisville & N. R. Co. v. Sloss-Sheffield Co.*, 269 U. S. 217, 240.

While in fixing a rate for the future the Commission exercises a legislative function, *Prentis v. Atlantic Coast*

Line, 211 U. S. 210, 226, yet strictly speaking the rate for the future has no relevancy to the reparation claim, since the award of reparation is made by the Commission in its quasi-judicial capacity to measure past injuries sustained by a private shipper arising from a violation of the Act by the carrier. But testimony showing the unreasonableness of a past rate may also furnish information on which to fix a reasonable future rate, and both subjects can be, and often are, disposed of by the same order. *Baer Bros. Co. v. Denver & R. G. R. Co.*, 233 U. S. 479, 486.

If the requirements of § 1 (5) are kept in mind, there can be no inconsistency in awarding reparation for the exaction of a "Commission-made" rate, which is in effect the legal rate until changed, but not necessarily the lawful rate, if subsequently it becomes in fact unreasonable.

Messrs. John E. Benton and Clyde S. Bailey, by special leave of Court, filed briefs on behalf of the National Association of Railroad and Utilities Commissioners and the Arizona Corporation Commission, as *amici curiae*.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case turns upon the power of the Interstate Commerce Commission to award reparations with respect to shipments which moved under rates approved or prescribed by it.

The respondent carriers maintained a rate of \$1.045 per hundred pounds for shipment of sugar from California points to Phoenix, Arizona. On complaint of petitioner and others, the Commission, after hearing, on June 22, 1921, found that the rate attacked had been, then was, and for the future would be, unreasonable to the extent that it exceeded 96.5 cents,¹ and ordered the establishment

¹ 62 I. C. C. 412,

of a rate not exceeding that figure. September 17, 1921, the carriers promulgated a rate of 96 cents, which they later voluntarily reduced to 86.5 cents. November 3, 1922, certain of the complainants in the earlier proceeding, other than petitioner, filed a new petition attacking the current rate. While this case was pending, the carriers, on January 10, 1924, again made a voluntary reduction to 84 cents. February 25, 1925, the Commission filed a report prescribing for the future a maximum reasonable rate of 71 cents, to that extent modifying its earlier order.² Reparation was found to be due shippers under the old rate, but none was awarded. February 8, 1927, the second case was reopened for further consideration, but the 71 cent rate was not disturbed. In a later proceeding, with which petitioner's and other claims for reparation were consolidated, the Commission found that the rates to Phoenix from and after July 1, 1922, had been unreasonable to the extent they had exceeded 73 cents from Northern California and 71 cents from Southern California; prescribed rates for the future from those origins to Phoenix and other Arizona destinations, and awarded petitioner and other shippers reparation in the amounts by which the rates paid (86.5 and 84 cents) exceeded those (73 and 71 cents) found to have been the reasonable rates during the period since July 1, 1922.³

The date of the first shipment made by petitioner on which reparation was awarded was February 21, 1923, and of the last February 5, 1925, so that all were made between the effective dates of the first and second orders above mentioned.

The respondents objected that they should not be required to pay reparations on shipments which moved under rates approved or prescribed by the Commission as reasonable. To this that body replied, "We reserve the right, upon a more comprehensive record, to modify our

² 95 I. C. C. 244.

³ 140 I. C. C. 171.

previous findings, upon matters directly in issue before us as to which it clearly appears that our previous findings would not accord substantial justice under the laws which we administer. We have such a case here. For the first time the record before us is comprehensive in the evidence which it contains upon the reasonableness of the rates assailed. Upon this record we reach the conclusion that the rate prescribed in the first Phoenix case, during the period embraced in these complaints, was unreasonable and that a lower rate would have been reasonable during that period. If we are within our authority in finding that a lower rate would have been reasonable, then it must follow that shippers who paid the freight charges at the higher rate paid charges which were unreasonable, and are entitled to reparation. . . ."

The carriers having failed to pay the amount awarded, the petitioner sued therefor in the District Court, and recovered judgment. The Circuit Court of Appeals reversed, and entered judgment for respondents.⁴ This Court granted certiorari. Whether, as the petitioner argues, the Commission correctly construed its authority, is to be determined by examination of the legislation defining its powers.

The exaction of unreasonable rates by a public carrier was forbidden by the common law. *Interstate Commerce Comm. v. Baltimore & Ohio R. Co.*, 145 U. S. 263, 275. The public policy which underlay this rule could, however, be vindicated only in an action brought by him who paid the excessive charge, to recover damages thus sustained. Rates, fares, and charges were fixed by the carrier, which took its chances that in an action by the shipper these might be adjudged unreasonable and reparation be awarded.

But we are here specially concerned with the Interstate Commerce Act of 1887⁵ and with some of the changes or

⁴ 49 F. (2d) 563. ⁵ Act of February 4, 1887, 24 Stat. 379.

supplements adopted since its original enactment. That Act did not take from the carriers their power to initiate rates—that is, the power in the first instance to fix rates, or to increase or to reduce them. *Skinner & Eddy Corp. v. United States*, 249 U. S. 557, 564; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Comm.*, 162 U. S. 184, 197. In order to render rates definite and certain, and to prevent discrimination and other abuses, the statute required the filing and publishing of tariffs specifying the rates adopted by the carrier, and made these the *legal* rates, that is, those which must be charged to all shippers alike.⁶ Any deviation from the published rate was declared a criminal offense, and also a civil wrong giving rise to an action for damages by the injured shipper.⁷ Although the Act thus created a legal rate, it did not abrogate, but expressly affirmed, the common-law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard.⁸ In other words, the legal rate was not made by the statute a lawful rate—it was lawful only if it was reasonable. Under § 6 the shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation.

The Act altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate.⁹ If the finding on this question was against the carrier, reparation

⁶ *Id.*, § 6. *Kansas City Southern Ry. Co. v. Carl*, 227 U. S. 639, 653; *Pennsylvania R. Co. v. International Coal Co.*, 230 U. S. 184, 197; *Louisville & N. R. Co. v. Maxwell*, 237 U. S. 94, 97; *Dayton C. & I. Co. v. Cincinnati, N. O. & T. P. Ry. Co.*, 239 U. S. 446, 450.

⁷ *Id.*, §§ 8, 9, 10.

⁸ *Id.*, § 1.

⁹ *Id.*, § 13. *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 443; *Robinson v. Baltimore & O. R. Co.*, 222 U. S. 506; *Skinner & Eddy Corp. v. United States*, 249 U. S. 557, 562, and cases cited.

was to be awarded the shipper, and only the enforcement of the award was relegated to the courts. In passing upon the issue of fact the function of the Commission was judicial in character;¹⁰ its action affected only the past, so far as any remedy of the shipper was concerned, and adjudged for the present merely that the rate was then unreasonable; no authority was granted to prescribe rates to be charged in the future. Indeed, after a finding that an existing rate was unreasonable, the carrier might put into effect a new and slightly different rate and compel the shipper to resort to a new proceeding to have this declared unreasonable.¹¹ Since the carrier had complete liberty of action in making the rate, it necessarily followed that upon a finding of unreasonableness, an award of reparation should be measured by the excess paid, subject only to statutory limitations of time.

Under the Act of 1887 the Commission was without power either to prescribe a given rate thereafter to be charged (*Interstate Commerce Comm. v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479), or to set a maximum rate for the future (*Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Comm.*, *supra*, p. 196), for the reason that so to do would be to exercise a legislative function not delegated to that body by the statute.¹²

The Hepburn Act¹³ and the Transportation Act¹⁴ evince an enlarged and different policy on the part of

¹⁰ *Interstate Commerce Comm. v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479, 499-500; *Baer Bros. Co. v. Denver & R. G. R. Co.*, 233 U. S. 479, 486.

¹¹ See *Baer Bros. Co. v. Denver & R. G. R. Co.*, *supra*, p. 487.

¹² Compare *Prentiss v. Atlantic C. L. Co.*, 211 U. S. 210, 226; *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 301; *Terminal Railroad Assn. v. United States*, 266 U. S. 17, 30; *Assigned Car Cases*, 274 U. S. 564, 582.

¹³ § 4, 34 Stat. 589.

¹⁴ §§ 418-421, 41 Stat. 484-488.

Congress. The first granted the Commission power to fix the maximum reasonable rate; the second extended its authority to the prescription of a named rate, or the maximum or minimum reasonable rate, or the maximum and minimum limits within which the carriers' published rate must come. When under this mandate the Commission declares a specific rate to be the reasonable and lawful rate for the future, it speaks as the legislature, and its pronouncement has the force of a statute.¹⁵ This Court has repeatedly so held with respect to the fixing of specific rates by state commissions;¹⁶ and in this respect there is no difference between authority delegated by state legislation and that conferred by Congressional action.

But it is suggested that the mere setting of limits by Commission order leaves the carrier free to name any rate within those limits, and, as at common law, it must at its peril publish a reasonable rate within the bound-

¹⁵ As a statute fixing or limiting rates to be charged by one whose business is affected by a public interest may be declared void for violation of the due process and equal protection clauses (*Dow v. Beidelman*, 125 U. S. 680; *Chicago & G. T. Ry. Co. v. Wellman*, 143 U. S. 339; *Budd v. New York*, 143 U. S. 517; *Covington Turnpike Co. v. Sandford*, 164 U. S. 578), an order made by a commission created by statute is subject to the like action of the courts (*Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19; *Minnesota Rate Cases*, 230 U. S. 352, 433-434). There is, however, in the case of a commission order, the additional element, that the courts will examine the question whether the administrative agency of the legislature has exceeded its statutory powers (*Skinner & Eddy Corp. v. United States*, 249 U. S. at p. 562, and cases cited) or has based its order upon a finding without evidence or upon evidence which clearly fails to support it (*Northern Pacific Ry. Co. v. Dept. of Public Works*, 268 U. S. 39).

¹⁶ *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418; *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362, 394; *Home Tel. & Tel. Co. v. Los Angeles*, 211 U. S. 265, 271; *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 306; and compare the cases cited in note 12.

aries set by the order; that as it has the initiative it must take the burden, notwithstanding the Commission's order, of maintaining the rate at a reasonable level, and will be answerable in damages if it fails so to do. This argument overlooks the fact that in declaring a maximum rate the Commission is exercising a delegated power legislative in character;¹⁷ that it may act only within the scope of the delegation; that its authority is to fix a maximum or minimum *reasonable* rate; for it is precluded by the statute from fixing one which is unreasonable, which by the statute is declared unlawful. If it were avowedly to attempt to set an unreasonably high maximum its order would be a nullity.

The report and order of 1921 involved in the present case declared in terms that 96.5 cents was, and for the future would be, a reasonable rate. There can be no question that when the carriers, pursuant to that finding, published a rate of 96 cents, the legal rate thus established, to which they and the shipper were bound to conform, became by virtue of the Commission's order also a lawful—that is, a reasonable—rate.

Specific rates prescribed for the future take the place of the legal tariff rates theretofore in force by the voluntary action of the carriers, and themselves become the legal rates. As to such rates there is therefore no difference between the legal or published tariff rate and the lawful rate. The carrier cannot change a rate so prescribed and take its chances of an adjudication that the substituted rate will be found reasonable. It is bound to conform to the order of the Commission. If that body sets too low a rate, the carrier has no redress save a new hearing and the fixing of a more adequate rate for the future. It cannot have reparation from the shippers for a rate collected under the order upon the ground that it was unreasonably

¹⁷ *Oklahoma Operating Co. v. Love*, 252 U. S. 331, 335.

low. This is true because the Commission, in naming the rate, speaks in its quasi-legislative capacity. The prescription of a maximum rate, or maximum and minimum rates, is as legislative in quality as the fixing of a specified rate.

In *Oklahoma Operating Co. v. Love*, 252 U. S. 331, 335, it was said, "The order of the Commission prohibiting the company from charging, without its permission, rates higher than those prevailing in 1913, in effect prescribed maximum rates for the service. It was, therefore, a legislative order. . . ."

If by act of Congress maximum rates were declared lawful for certain classes of service, neither carrier nor shipper could thereafter draw into question in the courts the conduct of the other if it conformed to the legislative mandate, save by an attack on the constitutionality of the statute. By the amendatory legislation Congress has delegated to the Commission as its administrative arm its undoubted power to declare, within constitutional limits, what are lawful rates for the service to be performed by the carriers. The action of the Commission in fixing such rates for the future is subject to the same tests as to its validity as would be an act of Congress intended to accomplish the same purpose.

As has been pointed out, the system now administered by the Commission is dual in nature. As respects a rate made by the carrier, its adjudication finds the facts and may involve a liability to pay reparation. The Commission may, and often does, in the same proceeding, and in a single report and order, exercise its additional authority by fixing rates or rate limits for the future. But the fact that this function is combined with that of passing upon the rates theretofore and then in effect does not alter the character of the action.¹⁸

¹⁸ *Interstate Commerce Comm. v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479, 499; *Baer Bros. Co. v. Denver & R. G. R. Co.*, 233 U. S. 479.

As respects its future conduct the carrier is entitled to rely upon the declaration as to what will be a lawful, that is, a reasonable, rate; and if the order merely sets limits it is entitled to protection if it fixes a rate which falls within them. Where, as in this case, the Commission has made an order having a dual aspect, it may not in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed.

The Commission in its report confuses legal concepts in stating that the doctrine of *res judicata* does not affect its action in a case like this one. It is unnecessary to determine whether an adjudication with respect to reasonableness of rates theretofore charged is binding in another proceeding, for that question is not here presented. The rule of estoppel by judgment obviously applies only to bodies exercising judicial functions; it is manifestly inapplicable to legislative action. The Commission's error arose from a failure to recognize that when it prescribed a maximum reasonable rate for the future, it was performing a legislative function, and that when it was sitting to award reparation, it was sitting for a purpose judicial in its nature. In the second capacity, while not bound by the rule of *res judicata*, it was bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect. It could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the legislature itself.

The argument is pressed that this conclusion will work serious inconvenience in the administration of the Act; will require the Commission constantly to reëxamine the fairness of rates prescribed, and will put an unbearable

burden upon that body. If this is so, it results from the new policy declared by the Congress, which, in effect, vests in the Commission the power to legislate in specific cases as to the future conduct of the carrier. But it is also to be observed that so long as the Act continues in its present form, the great mass of rates will be carrier-made rates, as to which the Commission need take no action except of its own volition or upon complaint, and may in such case award reparation by reason of the charges made to shippers under the theretofore existing rate.

Where the Commission has, upon complaint and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate.

The judgment is

Affirmed.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS think that the judgment should be reversed for the reasons stated by Judge Hutcheson in the concurring opinion in *Eagle Cotton Oil Co. v. Southern Ry. Co.*, 51 F. (2d) 443, 445.

DUNN *v.* UNITED STATES.

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

No. 393. Argued November 24, 1931.—Decided January 11, 1932.

1. Where no question was raised in the courts below with respect to the sufficiency of an indictment, and no such question is presented here, its sufficiency will be assumed. P. 392.