

of cargo and knocked into the water where he died, this court held that the state compensation act and not the maritime law governed. *Smith & Son v. Taylor*, 276 U. S. 179. Defendant conceded that the state law would apply if the deceased had been killed on the land. But it argued that as no claim was made for injuries there sustained and as the suit was solely for death, the case was exclusively within the admiralty jurisdiction. We said (p. 182): "But this is a partial view that cannot be sustained. The blow by the sling was what gave rise to the cause of action. It was given and took effect while deceased was upon the land. It was the sole, immediate and proximate cause of his death." *Mutatis mutandis*, what was there said is applicable here.

The substance and consummation of the occurrence which resulted in intestate's death and so gave rise to respondent's cause of action took place on the deck of the ship lying in navigable waters. The damages allowed by the Oregon statute are those resulting solely from the death. The foundation of the right to recover is a wrongful act or omission taking effect aboard the ship and resulting in death upon the land. This is a maritime tort, and upon it the respondent's claim rests. The admiralty court has jurisdiction. *The Chiswick*, 231 Fed. 452. *The Anglo-Patagonian*, *supra*, 94. *The Samnanger*, 298 Fed. 620, 624. *Shipping Board v. Greenwald*, 16 F. (2d) 948, 951. *Decree affirmed.*

BALTIMORE & OHIO RAILROAD CO. ET AL. V.
BRADY.

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

No. 526. Argued February 14, 15, 1933.—Decided March 13, 1933.

1. A suit by a shipper for damages resulting from discrimination practiced by a carrier in violation of its rule for coal-car distribu-

tion in time of shortage, which does not challenge the reasonableness or validity of the rule itself, may be maintained under § 9 of the Interstate Commerce Act without action or finding by the Commission. P. 455.

2. But if the shipper elects, under § 9, to proceed first before the Commission and secures an order for reparation which he sues to enforce under § 16 (2), he is bound by the Commission's award and can not claim more upon the ground that the Commission erred as a matter of law in reducing damages. P. 456.
3. The fact that the Act merely makes the findings and report of the Commission *prima facie* evidence, and so preserves the defendant's right to contest the award, gives no support to the contention that the award does not bind the plaintiff. P. 458.
4. Facts alleged *held* sufficient to show unlawful discrimination in distribution of coal cars and sufficient to sustain judgment for the amount of the award together with interest, costs and a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit. P. 459.

61 F. (2d) 242, reversed.

CERTIORARI, 287 U. S. 596, to review the affirmance of a judgment in a suit to enforce an award by the Interstate Commerce Commission.

Messrs. George M. Hoffheimer and Eugene S. Williams, with whom Messrs. Charles R. Webber, E. A. Bowers, and Wm. C. Purnell were on the brief, for petitioners.

Mr. George T. Bell, with whom Mr. Samuel T. Spears was on the brief, for respondent.

Once the Commission finds acts or practices of carriers in violation of the statute and fixes the lawful standard, that standard is conclusive whether it relates to the past, present or future. *Mitchell Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 258; *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 389.

Here, acting in its administrative capacity, the Commission found that petitioners' acts and practices were unlawful. It also laid down the standard of service that should have prevailed. But pursuant to the further hear-

ing granted for the sole purpose of determining the amount of respondent's damages on the basis of this standard, the Commission proceeded to treat as lawful the very "offer" which, in its administrative capacity, it had found unlawful because it was arbitrary and made without regard to the requirements of respondent's business.

A finding made by the Commission without evidence, or contrary to the indisputable character of the evidence, is void. *Interstate Commerce Comm'n v. Louisville & N. R. Co.*, 227 U. S. 88, 91-2; *Interstate Commerce Comm'n v. Union Pacific R. Co.*, 222 U. S. 541, 547-8.

The claim is not for a penalty but for compensation, — "a property right." *Spiller v. Atchison, T. & S. F. R. Co.*, 252 U. S. 117, 135. By requiring the injured shipper to elect between two remedies, Congress clearly intended that each of the two was to comprehend whatever measures are necessary to secure recovery of the statutory standard of full compensation. Each was to be as adequate and complete as the other, and its equal in final results. This is so because the fundamental principles of equality (the "primary purpose of the Act," *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U. S. 173, 181) and uniformity (the "paramount purpose of the Commerce Act," *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 290) permeate § 9 no less than the other provisions. Pursuant to this view, this Court has held that whether complaint is filed with the Commission or suit is brought in court, the same period of limitation applies (*Phillips Co. v. Grand Trunk R. Co.*, 236 U. S. 662, 667); the cause of action accrues at the same time (*U. S. ex rel. Louisville C. Co. v. Interstate Commerce Comm'n*, 246 U. S. 638, 644); the same starting basis, a finding by the Commission on the administrative question, is required (*Texas & Pac. R. Co. v. Abilene Cotton*

Oil Co., 204 U. S. 426, 436-7, 441-2, 446); and the same rules of law prevail,—“ the rule of damages in one hardly can be different from that proper for the other.” *Louisville & N. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288, 291.

But to make certain that both methods of procedure will be controlled by the same rules of law and hence culminate in like final results, they must be construed as subject also to the same judicial machinery for correcting errors and mistakes.

The suit under § 16 (2) is an adjunct of the “ method of procedure ” before the Commission referred to in § 9, and part and parcel of that particular “ remedy.” It is a trial *de novo* of the action with the same corrective function, scope and power as the new trial in the alternative method of procedure in a District Court.

The suit is not on the award, as such. *Lewis-Simas-Jones Co. v. Southern Pacific Co.*, 283 U. S. 654, 661. It is for damages actually incurred by the plaintiff. The Commission’s findings and order are available as evidence. If they were regularly and properly promulgated (and it is so presumed until the contrary appears), they are conclusive so far as they determine the administrative questions, if any, in the case, but only *prima facie* correct so far as they determine the fact and amount of damages. *Mitchell Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 257-8. The plaintiff may show that the Commission erred in its mathematical calculations, in the formula used in arriving at the amount, and in the application of rules of law. *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 430.

In the § 16 (2) phase of the alternative method of procedure, which “ suit shall proceed in all respects like other civil suits,” the Commission’s report and order on amount of damages is like an auditor’s report. Cf. *Matter of Walter Peterson*, 253 U. S. 300, 311.

The § 16 (2) right of further procedure in a federal or state court is not the § 9 right of initial procedure in a federal court. The § 16 (2) suit *per se* is not either of the § 9 methods of procedure; it is merely supplemental to one of them and that one the method initiated by complaint to the Commission. Each method is the equal of the other in final results. *Pennsylvania R. Co. v. Clark Bros. Co.*, 238 U. S. 456, 472; *Standard Oil Co. v. United States*, 283 U. S. 236, 241.

While this Court has never directly and specifically decided the precise question here involved, it has sustained in one case a greater recovery than the Commission's award correctly computed, and has clearly intimated in other cases that the shipper's right of action and the District Court's jurisdiction are not limited in maximum amount to the Commission's award. *Pennsylvania R. Co. v. Jacoby Co.*, 242 U. S. 89, 99; *Pennsylvania R. Co. v. Weber*, 257 U. S. 85, 90-1. See *Pennsylvania R. Co. v. Clark Bros. Co.*, 238 U. S. 456, 472-3; *Pennsylvania R. Co. v. Minds*, 250 U. S. 368, 371-5; *Louisville & N. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288, 291.

If the administrative determination is delayed beyond the two-year period for bringing suit, the shipper must recover his damages before the Commission or not at all. A construction of § 16 (2) that in such cases the shipper is limited to the award, even though the amount was arrived at by error of law or mathematical computations, would be manifestly unjust.

Respondent was deprived of his right to a voluntary election of § 9 remedies in this case. He was compelled to proceed for damages before the Commission or not at all.

There is no implication in the decisions of this Court that a reparation order less in amount than the sum claimed is, as to the diminution, an unreviewable nega-

tive order. Discussing: *Standard Oil Co. v. United States*, 283 U. S. 235, 239; *Alton R. Co. v. United States*, 58 F. (2d) 399; 287 U. S. 229; *United States v. Interstate Commerce Comm'n*, 63 F. (2d) 358; *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 290.

Section 16 (3f) merely limits the time within which the "petition" referred to may be filed. Its ultimate purpose and effect are to extend the § 16 (3b) period of limitation in order to insure equality of treatment.

The questions whether respondent had a right of action for, and the District Court jurisdiction to grant recovery of, a greater amount than the Commission's award, are *res judicata*, having been determined by the decree in *Brady v. Interstate Commerce Comm'n*, 43 F. (2d) 847. *aff'd*, 283 U. S. 804.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This is an action brought by respondent in the federal district court for northern West Virginia against petitioners in consequence of their failure to comply with a reparation order of the Interstate Commerce Commission. It directed them to pay to plaintiff \$12,838.31 damages found to have been sustained by reason of undue prejudice to which they had subjected him in respect of furnishing cars for the transportation of coal from his mine. He sought judgment for \$57,735.11 together with interest, costs and an attorney's fee. Defendants demurred to the complaint generally and also specifically upon the ground that plaintiff was not entitled to recover more than the award. The demurrers were overruled and, issue having been joined, there was a trial by jury which resulted in a verdict and judgment in favor of plaintiff for \$63,048.60, not including attorney's fee, as to which all questions were reserved. The Circuit Court of Appeals affirmed. 61 F. (2d) 242.

There is no bill of exceptions,¹ and we are called on to decide whether the facts alleged in the complaint, of which the reports and order of the Commission are a part, are sufficient to sustain the judgment. The substance of plaintiff's claim as thus shown is as follows:

Between October 14, 1922, and April 1, 1923, he operated a coal mine on a branch of the Baltimore & Ohio railroad over which the Western Maryland had trackage rights. His mine was located between two mines operated by a competitor and served by both defendants. During that period there was a shortage of coal cars.

For the rating of, and the distribution of coal cars among, mines on their respective lines, each of the defendants established and maintained in force certain rules and regulations. These required that during periods of coal-car shortage the cars available for loading should be distributed pro rata among the mines in accordance with their ratings. They also permitted the operator of "any mine reached by two railroads to order 100 per cent or less of its rating from either of the said railroads, or to divide the orders between the two railroads in any way which the judgment of the operator dictated, provided the combined orders did not exceed 100 per cent of the rating of the mine; and the mine was entitled to receive its pro rata share of the available cars on the basis of such orders and to ship the coal loaded therein via the railroad which furnished the cars."

The Baltimore & Ohio furnished a smaller percentage of cars ordered than did the Western Maryland. Plaintiff's mine was being served exclusively by the former. Desiring to be served by the latter, he regularly ordered

¹ The district court found the proposed bill was presented out of time and refused to sign it. 56 F. (2d) 231. The Circuit Court of Appeals denied mandamus. 58 F. (2d) 627. This Court denied certiorari, *Baltimore & Ohio R. Co. v. Baker*, 287 U. S. 610.

from it 100 per cent. of his rating but with a single exception was furnished no cars. He complained to the defendants and was informed that his competitor was ordering 20 per cent. from the Baltimore & Ohio and 80 per cent. from the Western Maryland and that such a division of his orders would be acceptable to them. He rejected the offer, claiming the right to order from either or both as from time to time he might see fit. But he was denied the right so given his competitor.

He complained to the Commission that defendants thus subjected him to undue prejudice. The Commission so found.² And it held the case open to permit him to file a petition for further hearing as to the amount of damages, if any, sustained by him. 112 I. C. C. 244. And see 102 I. C. C. 19. Plaintiff upon such hearing claimed that the cost of mining the coal that he shipped had been increased \$9,283.14 and that his loss of profits was \$48,451.97, making a total of \$57,735.11. Defendants while denying liability did not controvert these figures. The Commission found that if plaintiff had accepted defendant's offer his increased mining costs would have been only \$2,225.49 and his loss of profits but \$10,612.82, making in all \$12,838.31, and that he was entitled to reparation in that amount together with interest. It directed that, within 60 days, defendants pay that sum. 152 I. C. C. 327. They refused to do so.

The complaint attacks the award on the ground that as a matter of law the Commission erred in ruling that in order to lessen his loss plaintiff was bound to accept de-

² "The acts and practices of defendants whereby they accorded Maryland service to the mines of the West Virginia Coal & Coke Company located on the Coalton branch of the B. & O. Railroad Company during the period from October 14, 1922, to April 1, 1923, while failing to accord similar service to complainant's mine located intermediate thereto resulted in undue prejudice to complainant in the matter of car supply." 112 I. C. C. 251.

endants' offer. It asserts that the reduction of his claim upon that ground was beyond the power of the Commission and therefore null and void.³

The Interstate Commerce Act declares it unlawful for a carrier to subject any person or traffic to any undue or unreasonable prejudice or disadvantage (§ 3) and imposes upon carriers liability for the full amount of damages sustained by any person in consequence of any such violation of the Act. § 8. A person so injured may either make complaint to the Commission or bring suit for damages in a district court; but he shall not have the right to pursue both remedies, and must elect which method he will adopt. § 9. If the Commission shall determine that complainant is entitled to an award of damages it shall make an order directing the carrier to pay to him the sum to which he is entitled on or before a day named. § 16 (1). If the carrier does not comply with such order, the complainant may file in the United States district court or in any state court a petition "setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be *prima facie* evidence of the facts therein stated." § 16 (2).

Questions as to the reasonableness of rules and regulations governing the distribution of coal cars in periods of shortage are for the Commission. And until found unreasonable by it, a shipper may not maintain an action in any court against a carrier upon the claim that any such rule or regulation was unreasonable and that through

³ Plaintiff brought suit against the United States and the Commission to secure a decree directing the Commission to correct its findings in respect of damages. The district court dismissed the bill, 43 F. (2d) 847, and this Court affirmed. 283 U. S. 804.

its enforcement he sustained loss or damage. *Morrisdale Coal Co. v. Penna. R. Co.*, 230 U. S. 304, 313. But if the rule, regulation or practice of the carrier is not attacked and the shipper's claim is grounded upon its violation or discriminatory enforcement, there is no administrative question involved. In such cases the court is required merely to decide whether the carrier has departed from its established standard. The decision does not concern the reasonableness or validity of the rule itself and it has no tendency against uniformity or other purpose of the Act. Suits for damages upon such grounds may be prosecuted without action or finding by the Commission. *Penna. R. Co. v. Puritan Coal Co.*, 237 U. S. 121, 131-134. *Ill. Cent. R. Co. v. Mulberry Coal Co.*, 238 U. S. 275, 282-283. *Penna. R. Co. v. Sonman Coal Co.*, 242 U. S. 120, 124.

The facts stated in the complaint clearly show that there was no question in this case requiring the exercise of the Commission's administrative powers. Plaintiff's mine was in the same class as the mines of its competitor. It was entitled to have a supply of cars from either or both defendants as it saw fit. Cf. *United States v. New River Co.*, 265 U. S. 533, 542. His claim for damages does not rest upon defendants' adherence to or enforcement of their rule but upon their refusal to furnish him cars in accordance with the rule. Therefore, without any prior action on the part of the Commission, plaintiff was entitled under §§ 8 and 9 to maintain an action at law for the full amount of damages sustained by him on account of the undue prejudice to which he claims to have been subjected by defendants.

But having elected to seek relief through the Commission, plaintiff is not entitled to recover more than the amount of the award.

This is not a suit authorized by § 9 but one brought under § 16 (2) because of defendants' refusal to comply with the Commission's order. Subject to the right of

contestation preserved by the Act (*Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 430) it is a suit for the enforcement of the award. § 16 (3) (f). *Lewis-Simas-Jones Co. v. Southern Pacific Co.*, 283 U. S. 654, 661. Section 16 (2) does not permit suit in the absence of an award, and if the Commission denies him relief, a claimant is remediless. *Standard Oil Co. v. United States*, 283 U. S. 235. *Brady v. United States*, 283 U. S. 804. *Bartlesville Zinc Co. v. Mellon*, 56 F. (2d) 154. No suit is permitted if the carrier pays the award. *Louisville & N. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288. Cf. *Penna. R. Co. v. Clark Coal Co.*, 238 U. S. 456. Plaintiff may not adopt the award as the basis of his suit and then attack it. Cf. *Mitchell Coal Co. v. Penna. R. Co.*, 230 U. S. 247, 258.

The fact that the Act merely makes the findings and report of the Commission *prima facie* evidence and so preserves the defendant's right to contest the award gives no support to plaintiff's contention that it does not bind him. It is to be remembered that, by electing to call on the Commission for the determination of his damages, plaintiff waived his right to maintain an action at law upon his claim. But the carriers made no such election. Undoubtedly it was to the end that they be not denied the right of trial by jury that Congress saved their right to be heard in court upon the merits of claims asserted against them. The right of election given to a claimant reasonably may have been deemed an adequate ground for making the Commission's award final as to him. Confessedly, it is final save when carriers refuse to pay within the time allowed. If by such a suit plaintiff may obtain a trial *de novo* or a revision of the award, the provisions of § 9 requiring election and prohibiting pursuit of both remedies would be set at naught in cases in which carriers refuse to pay and would be given effect in all other cases. There is no support for such a distinction. The

construction for which plaintiff contends cannot be sustained. He is bound by the award.

Defendants insist that plaintiff not only was limited in recovery by the amount of the award but that he suffered no discrimination. The latter contention is without merit. The allegations of the complaint comply with the requirements of § 16 (2) and are clearly sufficient to sustain a judgment against the defendants for the amount of the award together with interest, costs and a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

The judgment of the Circuit Court of Appeals is reversed. The case is remanded to the district court for proceedings in accordance with this opinion.

Reversed.

UNITED STATES v. DAKOTA-MONTANA OIL CO.

CERTIORARI TO THE COURT OF CLAIMS.

No. 434. Argued February 8, 1933.—Decided March 13, 1933.

Section 234 (a) (8) of the Revenue Act of 1926, provides that, in the case of oil wells, the taxpayer shall have, as a deduction from gross income, "a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions of each case," to be made under departmental rules and regulations. Section 204 permits the taxpayer to calculate depletion on the basis of cost alone, or else to deduct an arbitrary allowance, fixed by the statute, without reference to cost or discovery value, at 27½% of gross income from the well. *Held*, construing these in the light of earlier provisions and administrative construction, that the capitalized cost of drilling, as distinguished from cost of physical property such as machinery, tools, equipment, pipes, etc., is subject to depletion allowance and not to depreciation allowance. Pp. 460, 466.

59 F. (2d) 853, reversed.

CERTIORARI, 287 U. S. 591, to review a judgment against the United States on a claim for money collected as income taxes.