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Robert W. Ginnane

James A. Murray

JUDICIAL REVIEW OF ORDERS OF THE INTERSTATE COMMERCE COMMISSION RELATING TO MOTOR CARRIERS

ROBERT W. GINNANE* and JAMES A. MURRAY**

When, in 1935, Congress provided for federal regulation of interstate motor transportation by the Interstate Commerce Commission, it made applicable to the Commission's regulatory orders with respect to motor carriers the same system of judicial review which it had devised for orders relating to railroads in the Urgent Deficiencies Act of 1913.[1] This invoked not only the naked statutory review provisions but also, at least by analogy, the mass of judicial decisions applying the 1913 legislation to Commission orders involving railroads.[2]

The statutory provisions for review of orders of the Interstate Commerce Commission have been codified into Title 28 of the U.S. Code, sections 1253, 1336, 1398, 2284, 2321-2325 (1952). They have two principal features: (1) such orders are reviewed by a United States district court composed of three judges (with exceptions discussed below), and (2) from the judgment of the three-judge court a direct appeal lies to the Supreme Court.

In some respects, this system of review might be regarded as archaic. It was devised in 1913, upon the demise of the commerce court,[3] a year before Congress provided for the first time in the Federal Trade Commission Act of 1914[4] for review of administrative orders in the courts of appeals. Until 1950, certain orders of the Federal Communications Commission, the Maritime Commission and the Secretary of Agriculture were subject to judicial review in the same manner as orders of the Interstate Commerce Commission. However, the Act of December 29, 1950[5] transferred the review of

* General Counsel, Interstate Commerce Commission.
** Associate General Counsel, Interstate Commerce Commission.
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1. 38 Stat. 219 (1913), 28 U.S.C. § 47 (1940), now 28 U.S.C. § 2284 (1952).
2. The same system of judicial review was also made applicable when Congress subjected water carriers to federal regulation in 1940 and freight forwarders in 1942. See Interstate Commerce Act, 49 Stat. 543 (1935), 49 U.S.C. §§ 301-788 (1952) and 54 Stat. 899 (1940), 49 U.S.C. §§ 901-923 (1952).
3. For discussions of the creation and brief life of the Commerce Court, see I SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 60-70 (1931); and Frankfurter, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System: IV. Federal Courts of Specialized Jurisdiction,* 39 HARV. L. REV. 587, 594-615 (1926).
4. 38 Stat. 717 (1914), 15 U.S.C. § 45 (1952).
5. 64 Stat. 1129 (1950), 5 U.S.C. §§ 1031-1042 (1952).

orders of those three agencies to the courts of appeals, with review by certiorari in the Supreme Court. The further recommendation of the Judicial Conference of the United States to transfer review of ICC orders to the courts of appeals was not accepted by Congress.

The statutory provisions derived from the Urgent Deficiencies Act relate only to venue, parties, intervention, and organization and powers of the three-judge court. Such important matters as scope of review and standing to sue were left for evolution in judicial decisions. Since 1946, the judicial review of orders of the Commission (and other federal agencies) are also governed by the codifying principles of section 10 of the Administrative Procedure Act.[6]

Judicial review of an order of the Interstate Commerce Commission is evoked by the filing[7] of a complaint in the United States district court for the district in which the plaintiff (or one of several plaintiffs) has its residence or principal office.[8] The United States must be named as a defendant.[9] The Commission has a statutory right to intervene and appear through its own counsel, and it does so invariably. Under the rather broad provision for intervention,[10] other per-

6. 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1952).

7. Unlike the statutory provisions governing review of orders of some other agencies [see, *e.g.*, Securities Act of 1933], 48 Stat. 80 (1933), 15 U.S.C. § 77(1) (1952) (60 days)], there is no specific time limit within which review of ICC orders must be sought. Presumably, however, the doctrine of laches is applicable. United States *ex rel.* Arant v. Lane, 249 U.S. 367 (1919).

8. 28 U.S.C. 1398 (1952). A novel venue question has arisen recently in cases arising out of the reference to the Commission of issues relating to the reasonableness of motor carrier rates which have arisen in lawsuits between shippers and motor carriers. Recent decisions hold that a shipper has a cause of action against a motor carrier for the collection of unreasonable rates, and that such issues of reasonableness may be referred by the court to the Commission for a determination. United States v. T.I.M.E., Inc., 252 F.2d 178 (5th Cir. 1958); United States v. Davidson Transfer & Storage Co., D.C. Cir. April 24, 1958; *cf.* Montana-Dakota Util. Co. v. Northwestern Public Serv. Co., 341 U.S. 246 (1951). The question has been raised in several pending cases whether such a determination by the Commission can be reviewed only by the court which referred the matter to the Commission, or whether the party to the original suit as to whom the Commission's determination is adverse may obtain review of such determination in a separate suit brought in the district in which he has his principal residence or principal office. The question hinges at least in part on whether such a determination by the Commission as an incident to a judicial proceeding is a reviewable order apart from that proceeding.

9. 28 U.S.C. § 2322 (1952).

10. 28 U.S.C. § 2323 reads in part as follows:

> "The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.
>
> "Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.
>
> "The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may

sons who were parties to the proceeding before the Commission and who are benefited by its order, frequently intervene in the review proceedings as defendants in support of the order. The United States, the Commission and other defendants must file answers to the complaint within 60 days after service.[11] The utility of such answers is sufficiently indicated by the fact that they are not required in the similar proceedings in the courts of appeals to review orders of other agencies (*e.g.*, SEC).

The district judge to whom a complaint is presented must notify the chief judge of the court of appeals for that circuit, who in turn designates two additional judges (at least one of whom must be a court of appeals judge) to constitute with the first judge a three-judge court.[12] Any one of the three judges may enter procedural orders, including temporary restraining orders, subject to review by the full court at any time before final hearing. However, a single judge may not "hear or determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment."[13]

A single judge may issue an order temporarily restraining or suspending the operation of the Commission's order. While the statute contemplates that such a restraining order will remain in effect only until the full court can hear and determine an application for an interlocutory injunction, in actual practice such orders may, if the parties do not object, remain in effect until the hearing or decision on the merits. Under the statute, a temporary restraining order issues "to prevent irreparable damage," and must "contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted."[14] A restraining order cannot operate to require

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prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein."

11. FED. R. CIV. P. 12(a).

12. 28 U.S.C. § 2284(1) (1952).

13. 28 U.S.C. § 2284(5) (1952). These provisions for the constitution of a three-judge court require strict compliance. Thus, Ayrshire Collieries Corp. v. United States, 331 U.S. 132 (1947) held that where one of the three judges died between hearing and decision, the remaining were without power to proceed until the court was reconstituted with three judges. Also, the judge to whom the case is first presented must be a member of the three-judge court. Thus, in several cases in which a district judge issued a temporary restraining order while assuming that he would not participate further in the case, it was necessary for counsel to urge upon him that the statute required his inclusion in the three-judge court.

14. 28 U.S.C. § 2284(3) (1952). The standard would appear to be the same under the interim relief provisions of section 10(d) of the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (d) (1952), which provides as follows:

"(d) Relief Pending Review. Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required

the Commission to grant temporarily a certificate or permit which it has denied. On the other hand, such orders have been issued to restrain or suspend the operation of cease and desist orders and general regulations such as the Commission's leasing rules.

In some cases, temporary restraining orders, where issued, are issued ex parte, without opportunity for the United States, the Commission, or interested private parties to oppose. In the opinion of the authors, this practice leads to abuses where an order so issued remains in effect for months. Under rule 65(b) of the Federal Rules of Civil Procedure, a restraining order issued ex parte can remain in effect for only 10 days unless extended by the judge for another 10 days. While there is disagreement as to whether and to what extent the Federal Rules of Civil Procedure apply to these review proceedings, the policy of rule 65(b) is sound and should be applied by analogy, as it already is by some district judges. In any event, the offhand issuance of temporary restraining orders is clearly inconsistent with the express limitation of the statute and with any presumption that the Commission's order is valid.[15]

While the statute is silent as to the record on review, the settled practice requires the plaintiff to file with the court such portions of the record as he deems essential and has certified by the Secretary of the Commission.[16] Printing of the record is not required. If the plaintiff does not file with the court the evidence submitted to the Commission, it may not attack the Commission's findings as unsupported by the evidence.[17] However, to the extent that the issues raised by a com-

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and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings."

15. Some lawyers appear to believe that the Commission will always suspend the effectiveness of its own order upon the informal request or suggestion of the court. As a general proposition, this is not correct. While the Commission desires to cooperate with the courts, it will not voluntarily suspend an important order which in its opinion involves no novel issues, nor will it voluntarily suspend an order which directly affects other private parties who desire to be heard by the court in opposition to the application for a restraining order.

16. This practice thus differs from the procedure under statutes providing for review of Federal administrative orders in the Courts of Appeals which typically require the agency to file with the reviewing court a certified record of its proceedings. Where, as in the review of ICC orders, the statute is silent as to who shall file the record, the plaintiff has the burden. See FED. R. CIV. P. 44.

The original transcript and original exhibits in a Commission proceeding are public records retained in the Commission's Washington office where they are available for public inspection. Accordingly, a plaintiff must produce his own copy of the record and obtain the certification of the Secretary that it is a true copy.

17. Mississippi Valley Barge Co. v. United States, 292 U.S. 282, 286 (1934).

plaint are limited, it is sometimes possible for the parties to stipulate for the filing of less than the full record.

The hearing before the three-judge court is not a trial but an appellate argument exactly as in the courts of appeals. The review is upon the record made before the Commission without the introduction of other evidence. No issue may be raised before the court which the complainant did not raise before the Commission.[18] Since the district court rules are designed for trials rather than judicial review of administrative orders, there are no general rules governing the filing of briefs in cases before the three-judge courts. Ordinarily, the court will fix a date for the exchange and filing of briefs or, if the parties request it, separate dates for plaintiffs', defendants', and reply briefs.

From the decision of a three-judge court, any party may appeal directly to the Supreme Court.[19] Such an appeal must be taken within 60 days from the final judgment appealed from, unless it holds unconstitutional all or part of an act of Congress in which case the appeal must be taken within 30 days.[20] The procedure for appeal is governed by the Revised Rules of the Supreme Court of the United States and will not be discussed here.[21]

However, it is worth noting that what appears to be a direct appeal as of right to the Supreme Court (as distinguished from the Court's discretionary certiorari jurisdiction) no longer means that the appellant will receive an opportunity for full briefing and oral argument in that Court, to be followed by the Court's reasoned opinion. Rule 16 of the Supreme Court's Rules expressly provides for the filing of a motion to affirm after an appellant has filed his jurisdictional statement. In such a motion, the appellee seeks to demonstrate that the lower court's decision is both correct and lacking in sufficient importance to warrant plenary consideration by the Supreme Court. If a motion to affirm is granted, the Supreme Court enters a simple order that "The motion to affirm is granted and the judgment is affirmed."[22] At least half of the appeals to the Supreme Court from the judgment of three-judge courts are disposed of by such summary affirmances.[23] This procedure is simply one of the ways by which the Supreme Court conserves its time and energies for the significant cases. To this extent, direct appeals have been analogized to the dis-

18. United States v. Capital Transit Co., 338 U.S. 286 (1949); Tucker Truck Lines, Inc. v. United States, 344 U.S. 33 (1952).
19. 28 U.S.C. § 1253 (1952).
20. 28 U.S.C. § 2101 (a), (b) (1952).
21. A detailed discussion of the procedure for direct appeals to the Supreme Court appears in STERN & GRESSMAN, SUPREME COURT PRACTICE Part VI (2d ed. 1954).
22. See, *e.g.*, United States v. Watson Bros. Transportation Co., 350 U.S. 927 (1956).
23. STERN & GRESSMAN, *op. cit. supra* note 21, at 233-236.

cretionary review by certiorari. However, it has left lower courts and lawyers wondering whether greater weight attaches to a lower court decision which is thus summarily affirmed than to one as to which the Supreme Court has denied a petition for a writ of certiorari.

REVIEWABLE ORDERS

Generally, any final order of the Commission in motor carrier matters is subject to judicial review at the suit of persons who have standing to institute and maintain such actions. Thus an order from which there is available no further administrative recourse and which requires a person to do or refrain from doing something, or which grants or denies an application for a certificate, permit or license, or which grants or denies a claimed right or privilege, is reviewable. Certain actions taken by the Commission are so discretionary in nature that they are reviewable, if at all, only on the issue of whether the Commission has acted arbitrarily or capriciously. Examples of orders of this class are orders granting or denying temporary authorities under section 210(a) and orders suspending or refusing to suspend proposed new rates under section 216(g).[24]

Section 17(9) of the Interstate Commerce Act provides, in substance, that the matter must have been passed upon by an ultimate Commission authority, either the entire Commission or an appellate division, before the matter is subject to judicial review. The courts have dispensed with this requirement in only a few cases in which division orders would have become operative before the petition for reconsideration could be acted upon.[25]

Some interesting questions have arisen as to the reviewability of certain types of declaratory and interpretative orders which the Commission issues with respect to motor carriers. Section 5(d) of the Administrative Procedure Act provides that in cases of "adjudication" "The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty."[26] The Interstate Commerce Commission probably has made a more extensive use of declaratory orders than any other federal agency.[27] At the same time, the Commission has asserted a power independent of section 5(d) to issue formal interpretations of the act and of rights and duties under the

24. See, *e.g.*, Bowen Transports, Inc. v. United States, 116 F.Supp. 115 (E.D. Ill. 1953).

25. Pacific Inland Tariff Bureau v. United States, 129 F. Supp. 472 (D. Ore. 1955); Cantlay & Tanzola, Inc. v. United States, 115 F. Supp. 72 (S.D. Cal. 1953).

26. See DAVIS, ADMINISTRATIVE LAW 172-74 (1951), for a discussion of the problems in determining the applicability of § 5(d).

27. American Barge Line Co., 294 I.C.C. 796 (1955); Arizona Sand & Rock Co. v. Southern Pac. Co., 280 I.C.C. 285 (1951).

act, which are difficult to distinguish from declaratory orders as such.[28]

Starting with *United States v. Los Angeles & Salt Lake R.R.*,[29] one might conclude that such declaratory and interpretative orders were not reviewable. In that case, the Supreme Court held unreviewable an order issued by the Commission under section 19(a) stating a valuation for a railroad's property. Rejecting the railroads' contention that the valuation order affected its credit, the Court pointed out that if the valuation was later used adversely to the carrier in a specific situation, such as the fixing of its rates, it could then challenge the valuation. In so holding, the Supreme Court, speaking through Justice Brandeis, made the famous statement that:

> The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation.[30]

Taking the quoted language literally, it would seem that neither declaratory nor interpretative orders would be reviewable since they do not in terms prohibit or require action by anyone.

However, it is generally accepted that the strict standard of reviewability of the *Los Angeles* case was relaxed in the Supreme Court's 1942 decision in *Columbia Broadcasting System, Inc. v. United States*,[31] holding that the FCC's chain broadcasting regulations were reviewable at the suit of broadcasting systems whose contracts with individual stations probably would be affected by the impact of the regulations upon the latter. Accordingly, when a suit was brought before a three-judge court attacking the Interstate Commerce Commission's determination[32] that the motor transportation of many commodities was or was not exempt from economic regulation under section 203(b)(6),[33] the Commission conceded that its determination was reviewable, by analogy to declaratory orders, although it did not in words prohibit any persons from engaging in transportation inconsistent with the determination, and any defendant could contend to

28. Atlantic Freight Lines, Inc., 51 M.C.C. 175, 185 (1949).
29. 273 U.S. 299 (1927).
30. *Id.* at 309.
31. 316 U.S. 407 (1942).
32. Determination of Exempted Agricultural Commodities, 52 M.C.C. 511 (1951).
33. 49 Stat. 544 (1938), 49 U.S.C. § 203(b)(6) (1952).

the contrary in an enforcement action brought by the Commission. The Supreme Court sustained the Commission's view that carriers transporting commodities which the Commission held non-exempt should be able to challenge a holding which if correct exposed them to civil or criminal sanctions.[34]

While section 5(d) of the Administrative Procedure Act is silent as to whether declaratory orders shall be subject to judicial review, the reports of the Senate and House Judiciary Committees on that act specifically indicate a purpose to make declaratory orders reviewable; also, the *Frozen Food Express* case strongly indicates that they are reviewable.

In considering the reviewability of interpretations, a line must be drawn between informal interpretations, frequently in the form of letters signed by employees of the Commission, which clearly are no more reviewable than are press releases, and formal interpretations made by the Commission itself under circumstances which make them indistinguishable as a practical matter from formal declaratory orders. For example, motor carriers occasionally request the Commission to formally interpret the scope of their certificates or permits—usually as the result of a disagreement with the Commission's staff or with competing carriers. Where the Commission does this, as it occasionally does, with or without a hearing, the impact upon the carrier, if adverse to his claim, in terms of his credit and relations with shippers is indistinguishable from that of a formal declaratory order to the same effect. Such an interpretation is issued in the form of a regular report or opinion of the Commission, but is not accompanied by an order prohibiting or requiring action. Nevertheless, the law is unsettled (unless it was settled by *Frozen Food Express*) as to whether such interpretations by the Commission are reviewable actions.

We should mention briefly that orders of the Commission which were admittedly reviewable when issued, do not necessarily remain subject to challenge in later judicial proceedings to review a later and in some way related order. While it is often said that such orders are not subject to collateral attack, comprehensive principles have not been developed fully. However, the Supreme Court has held that the transferee of a certificate may not contend that the Commission erred in the antecedent "grandfather" certificate issued to the transferor.[35] Similarly, it has been held that a motor carrier which has been ordered by the Commission to cease and desist from operations in excess of its grandfather certificate may not attack the cease and de-

34. Frozen Food Express v. United States, 351 U.S. 40 (1956).

35. Callanan Road Improvement Co. v. United States, 345 U.S. 507, 512-13 (1953).

sist order upon the ground that the Commission should have issued a broader certificate.[36]

WHO MAY MAINTAIN SUITS TO REVIEW ORDERS OF THE COMMISSION

Suits to enjoin, set aside, annul, or suspend final orders of the Commission in motor carrier matters may be instituted and maintained by "any party in interest."[37] Section 205(g) of the Interstate Commerce Act states:

> Any final order made under this part shall be subject to the same right of relief in court *by any party in interest* as is now provided in respect to orders of the Commission made under chapter 1. . . . (Emphasis added.)

Neither the Interstate Commerce Act nor the applicable judicial review provisions in Title 28 of the United States Code[38] contain any explanation as to who is a "party in interest." This phrase had previously been used in section 1(20) of the act in reference to suits to enjoin the construction or abandonment of a line of railroad without approval of the Commission.

Section 10(a) of the Administrative Procedure Act states:

> (a) Right of Review. Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.[39]

The Attorney General, in commenting on the meaning of this provision of the Administrative Procedure Act, stated:

> Section 10(a): Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review of such action. This reflects existing law. In *Alabama Power Co. v. Ickes* (302 U.S. 464), the Supreme Court stated the rule concerning persons entitled to judicial review. Other cases having an important bearing on this subject are: *Massachusetts v. Mellon* (262 U.S. 447), *The Chicago Junction Case* (264 U.S. 258), *Sprunt & Son v. United States* (281 U.S. 249), and *Perkins v. Lukens Steel Co.* (310 U.S. 113). An important decision interpreting the meaning of the terms "aggrieved" and "adversely affected" is *Federal Communications Commission v. Sanders Bros. Radio Station* (309 U.S. 470).[40]

It will be observed that the Administrative Procedure Act states that two classes of persons are entitled to judicial review: (1) those

36. Andrew G. Nelson, Inc. v. United States, 355 U.S. 554, 561-62 (1958).
37. 49 Stat. 548 (1938), 49 U.S.C. § 205(g) (1952).
38. 62 Stat. 931, 936, 968, 969, 970 (1948), 28 U.S.C. §§ 1336, 1398, 2284, 2321-2325 (1952).
39. 60 Stat. 243 (1946), 5 U.S.C. § 1009(d) (1952).
40. S. Doc. No. 248, 79th Cong. 2d Sess. 230 (1946).

suffering legal wrong because of agency action and (2) those adversely affected or aggrieved by such action within the meaning of any relevant statute. The first category would include applicants who claim that they have been illegally denied certificates to engage in motor carrier operations and carriers who contend they have been required to perform service at rates so low that their property is being taken for public use. These are persons who can assert that the Commission's order requires that they do or refrain from doing something contrary to law. All other persons, such as shippers, passengers, competing carriers, connecting carriers, community and business associations, may be entitled to judicial review if, within the meaning, plan, and purpose of the particular statute involved, protection is intended to be extended or rights are given to such persons as to the matters in issue. If so, they are adversely affected or aggrieved parties.

While the statutes do not give specific content to either the phrase "any party in interest" as used in the Interstate Commerce Act or the right of review provisions of the Administrative Procedure Act, it appears that the meaning given to the former provision by the various court decisions is entirely consistent with the meaning of the Administrative Procedure Act provision. The meaning of these provisions can best be gathered from the decisions.

Orders of the Commission in motor carrier proceedings under various provisions of part I of the Interstate Commerce Act (including section 5 relating to combinations and consolidations of carriers, and section 5(a) relating to agreements between carriers) and other statutes (other than the Clayton Act) are reviewable in accordance with section 17(9) under 28 United States Code, sections 1336, 1398, 2284 and 2321-2325. These provisions do not include any mention that only a party in interest may obtain such review, but the courts have consistently required a showing of interest.[41] In fact, as pointed out by the Attorney General, section 10(a) of the Administrative Procedure Act was intended to codify the existing law as previously developed by the courts. Many of the court decisions in which this law was developed were decisions in cases involving orders of the Interstate Commerce Commission. Orders of the Commission issued under the Clayton Antitrust Act,[42] are reviewable in United States courts of appeals in accordance with the procedure prescribed in section 21 of that title.

An action for the review of any order of the Commission which is reviewable, may be instituted and maintained by the person to whom

41. The Chicago Junction Case, 264 U.S. 258, 266-71 (1924); Edward Hines Yellow Pines Trustees v. United States, 263 U.S. 143, 148 (1923).
42. 38 Stat. 730 (1914), 15 U.S.C. §§ 12-27 (1952).

the order is addressed, whether the order requires the person to do or refrain from doing something or whether it disposes of an application for the granting of a privilege or right or for relief from some requirement. This seems to be so obvious and accepted as not to require the citation of cases. These persons, with few exceptions, are carriers since carriers are the principal classes of persons subject to regulation by the Commission.[43]

In some not so recent cases, the Supreme Court has indicated that being a party to the proceeding before the Commission may establish a party's interest for the purpose of seeking judicial review.[44] Later decisions have discounted the effect of participation in Commission proceedings upon the right to seek judicial review. In *Pittsburgh & W. Va. Ry. v. United States,*[45] for example, in holding that the Pittsburgh & West Virginia Railway was without standing, the Court stated:

> The District Court held that the appellant was entitled to bring this suit under the Urgent Deficiencies Act to set aside the order, because it had intervened in the proceedings before the Commission, and because it is a connecting carrier and a minority stockholder of the Wheeling. The court erred in so holding. The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened legal injury to it, *Alexander Sprunt & Son v. United States, ante* p. 249.[46]

A carrier whose operations will be competitive with a motor carrier operation proposed to be established under a certificate or permit to be issued by the Commission is a party in interest and entitled to institute an action to set aside the order granting the certificate. The leading case on this point is *Alton R.R. v. United States.*[47] This point was discussed on pages 18-21 of the Court's opinion, as follows:

> Each is a common carrier and a competitor of Fleming in some portion of the territory which Fleming is authorized to serve. They rest their right to sue on § 205(h) [now 205(g)] of the Motor Carrier Act (49 U.S.C. Supp. § 305(h)) which provided that "Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under part I . . ." . . . Hence we conclude that § 205(h) has incorporated by reference the "party in interest" provision of § 1(20). We do not stop to inquire what effect, if any, the status of appellant railroad companies

43. Persons, other than carriers, who may be subject to orders of the Commission include brokers of motor carrier transportation subject to section 211, persons described in section 5(3) authorized to control two or more carriers, and certain associations and other persons mentioned in section 220.
44. See, *e.g.*, The Chicago Junction Case, 264 U.S. 258, 267-68 (1924).
45. 281 U.S. 479 (1930).
46. *Id.* at 486. See also Moffat Tunnel League v. United States, 289 U.S. 113 (1933); Alexander Sprunt & Son, Inc. v. United States, 281 U.S. 249 (1930).
47. 315 U.S. 15 (1942).

> as intervenors before the Commission had on their right to bring and maintain this suit. Cf. *Chicago Junction Case,* 264 U.S. 258, with Pittsburgh & West Virginia Ry. Co. v. United States, 281 U.S. 479. They clearly have a stake as carriers in the transportation situation which the order of the Commission affected. They are competitors of Fleming for automobile traffic in territory served by him. They are transportation agencies directly affected by competition with the motor transport industry—competition which prior to the Motor Carrier Act of 1935 had proved destructive. S. Doc. No. 152, 73d Cong. 2d Sess., pp. 13-27. They are members of the national transportation system which that Act was designed to coordinate. S. Rep. No. 482, 74th Cong., 1st Sess., H. Rep. No. 1645, 74th Cong. 1st Sess. Hence they are parties in interest within the meaning of § 205(h) under the tests announced in *Texas & Pacific Ry. Co. v. Gulf, C. & S.F. Ry. Co.,* 270 U.S. 266; *Western Pacific California R. Co. v. Southern Pacific, Co.,* 284 U.S. 47; and *Claiborne-Annapolis Ferry Co. v. United States, supra.*

Interest of a carrier in activities of another carrier, not amounting to a competitive interest, may not be sufficient to constitute it a party in interest.[48] In *Interstate Commerce Comm'n v. Chicago, Rock Island & Pac. R.R.,*[49] involving rate relationships between various localities, the Court said:

> That the companies [railroads] may complain of the reduction made by the Commission so far as it affects their revenues is one thing. To complain of it as it may affect shippers or trade centers is another. We have said several times that we will not listen to a party who complains of a grievance which is not his.[50]

Singer & Sons v. Union Pacific R. Co.,[51] involved a suit by certain produce and food merchants in Kansas City, Missouri, to enjoin an alleged unlawful extension of a railroad to serve a competing produce and food market in Kansas City, Kansas. In holding that the complainants were without standing to maintain the suit, the court commented on the subject of "interest" as follows:

> The Transportation Act, 1920, was designed to protect the public against action which might endanger its interest. In order to aid that general purpose, Paragraph 20, § 402, provided that suit for an injunction may be instituted by the United States, the Commission (I.C.C.), any Commission or Regulative Body of the state or states affected, or any "party in interest." Such a suit cannot be instituted by an individual unless he "possesses something more than a common concern for obedience to law." The general or common interest finds protection in the permission to sue granted to public authorities. An individual may have some special and peculiar interest which may be directly and materially affected by alleged unlawful action. See *Detroit & M. Ry. Co. v. Boyne City, G. &*

48. Pittsburgh & W. Va. Ry. v. United States, 281 U.S. 479 (1930); Interstate Commerce Comm'n. v. Chicago, Rock Island & Pac. R.R., 218 U.S. 88 (1910).
49. 218 U.S. 88 (1910).
50. *Id.* at 109.
51. 311 U.S. 295 (1940).

> *A.R. Co.*, 286 F. 540. If such circumstances are shown he may sue; he is then "party in interest" within the meaning of the statute. In the absence of these circumstances he is not such a party.
>
> We cannot think Congress supposed that the development and maintenance of an adequate railway system would be aided by permitting any person engaged in business within or adjacent to a public market to demand an injunction against a carrier seeking only to serve a competing market by means of an extension not authorized by the Interstate Commerce Commission.
>
> The right to sue under the statute is individual. Petitioners are not helped by uniting.[52]

Section 17 (11) of the Interstate Commerce Act specifically authorizes representatives of employees of a carrier, duly designated as such, to intervene and be heard in any proceeding affecting such employees. This right is particularly necessary for purposes of the protection of the interest of employees as provided in section 5 (2) (f) in case of the unification or merger of carriers.

A carrier has standing to obtain judicial review of an order of the Commission allowing its competitor to establish reduced rates. Said the court in *Pacific Inland Tariff Bureau v. United States*:[53]

> By permitting the railroads to reduce their rates, the Commission has, in effect, required the motor carriers to reduce their rates. To deny the motor carriers the opportunity to have such rates judicially reviewed is indistinguishable in practice from a denial of an opportunity to challenge rates directly imposed upon them.[54]

Shippers are entitled to maintain actions to review orders prescribing rates which they will be compelled to pay, at least if the basis of the complaint is the lawfulness of those rates. On the other hand, a shipper is not always entitled to contest an order prescribing rates which his competitor will pay. A case in which the latter situation was discussed is *Alexander Sprunt & Son, Inc. v. United States*.[55] The railroads maintained two sets of rates on cotton to Gulf ports; an export or ship-side rate, and a domestic or city delivery rate. The former was 3½ cents higher than the latter. The 3½ cents per 100 pounds rate represented the usual drayage cost from uptown warehouses to the water front. Sprunt & Son had a water front warehouse, however, and was able to have cotton delivered to its warehouse at the domestic rate. Because of its location it did not incur any expense for drayage to the water front. The railroads did not contest this change but Sprunt & Son brought suit to have the Commission's order set aside. In holding that Sprunt lacked standing to maintain the action, the Court said:

52. *Id.* at 303.
53. 129 F. Supp. 472 (D. Ore. 1955).
54. *Id.* at 477.
55. 281 U.S. 249 (1930).

> In the case at bar, the appellants have no independent right which is violated by the order to cease and desist. They are entitled as shippers only to reasonable service at reasonable rates and without unjust discrimination. If such service and rates are accorded them, they cannot complain of the rate or practice enjoyed by their competitors or of the retraction of a competitive advantage to which they are not otherwise entitled.[56]

A parent corporation was not a party in interest entitled to maintain an action to set aside an order of the Commission denying a permit to its wholly owned subsidiary.[57]

A stockholder may maintain a suit to set aside an order of the Commission affecting the corporation only if he can show some possibility of direct injury to him other than that common to all stockholders. In *Alleghany Corporation v. Breswick & Co.*[58] the Court said:

> We find that appellees do have standing to challenge these orders. This is not a case where "the order under attack does not deal with the interest of investors," or where the "injury feared is the indirect harm which may result to every stockholder from harm to the corporation." *Pittsburgh & W. Va. R. Co. v. United States*, 281 U.S. 479, 487. The appellees are common stockholders of Allegheny. The new preferred stock issue approved by the Commission is convertible, and under relevant notions of standing, the threatened "dilution" of the equity of the common stockholders provided sufficient financial interest to give them standing. See *American Power & Light Co. v. SEC.*, 325 U.S. 385, 388-389.

SCOPE OF JUDICIAL REVIEW

We shall not attempt to discuss here the many and often subtle questions which arise as to the scope of judicial review, i.e., the standards to be applied by the courts in sustaining or setting aside orders of the Interstate Commerce Commission. These matters are the subject of an immense periodical and text literature and of innumerable court decisions. Moreover, the Code of Administrative Procedure proposed by the American Bar Association renews an old controversy as to how far reviewing courts should go in substituting their conclusions for those of regulatory agencies.

The statutory provisions which originated in the Urgent Deficiencies Act of 1913 for judicial review of orders of the Commission are entirely silent as to the scope of judicial review. Nevertheless, long before the beginning of federal motor carrier regulation in 1935, the federal courts had applied to orders under Part I of the Interstate Commerce Act (dealing with railroads) the general principles (developed in large part by the courts) governing the judicial review of federal regulatory orders generally. Briefly stated, an order issued

56. *Id.* at 255.
57. Schenley Distillers Corp. v. United States, 326 U.S. 432 (1946).
58. 353 U.S. 151, 159-60 (1957).

after a formal hearing will be sustained by the courts if (1) it is within the Commission's statutory powers, (2) it is supported by adequate findings or reasons which are based upon substantial evidence, and (3) it is issued after proceedings which satisfy the procedural requirements of due process of law and of the Interstate Commerce Act. These principles as to the scope of review have been codified in section 10 of the Administrative Procedure Act of 1946 with the addition that orders must have been issued after proceedings which comply with the procedural requirements of that act. These principles govern the judicial review of the Commission's orders in motor carrier matters. Indeed, the courts have developed what amounts to a common law of judicial review which is applied to federal regulatory orders generally.

Motor carrier proceedings before the Commission do not typically involve disputed issues of evidentiary fact in the sense that the Commission must resolve conflicting testimony. Rather, in most cases, the basic facts are largely undisputed, so that the disputed matters relate to ultimate issues as to whether "public convenience and necessity" requires additional motor carrier service, whether rates are "just and reasonable" or whether a merger of carriers is "consistent with the public interest." These broad standards obviously vest in the Commission a fairly broad discretion.[59] At the same time, they invoke the various and sometimes overlapping objectives of the national transportation policy.

It would be a mistake to assume that the courts cannot forge out of such broad standards plus the national transportation policy an effective check against erroneous administrative action. It is true that courts will not substitute their judgment for that of the Commission in the application of such broad standards. To the contrary, the courts have reiterated that when Congress employs such concepts as "public convenience and necessity" or "consistent with the public interest" it intends to place in the regulatory agency primary responsibility to apply them in the exercise of specialized and informed judgment.

Nevertheless, reviewing courts can and do exercise a pervasive influence upon administrative action through requirements as to the findings necessary to support particular types of orders. Sometimes a requirement of findings may mean no more than that the Commission must recite, consider and discuss in its report the effect of its action upon, for example, competing carriers. In other cases, a requirement of findings will mean that the Commission may not act unless it finds that specific facts or circumstances exist. Similarly,

59. Interstate Commerce Comm'n. v. Parker, 326 U.S. 60, 65 (1945); McLean Trucking Co. v. United States, 321 U.S. 67, 87 (1944).

the courts have held that certain types of orders must be based upon specific findings by the Commission in relation to the broad objectives of the national transportation policy.[60]

It is impossible to catalogue the various types of orders issued by the Commission in terms of findings the absence of which will result in reversal by the courts. This is because the required findings vary not only with the statutory provisions involved, but also with the issues raised by the parties in pleadings, evidence and argument. Nevertheless, one of the most frequent grounds upon which courts have set aside orders of the Commission has been the inadequacy of its findings.

60. Schaffer Transp. Co. v. United States, 355 U.S. 83 (1957); Cantlay & Tanzola, Inc. v. United States, 115 F. Supp. 72 (S.D. Cal. 1953).