COMMENTS

THE DOCTRINE OF PRIMARY JURISDICTION
AND THE T.I.M.E. CASE

The doctrine of primary jurisdiction, in Administrative Law, has generally meant that an administrative agency, rather than a court, must decide questions dependent upon factors peculiarly within the competence of the agency, even where the questions arise in judicial proceedings.1 When the questions do arise in judicial proceedings, courts have stayed the proceedings and referred the administrative questions to the agency.2 The Supreme Court decision in *T.I.M.E. v. United States*,3 however, requires a re-examination of traditional thinking about primary jurisdiction. Commentators have generally either attacked the *T.I.M.E.* decision or have ignored its treatment of the doctrine of primary jurisdiction.4 The purpose of this Comment is to show that the Court may have been technically correct in its decision and that the result is defensible on policy grounds.

1 Where for example, the reasonableness of rates charged by a common carrier is in issue, the question cannot be decided by a court but must be left to the administrative agency, since reasonableness of rates involves technical factors of cost, kind of service, and competition, plus attention to a uniform national transportation policy. See generally United States v. Western Pacific R.R., 352 U.S. 59 (1956), and Texas & P. R.R. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

The doctrine as it has broadly been understood is perhaps summarized in the following statement: "In cases raising issues of fact not within the conventional experience of judges or cases requiring exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequence to be judicially defined." Far East Conference v. United States, 342 U.S. 570, 574 (1952).

It has been further said that "in certain kinds of litigation practical considerations dictate a division of functions between court and agency under which the latter makes a preliminary comprehensive investigation of all the facts, analyzes them, and applies the statutory scheme. . . . It is recognized that the courts, while retaining the final authority to expound the [regulatory] statute, should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshalling them into a meaningful pattern." Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481, 498 (1958).

The thrust of these statements is perhaps that the doctrine's "precise function is to guide a court in determining whether the court should refrain from exercising jurisdiction until after an administrative agency has determined some question or some aspect of some question arising in the proceeding before the court." Davis, *Administrative Law Treatise* § 19.01 (1958).


4 See the following Notes: 33 So. Cal. L. Rev. 97 (1959); 28 U. Cinc. L. Rev. 512 (1959); 73 Harv. L. Rev. 213 (1959); 11 Syracuse L. Rev. 128 (1959); 14 Rutgers L. Rev. 205 (1959); 28 Fordham L. Rev. 544 (1959); 7 U.C.L.A.L. Rev. 117 (1960).
The Court held first that the requirement of reasonable rates imposed upon carriers by the Motor Carrier Act did not give shippers a justiciable right to such rates. This holding rested upon the analogous authority of *Montana-Dakota Utility Co. v. Northwestern Pub. Serv. Co.*, and upon the Court's construction of the Motor Carrier Act. *Montana-Dakota* involved the Federal Power act. The Court dismissed a suit for recovery of alleged unreasonable charges and refused to refer the issue of reasonableness to the Federal Power Commission. The plaintiff in *Montana-Dakota* argued that since the Federal Power Act, like the Motor Carrier Act, declares unreasonable rates unlawful, the charging of unreasonable rates gave rise to a cause of action. The Court held that the mere requirement of reasonable rates in the Federal Power Act established a "criterion for administrative application in determining a lawful rate," rather than a justiciable right to reasonable rates. This conclusion was extended to the Motor Carrier Act in *T.I.M.E.*

The Court further pointed out in *T.I.M.E.* that the Motor Carrier Act contains no provision making carriers liable to injured parties for doing anything declared unlawful by the act or for failing to do anything required by the act. Part I of the Interstate Commerce Act, regulating railroads, however, makes railroads liable for violating the statutory duty of charging reasonable rates. The Motor Carrier Act is Part II of the Interstate Commerce Act, and is closely related to the railroad provisions of Part I. Under these circumstances, the Court correctly denied that reasonable motor carrier rates are a justiciable right of shippers. A decision that a shipper has a justiciable right to reasonable rates under the Motor Carrier Act would have implied that the liability provisions of the railroad section of the Interstate Commerce Act are surplusage.

I

The Court also held that under the doctrine of primary jurisdiction as announced in *Texas & P. R. R. v. Abilene Cotton Oil Co.*, no common law remedy for unreasonable rates survived passage of the Motor Carrier Act. This part of the *T.I.M.E.* opinion invites inquiry. In previous cases, the Court had stated

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*49 Stat. 558 (1935), 49 U.S.C. § 316(b) (1958): "It shall be the duty of every ... [motor] carrier ... to establish, observe, and enforce just and reasonable rates. ..."*

*341 U.S. 246 (1951).*

*41 Stat. 1073 (1920), 16 U.S.C. § 791 (1958).*

*359 U.S. 464 (1959).*


"We find it impossible to impute to Congress an intention to give such a right to shippers under the Motor Carrier Act when the very sections which established that right in Part I were wholly omitted in the Motor Carrier Act." *T.I.M.E. v. United States*, 359 U.S. 464, 471 (1959).

*204 U.S. 426 (1907).*
that there was a shipper's remedy at common law. This assumption has been attacked as fallacious, and indeed, the Court has never cited a case resting on the existence of such a remedy. Nevertheless, T.I.M.E. proceeded upon the assumption that the remedy did exist. In effect, the Court held that the doctrine of primary jurisdiction extinguished the common law remedy. According to the Court, Abilene held that "because under the statutory scheme only the ICC could decide in the first instance whether any filed rate was 'unreasonable' ... any common-law right was necessarily extinguished as 'absolutely' inconsistent with recognition of the Commission's primary jurisdiction." Thus, a "common-law right of action to recover unreasonable common carrier charges is incompatible with a statutory scheme in which the courts have no authority to adjudicate the primary question in issue. . . ."

This construction of Abilene moved the dissenters in T.I.M.E. to observe that the doctrine of primary jurisdiction had not previously operated as the majority was using it. Those commentators who have recognized the issue have agreed with the dissenting opinion's characterization of primary jurisdiction and the attack on the majority's construction of Abilene. A close reading of the cases, however, shows that the majority may have been technically correct in its approach.

In Abilene, a shipper sued a railroad in a state court on a common law cause of action to recover unreasonable charges. The United States Supreme Court noted that one objective of the Interstate Commerce Act was uniform rates. This objective would not be achieved if every court could decide the specific

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ATchison, Fair Reward and Just Compensation, Common Carrier Service 10 (1954).


Id. at 474.

Id. at 480.

See the following notes: 33 So. Cal. L. Rev. 97 (1959); 28 U.Cinc. L. Rev. 512 (1959); 14 Rutgers L. Rev. 205 (1959); 28 Fordham L. Rev. 544 (1959); 7 U.C.L.A. L. Rev. 117 (1960).

The contention that the Court was overthrowing prevailing interpretation of the doctrine might also be supported by cases decided by the Interstate Commerce Commission. Previous to T.I.M.E. v. United States, the Commission had held that although the ICC had no power to award reparation for the charging of unreasonable rates by a motor carrier, a shipper could obtain a ruling on the question of reasonableness from the Commission and then sue for recovery in court. Bell Potato Chip Co. v. Aberdeen Truck Line, 43 I.C.C. (M.C.C.) 337 (1944). In other cases, the Commission had held that the ICC could make a determination of the reasonableness of motor carrier rates charged a shipper in the past, despite the Commission's inability to award reparation. Hausman Steel Co. v. Seaboard Freight Lines, Inc., 32 I.C.C. (M.C.C.) 31 (1942); Kingan & Co. v. Olson Transportation Co., 32 I.C.C. (M.C.C.) 10 (1942); Dixie Mercerizing Co. v. ET & WNC Motor Transportation Co., 21 I.C.C. (M.C.C.) 491 (1940); W. A. Barrows Porcelain Enamel Co. v. Cushman Motor Delivery Co., 11 I.C.C. (M.C.C.) 365 (1939).

The Court of Appeals had followed these ICC cases in the T.I.M.E. litigation, and had held that the ICC could determine the question of reasonableness. 232 F.2d 178 (5th Cir. 1958).
issue of reasonableness presented by individual suits. Hence the question could be answered only by the ICC, which possessed administrative power to obtain uniform rates. The common law remedy could not survive, and the state court lacked jurisdiction.\textsuperscript{18} Considered in this light, \textit{Abilene} held that the shipper's common law action had been extinguished by the statutory scheme of regulation and the objective of uniformity.\textsuperscript{19}

\textit{Abilene} also contained important dicta, however. The Court several times seemed to emphasize that the doctrine of primary jurisdiction governed the question of whether court or agency should initially decide certain issues. Particularly pertinent is the following language:\textsuperscript{20}

[T]he independent right of an individual \textit{originally} to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by [the saving clause, which preserved remedies not inconsistent with the act] must be confined to redress of such wrongs as can . . . be redressed by courts without \textit{previous} action by the Commission, and, therefore, does not imply the power in a court to \textit{primarily} hear complaints concerning wrongs of the character of the one here complained of.\textsuperscript{21} [Italics added.]

\textsuperscript{18} The state court also would not have had jurisdiction over the statutory cause of action because that cause of action was by its terms limited to actions before the ICC or in the federal courts. 24 Stat. 382 (1887), as amended, 49 Stat. 543 (1935), 49 U.S.C. § 9 (1958).

\textsuperscript{19} Mr. Justice Black, dissenting in T.I.M.E. v. United States, 359 U.S. 464, 480 (1959), suggested a related interpretation. Since the Interstate Commerce Act empowered the ICC to award reparation and gave the complainant a choice of suing either before the ICC or in the federal district court, Black felt that Texas & P. R. R. v. Abilene Cotton Oil Co. might be interpreted as saying that the statutory remedies were exclusive. The effect assigned to this approach by the dissent seems to have been that the absence of provisions in the Motor Carrier Act giving the ICC remedial power left the pre-existing common law action untouched.

Closer analysis, however, casts doubt upon the validity of this interpretation. The interpretation embodies a suggestion that the powers assigned to the ICC were complete and exclusive in the areas covered by the Interstate Commerce Act. Texas & P. R. R. v. Abilene Cotton Oil Co. held that the determination of reasonable rates was one of such areas. But the similar construction of the Motor Carrier Act, the assignment of its administration to the ICC, its inclusion as a part of the Interstate Commerce Act, and the fact that motor and rail carriers compete for much the same freight business indicate that if Part I of the Interstate Commerce Act (the rail carrier provisions) is complete and exclusive in the areas it covers, the same should be true of the Motor Carrier Act. If, then, a common law action could not survive under the rail carrier provisions, the same action could not survive under the motor carrier provisions.

\textsuperscript{20} 204 U.S. 426, 442 (1907).

\textsuperscript{21} Other language in the case indicates the same distinction. "[I]f it be that the standard of rates fixed in the mode provided by the statute could be treated . . . by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable and ordering the carrier to desist in the future from violating the act, . . . a shipper might obtain relief upon . . . the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced." \textit{Id.} at 440. "[N]o reason can be perceived for the enactment of the provision endowing the administrative tribunal . . . with power . . . to award reparation . . . if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission. . . ." \textit{Id.} at 441.
Thus, a court cannot originally hear cases in which an administrative agency must decide certain issues. In such cases, "previous action" by the agency is required. The inference is that one might obtain adjudication in court in a case involving "administrative questions" by first resorting to the agency for a ruling on the issue(s) within its province. The thrust of this view is that the doctrine of primary jurisdiction as established in Abilene allocated the power to decide certain issues between court and agency and governed the timing of such decisions.

The dissenters in T.I.M.E. relied upon decisions subsequent to Abilene for the proposition that the primary jurisdiction doctrine essentially concerns the implications of this dicta. In Mitchell Coal & Coke Co. v. Pennsylvania R.R., a shipper sued under the Interstate Commerce Act in federal court to recover because of alleged rate discrimination in favor of other shippers. Recovery depended upon whether the alleged discrimination consisted of reasonable allowances for services performed by the shippers themselves. The Interstate Commerce Act permitted such allowances if reasonable. The reasonableness issue was for the ICC under the doctrine of primary jurisdiction. Therefore, said the Court, the shipper's action would not lie in advance of action by the ICC. Mitchell endorsed the allocation of decision making power and the timing of the use of such power. If the shipper's action would not lie in advance of ICC action, the implication was that the action would lie after resort to the Commission on the reasonableness issue. Since the cause of action was statutory, furthermore, the case did not relate to Abilene's denial of a common law remedy.

General American Tank Car Corp. v. El Dorado Terminal Co. involved an action of assumpsit in a federal court against the owner of tank cars leased to the shipper. The object was recovery of the difference, which the owner had retained, between rentals due under the lease and a mileage allowance made by railroads for use of the cars. The question of the survival of a shipper's common law action against a rail carrier for unreasonable rates did not arise, however, because the action was not against a rail carrier but against the lessor on the lease agreement. The litigants differed as to whether the amounts in question were reasonable allowances for services provided by the shipper himself, legal under the Interstate Commerce Act, or unreasonable allowances, illegal under the act. The question of reasonableness was for the ICC under the doctrine of

22 230 U.S. 247 (1913).
24 See also Southern Ry. v. Tift, 206 U.S. 428 (1907), where the Court held that a shipper who alleged unreasonable rates where the ICC had already ruled that the rates were unreasonable could recover the excessive amount in the federal court, under the statutory remedy provided in the Interstate Commerce Act.
25 308 U.S. 422 (1940).
primary jurisdiction, since its resolution depended upon technical factors. Nevertheless, it was held that the district court could take jurisdiction and then stay proceedings pending on ICC ruling.

In *United States v. Western Pacific R.R.*, the railroad sued for charges allegedly due on government shipments of napalm bomb cases. Suit was brought in the Court of Claims on a statutory cause of action created by the Tucker Act. The parties disagreed as to whether the applicable rate was that for incendiary bombs or for gasoline in steel drums, and if the former, whether the rate was reasonable. The Supreme Court held that both questions were for the ICC under the doctrine of primary jurisdiction. Nevertheless, the action was cognizable in the courts, since the statute gave the courts jurisdiction. Regarding the doctrine of primary jurisdiction, the Court said:

The doctrine of primary jurisdiction ... applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

Again the Court highlighted aspects of the doctrine of primary jurisdiction which allocate decision-making power between court and agency and govern the timing of court and agency decisions.

Thus, *Abilene*, by dicta, established that in cases which involve issues requiring administrative opinion, and in which courts have jurisdiction, the decision-making power is allocated between court and agency. Cases between *Abilene* and *T.I.M.E.* where the “administrative question” of reasonable carrier charges or payments was present involved either statutory causes of action or suits against a person other than the carrier. These cases therefore ignored the aspects of the doctrine of primary jurisdiction, present in *Abilene*, which deny common law actions against carriers under certain conditions, and emphasized the allocative and timing aspects. As a result, thought about the doctrine was

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27 352 U.S. 59 (1956).
29 352 U.S. 59, 63–64 (1956).
30 It might be argued that *Montana-Dakota Utility Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951), involved the substantive aspect of the doctrine, which denies common law remedies under given conditions. Plaintiff alleged that past rates charged by defendant power company had been unreasonable, and maintained that since defendant and plaintiff were under single management at the time of the alleged overcharge, plaintiff had been prevented by fraud from securing FPC investigation of the rates at the time they were originally proposed. The action was dismissed and referral of the reasonableness issue to the FPC was refused. Since the action sounded in fraud, the case might be interpreted as a denial of a common law action on the basis of the doctrine of primary jurisdiction.

The operation of the doctrine upon a common law action was not made clear by the opinion, however. Although the alleged fraud consisted of the interlocking management's refusal to allow plaintiff to go to the FPC, the Court said that the basic problem was whether courts
concentrated on these latter aspects. T.I.M.E.'s denial of the common law action on the basis of the primary jurisdiction doctrine as established in *Abilene* did not "alter" the doctrine or construe *Abilene* incorrectly. Instead, T.I.M.E. represents a defensible, if technical, reading of *Abilene*.

II

Although T.I.M.E. is a technically correct decision, the issue still remains whether the result is consonant with proper policy in the motor carrier industry. The resolution of this issue will necessarily be for Congress, to which the shipper must now turn if he is to obtain a remedy for unreasonable past charges. It is therefore pertinent to suggest some policy issues which the legislature must consider.

There are several arguments in favor of giving motor shippers an action for unreasonable past rates. Perhaps the nature of rate-making indicates that a remedy for unreasonable rates would be useful. Under the present method of setting rates, the formal machinery of the Motor Carrier Act may not itself produce reasonable rates. Such rates may have to be arrived at through the experience of shippers and carriers. Initially, the carriers set the rates and file them with the ICC. Shippers can contest proposed rates, in which case the Commission will determine a reasonable level. The Commission can also act on its own initiative. A shipper, however, may often not protest until he makes a shipment under a published rate. Until such time, the shipper may not have studied the rates. Even if he has, their complexity may hide inequities which appear only when the shipper makes a specific shipment. An example is the situation in T.I.M.E. The rate from a point in Oklahoma to a town in California via a through-route was higher than the combination of the rates from the starting point in Oklahoma to El Paso, Texas, and from El Paso to California. Unless a shipper had goods to ship from one town in Oklahoma to a town in California, he might not discover the seeming inequity.

can determine reasonable rates. The Court concluded that the issue of reasonableness was not severable from issues of liability, for the acts charged would not amount to fraud unless there had been unreasonable charges. Whether there had been unreasonable charges was an issue for administrative decision. But because the FPC had no reparation power, plaintiff could not have pursued his claim before the Commission independently of the courts. Thus, the FPC did not have jurisdiction independently to decide the issue. The Court held that the issue therefore could not be referred to the FPC because to do so would allow that body to do indirectly what it could not do directly. Since the reasonableness issue therefore could not be decided, plaintiff was out of court. The holding was thus grounded not upon the fact that plaintiff had bought a common law action, but upon the proposition that no body could decide the chief issue necessary to the question of defendant's liability.

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31 See authorities cited note 1 supra.
34 Ibid.
The same considerations plus others might also render questionable much reliance upon ICC initiative. Motor carrier rates are not established nationally, but are usually initiated by regional rate conferences on behalf of their carrier members. Rates apply only to the territory covered by the conference establishing them. The result may be a complex of overlapping rate schedules, such as created the issue in T.I.M.E. Moreover, the number of motor tariff publications annually filed with the ICC is huge, a fact which may prohibit the individualized attention probably necessary to discovery of hidden inequities.

Finally, rate-making perhaps should include an element of experimentation. Economic growth and the rapid influx of new products means that rate-making must be flexible. Experimentation would probably facilitate flexibility. In addition the complexity of rate schedules, evident in T.I.M.E., may make experimentation the only means of preventing long-term inequities. To the extent that a shipper's remedy for unreasonable rates would implement experimentation, and alleviate the impact of individual rate inequities upon the small shipper, the remedy might be advisable.

Yet, there are considerations which indicate that a remedy is unnecessary. These considerations outbalance those in favor of adding a shipper's remedy to

36 TaFF, COMMERCIAL MOTOR TRANSPORTATION 432 (1955).
37 Ibid.
38 The difference in rates arose from the fact that the rates established through the regional rate bureaus apply only in the region under the jurisdiction of the bureau establishing them. T.I.M.E., the carrier, was a member of three rate bureaus. One of the bureaus had established a through rate from the shipping point in Oklahoma to the terminal point in California, but had no rate from the shipping point to El Paso, Texas, or from El Paso to the terminal point. A second bureau had a rate from the shipping point to El Paso, but no through rate from the shipping point to the terminal point. The third bureau had a rate from El Paso to the terminal point in California, but no rate from the shipping point in Oklahoma to the terminal point in California. It was thus possible to charge the through rate of the first bureau from the shipping point to the terminal point, or to charge a combination of the rate of the second bureau from the shipping point to El Paso, plus the rate of the third bureau from El Paso to the terminal point. The carrier contended that under rules promulgated by the ICC, the applicable rate was the through rate of the first bureau. Brief for Petitioner, pp. 8-10, T.I.M.E. v. United States, 359 U.S. 464 (1959).
39 Over 69,000 motor tariff publications are filed annually with the Commission. TaFF, op. cit. supra note 36, at 549.
40 That rate-making may have to be largely experimental is indicated by the language of Judge Hutcheson in his concurring opinion in Eagle Cotton Oil Co. v. Southern Ry., 51 F.2d 443, 445 (5th Cir. 1931). Judge Hutcheson refers pointedly to the experimental character of rates and rate-making, to the fact that the system provided under regulatory statutes allows rates to be experimentally laid down and experimentally tried out, and to the fact that such a system permits the flexibility necessary to the growth of commerce. The ICC, he says maintains a reasonable rate structure through constant experiment and change. He points out that shippers come up against temporary or particular inequalities and imperfections of the rate structure. The narrow holding of Eagle Cotton Oil Co. v. Southern Ry. was overruled in Arizona Grocery Co. v. Atchison, T. & S. F. Ry., 284 U.S. 370 (1932). Since Judge Hutcheson's language was dictum, however, the latter case does not necessarily repudiate his reasoning.
41 See note 38 supra.
the Motor Carrier Act. In the first place, the sums usually in controversy in a rate dispute are probably small. Consequently, many shippers would not find it worthwhile to sue. Under such circumstances, it is difficult to counter the argument that a shipper's remedy is unnecessary to balance shipper and carrier interests as the Motor Carrier Act now stands. Under that act, a trucker can raise rates only on thirty days' notice. If a shipper complains of a proposed increase, or the ICC acts on its own initiative, the Commission can suspend the operation of the new rates for seven months more, while adjudicating the issue of reasonableness. If the increase ultimately is allowed, the carrier has no way of collecting the increment between the new and old rates for the suspension period. Thus, the carrier will usually be the one to suffer by administrative lag.

It has been argued that the possible delay of seven months is not favorable to the shipper because the carrier will raise his proposed rate enough to offset anticipated losses from administrative lag. But such an argument is based on the questionable assumption that the carrier can accurately predict the length of the lag and the effect of a rate increase upon total revenue, so as to know how much to recoup. Moreover, any increase in a proposed rate made for the purpose of offsetting the loss from administrative lag will furnish the shipper with that much more basis for arguing that the proposed increase is unreasonable and should not be allowed.

The existence of a rail shipper's remedy for unreasonable past rates may contribute to a feeling that the motor shipper is being treated unfairly if he does not have such a remedy. The most important argument against creating a motor shipper's remedy, however, rests on a comparison of the motor carrier industry with the rail carrier industry. The motor shipper has an effective means of assuring reasonable rates aside from his power to force ICC scrutiny

42 The Court noted in T.I.M.E. v. United States, 359 U.S. 464, 479 (1959), that few shippers by truck have sought to recover for alleged unreasonable rates. The reason may be that the sums which would be in controversy are often too small to warrant the expense of an action. The sum in controversy in such an action is the difference between the rate charged and the alleged reasonable rate. It is possible that even where the total charge on a shipment is large, this difference may be relatively small, since the amount by which an alleged unreasonable per unit shipping rate exceeds a supposed reasonable per unit shipping rate may be a small percentage of the total charge. On the other hand, T.I.M.E. v. United States indicates that the supposition of small sums is not universally valid. The difference between the alleged unreasonable rate and the alleged reasonable rate was almost $4.00 per cwt. Brief for the United States, p. 5, T.I.M.E. v. United States, 359 U.S. 464 (1959). The amount by which the total charges of the shipper exceeded the alleged reasonable charges was over $2,200. Id. at p. 3.

43 A full-scale investigation on this point would necessarily include an attempt to determine whether rail shippers find it worthwhile to sue for unreasonable rates under the statutory cause of action given them by Part I of the Interstate Commerce Act.

of proposed rates. The shipper who feels that a rate charged by a given motor carrier is unreasonable can, in most instances, simply transfer his business to another trucker. Another trucker will usually be available because the trucking industry is relatively competitive. Competition is assured by the relatively low costs of entry in the trucking business. Even the smallest prospective trucker can usually afford the cost of a truck. Highways are paid for by taxes not only on trucks, but also on automobiles, resulting in a virtual subsidy for the motor carrier.

The rail shipper, on the other hand, unless he is located in one rail center and is shipping to another, is limited in his choice of carriers. In the many locations which are served by only one carrier, moreover, there will be no choice. This situation is caused by the high entry costs in the railroad industry: expensive rolling stock; expensive, privately financed roadbeds; and no subsidies. The rail shipper is thus probably in greater need of a remedy for unreasonable past rates as a means of pressuring the rail carrier into maintaining a reasonable rate level.

See TAYF, op. cit. supra note 36, at 548-9, and LOCKLIN, ECONOMICS OF TRANSPORTATION (4th ed. 1954) 679-80, 682-83, 700-02, 704. Locklin argues (p. 704) that rate regulation is justified in the motor carrier industry even though competitive conditions are more likely to prevail among motor carriers than among railroads because the number of motor carriers available to some shippers on a given route may be limited and because small shippers who cannot get contract carriers and are unable to do their own carrying are at the mercy of common carriers. (Contract carriers haul under individual contracts with shippers. Their rates are not regulated by the ICC). To say that rate regulation as such is justified by these conditions, however, is not to say that a shipper’s action for unreasonable past rates is necessary. It would appear that in most instances the shippers who are on routes where the number of available common motor carriers is limited will hire contract carriers or will haul their own goods unless they are small. These same small shippers will be the ones who are at the mercy of the common carriers in any case. But it is the small shipper who is likely to find an action for unreasonable past rates too expensive to be worthwhile.

LIMITATIONS UPON STATE USE OF FORUM NON CONVENIENS IN FELA ACTIONS

In Cotton v. Louisville & Nashville R.R.1 the Supreme Court of Illinois indicated that although the doctrine of forum non conveniens2 is available to state courts in FELA3 cases, its application to such cases is limited4 by plaintiff’s federal right to his choice of forum.5 Justice Schaefer, dissenting, contended that

1 14 Ill. 2d 144, 152 N.E. 2d 385 (1958).
2 Forum non conveniens refers to the exercise of “the discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the cause before it may be more appropriately tried elsewhere.” Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Colum. L. Rev. 1 (1929).
4 “[O]nly where it is shown that plaintiff is motivated purely by vexation and harassment will an F.E.L.A. case be dismissed.” 14 Ill. 2d 144, 152 N.E. 2d 385, 400 (1958).
5 If the venue provision of FELA is interpreted to be a special privilege created by a federal statute that confers a right to its contents to litigants under the FELA, the supremacy clause