RECENT CASES

Administrative Law—Public Service Commission—Denial of Certificate of Convenience and Necessity Not Res Judicata—[Utah].—An application by a truck company for a certificate of convenience and necessity, a statutory prerequisite for operation as a common motor carrier, was granted by the Utah Public Service Commission in March, 1937. Upon rehearing in December, 1937, the certificate was in effect denied, and this denial was affirmed by the Utah Supreme Court in December, 1939. While the appeal was pending, the truck company applied for a certificate substantially like that originally sought, and in May, 1940, the commission granted this application. Several common carriers, chiefly railroads, which opposed the granting of a certificate to the truck company, appealed to the state supreme court on the ground, inter alia, that the commission's prior denial of the certificate was res judicata in view of the fact that there had been no change in conditions. Held, that since the commission's denial of a certificate involved no legal rights and hence no legal controversy, it was not an exercise of the judicial function and therefore was not res judicata in the absence of a change in conditions. Order affirmed, two justices dissenting.  

In Cardinal Bus Lines v. Consolidated Coach Corp., the only other case directly in point, it was held that the denial of a certificate of convenience and necessity was an exercise of the judicial function and was therefore res judicata in the absence of a change in conditions. The court there assumed that it was necessary to determine whether a

3 The provision of the Utah statute under which the court assumed jurisdiction states that the court's review shall include a determination "whether the commission has regularly pursued its authority." Utah Rev. Stat. Ann. (1933) § 76-6-16.  
4 Larson, J., who delivered the opinion of the court, assumed that there had been no change in conditions, and that the commission had exercised an executive function. Wolfe, J., concurred in the finding that the commission had not exercised a judicial function and hence was not bound by res judicata, but dissented in part on the ground that there had been a change in conditions. In the dissenting opinion of Pratt, J., it was assumed that there had not been a change in conditions, but it was urged that the prior order should be binding even though it might not be res judicata.  
5 117 P. (2d) 298 (Utah 1941).  
6 254 Ky. 586, 72 S.W. (2d) 7 (1934).  
public service commission acted judicially. This assumption, likewise made in the instant case, that such a determination is necessary and sufficient, clearly oversimplifies the problem.9

Nevertheless, a broader approach, involving an analysis of the applicability of the doctrine of res judicata, the effect of relevant statutes, and the practical consequences, does not require that the commission's order in the instant case be binding. The doctrine of res judicata is ordinarily invoked in a second suit on a single cause of action arising out of a given fact situation, fixed in time, when a final judgment has already been entered. The underlying policy is to prevent relitigation of the same issues. In the instant case, however, the conditions to which one hearing had reference were distinct in point of time from those to which the other hearing referred, even though the two sets of conditions may have been similar in every other respect. Since a hearing would be necessary to establish that conditions had not changed, a prior order might be said to be res judicata only when the policy of the doctrine of res judicata could no longer be effective.

One of the dissenting justices urged that the statutory provisions for appeal to the state supreme court would be meaningless if the commission could reverse itself without a change in conditions, since a favorable decision upon appeal would be of no value to a protestant.0 But this argument ignores the court's power to determine on appeal whether the commission's finding concerning public convenience and necessity is supported by substantial evidence and to reverse the order if substantial evidence is lacking.11 After a reversal the commission would be required to issue a contrary order, which would be final, in the absence of a change of conditions, not because of res judicata, but because the commission is precluded from reissuing its first order on the basis

8 The assumption that it would be necessary to make such a determination—that an administrative order could not be binding unless it were judicial—is questionable because of the possibility that relevant statutes may require a binding effect. Likewise, the assumption that such a determination would be sufficient—that if the administrative body were exercising a judicial function it would be obligatory to apply the doctrine of res judicata—also seems to be questionable. The fact that an administrative function may be considered analogous to the judicial function of a court for some purposes does not require that the judicial doctrine of res judicata be carried over into administrative procedure. Matthews v. State ex rel. St. Andrews Bay Transportation Co., 111 Fla. 587, 591, 149 So. 648, 649 (1933) ("An order of the Railroad Commission . . . while quasi-judicial in character, is not res adjudicata of another application of exactly the same nature subsequently filed."); Rockwell Lime Co. v. Commerce Com'n, 373 Ill. 309, 26 N.E. (2d) 99 (1940).

9 The court seems to have placed a disproportionate emphasis upon the question of whether the prior order was res judicata, in contrast to the question of whether the statute may have required that the prior order be binding. The court's reliance upon the statute, in determining that the granting of a certificate was a matter of privilege and not of legal right, seems relevant only if it had already been assumed that the doctrine of res judicata would be applicable if the granting of a certificate were a matter of legal right. On the other hand, the court also suggested that the absence of a statutory limit upon the number of times an application could be made, together with the commission's rule that an application could not be renewed within one year, indicated that the commission did not intend that an order should be final.

10 Mulcahy v. Public Service Com'n, 117 P. (2d) 298, 310 (Utah 1941).
11 Fuller-Toponce Truck Co. v. Public Service Com'n, 99 Utah 28, 96 P. (2d) 722 (1939); Los Angeles & S. L. R. Co. v. Public Utilities Com'n, 81 Utah 286, 17 P. (2d) 287 (1932); Salt Lake City v. Utah Light & Traction Co., 52 Utah 210, 173 Pac. 556 (1918).
of conditions which the court has already held not to constitute convenience and necessity. The effect of an affirmation by the court of an order of the commission is somewhat different. A distinction must be drawn between those situations in which there is substantial evidence for either granting or denying a certificate and those in which there is substantial evidence only for granting, or only for denying, a certificate. The affirmation of the granting or denying of a certificate in the latter situation is final. But the affirmation of the granting or denying of a certificate in the former situation does not necessarily preclude the commission from subsequently reversing such an order. Consequently the statutory provisions for appeal to the state supreme court are not rendered meaningless, because the result objected to could arise only in the limited situation in which there is substantial evidence for either granting or denying a certificate. Nor does such a circumstance involve a violation of the rule of Hayburn's Case, that a court is without jurisdiction if its decision can be set aside by another branch of the government. The court's holding that there is substantial evidence for the order is final insofar as the commission is concerned, even though the court itself may subsequently find that there is also substantial evidence for a contrary order.

To allow the commission to decide whether, in the absence of a change in conditions, it should be bound by its prior decisions seems to provide the flexibility necessary in the determination of public convenience and necessity. For instance, the commission, because of its intimate knowledge of the trends in transportation, might anticipate an increased need for carriers in the near future, even though the evidence of such a possibility would not constitute proof of a change in conditions. Under these circumstances the commission should be allowed to reverse its prior denial of a certificate. It also seems more conducive to the development of administrative responsibility to provide an opportunity for correcting what in many instances is essentially an error in judgment.

Bankruptcy—Provability and Priority of Back-Pay Award—[Federal].—The National Labor Relations Board found that the Hamilton Brown Shoe Company had engaged in unfair labor practices and ordered the reinstatement of discharged employees with back pay. Following affirmation of the board's order by the circuit court of appeals, the company was adjudicated a bankrupt. The board then asserted a claim for the back pay in the bankruptcy proceedings. The claim was disallowed by the referee on the ground that a back-pay order did not constitute a debt provable in bankruptcy. On appeal to the Circuit Court of Appeals for the Eighth Circuit from an order of the district court sustaining the position of the referee, held, that a back-pay award is a debt provable in bankruptcy which the National Labor Relations Board is

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x2 In the instant case it was held that there was substantial evidence for granting a certificate. Likewise, on appeal from the prior order, the court in 1939 held that there was substantial evidence for denying the major portion of the substantially similar certificate. Fuller-Toponce Truck Co. v. Public Service Com'n, 99 Utah 28, 37-38, 96 P. (2d) 722, 726 (1939).

x3 2 Dall. (U.S.) *409 (1792).

x4 This consideration would seem to outweigh that of the undesirability of requiring common carriers opposing the granting of a certificate previously denied to incur the burden of resisting a second application in the absence of a change in conditions. The latter point was urged by Pratt, J., dissenting. Mulcahy v. Public Service Com'n, 117 P. (2d) 298, 310 (Utah 1941).