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Injunctive Relief from Confiscatory Orders of Regulatory Bodies Pending Litigation

Edwin P. Wolfe

NOTES AND COMMENT

Editor—JAMES F. KELLY

INJUNCTIVE RELIEF FROM CONFISCATORY ORDERS OF REGULATORY BODIES PENDING LITIGATION.

Rate-making litigation with its laborious tasks and well-paid experts to do them, is an expensive undertaking. Each added item of expense brings a proportionate reduction in the benefit to the public resulting from rate regulation of public utilities. It is particularly regrettable when, as in the recent Interborough Rapid Transit Company litigation in the federal courts, additional expenditures of hundreds of thousands of dollars, are incurred to ascertain only that there was an improvident exercise of judicial discretion in an ancillary action.

A great deal has been said of the decision of the United States Supreme Court [1] which reversed the order of the Statutory Court.[2] The Statutory Court had granted an interlocutory injunction restraining the Public Service Commission of New York from interfering with the rate of fare charged by the Transit Company. From a viewpoint unbiased by political views or personal gain motives, the following excerpt seems to present the gist of the Supreme Court opinion:

> "Considering the entire record we believe the challenged order was improvident and beyond the proper discretion of the Court." [3]

It appears that the decision of the highest court of the land rests simply on the application of fundamental principles of equity jurisprudence. There was a failure on the part of the petitioner to make out a case justifying summary relief, or to prove a condition so bur-

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[1] Gilchrist *et al.* v. Interborough Rapid Transit Co. *et al.*, 279 U. S. 156, 49 Sup. Ct. Rep. 282 (1929).

[2] 26 Fed. (2d) 912 (S. D. N. Y., 1928) Section 266 of the Judicial Code (28 U. S. C. A., Sec. 380) provides: "No interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a state by restraining the * * * enforcement of an order made by an administrative board or commission * * * shall be issued or granted * * * unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application."

[3] *Supra* Note 1 at 207, 49 Sup. Ct. Rep. at 288.

densome as to render the granting of an injunction, a proper exercise of judicial discretion.

> "It is well settled that the granting of a temporary injunction pending a final hearing is within the sound discretion of the trial court, and that upon appeal, an order granting such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion." [4]

It is significant, however, that among the twelve members of the judiciary who considered the *Interborough* application, there was evenly divided opinion as to whether the facts in the record warranted summary relief.[5] Apparently the propriety of such relief admits of considerable debate and it may therefore be useful to discuss the basis upon which the Court will grant a temporary injunction restraining state regulatory bodies.

Rate regulation with respect to utilities engaged in intrastate business is a power which belongs to the state within which the utility is operating. The determination of what is a proper rate is a legislative act and not a judicial act [6] though the categorical classification as such, is much discussed and criticized.[7] Opportunity for judicial review of the legislative pronouncement must be given.[8] In pleading confiscation the utility may invoke either the jurisdiction of the federal courts or the state courts and when jurisdiction by the former has been obtained it is exclusive.[9]

In the leading case of Prentis v. Atlantic Coast Line [10] the utility applied to the Federal Court for an injunction to restrain the Com-

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[4] Prendergast v. New York Tel. Co., 262 U. S. 43, 51, 43 Sup. Ct. Rep. 466, 469 (1922) citing Meccano, Ltd. v. John Wanamaker, 253 U. S. 136, 40 Sup. Ct. Rep. 463 (1919).

[5] Three of the nine Justices of the Supreme Court dissented from the opinion of the majority which reversed the order of the Statutory Court composed of three Judges which had granted the injunction.

[6] *Infra* Note 10, 211 U. S. at 226, 29 Sup. Ct. Rep. at 69, Lake Erie & Western R. R. Co. v. Commission, 249 U. S. 422, 39 Sup. Ct. Rep. 345, 63 L. ed. 684 (1918).

[7] Ray A. Brown, The Functions of Courts and Commissions in Public Utility Rate Regulation, 38 Harv. Law Rev. 141, 149 *et seq.*, People v. Willcox, 194 N. Y. 383, 386, 87 N. E. 517 (1909).

[8] Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 40 Sup. Ct. Rep. 527, 64 L. ed. 908 (1920); Oklahoma Operating Co. v. Love, 252 U. S. 331, 40 Sup. Ct. Rep. 338, 64 L. ed. 596 (1920); Missouri Pac. R. R. v. Tucker, 230 U. S. 340, 347, 33 Sup. Ct. Rep. 961, 57 L. ed. 1507 (1912). See Interstate Commerce Commission v. Union Pac. R. Co., 222 U. S. 541, 32 Sup. Ct. Rep. 108, 56 L. ed. 308 (1911).

[9] Cohen v. Virginia, 6 Wheat. 264, 404 (821); Hardrader v. Wadley, 172 U. S. 148, 19 Sup. Ct. Rep. 119 (1898); Mercantile Trust Co. v. Columbus, 203 U. S. 311, 27 Sup. Ct. Rep. 83 (1906); Columbus Railway, etc. v. Columbus, 249 U. S. 399, 39 Sup. Ct. Rep. 349 (1918); Binderup v. Pathe Exchange, 263 U. S. 291, 44 Sup. Ct. Rep. 96 (1923).

[10] 211 U. S. 210, 29 Sup. Ct. Rep. 67 (1908).

mission from effecting certain rates which were alleged to be confiscatory. Under the Virginia Statute the Supreme Court of the state was vested with power to review the findings of the Commission and substitute its own findings. The application to the Federal courts was made without taking an appeal to the Virginia Supreme Court. The United States Supreme Court permitted the application to be retained (on other grounds) but stated that the orderly and proper course to be pursued by the utility was an appeal to the Virginia Supreme Court.

> "The State of Virginia has endeavored to impose the highest safeguards possible upon the exercise of the great power given to the State Corporation Commission * * * by making its decision dependent upon the assent of the same historic body that is entrusted with the preservation of the most valued constitutional rights, if the railroads see fit to appeal. It seems to us only a just recognition of the solicitude with which their rights have been guarded, that they should make sure that the State in its final legislative action would not respect what they think their rights to be, before resorting to the courts of the United States." [11]

In those states where power is vested in an appellate tribunal to review the findings of the regulatory body and substitute its own findings, an interlocutory injunction is premature, until an appeal is taken to the appellate tribunal from an order of the Commission.[12] Pronouncement must have been made by the tribunal having the final "legislative" authority of the state. However, injunctive relief may properly be granted where the Commission attempts to enforce alleged confiscatory rates, during the pendency of an appeal to the State Court and a stay is denied. Upon a showing that the prescribed rates are confiscatory the utility is entitled to have their enforcement enjoined pending the continuance and completion of the rate-making process.[13] The act of the Commission is a final legislative act as to the time the rates would be in effect pending final determination.

On the other hand, where the Commission is vested with final legislative authority, as in New York where a review by *certiorari* is purely of a judicial character, no appeal need be taken.[14] An injunction against the Commission will properly issue immediately upon

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[11] *Ibid.* at 230, 29 Sup. Ct. at 71.

[12] *Supra* Note 10; *Cf.* cases cited, *infra* Note 14.

[13] Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 43 Sup. Ct. Rep. 353 (1922); Springfield Gas and Electric Company v. Barker, 231 Fed. 331 (W. D. Mo., 1915). See by analogy Northwestern Bell Telephone Company v. Hilton, 274 Fed. 384 (D. C. Minn., 1921).

[14] *Supra* Note 4, 262 U. S. 43; Bacon v. Rutland R. R. Co., 232 U. S. 134, 34 Sup. Ct. Rep. 283 (1913); Monroe Gaslight, etc. Co. v. Michigan Public Utilities Commission, 292 Fed. 139 (D. C. Mich., 1923).

the rendition of its alleged confiscatory order.[15] An application for a rehearing is not necessary where the granting of the rehearing is entirely within the discretion of the Commission.[16] If, however, the Commission fixes an early date for the rehearing that fact may be considered as an element affecting the exercise of judicial discretion in the granting of temporary injunctions.[17]

Thus, the first test to be applied in determining the propriety of granting an interlocutory injunction is whether the prescribed rates have been passed upon by the authority of the state having the final "legislative" power. Then, and not until then, unless the preliminary authority is attempting to enforce its alleged confiscatory decree pending appeal, and a stay is denied, will an injunction properly issue.

The application being seasonably made, the next and essential test is whether the alleged facts make out a *prima facie* case of confiscation.

Obviously there can be no taking of property in violation of the due process clause if the utility has contracted away its right to a fair return, unless existing or subsequent legislation modifies the contract.[18] Where the effectiveness of a contract in the light of alleged statutory modification is in question, and it cannot be clearly shown that the contract is thereby rendered impotent, recourse to the state courts for adjudication should be made before injunctive relief may be properly had.[19] At least it may justifiably be said that the discretion of the Court is severely taxed if an adjudication has not been had.

In order to adduce a *prima facie* case of confiscation it is incumbent upon the petitioner to show that the property upon which it alleges confiscation is properly included in the rate base. Factors such as the unification of two systems for rate-making purposes and

[15] If respect is to be accorded the state commissions it is apparent that official action or order of the commissions is necessary and will not be anticipated in the absence of special circumstances. "Alleged newspaper stories and unbecoming declarations by counsel or city officials cannot be regarded here as of grave importance." Gilchrist v. Interborough Company, *supra* Note 1, 279 U. S. at 208, 49 Sup. Ct. Rep. at 289. Were the only point in the Interborough case that the petitioner did not await the official action of the Commission it is likely that the order granting the injunction would have been affirmed, regardless of that fact, in view of the disposition of former applications to the Commission and statements made by Commission members in the present application.

[16] *Supra* Note 4, 262 U. S. at 50, 43 Sup. Ct. Rep. at 469.

[17] Cumberland Telephone Co. v. Louisiana Commission, 283 Fed. 215 (E. D. La., 1922) cited with approval in Prendergast v. New York Telephone Company, *supra* Note 4, 262 U. S. at 50, 43 Sup. Ct. Rep. at 469.

[18] Henderson Water Company v. Corporation Commission of North Carolina, 269 U. S. 278, 46 Sup. Ct. Rep. 112 (1925); Columbus Railway Company v. Columbus, 249 U. S. 399, 39 Sup. Ct. Rep. 349 (1918); Public Service Company v. St. Cloud, 265 U. S. 352, 44 Sup. Ct. Rep. 492 (1923).

[19] "The effect of the contracts, long the subject of serious disputation, depended upon the proper construction of State statutes—a matter primarily for determination by the local courts." *Supra* Note 1, 279 U. S. at 208, 49 Sup. Ct. Rep. at 289.

the claiming of a return on property leased from a municipality require clear and convincing support as to their propriety in law.[20]

The application of the utility in Prendergast v. New York Telephone Company [21] is the antithesis of the Interborough case in the matter of sufficient facts upon which to grant summary relief. The only problem in that case was the determination of a fair valuation of the property used and useful in the operation of the utility, and the relationship of the prescribed rates to the fair value.

> "The bill specifically alleged that the cost of the company's property in the State devoted to the rendition of intrastate telephone service, the cost of its reproduction and its fair and reasonable value * * * and that the rates prescribed by the Commission would prevent it from earning more than 2.56% upon the cost of such property and 1.96% upon its fair and reasonable value, and would not afford it a fair return upon such value." [22]

If the allegations were substantiated by proof it is apparent that the prescribed rates were insufficient to yield a fair return on a fair valuation and that the petitioner was being deprived of property in violation of its constitutional rights.

The protection of constitutional rights is a grave responsibility of the federal courts. To justify summary relief, however, the invasion of the petitioner's rights must be clearly established by it. This requires cogent and convincing evidence, the effect of which, interpreted in the light of existing principles of the law, shows that the prescribed rates are insufficient in fact. The degree of success with which this burden is met measures the propriety of the exercise of judicial discretion in granting the temporary injunctive relief.

EDWIN P. WOLFE.

RIGHT TO RECOVER FOR BREACH OF IMPLIED WARRANTIES IN SALES OF FOOD.

It is a well-settled principle in the law of sales that upon the sale of food for human consumption there arises an implied warranty that it is wholesome and fit for the use presumably intended. This was so

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[20] The failure adequately to support these contentions in the Interborough case contributed largely to the reversal by the Supreme Court of the order of the lower court.

[21] *Supra* Note 4.

[22] *Ibid.* 262 U. S. at 47, 43 Sup. Ct. Rep. at 468.