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ADMINISTRATIVE LAW - REVIEW OF ADMINISTRATIVE ORDERS - ELIMINATION OF THE "NEGATIVE" ORDER DOCTRINE

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COMMENTS

ADMINISTRATIVE LAW — REVIEW OF ADMINISTRATIVE ORDERS — ELIMINATION OF THE "NEGATIVE" ORDER DOCTRINE — The recent decision of the Supreme Court in *Rochester Telephone Corporation v. United States*[1] is of importance in determining the reviewability of administrative orders that are negative in character. In the principal case, under authority of the Federal Communications Act[2] the Federal Communications Commission issued a general order directing that every telephone carrier file statements concerning its business and affairs. The Rochester Telephone Corporation, the petitioner, failed to file such statements, claiming it was not subject to the commission's jurisdiction because of an exemption under section 2(b) (2) of the Communications Act of 1934. This section provides that the commission shall not have jurisdiction over any carrier "engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carrier." Upon subsequent hearing before the commission, to show cause why the carrier had not filed the necessary reports, it was decided that the telephone company was subject to the act because under the "control" of the New York Telephone Company, for the New York Company by stock holdings exercised substantial operating control over the petitioner. The result of this decision was to decide its "status" as to the act and to subject the petitioner to the earlier general order, requiring all telephone carriers to file statements of their business and affairs. From such order the carrier sought judicial review. In granting review of the commission's order which had denied affirmative relief, the Supreme Court expressly overruled the "negative" order doctrine. It is this doctrine, its operation, and the effects of its elimination which the following comment examines.

[1] 307 U. S. 125, 59 S. Ct. 754 (1939), affirming (D. C. N. Y. 1938) 23 F. Supp. 634. See comment, 24 MINN. L. REV. 379 (1940) and McAllister, "Statutory Roads to Review of Federal Administrative Orders," 28 CAL. L. REV. 129 (1940).

[2] 48 Stat. L. 1077 (1934), 47 U. S. C. (1934), § 219.

I.

Since the ascendancy of federal regulatory agencies in our governmental system, no single, clearly defined rule has governed the action of the judiciary in reviewing administrative orders. Inasmuch as statutory provisions have normally indicated but vaguely the kind of orders which may be reviewed and the extent of such review, the courts have had unrestrained discretion in placing limitations on reviewability.[3] The manifest course of the judiciary has been to restrict the field of reviewable orders, oftentimes imposing a real hardship on petitioners seeking review.[4] The purposes served by the practice of non-reviewability were indisputable. Preliminary issues and problems were eliminated by administrative action, and final consideration by the administrative commission restricted and more precisely defined the questions that the court must consider.[5] Furthermore, in many instances, to broaden the review would have destroyed the peculiar benefit gained from administrative function because of the administrative proficiency with respect to technical questions involved.[6] In addition, to forestall premature attempts at judicial review, the courts espoused the doctrine of primary jurisdiction, believing that such restriction would perpetuate the federal agencies' dominant control over policies involved, and likewise insure uniformity of result.[7] Thus, whenever an administrative inquiry necessitated the exercise of administrative discretion, the principle of primary jurisdiction was invoked to secure precedence of administrative action. To further restrict the scope of reviewability, the principle of administrative finality was evoked, giving administrative

[3] McDermott, "To What Extent Should the Decisions of Administrative Bodies Be Reviewable by the Courts," 25 A. B. A. J. 453 (1939); Davison, "Administration and Judicial Self-Limitation," 4 GEO. WASH. L. REV. 291 (1936); 2 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 385 (1931); MCFARLAND, JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION 1920-1930, p. 138 (1933).

[4] DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 71 (1927); 48 YALE L. J. 1257 (1939).

[5] United States v. Los Angeles & S. L. R. R., 273 U. S. 299, 47 S. Ct. 413 (1927); United States v. Griffin, 303 U. S. 226, 58 S. Ct. 601 (1937); 47 YALE L. J. 766 (1937); 48 YALE L. J. 1257 (1939).

[6] 2 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 390 (1931); LANDIS, THE ADMINISTRATIVE PROCESS 141 (1938). Thus, preliminary procedural orders and final orders of administrative agencies which are merely findings of fact or valuations would generally not be reviewable. Delaware & Hudson Co. v. United States, 266 U. S. 438, 45 S. Ct. 153 (1924); Federal Power Commission v. Metropolitan Edison Co., 304 U. S. 375, 58 S. Ct. 963 (1938).

[7] The doctrine of primary jurisdiction was first invoked in Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350 (1907). This doctrine was intended to establish only priority of administrative jurisdiction, but the actual working of the rule has made many administrative findings and orders final.

officers wide latitude to determine conclusively certain matters of fact brought before them.

With the growing demand for judicial review due to the increased number of administrative orders under the Interstate Commerce Act, the Supreme Court of the United States expounded the "affirmative" and "negative" order doctrine, limiting review to only those orders which demanded or directed that a particular thing be done.[8] In so refusing judicial review of certain "negative" administrative orders, the consideration guiding the Supreme Court was that the tribunal had denied affirmative relief and not that the tribunal's order was negative in character.[9] The application of this doctrine was considered by many to be a questionable narrowing of the area of judicial interference.[10] It was a restrictive interpretation of the statutory right of review. As a result, various efforts were made to obtain judicial review in a manner other than by statutory appeal or statutory injunction, but generally to no avail.[11] However, when the orders were "permissive," strangely enough the Court generally granted review without application of the "negative" order doctrine.[12] Although the doctrine was originally confined to the decisions of the Interstate Commerce Com-

[8] Proctor & Gamble Co. v. United States, 225 U. S. 282, 32 S. Ct. 761 (1912). The opinion in the Proctor case rested on two grounds: (1) the exercise of powers of review over negative orders was declared to be inconsistent with the entire system of administrative control set up by the act to regulate commerce; (2) the Court interpreted the statute creating the Commerce Court, and concluded it showed a legislative intent to limit review to affirmative orders only.

[9] Chicago Junction Case, 264 U. S. 258 at 264, 44 S. Ct. 317 (1924), where the Court said: "In Proctor & Gamble v. United States, 225 U. S. 282 [32 S. Ct. 761 (1912)]; Hooker v. Knapp, 225 U. S. 302 [32 S. Ct. 769 (1912)]; and Lehigh Valley R. R. Co. v. United States, 243 U. S. 412 [37 S. Ct. 397 (1917)], judicial review was refused, not because the order was permissive, or because it was negative in character, but because it was a denial of the affirmative relief sought."

[10] In order to obtain judicial relief from the administrative agency's order, the Urgent Deficiencies Act provided for alternative statutory relief, either by direct appeal or by use of statutory injunctive relief. 38 Stat. L. 219 (1913), 28 U. S. C. (1934), § 41 (28). In providing for these alternative reliefs from administrative orders, the statute did not in express language provide that judicial review should be limited to "affirmative" orders.

[11] Injunction: Sykes v. Jenny Wren Co., (App. D. C. 1935) 78 F. (2d) 729; certiorari: Chamber of Commerce of Minneapolis v. Federal Trade Commission, (C. C. A. 8th, 1922) 280 F. 45; mandamus: Interstate Commerce Commission v. United States ex rel. Campbell, 289 U. S. 385, 53 S. Ct. 607 (1933); prohibition: United States v. Interstate Commerce Commission, (App. D. C. 1931) 51 F. (2d) 429; quia timet: White v. Johnson, 282 U. S. 367, 51 S. Ct. 115 (1931); declaratory judgment: Piedmont & Northern Ry. v. United States, 280 U. S. 469, 50 S. Ct. 192 (1930).

[12] Chicago Junction Case, 264 U. S. 258, 44 S. Ct. 317 (1924); Colorado v. United States, 271 U. S. 153, 46 S. Ct. 452 (1926); 34 COL. L. REV. 908 at 909 (1934).

mission, later decisions applied it to other federal agencies whose decisions were subject to similar types of review.[13] The negative order doctrine had the further consequence of inducing the courts to deny review of interlocutory orders.[14] By application of similar technique and reasoning, the courts held that a "finding" or "decision" of an administrative commission was not an order within the statute because it did not command or direct a particular thing to be done; therefore it was non-reviewable.[15] Nevertheless, the Supreme Court soon departed from the rigour of its original rule, and held that an order negative in form would be reviewable if affirmative in substance.[16] In more recent decisions the Court has even granted independent equitable relief, although the statutory methods of judicial review were intended to be exclusive.[17] In fact, in a few instances independent equitable relief has been granted on the ground that property rights have been jeopard-

[13] Decision of the secretary of agriculture under the Packers and Stockyards Act [42 Stat. L. 168 (1921), 7 U. S. C. (1934), § 217] in United States v. Corrick, 298 U. S. 435, 56 S. Ct. 829 (1936); decision of the Federal Communications Commission under the Communications Act [48 Stat. L. 1093 (1934), as amended by 50 Stat. L. 197 (1937), 47 U. S. C. (Supp. 1938), § 402 (a)] in American Tel. & Tel. Co. v. United States, (D. C. N. Y. 1936) 14 F. Supp. 121.

[14] An "order" assigning a cause for further hearing was held not reviewable, although the defendant railroad denied the tribunal's jurisdiction. United States v. Illinois Central R. R., 244 U. S. 82, 37 S. Ct. 584 (1917). "Order" denying motion to dismiss a proceeding before hearing was held not reviewable. Chamber of Commerce of Minneapolis v. Federal Trade Commission, (C. C. A. 8th, 1922) 280 F. 45.

[15] In American Federation of Labor v. National Labor Relations Board, (App. D. C. 1939) 103 F. (2d) 933, the board's decision had determined that the employer unit for purposes of representation should embrace the entire West Coast, and that the C. I. O. should be the exclusive bargaining agent. From this determination the A. F. of L. appealed, but the court refused to give review because the "decision" of the board was not an "order" since there was no affirmative command. See also, Carolina Aluminum Co. v. Federal Power Commission, (C. C. A. 4th, 1938) 97 F. (2d) 435, where the court held that a "finding" of the Federal Power Commission that interstate or foreign commerce would be affected by the proposed construction of a hydro-electric plant by the petitioner was not an "order" within the terms of the statute.

[16] Thus the propriety of the commission's action in denying departure from the long and short haul clause was held reviewable because the commission's failure to take jurisdiction was affirmative in substance and such action refused an affirmative right of judicial review given by the statute when certain conditions existed. Intermountain Rate Cases, 234 U. S. 476, 34 S. Ct. 986 (1914). Similarly, an order of the commission dealing with apportionment of coal cars in time of shortage, which in form dismissed a complaint of shippers, but in effect required the observance of a particular car-distribution rule had been held affirmative in substance and thus reviewable. United States v. New River Co., 265 U. S. 533, 44 S. Ct. 610 (1924). See also, Alton Ry. v. United States, 287 U. S. 229, 53 S. Ct. 124 (1932).

[17] 47 YALE L. J. 766 (1938).

ized, or that the complainant has been compelled to disclose confidential information.[18] These opinions are subject to the criticism that they allow administrative orders to be reviewed by single judge district courts, whereas the statute calls for appellate review either by circuit courts of appeals or by "three-judge courts" in some circumstances.[19] Furthermore, to concede such equitable jurisdiction in federal district courts is undesirable, since it results in greater delay in the appeal process; and generally the expertness of a single judge on an administrative problem is not comparable to that of judges on the circuit court of appeals or three-judge courts set up under the statutory proceeding.

There has been no real need for the negative order doctrine, since the supremacy of administrative method could be effectively maintained through the requirement of preliminary resort to the administrative agency. Furthermore, there has been as great a need for judicial review of administrative orders denying affirmative relief as there was for those which granted affirmative relief. If judicial review is granted, it is not an infringement on legitimate administrative discretion, but only a check on its ultra vires acts and those amounting to an abuse of discretion.[20] Recently, with the increasing importance and growth of administrative agencies, resulting in increased attempts at judicial review, there has been an indication that the negative order doctrine has operated only to preclude attacks by statutory injunction and not to prevent independent equitable relief from negative orders.[21] However, the most recent decision of the Supreme Court completely discards the negative order doctrine as a restriction upon judicial review on the ground that "The considerations of policy for which the notions of 'negative' orders and 'affirmative' orders were introduced, are completely satisfied by application of the combined doctrines of primary jurisdiction and administrative finality."[22] Since the *Rochester* decision sets up new criteria for

[18] In American Sumatra Tobacco Corp. v. Securities and Exchange Commission, (App. D. C. 1937) 93 F. (2d) 236, independent equitable relief was granted since the property rights of the complainant were supposedly being jeopardized. See also, Utah Fuel Co. v. National Bituminous Coal Commission, 306 U. S. 56, 59 S. Ct. 409 (1939), where the complainant fuel company was granted relief in equity, independent of the statutory method, against the threatened disclosure by the commission of confidential information.

[19] 48 YALE L. J. 1257 at 1259 (1939).

[20] 2 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 416 (1931). Assuming the courts grant judicial review, that review is limited. However, there has been a recent tendency to broaden the scope of such review. 50 HARV. L. REV. 78 (1936).

[21] United States v. Griffin, 303 U. S. 226, 59 S. Ct. 601 (1937); 47 YALE L. J. 766 (1938).

[22] Rochester Telephone Corp. v. United States, 307 U. S. 125 at 142, 59 S. Ct. 754 (1939). Frankfurter, J., in delivering the majority opinion of the Court said further (307 U. S. at 143): "any distinction, as such, between 'negative' and 'affirmative' orders, as a touchstone of jurisdiction to review the Commission's orders, serves

testing the reviewability of administrative orders, it will be expedient to view the decision in detail.[23]

2.

The opinion first affirms the doctrine of primary jurisdiction and the necessity of full resort to the administrative process as prerequisites to petitioning for judicial review. The party seeking review must further satisfy three general requirements: existence of a "case" or "controversy," certain conventional requisites of equitable jurisdiction, and finally a right to review within the specific terms of the Urgent Deficiencies Act.[24] No general classification of reviewable orders is set out, but the Court indicates three general categories into which prior decisions under the negative order doctrine fell.[25] The first group included those orders which would have the effect of forbidding or compelling conduct only on the contingency of some further action by the commission and thus non-reviewable.[26] Under the new definition of reviewable orders, the first group would still not be reviewable because there would be no "case" or "controversy"; furthermore, the decisions in this group consist largely of orders which are interlocutory steps in the administrative proceeding which are never reviewable. The second group includes those orders "where the action sought to be reviewed declines to relieve the complainant from a statutory command forbidding or compelling conduct on his part."[27] Here, under the new defi-

no useful purpose, and insofar as earlier decisions have been controlled by this distinction, they can no longer be guiding."

[23] Of course the elimination of the negative order doctrine necessarily means a broadening of the field of judicial review, and presupposes the wisdom of such review. Keller, "Judicial Control and the Communications Commission," 25 GEORGETOWN L. J. 930 (1937). Some authorities have denied the need for judicial review of administrative orders. A third group has advanced the feasibility of an autonomous administrative justice with a special administrative judiciary set up to review administrative orders. Cooper, "Administrative Justice and the Role of Discretion," 47 YALE L. J. 577 (1938).

[24] 38 Stat. L. 219 (1913), incorporated in the Federal Communications Act, 48 Stat. L. 1093 (1934), 47 U. S. C. (Supp. 1938), § 402(a).

[25] Rochester Telephone Corp. v. United States, 307 U. S. 125 at 129-130, 59 S. Ct. 754 (1939).

[26] Thus the following orders would not be reviewable: tentative valuation: Delaware & Hudson Co. v. United States, 266 U. S. 438, 45 S. Ct. 153 (1924); final valuation allegedly inaccurate: United States v. Los Angeles & S. L. R. R., 273 U. S. 299, 47 S. Ct. 413 (1927); finding that a carrier is within the Railway Labor Act and thus amenable to the National Mediation Board: Shannahan v. United States, 303 U. S. 596, 58 S. Ct. 732 (1938).

[27] Rochester Telephone Corp. v. United States, 307 U. S. 125 at 129, 59 S. Ct. 754 (1939). Denial of the application of the carrier for a continuance of common control of rail and water lines was held not reviewable by the court. Lehigh Valley R. R. v. United States, 243 U. S. 412, 37 S. Ct. 397 (1917). An order of the com-

nition, judicial review will be allowed, although it would not have been allowed under the negative order concept. The facts of the principal case bring it within this group, for the order of the Federal Communications Commission involved in this case determined the "status" of the telephone company as one engaged in interstate commerce through physical connection with the facilities of another carrier controlling it, and thus the company was bound by earlier general orders requiring all telephone carriers to file schedules of charges, copies of contracts, and other information.[28] In holding that the question of "status" was a reviewable one, the *Rochester* case overrules prior decisions which refused to decide or review the administrative finding in regard to "status." The third group of formerly non-reviewable orders consists of administrative decisions that fail to forbid or compel conduct by a *third party*. By placing this group within the field of reviewable orders, the Court expressly overrules *Proctor & Gamble v. United States*.[29]

As the decision sets up general standards which may be liberally or strictly construed in granting judicial review, it is difficult to evaluate its results. For instance, one of the essential requirements for review is that there be a "case" or "controversy."[30] It remains possible for the Court, in order to limit judicial review, to adopt a narrow construction of the terms "case" or "controversy."[31] Furthermore, the requirements of the Urgent Deficiencies Act must still be satisfied; namely, that the suit be one "to enjoin, set aside, annul, or suspend" an "order of the . . . commission."[32] Here, again, the word "order" is peculiarly

mission denying a certificate to extend line was held not reviewable in Piedmont & Northern Ry. v. United States, 280 U. S. 469, 50 S. Ct. 192 (1930).

[28] Butler, J., dissenting in the principal case, 307 U. S. at 147, said that the final order of the commission was more than a determination of the "status" of the complainant telephone company, since the order subjected the party to the earlier affirmative general orders of the commission, and thus was reviewable because affirmative in substance. The fallacy of this reasoning was that review was denied on practically similar facts in Piedmont & Northern Ry. v. United States, 280 U. S. 469, 50 S. Ct. 192 (1930).

[29] 225 U. S. 282, 32 S. Ct. 761 (1912). This was the first decision to espouse the negative order doctrine. Here an order which denied recovery of demurrage from certain railroads and which refused to set aside administrative rules allowing demurrage charges was held non-reviewable. However, if the commission had ruled for the shipper in the Proctor case, the railway could have had judicial review. 87 UNIV. PA. L. REV. 1010 (1939); 47 YALE L. J. 766 (1938).

[30] The following elements are necessary to make up a justiciable controversy: adversary parties with a plaintiff and defendant adequately interested, and personal or property rights, private or public, which would be definitely affected. Muskrat v. United States, 219 U. S. 346, 31 S. Ct. 250 (1911).

[31] In the declaratory judgment field this narrow interpretation of the words "case" and "controversy" has been particularly evident. Borchard, "Justiciability," 4 UNIV. CHI. L. REV. 1 (1936).

[32] 38 Stat. L. 219 (1913), 28 U. S. C. (1934), § 46.

susceptible to judicial interpretation. There have been cases outside the field of the negative order concept, where it has been held that a "decision" or "finding," though final, was not reviewable because it was not an order.[83] Thus, by the application of this line of authority, it still remains possible to use the reasoning of the negative order doctrine to prevent a judicial review of administrative orders negative in character; for this reason it is possible that the principal decision may not completely dispel the possibility of future application of negative order reasoning. However, the opinion is desirable in that it discards a concept which confused the category of reviewable orders, and further it escapes the confinement of rigidly grouping reviewable and non-reviewable orders. Moreover, since the expediency of giving judicial review of administrative orders varies with each specific problem, the guides for reviewability in the principal decision are sufficiently flexible to cope with the ever-changing demand for review by the courts. In this respect the *Rochester* opinion represents a desirable departure from the strictures of the negative and affirmative order tests of reviewability.

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[83] 33 ILL. L. REV. 852 (1939); Carolina Aluminum Co. v. Federal Power Commission, (C. C. A. 4th, 1938) 97 F. (2d) 435; American Federation of Labor v. National Labor Relations Board, (App. D. C. 1939) 103 F. (2d) 933.