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PRIMARY JURISDICTION RECONSIDERED. THE ANTI-TRUST LAWS.

Louis L. Jaffe †

The doctrine of "primary jurisdiction" is a valuable corollary to the administration of the statutory purposes committed to nonjudicial agencies. It is, however, becoming a shibboleth. If the courts have at times resisted the legitimate claims of administrative autonomy under the smart of criticism, they can too much repent their sins. They may exaggerate the so-called "expertise" of the agencies and they may overstate its relevance to the solution of issues for which they share primary responsibility with the agencies. The application of anti-trust laws to the regulated industries raises the problem acutely.¹ It will be useful, I believe, to explore the foundations of the doctrine and then to examine it more particularly in the context of the anti-trust laws.

THE QUESTION STATED

Recently Mr. Justice Frankfurter in *Far East Conference v. United States*,² has thus described the "principle" which goes by the name of the "primary jurisdiction;" it is, he says, a principle,

" . . . now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not

† Byrne Professor of Administrative Law, Harvard Law School. Author of *JUDICIAL ASPECTS OF FOREIGN RELATIONS* (1933); *ADMINISTRATIVE LAW, CASES AND MATERIALS* (1953).

1. Professor Louis B. Schwartz has recently canvassed this problem in his excellent article, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436 (1954), particularly at 464.

2. 342 U.S. 570 (1952)

be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."³

Justice Frankfurter continues, pointing out that the Government demanding judicial relief under the anti-trust laws is as much bound by this principle as is any private party, reasoning that "The same considerations of administrative expertise apply, whoever initiates the action."⁴

We may assume for the moment the correctness of the decision in *Far East*. Nevertheless, there is danger in grounding the doctrine of primary jurisdiction so insistently in the fact of "administrative expertise." For lack of proper pruning it will crowd out other useful jurisdictions. Limitations already judicially established will not be understood and will be put down as merely arbitrary. A case for example, in the same volume of the *United States Reporter*, *International Longshoremen's Union v. Juneau Corporation*,⁵ has puzzled some who have come to understand the doctrine of primary jurisdiction in the all-embracing sense which, from the language of *Far East*, might appear to be justified. In that case an employer was allowed to recover damages (under the Taft-Hartley Act) for a secondary boycott. The National Labor Relations Board is competent to declare such a boycott to be an unfair labor practice and to order it stopped. Can the court "pass over" the Board and award damages without a prior ruling from the Board? The Labor Board in common with all administrative agencies has been stated by the courts to possess "expertise." Yet prior resort was not required. The statute itself, said the Court, specified two different remedies, one administrative, the other judicial. "Certainly there is nothing in the language of . . . [the statute] which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed."⁶ But

3. *Id.* at 574-5.

4. *Id.* at 576.

5. 342 U.S. 237 (1952). Cf. *Texas State Fed. of Labor v. Brown & Root, Inc.*, 246 S.W.2d 938 (Tex. Civ. App. 1952); *Russell v. International Union*, 258 Ala. 615, 64 So.2d 384 (1953).

6. *International Longshoremen's Union v. Juneau Corp.*, 342 U.S. 237, 244 (1952).

In *Garner v. Teamsters Local Union*, 74 Sup. Ct. 161, 165-6 (1953), Mr. Justice Jackson seems, in the following statement, to overlook the *Juneau* case: "Congress

that, of course, does not distinguish the case from other cases in which the doctrine has been applied. In the famous *Abilene*⁷ case from which the doctrine derives, the judicial remedy was, if not created by the statute, at least explicitly and unqualifiedly confirmed. And yet the decision in the *Juneau* case is in no way exceptional either as statute law or judicial decision. Another example: the enforcement of the Clayton Act is committed simultaneously to the Federal Trade Commission, the Attorney General, and private party action. It seems never even to have been suggested that primary jurisdiction is applicable to original judicial action under it. If "expertise" is the dominant factor it must be expertise in a sense more narrow than is usual in administrative law; or it must be that expertise is but one of the factors in the constellation.

The conception of primary jurisdiction cannot be stated as an invariable rule except in the specific instances where its incidence has been judicially determined. But it is possible to describe the legal situation in which its application is relevant. These are the principal features: (1) In all such situations there is at some point a claim enforceable by *original* judicial action, that is to say, a claim which in whole or in part is tried and enforced by judicial action. It is this that distinguishes the doctrine from the doctrine which demands exhaustion of administrative remedies before seeking judicial interference. In the exhaustion situation the claim is enforceable by administrative action alone; the judiciary is being invoked to correct or quash the administrative action. The exhaustion doctrine where applicable forbids judicial supervision of the administrative process until the latter has been exhausted. And now to continue: (2) The original judicial action may derive from (a) common law, (b) the same statute which created the administrative jurisdiction (in *Abilene* the statute provided an action for damages, and confirmed such common law actions as might obtain), (c) another statute. (3) The determination of the judicial action may require the resolution of issues which are more or less related to issues which an administrative agency is competent to resolve. It is not a requisite condition of the doctrine that the agency

did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." This decision, however, deals with the applicability of state law to a situation within the scope of the federal act.

7. *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

is empowered to grant any or part of the relief being judicially sought,⁸ though occasionally judges have thought otherwise.⁹ It may be enough that the question is one which in some connection now or later may be a premise of administrative action, though it should be a factor against the application of the doctrine that the agency is not presently competent to give any relief.

In such situations, then, we are faced with a conflict between two putatively competent jurisdictions. In each instance there is a concrete complex made up of *specific* statutory and, in some cases, common law arrangements. It does violence to the specific features of the situation to solve it by the abstraction of administrative expertise. This analysis is sometimes "loaded" by the implication that the court is competing for jurisdiction, as was true of the old unworthy fight by law against equity.¹⁰ But the jurisdiction of the courts, be it under the anti-trust laws, the common law or the very statute creating the administrative agency, is not to be regarded primarily as a source of institutional power. It, too, just as much as administrative power, will represent a facet of public policy. Neither administrative nor judicial power should be set off from the interest which each is established to protect. There is a disposition, which is the more unwarranted as time accumulates evidence, to treat administrative actions—in contra-

8. In the leading case of *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422 (1940), the action was for breach of contract. The defendant pleaded that enforcement would work an illegal rebate to a shipper. The controversy between plaintiff, a shipper, and defendant, a supplier of tank cars, was not subject to the jurisdiction of the ICC. The Supreme Court, nevertheless, referred the question of illegal rebate to the ICC. A claim was then made that the ICC had no jurisdiction to make a declaration which would serve no function other than to advise the Court. On direct appeal from the ICC ruling on the rebate, the ICC was held to have such jurisdiction. *El Dorado Oil Works v. United States*, 328 U.S. 12 (1946). The ICC has held that it has jurisdiction to interpret its certificates in aid of litigation. *Atlantic Freight Lines, Inc.*, 51 M.C.C. 175 (1949).

In *S.S.W., Inc. v. Air Transport Ass'n*, 191 F.2d 658 (D.C. Cir. 1951), the court, in a suit for damages under the anti-trust act, required prior recourse to the CAB though CAB power over the practices in question is limited to a cease and desist order.

In *Bell Potato Chip Co. v. Aberdeen Truck Line*, 43 M.C.C. 337 (1944), discussed at note 47 *infra*, the ICC claimed jurisdiction to determine the past reasonableness of motor carrier rates in support of a damage action though it has no power to award reparations in such cases. See also *Continental Charters Inc.*, 3 *PIKE & FISCHER AD. LAW* (2d ser.) 130 (CAB 1953) discussed at note 54 *infra*.

9. *E.g.*, *Pennsylvania R.R. v. Fox & London, Inc.*, 93 F.2d 669 (2d Cir. 1938); Clark dissenting in *S.S.W., Inc. v. Air Transport Ass'n*, 191 F.2d 658, 665 (D.C. Cir. 1951); *Texas State Fed. of Labor v. Brown & Root, Inc.*, 246 S.W.2d 938 (Tex. Civ. App. 1952); *cf. Slick Airways, Inc. v. American Airlines, Inc.*, 107 F. Supp. 199 (D.N.J. 1952). This case reaches a result contrary to *S.S.W., Inc. v. Air Transport Ass'n*, *supra*, though not solely on the ground that the CAB has no reparation power. And see the discussion in text at note 41 *infra*, of *Montana-Dakota Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951).

10. Thus in *Far East Conference v. United States*, 342 U.S. 570, 575 (1952), Mr. Justice Frankfurter quotes Mr. Justice Stone's warning against repetition of the struggle between law and equity.

distinction to judicial action—as manifestations of some abstract “public interest” quite divorced from private claims and pressure. In deciding whether to require prior administrative recourse, the respective claims of the opposing interests are entitled to be considered.

If then “expertise” as such is not determinative how are these opposed claims to be evaluated? The answer, I think, should be grounded in the notion of statutory purpose. If “expertise” be a relevant datum implied in the statutory scheme it is yet no more relevant than the statute (plus the total legal situation in which it is found) makes it. It is undoubtedly an implied aspect of the statutory purpose that a specialized administrative tribunal has been created to deal with problems in a certain area of conflict; statutes setting up agencies may be assumed to focus the solution of the problem in terms of the development of special competence. But a grant of power implies a limit. The simultaneous grant of jurisdiction to the courts or a failure to abolish jurisdiction potentially conflicting may imply such a limit. The statutory purpose is seldom sufficiently explicit to resolve the conflict. It becomes necessary to construct a system not in the unmediated term of the dominance of a presumed expertise but in terms of what is necessary to make *all* of the prescribed procedures workable. This system must perforce include concurrent judicial remedies in so far as explicitly created and those judicial remedies otherwise created in so far as they survive.

The upshot may be that as the court finally works it out in a particular case these judicial remedies do not survive. Where the statute establishing the administrative organ specifically creates or recognizes a judicial remedy this result is not possible. But where the asserted judicial remedy rests on common law or an independent statute (usually prior) it may be thought that the administrative statute excludes all other forums. Strictly the doctrine of primary jurisdiction in these latter cases had nothing on which to operate. The same arguments, however, which support that doctrine will, when carried further, produce the total extinction of the competing judicial remedies. Let us turn now to the cases.

THE GROWTH OF THE DOCTRINE

The doctrine of primary jurisdiction was established in the landmark case of *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*¹¹ A shipper claiming that a duly published carrier rate was “unreasonable” sued the carrier in a state court for the excess. The Supreme Court revers-

11. 204 U.S. 426 (1907).

ing the state court held that the action did not lie. The Interstate Commerce Commission alone was competent to determine whether the carrier rate was reasonable. The Commerce Act, reasoned Mr. Justice White, was intended (by establishing a uniform published rate) to abolish preferences and discriminations. If power existed in courts or juries to revise a published rate there could be no uniformity, and this ". . . would render the enforcement of the act impossible."¹² The Act, it is true, did provide that nothing ". . . shall in any way abridge or alter the remedies now existing at common law or by statute. . . ."¹³ Justice White, admitting that the action lay at common law, nevertheless concluded that the ". . . Act cannot be held to destroy itself."¹⁴

It will be seen that in this germinal decision there was no explicit reliance on expertness as the controlling consideration, however much it might be thought implied in the rationale. In the years immediately following there was a considerable body of decisions which applied or rejected *Abilene* in terms of the statutory requirement for uniform treatment. These cases involved either rates or services, one fruitful source of controversy being the allocation of coal cars in times of emergency. The cases appeared to turn very much on the pleadings. If the pleading adverted to a carrier rule or even an established carrier custom and then attacked the rule as unreasonable or discriminatory the action would be dismissed.¹⁵ If the complaint alleged a failure to abide by rule or custom it was held that *Abilene* did not bar the action.¹⁶

12. *Id.* at 441.

13. 24 STAT. 387 (1887), as amended, 49 U.S.C. § 22 (1946).

14. *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907).

15. *Baltimore & Ohio R.R. v. Pitcairn Coal Co.*, 215 U.S. 481 (1910) (attack on published scheme for allocating cars in emergency; this is the leading case); *Robinson v. Baltimore & Ohio R.R.*, 222 U.S. 506 (1912) (published rate allegedly discriminatory); *Midland Valley R.R. v. Barkley*, 276 U.S. 482 (1928).

16. *Pennsylvania R.R. v. International Coal Co.*, 230 U.S. 184 (1913); *Pennsylvania R.R. v. Puritan Coal Co.*, 237 U.S. 121 (1915) (departure from published rules of car distribution). *Kelly v. Union Stockyards Co.*, 190 F.2d 860 (7th Cir. 1951) may be correct on the facts but seems completely out of line in its statement that the question of whether the defendant is violating a "practice," being one of fact, is exclusively for the administrative agency. In *Mitchell Coal Co. v. Pennsylvania R.R.*, 230 U.S. 247 (1913) plaintiff coal company claimed that the railroad was making discriminatory allowances to its rivals for carrying their coal to a central terminal. This allowance was not published but the Court interpreted the published rate as covering carriage from the mine and so entitling to an allowance a mine company which carried coal to a central terminal; whether the allowance was excessive was for the Commission. Justice Pitney, who rather deplored the extensions of the primary jurisdiction doctrine, dissented in an interesting opinion. He believed that *Abilene* should be applied only to protect a *published* rate or allowance. He argued also that since the attacked practice had been discontinued the objectives of the action were entirely judicial and raised no questions of administrative uniformity. ". . . administration, management, regulation, concern themselves with the present and the future." *Id.* at 284. He was not troubled by the majority's

In some cases the courts have upheld complaints based on an alleged failure to fulfill the common law duty to serve,¹⁷ but where it appeared that such a complaint might implicitly involve an attack on the reasonableness or fairness of a carrier practice it has been rejected, at least if the practice involves typical transportation factors of an economic character thought to require administrative evaluation. In *Loomis v. Lehigh Valley R.R.*,¹⁸ for example, a shipper complained of the failure of the railroad to furnish lumber for bulkheads for shipping grain. His claim was that the railroad had a common law duty to provide adequate facilities for the carriage at the published rate. It appeared that the question was typical of a host of questions concerning the furnishing of special equipment; e.g., heat for fruit and vegetables in winter. With these the ICC had from time to time struggled. It had specifically rejected shippers' claims for car fittings. Said the Court:

"An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation. . . . In the last analysis the instant cause presents a problem which directly concerns rate-making and is peculiarly administrative. . . . And the preservations of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court."¹⁹

I shall have more to say as to how far this administrative power supersedes the application of the common law to the regulated carrier. But at this point it should be made clear what is implied in primary jurisdiction as exemplified by *Abilene*. It does much more

somewhat theoretic claim that reparations even here would promote lack of past uniformity, but he insisted that in any case complete uniformity in law enforcement was "an unattainable dream." *Ibid.* The majority decision is one of the earliest to stress the point that the courts do not possess the necessary expertness to decide this sort of issue.

17. *Eastern Ry. v. Littlefield*, 237 U.S. 140 (1915) (failure to deliver cars as agreed); *Pennsylvania R.R. v. Sonman Coal Co.*, 242 U.S. 120 (1916) (action for refusal to deliver cars, Court said there is a common law duty to deliver cars except in an emergency). *Quaere* if this case is not inconsistent with the later *St. Louis, B. & M. Ry. v. Brownsville Navigation Dist.*, 304 U.S. 295 (1938).

18. 240 U.S. 43 (1916). See also *Director General v. Viscose Co.*, 254 U.S. 498 (1921) (striking silk from a list of commodities to be accepted for shipping is a change in classification; its validity is for ICC). The four dissenters no doubt reasoned that outright refusal to carry a commodity whether by cancellation of the classification or otherwise was a breach of "common law duty." *Armour & Co. v. Alton R.R.*, 312 U.S. 195 (1941) (attack on railroad's practice of unloading cattle into the pens of Union Stockyard which then imposed a fee on consignee); *St. Louis, B. & M. Ry. v. Brownsville Navigation Dist.*, 304 U.S. 295 (1938) (refusal to furnish cars which would tend to "short-haul" the railroad company); *Thompson v. Texas M. Ry.*, 328 U.S. 134 (1946) (proper rental to be charged for use of tracks by bankrupt railroad exclusively for ICC).

19. *Loomis v. Lehigh Valley R.R.*, 204 U.S. 43, 50 (1916).

than prescribe the mere procedural time table of the lawsuit. It is a doctrine allocating the law-making power over certain aspects of the carrier-shipper relation. It transfers from court to agency the power to determine the incidents of this relation at least where there is involved day-to-day cost of service factors.

Though there has been and is no doubt that an action at law lies for the violation or refusal to apply a carrier rate, rule, regulation or custom, the courts have had difficulty where there is a question of interpretation. There are two leading cases. The first in time is *Texas & Pacific Ry. v. American Tie Co.*²⁰ The shipper attempted to ship oak railroad ties under a tariff for "lumber." The carrier rejected them: the ties were not, the carrier argued, "lumber;" it would be necessary before accepting them to publish an applicable rate. In a damage action, experts testified pro and con as to whether oak ties were "lumber." Mr. Chief Justice White, author of *Abilene*, held that the ICC alone could resolve this question. It is clear, he said, that ". . . whether the lumber tariff included crossties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs. . . ." ²¹ This probably carries the primary jurisdiction doctrine a step beyond *Abilene*. It asserts, though not explicitly, the power not only to make the tariff but to construe it. The meaning of White's statement came into acute question in *Great Northern Ry. v. Merchants Elevator Co.*²² A shipper billed wheat from a point in Iowa to a point in Minnesota where it was inspected and then reconsigned to an ultimate destination. Under a railroad rule there was a \$5 per car charge for reconsignment but the charge was not applicable to grain "held . . . for inspection and disposition orders incident thereto at billed destination. . . ." ²³ Was an order for reconsignment after inspection a "disposition order incident to inspection?" A Minnesota state court held that the court was competent to decide this question.²⁴ But was not the decision of this question an incident of the Commission's "power concerning tariffs?" In an earlier case, Mr. Justice Brandeis had said that *Abilene* was applicable "to any practice of the carrier which gives rise to the application of a rate." ²⁵ The Court nevertheless, Mr. Justice Brandeis writing the opinion, held that *Abilene* did not apply because the construction of a writing when

20. 234 U.S. 138 (1914).

21. *Id.* at 146.

22. 259 U.S. 285 (1922).

23. *Id.* at 289.

24. *Merchants Elevator Co. v. Great Northern Ry.*, 147 Minn. 251, 180 N.W. 105 (1920).

25. *Northern Pac. Ry. v. Solum*, 247 U.S. 477, 483 (1918).

"the words of a written instrument are used in their ordinary meaning" presents a question solely of law. The *Tie* case was distinguished on the ground that the testimony in that case showed a dispute as to whether the words were used in a special or an ordinary sense. Since juries might differ, uniformity would be destroyed. In the case at hand, the question being "solely of law," uniformity could be secured by the action of the Supreme Court. One might question whether the reason thus given for the decision in the *Tie* case is well-founded. The Justice relied on the procedural analogy concerning writings; disputed questions of fact relating to construction are put to a jury. But it is doubtful that this procedure is necessary or even appropriate when the writing has the force of a statute. Questions concerning the construction of a statute—though requiring the resolution of questions of fact—should be decided uniformly and so should be settled authoritatively.²⁶

But Mr. Justice Brandeis does not rest *Abilene* solely on uniformity. He sounds the note of special administrative competence which is later to become so dominant. Where, he explains, the question is of "reasonableness" as in *Abilene*, the function is "administrative."

"... the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found in a body of experts."²⁷

He then concludes: "Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion."²⁸

It is not quite clear whether under this analysis a case like *Tie* is completely assimilated to *Abilene*. White appeared to believe that the ICC had the power to interpret as well as to make the regulation, and that either exercise of power must be sustained if reasonable. Brandeis holds that interpretation is for the court with prior recourse

26. See, de Sloovere, *The Functions of Judge and Jury in the Interpretation of Statutes*, 46 HARV. L. REV. 1086 (1933); *Attorney-General v. Cast-Plate Glass Co.*, 1 Anstr. 39, 145 Eng. Reprint 793 (1792). Compare *Commonwealth v. Wright*, 137 Mass. 250 (1884), with *Commonwealth v. Sullivan*, 146 Mass. 142, 15 N.E. 491 (1888).

27. *Great Northern Ry. v. Merchants Elevator Co.*, 259 U.S. 285, 291 (1922).

28. *Id.* at 294.

only to resolve questions of fact. The court is not bound by the Commission's interpretation,²⁹ however much weight it may be given; but the court will accept the Commission's findings on questions of fact.³⁰

It must be confessed that Justice Brandeis' distinction is not free from difficulty. It may take a lawsuit to find out whether a tariff is used in a peculiar sense requiring evidence, with the consequence that the lawsuit has been all in vain. And quite apart from what the parties are prepared to make issuable it is possible that the agency if it had been given the opportunity to address itself to the question would have been able to show that what appeared to be "solely a question of construction" stood in need of peculiar knowledge for its solution. Then, too, there will be those who find the distinction between law and discretion a trifle old-fashioned. The resolution of an ambiguity in a railroad tariff will depend on its purpose. This will ordinarily be deduced from a history with which the agency has had a special connection. Choice between competing meanings, if it is assumed that either meaning is within the Commission's power to adopt, may be thought to be a policy choice to be made by the Commission. Some regulations are almost as indeterminate as the statute out of which they grow,³¹ so that the process of "interpretation" may be more aptly described as the process of further definition and rule making. This is perhaps true of the CAB's regulation concerning the permitted conduct of the so-called irregular or non-scheduled air carriers. A court has refused³² to entertain a suit by a certificated carrier to enjoin illegal operation by an irregular carrier. The court held that the agency alone was competent to determine violation. The Board, as *amicus*, supported the plaintiff. The court said critically: "In other cases, also, the Board has attempted to have the courts settle questions which were primarily within the aura of responsibility committed to it."³³ The regulation, said the court, was not "static." The economic situation was "mutable." So, therefore, was the regulation. The power thus recognized by the court to rewrite a regulation by reinterpretation

29. *Brown Lumber Co. v. Louisville & N.R.R.*, 299 U.S. 393 (1937); *cf. Adirondack Transit Lines, Inc. v. United States*, 59 F. Supp. 503 (S.D.N.Y. 1944), *aff'd*, 324 U.S. 824 (1945) (discussed in note 36 *infra*).

30. *Cf. Crancer v. Lowden*, 315 U.S. 631 (1942).

31. See the dissents of Jackson, J., in *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 343 (1952) and *FTC v. Ruberoid Co.*, 343 U.S. 470, 480 (1952).

32. *Trans-Pacific Airlines, Ltd. v. Hawaiian Airlines, Ltd.*, 174 F.2d 63 (9th Cir. 1949); *accord, American Airlines, Inc. v. Standard Airlines, Inc.*, 80 F. Supp. 135 (S.D.N.Y. 1948).

33. *Trans-Pacific Airlines, Ltd. v. Hawaiian Airlines, Ltd.*, 174 F.2d 63, 65 (9th Cir. 1949).

is unorthodox and potentially dangerous.³⁴ It reflects perhaps the peculiarly vulnerable and obscure position of the non-certificated air carrier. The court distinguished *Great Northern*: The regulation there was "clear," no special familiarity with complicated factual situations was needed. When somewhat later the CAB itself brought an enforcement action against an irregular carrier another court held that the question of interpretation was within its competence "regardless of its complexity."³⁵ In the meantime, however, the CAB had somewhat clarified the regulation. It would appear then that the courts oscillate between *Tie* and *Great Northern* depending perhaps on the character of the regulation.³⁶

But despite the difficulties in applying *Great Northern* it is, in my opinion, correct. Congress has granted and confirmed the original jurisdiction of the courts to enforce carrier rules and tariffs. This makes available to shippers hundreds of convenient local federal and state judicial forums. The Commission is overwhelmed with a multitude of vast tasks. It has been almost tearfully complaining that it is starved for funds and cannot recruit adequate personnel.³⁷ The function

34. See the curious three way split involving this regulation in *CAB v. American Air Transport Inc.*, 201 F.2d 189 (D.C. Cir. 1952). The judges there took a more orthodox view of the CAB's power.

35. *CAB v. Modern Air Transport, Inc.*, 179 F.2d 622 (2d Cir. 1950).

36. There appears to be a firmly established doctrine that if the scope of a motor carrier certificate is "ambiguous," ICC interpretations are binding unless "clearly erroneous or arbitrary." Whether this rule requires prior recourse is not clear. *Adirondack Transit Lines, Inc. v. United States*, 59 F. Supp. 503 (S.D.N.Y. 1944), *aff'd*, 324 U.S. 824 (1945); *Wilson v. United States*, 114 F. Supp. 814 (W.D. Mo. 1953).

On the other hand, judges do not hesitate to construe regulations requiring considerable penetration of technical mysteries. *Brown Lumber Co. v. Louisville & N.R.R.*, 299 U.S. 393 (1937) (Brandeis, J.); *Texas & Pac. Ry. v. Gulf, C & S.C. Ry.*, 270 U.S. 266 (1926) (Brandeis, J.); *Burris Mill & Elevator Co. v. Chicago R.I. & P.R.R.*, 131 F.2d 532 (10th Cir. 1942).

In *American Ry. Express Co. v. Price Bros., Inc.*, 54 F.2d 67 (5th Cir. 1931) involving the question of whether small onions for replanting were "Onions, Green" or "Plants, Strawberry and Vegetable" the court resolved the issue though it was one which perhaps under *Tie* should have gone to ICC; in *Louisville & N.R.R. v. United States*, 106 F. Supp. 999 (W.D. Ky. 1952) the court decided without prior recourse that equipment containing 35% to 70% silver was a "silver article" and so within a railroad regulation to the effect that it did not carry "silver articles" in regular course; in *Great Northern Ry. v. Ry-Krisp Co.*, 4 F. Supp. 358 (D. Minn. 1933) the court refused to determine whether "Ry-Krisp" was "bread" or "cereal"; in *Norge Corp. v. Long Island R.R.*, 77 F.2d 312 (2d Cir. 1935) the court refused to classify refrigerators as either "refrigerators and cooling apparatus combined" or "cooling or freezing machines."

The state law has not been generally investigated but state courts occasionally make very broad statements as to the requirement of prior recourse, particularly in railroad cases. *Chicago, I. & L. Ry. v. Railroad Comm'n*, 175 Ind. 630, 637, 95 N.E. 364, 367 (1911); *Marion Trucking Co. v. McDavid Freight Lines, Inc.*, 231 Ind. 519, 522, 108 N.E.2d 884, 885 (1952).

37. See 65 ICC ANN. REP. 130 (1951).

of interpreting the scope of specific tariffs is not central to carrier regulation. The result in *Great Northern* is consistent with these facts. It avoids the expense and frustration of two proceedings. It makes more valuable the judicial jurisdiction without impairing the coherence of the administrative program. It does not insist on the value of expertness to the exclusion of other considerations. It recognizes that expertness is a question of degree. More positively, it expresses a confidence that the court will be able to do an adequate job. It will have the help of counsel who will put before it much of what would be put before the Commission. As Judge Clark has said in *CAB v. Modern Air Transport, Inc.*: ". . . the outstanding feature of the doctrine is properly said to be its flexibility permitting the courts to make a workable allocation of business between themselves and the agencies."³⁸

A special problem arises where the administrative agency is not given jurisdiction to award reparations.³⁹ This is the case with the Federal Power Commission (FPC), the ICC with respect to motor carriers, and the CAB. In such cases there is probably a judicial remedy for violation of a rate as published or as revised following administrative determination of unreasonableness. At least that is so where the statute, as does the Motor Carrier Act, saves remedies not inconsistent with the statute.⁴⁰ But does an action at law lie for overcharges made prior to the administrative determination of unreasonableness? In *Montana-Dakota Co. v. Northwestern Public Service Co.*,⁴¹ the court held that no such action lay. This was based in part on a history indicating that Congress did not believe such relief necessary,⁴² but also on a rather reversed application of the primary jurisdiction doctrine. Justice Jackson argued that the agency alone could determine what was a reasonable rate, and further stated: ". . . we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose."⁴³ Mr. Justice Frankfurter, dis-

38. 179 F.2d 622, 625 (2d Cir. 1950). The court cites McAllister, *Statutory Roads to Review of Federal Administrative Orders*, 28 CALIF. L. REV. 129, 143, 147 (1939); and Note, *Primary Jurisdiction*, 30 GEO. L.J. 545 (1942).

39. McAllister, *supra* note 38, at 148, has a catalogue of causes of action under regulatory statutes.

40. 49 STAT. 560 (1935), 49 U.S.C. § 316(j) (1946) saves "any remedy or right of action not inconsistent herewith."

41. 341 U.S. 246 (1951).

42. The consumer under FPC is a wholesaler and it was thought that he would be adequately protected by invoking the power of the FPC to revise rates for the future.

43. *Montana-Dakota Co. v. Northwestern Service Co.*, 341 U.S. 246, 254 (1951). In *Hope Nat. Gas. Co. v. FPC*, 134 F.2d 287 (4th Cir. 1943) the FPC declared rates unreasonable to provide a premise for an action in a state court. The court held that the filed rate was the only "legal" rate and governed all past transactions.

senting,⁴⁴ pointed to at least two cases⁴⁵ where an agency without immediate jurisdiction had advised a court. It is true that the questions in those cases could have become issuable before the agency in other contexts, but that was roughly true in this case since in pronouncing a rate unreasonable for the future, the FPC may and usually does find past unreasonableness.

The ICC has believed that despite the lack of a reparations power, an action lies for past unreasonableness. This may be thought to follow from the express saving of common law remedies. It is, to be sure, doubtful that reparations in such a case serve a useful function. Rates are under continuous scrutiny. Administrative condemnation implies new circumstances or new understanding rather than serious past injustice. And, as Mr. Justice Jackson observes in the *Montana-Dakota* case, the overcharge has usually been passed along by the one who paid it to some undiscoverable and unreimbursable consumer. But if the action lies it is clear that primary jurisdiction applies⁴⁶ and the ICC has in the motor carrier cases been making determinations to serve as premises for judicial relief.⁴⁷

But recently some courts have carried the application of the doctrine to extremes or at least have expressed extreme views. In one case a plaintiff alleged that an airline had "unreasonably" cancelled a flight. The court assumed that the airline's conduct had been done pursuant to a "practice," and held that the CAB alone was competent to deter-

44. The dissenters did not dissent to the general substantive proposition stated in the text. The complaint alleged a cause of action by a subsidiary against a parent corporation for fraud. It alleged that the parent had filed with the FPC excessive rates for sales by the parent to the subsidiary and prevented the subsidiary from objecting to them. The dissenters believed that since the subsidiary was thus prevented from securing even future administrative relief there was involved a serious interference with its protected position under the statute. Mr. Justice Frankfurter pointed to a number of cases in which the courts had improvised remedies for violation of statutory protection, the most famous of which were *Texas & N.O.R.R. v. Brotherhood of Clerks*, 281 U.S. 548 (1930), and *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944). Justice Frankfurter expressed the dissenters' approach to the problem as follows: "... we cannot agree that the inability of the Federal Power Commission to grant relief requires that courts be similarly disabled. Courts, unlike administrative agencies, are organs with historic antecedents which bring with them well-defined powers. They do not require explicit statutory authorization for familiar remedies to enforce statutory obligations." *Montana-Dakota Co. v. Northwestern Service Co.*, 341 U.S. 246, 261 (1951).

45. *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422 (1940); *United States v. Morgan*, 313 U.S. 409 (1941). See also cases cited note 8 *supra*.

46. But in *Pennsylvania R.R. v. Fox & London, Inc.*, 93 F.2d 669 (2d Cir. 1938) where a carrier was suing for an undercharge, the court said in passing that since the ICC cannot award reparations against a *shipper*, primary jurisdiction was inapplicable.

47. *Bell Potato Chip Co. v. Aberdeen Truck Lines*, 43 M.C.C. 337 (1944). The majority held that it would not entertain a proceeding unless a timely action had been filed in court.

mine the reasonableness of the practice.⁴⁸ This is contrary to the earlier railway cases holding that the courts are competent without prior recourse to try cases alleging violation of so-called "common law" duties. It is true, to be sure, that when a court can see that the alleged common law duty would compel services involving rate elements it will require prior recourse despite the fact that the practice has not been covered by a published tariff. And as the years have worn on, the area of putative regulations has more and more cut down "common law duty."⁴⁹ But problems still arise which the courts regard as apt for independent judicial solution. Recently they have entertained suits based on the refusal of a railroad to cross a picket line to pick up or discharge freight,⁵⁰ even though the ICC itself has entertained jurisdiction in this area, sometimes ordering the railroad to serve, at other times not.⁵¹ It has been held that a Negro forced to move into a "Jim Crow" car can sue the offending railroad.⁵² In such cases the judiciary may appropriately conclude that because the problem involves factors not peculiarly or exclusively technical, it has an historic warrant to solve it within the broad domain of its common law jurisdiction. The jurisdiction and experience of the judge embraces all of the social conflicts regulated by law. His canon of legal objectives may be correspondingly broader or at least less likely than the administrator's to be distorted by specialized interest and responsibility.⁵³

Cases of negligence may raise incidental questions concerning "practices." Recently the airlines put into effect a rule barring a negligence suit unless the plaintiff had given notice of claim thirty days after the accident. The rule was embodied in a filed tariff. Some

48. *Adler v. Chicago & S. Air Lines, Inc.*, 41 F. Supp. 366 (E.D. Mo. 1941). This case then proceeded before the CAB which dismissed his claim. *Adler v. Chicago & S. Air Lines, Inc.*, 4 C.A.B. 113 (1943). *Mack v. Eastern Air Lines, Inc.*, 87 F. Supp. 113 (D. Mass. 1949) is sometimes cited as in accord but Judge Wyzanski's decision in that case proceeds on the basis that the conduct complained of was in accord with published rules. *Schwartzman v. United Air Lines*, 6 F.R.D. 517 (D. Neb. 1947), refused, on motion to dismiss, to treat the conduct complained of as a "practice" immune from judicial scrutiny. The *Adler* case is criticized in Note, *Primary Jurisdiction*, 30 GEO. L.J. 545 (1942).

49. See cases cited note 18 *supra*.

50. *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 32 LAB. REL. REP. (Labor-Management) 2386 (D. Ore. 1953); *Pacific Gamble Robinson Co. v. Minneapolis & St. L. Ry.*, 105 F. Supp. 794 (D. Minn. 1952).

51. See Note, *Duty of Common Carrier to Cross Picket Line of Shipper's Employees to Receive Goods for Carriage*, 67 HARV. L. REV. 317 (1953).

52. *Moore v. Atlantic Coast Line R.R.*, 98 F. Supp. 375 (E.D. Pa. 1951); *Solomon v. Pennsylvania R.R.*, 96 F. Supp. 709 (S.D.N.Y. 1951).

53. This view is expressed in Markham and Blair, *The Effect of Tariff Provisions Filed under the Civil Aeronautics Act*, 15 J. AIR L. 251 (1948). But see King, *The Effects on Tariff Provisions; some Further Observations*, 16 J. AIR L. 174 (1949).

courts held the tariff to be reasonable.⁵⁴ Others declared it unreasonable,⁵⁵ acting on a doctrine announced years ago by the Supreme Court.⁵⁶ Under certain circumstances a rule disclaiming liability may not be a "tariff" and the courts are competent to declare it unreasonable. Cautious courts, however, under the current empire of the primary jurisdiction rule, are reluctant to assert patent inability without first hearing from the agency.⁵⁷ In the matter of the thirty day notice, one court abated the negligence suit until the CAB acted. The carriers objected that having no reparation power the CAB was without jurisdiction. But the Board pointed out that if this argument were applied the carriers could slip into the tariffs all manner of outrageous immunity for past misconduct since the Board's staff was too small to police the filings.⁵⁸ It then denounced the thirty day rule as unreasonable and void. But more recently the CAB has adopted a regulation that carrier rules limiting liability for personal injury are not "required" to be filed as "tariffs." The advantages, says the CAB, of uniform application of state law in negligence actions outweigh uniform federal rules.^{58a}

In conclusion: the doctrine of primary jurisdiction should not be applied automatically whenever in the course of a lawsuit a question arises which could or might be the occasion for administrative judgment. Its application should depend on a balance of considerations. These questions should be asked: how peculiarly apt for administrative discretion is the question to be decided? How seriously will a decision in this very litigation (or a course or practice of such litigation) jeopardize the statutory purpose? (In *Abilene* it would give rise to outlawed discrimination.) How seriously would the requirement of prior recourse jeopardize the purposes of the judicial jurisdiction, as by imposing great inconvenience on at least one of the parties in terms of expense or delay; or more seriously, by giving

54. *Wilhelmy v. Northwest Air Lines*, 86 F. Supp. 565 (W.D. Wash. 1949); *Indemnity Ins. Co. of North America v. Pan American Airways, Inc.*, 58 F. Supp. 338 (S.D.N.Y. 1944).

55. *Shortly v. Northwestern Airlines, Inc.*, 104 F. Supp. 152 (D.D.C. 1952); *Thomas v. American Airlines, Inc.*, 104 F. Supp. 650 (E.D. Ark. 1952). These cases rest on the authority of *Pacific S.S. Co. v. Cackette*, 8 F.2d 259 (9th Cir. 1925), *cert. denied*, 269 U.S. 586 (1926).

56. *Boston & Maine R.R. v. Piper*, 246 U.S. 439 (1918).

57. *Lichten v. Eastern Airlines, Inc.*, 189 F.2d 939 (2d Cir. 1951). This involved a tariff unconditionally disclaiming liability for certain losses. The majority applied primary jurisdiction. Frank, J., dissenting, thought the rule void under *Boston & Maine R.R. v. Piper*, 246 U.S. 439 (1918). Frank also notes the CAB's lack of reparations power and that no great expertise was involved. "If 'exhaustion of remedies' is demanded in a case like this, the result will be the exhaustion of litigants." *Lichten v. Eastern Air Lines, Inc.*, 189 F.2d 939, 948 (2d Cir. 1951).

58. *Continental Charters, Inc.*, 3 *PIKE & FISCHER AD. LAW* (2d ser.) 130 (CAB 1953).

58a. 19 *FED. REG.* 509 (1954).

undue weight to the purposes represented by the agency as opposed to the purposes entrusted to the judiciary? As we have seen in the *Juneau* case, the court concluded without apparent effort that whether a boycott was an unfair labor practice was not an exclusively administrative question to be resolved by prior resort to the Labor Board. This question was of a kind with which the judiciary had dealt in the past. There was the possibility of contrary judicial and administrative decisions, at least initially, but the question involved was sufficiently statable as one of law that there might be a tolerable reconciliation through the medium of judicial review of contrary administrative decisions. And, in so far as the decision would depend on resolution of factual issues, a merely occasional contrariety of findings would not threaten the statutory scheme. Regulation in this area is less systematic than in some. There is, therefore, more room for varying judgment in particular situations, though even here, a serious split between court and agency could destroy the spirit of the legislation.

THE DOCTRINE AND THE ANTI-TRUST LAWS

In recent years the most controversial problems in this area have arisen in the attempt to enforce the anti-trust laws against the so-called regulated industries: the railroads, airlines, and water carriers. In an early case⁵⁹ which a recent district court decision completely ignores⁶⁰ the United States brought an indictment under the Sherman Act alleging that the defendant railroads and steamships had conspired to exclude other steamship companies from the Alaska carrying trade. It was alleged that the railroads refused to establish reasonable or non-discriminatory joint through rates with the victimized steamship companies in violation of the Commerce Act; also that the defendants induced docking companies to discriminate. The defendants moved to dismiss under *Abilene*. The court did dismiss the claims that the through rates were discriminatory; this question was a transportation problem to be solved by the regulatory process. But the conspiracy to monopolize was held to state a cause of action under the Sherman Act which could be tried without prior recourse.

In the important *Keogh*⁶¹ case one implication of this distinction was developed. A shipper of commodities sued for damages under

59. *United States v. Pacific & Arctic Co.*, 228 U.S. 87 (1913). Other cases refusing remedies to enforce obligations against carriers contrary to tariffs or arrangements filed or approved by the ICC are: *Central Transfer Co. v. Terminal R.R.*, 288 U.S. 469 (1933); *Terminal Warehouse Co. v. Pennsylvania R.R.*, 297 U.S. 500 (1936); *Interstate Natural Gas Co. v. Southern California Gas Co.*, 102 F. Supp. 685 (S.D. Cal. 1952).

60. See text at note 77 *infra*.

61. *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922).

the Sherman Act, alleging an agreement by the carriers to fix rates pursuant to the so-called conference method. The rates so fixed had been filed with the Commission; the rate had been attacked before the Commission (by Keogh, himself, among others) and upheld as reasonable. The court held that the action did not lie *because damages could not be proved*. The rate as such was legal. Even were it demonstrable that the conspiracy had resulted in higher rates, damages based on assumed lower rates could not be awarded unless and until the Commission found the lower rates to be legal. Any other rule would offend the requirement of uniformity. It will be noted that basically this decision transcends the primary jurisdiction rule in so far as it holds that there is no judicial action at all. The remedy for damages under the Sherman Act has been superseded pro tanto by such remedy as exists under the Commerce Act. The court rests its decision on the avoidance of a square legal contradiction. Mr. Justice Brandeis, however, explicitly excepts the right of the Government to bring a criminal or equitable action to enforce the anti-trust laws. "The fact that these rates had been approved by the Commission, would not, it seems, bar proceedings by the Government."⁶² The court was, of course, not faced with the question whether in a suit by the Government, prior recourse to the ICC would be required.

But the key case is *United States Navigation Co. v. Cunard S.S. Co.*⁶³ It goes much beyond *Keogh* in laying a basis for expansive views of primary jurisdiction. A steamship company sued in equity under the anti-trust laws to enjoin a conference of steamship companies from driving it out of business. It alleged an agreement among the defendants to grant lower or "contract" rates (by "as much as 100%") to shippers who used the conference carriers exclusively. It further alleged, inter alia, rebates, false rumors concerning the plaintiff and black-listing of brokers who acted for plaintiff. The court dismissed this action on the ground that under the Shipping Act the Shipping Board had jurisdiction to outlaw all of these practices. Like *Keogh* it is a decision that the remedies under the Sherman Act have been superseded by the administrative remedies: in this case not reparations but cease and desist orders. Thus the doctrine of primary jurisdiction in its strict sense is not involved. But *Abilene*, as well as *Keogh*, is relied on. The decision, however, goes beyond both. Whereas these rested on a contradiction between judicial relief and the statutory requirement of uniformity among shippers, the decision here is placed avowedly on the superior competence of the administrative body, on its knowledge

62. *Id.* at 162.

63. 284 U.S. 474 (1932).

and experience in a field ". . . generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade. . . ." ⁶⁴ The court did appeal to the value of uniformity, but I take it that what is meant is not uniformity among shippers as in *Abilene* but uniformity of policy. This is indeed a much broader deference to expertness than anything thus far, and a much bolder application of the implied repeal *pro tanto* of the Sherman Act.

In the famous case of *Georgia v. Pennsylvania R. R.*,⁶⁵ this movement suffered a check, though it would seem only a momentary one. Georgia, for herself and as *parens patriae*, asked leave to file an original bill in the Supreme Court charging the railroads with a conspiracy under the Sherman Act to impede the development of the South by maintaining rates higher than in the North in order to protect the North from Southern competition. As in *Keogh*, particular rates and the rate level in general had been attacked before the Commission and approved. Georgia, however, asked only for an injunction. A closely divided Court allowed the bill to be filed. Relying heavily on the dictum of Brandeis, J., in *Keogh* the majority argued that the conspiracy as such was a violation of the anti-trust laws, that the Commission had no authority either to examine the legality of the conspiracy or to give relief against it, and that an injunction would not interfere with the regulatory scheme. There is under the Transportation Act a broad area or band of reasonable rates designed to preserve private initiative in rate making. Within this area the Sherman Act requires that each carrier retain its freedom of action. ". . . repeals by implication are not favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy." ⁶⁶

The dissenters relied first on *Keogh*. Georgia could not prove damage. Proof of damage, they insisted, is as necessary to an injunction as to a damage action. Second, the Commission could entertain rate proceedings based on discrimination and unreasonableness. Such a proceeding so closely approximates the ground of complaint here that, as in *Cunard*, the anti-trust remedies must be regarded as superseded. In any case an injunction would be meaningless and futile unless it supervised the rates. Finally, by reason of the fact that the Department of Justice had joined as *amicus* in favor of Georgia, there is no need for the suit since there would appear to be no obstacle to a

64. *Id.* at 485.

65. 324 U.S. 439 (1945).

66. *Id.* at 456.

suit by "the Government" which is charged with the enforcement of the anti-trust laws.

But in *Far East Conference* the doctrine of primary jurisdiction was once more expanded, this time, and for the first time by the Supreme Court, against a claim of "the Government."⁶⁷ The allegations were almost identical to those in *Cunard*. It was charged that a shipping conference had agreed on a "contract rate" system. Though the general conference agreement had been filed with the administrative authority, the contract rate tariffs had not been. This was in violation of a specific requirement for filing, a violation of which entailed a criminal penalty. There was a statutory declaration that an unfilled agreement was per se a violation of the anti-trust laws. The Court held that "the Government" could not sue under the Sherman Act, at least not without first seeking relief from the Maritime Board. The decision, however, was not, as in *Keogh*, that the plaintiff, here the United States, had no action. If the Maritime Board were to refuse to immunize the conference agreement presumably the United States could then sue for an injunction or prosecute a criminal proceeding under the anti-trust laws. Similarly in suits under the anti-trust laws for damages against the regulated air carriers the action has been held to lie (subject to the condition of prior recourse)⁶⁸ because the CAB does not have reparation power: it would be a strong thing to hold that the administrative remedy of future prohibition has superseded the anti-trust remedy of damages.

Mr. Justice Frankfurter writing for the Court in *Far East Conference* did not refer to the dictum in *Keogh* nor to the dissent in *Georgia*, (in which he concurred), both of which would reserve anti-trust actions by the Government. Relying on *Cunard* he said:

"The same considerations of administrative expertise apply, whoever initiates the action. The same anti-trust laws and the same Shipping Act apply to the same dual rate system. To the same extent they define the appropriate orbits of action as between court and Maritime Board."⁶⁹

67. However in *United States v. Railway Express Agency, Inc.*, 89 F. Supp. 981 (D. Del. 1950) a civil action to declare invalid the railway agreement establishing the Railway Express Agency as their exclusive express instrumentality, the court, though it refused to dismiss, referred the legality question to the ICC. The ICC approved the agreement. The court refused to review the approval because "... the orders of the Interstate Commerce Commission may not be attacked in a collateral proceeding." *United States v. Railway Express Agency, Inc.*, 101 F. Supp. 1008, 1012 (D. Del. 1951).

68. *S.S.W., Inc. v. Air Transport Ass'n*, 191 F.2d 658 (D.C. Cir. 1951). *Appgar Travel Agency, Inc. v. International Air Transport Ass'n*, 107 F. Supp. 706 (S.D.N.Y. 1952). But in *Slick Airways, Inc. v. American Air Lines, Inc.*, 107 F. Supp. 199 (D.N.J. 1951), Judge Forman, in a very elaborate and well-reasoned opinion, held that prior recourse was unnecessary. He distinguished both *S.S.W.* and *Far East Conference*.

69. *Far East Conference v. United States*, 342 U.S. 570, 576 (1952).

The Government protested that it should not be forced to go before the Board. It should not be deemed such a "person" as may under the Act file a complaint. The Court thought this argument "frivolous:" certainly the Government could seek relief as a shipper. The "large question" should not turn on a "debater's point." But with deference it may be urged that the point has a bearing on the "large question." The decision has been impliedly criticized for failure to distinguish between the United States as private claimant and as sovereign.⁷⁰ Dissenting, Mr. Justice Douglas said: "Why should the Department of Justice be remitted to the Board for its remedy?"⁷¹

Now from a theoretic point of view it would not seem that the Department of Justice, as such, has rights or remedies, or that it can be said to be any more representative of the "sovereignty" of the United States than the Maritime Board. But that would be to continue the discussion in the dry terms of the "debater." And there is a practical truth behind these criticisms. If so much is to be made of the "expertise" of the Board, it must be remembered that expertise is not the merely neutral accumulation of knowledge or abstract understanding. An agency regulating a single industry to some extent identifies with the industry. The relation between agency and industry, is, in the term of the biologist, symbiotic. This is not merely, as some would imply, a sympathy with the industry's position though that is part of it. But the agency over a period of time comes itself to have an investment in the present status of the industry. By its regulatory activity it has helped to determine the form of the industry. The agency may be, therefore, not only sympathetic to the prevailing or dominant industry forces, but hostile to potential disturbers of the status quo. There is always a danger that such a combination of governmental and private power will insist too exclusively or too narrowly on its point of view. The position may become even more strongly consolidated if the agency is an "independent" one not immediately subject to presidential control. The Department of Justice may become a focus for the forces which would mitigate or qualify this concentration of power.⁷² Congress has provided a remedy which it has not explicitly repealed. It has indeed provided that an agreement filed with and approved by the Board is immune from Sherman Act attack, but unless filed, is subject to the anti-trust laws. The agreement here was neither filed nor ap-

70. Cf. HART AND WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1131 (1953).

71. *Far East Conference v. United States*, 342 U.S. 570, 578 (1952).

72. See Stern, "Inconsistency" in *Government Litigation*, 64 HARV. L. REV. 759 (1951).

proved. The Court, nevertheless, holds that the remedy is unavailable, at least prior to a refusal of approval by the Board.

In earlier anti-trust suits, at least by the Government, the Court had not been willing to hold that either the anti-trust remedy was gone or that its exercise was subject to a condition of prior resort. This is particularly true of cases where the Federal Trade Commission exercises concurrent jurisdiction under the anti-trust laws which it does over industries not subject to an industry regulatory commission. To be sure in these cases both the judicial and administrative remedies are created by the same law. It could not, of course, be held that the anti-trust remedy had been repealed, but it was logically possible to have required prior resort, as in *Abilene* where both administrative and judicial remedies were established in the same statute. But such a position has never been seriously suggested except in a case where the Trade Commission jurisdiction arose not under the Sherman Act but the Webb-Pomerene Act.⁷³ That Act immunized publicly filed agreements of export associations but not all practices of such association. The Act gave the Commission, as a matter of fact, only a power to recommend prosecutions to the Department of Justice. The Court refused to require prior resort.⁷⁴ The Commission "can give no remedy; can make no controlling finding of law or fact." But the Court said also that qualification of the Department of Justice's jurisdiction by the primary jurisdiction doctrine would require "a clear expression of that purpose by Congress." *Abilene*, in other words, was distinguished as resting on a palpable inconsistency between the untrammelled judicial action and the statutory purpose.

Cunard, Georgia and *Far East* differ, however, from the situation in which the Trade Commission has concurrent jurisdiction. The jurisdiction of the FTC affects industries which are still legally governed by the competitive norm. The carrier industries are each subject to a comprehensive regulation of rates and facilities. The scheme of regulation supplants or may supplant competition. Competitive rates may be administratively disapproved as too low. They may not be changed without agency permission. In *Far East* the agency could grant anti-trust exemption of the very agreement in question. It was not argued, of course, by the dissenters in *Georgia* that the ICC could approve an agreement by the carriers not to file competitive rates or an agreement to maintain a higher rate level in the South. The dissenters' position was rather that the regulatory scheme was so comprehensive,

73. 15 U.S.C. 61 (1946).

74. *United States Alkali Export Ass'n, Inc. v. United States*, 325 U.S. 196 (1945), relying on *United States v. Borden Co.*, 308 U.S. 188 (1939).

that it so qualified the area in which competition could operate, that to apply the competitive criteria of the anti-trust laws to the carrier activities in question was arbitrary and futile. The regulatory purposes would bring into play criteria which cut across anti-trust criteria. There was thus created an implied contradiction between the regulatory and the anti-trust criteria which would make applicable the reasoning of the *Abilene* case.

Perhaps such inconsistency does exist in *Far East*. The Board had an explicit power to exempt the agreement in question. This is something more than concurrent jurisdiction (as in Trade Commission cases). It is a power to *absolve* from the anti-trust laws for reasons of policy deriving from another law. Thus, though a court might hold that the agreement violated the anti-trust laws, and so enjoin it, the Board then could render the judicial proceedings nugatory by approving it. Under the statute the agreement is subject to the anti-trust laws unless filed and approved until which time it would seem clear that the court does have jurisdiction. Nevertheless, a court of equity might consider an injunction futile or wasteful of its process, if it can be thereafter undone by administrative action.⁷⁵ But as my colleague, Professor Hart, has suggested, the Court might at least have conditioned its refusal of relief on a filing of the agreement by the defendant. And it might also have retained the action in the event that the agency refused approval.⁷⁶

It is with some misgiving that I reach the conclusion that *Far East* was correctly decided. The maxim, that repeals by implication are not favored, rests on the solid ground that large debatable issues of policy should be resolved by Congress, the most broadly representative organ. I am to some extent troubled that the sole organ for resolving the issue of consumer and competitor protection involved in the anti-trust laws becomes an agency so powerfully moved to support industry price regulation. There is to be sure judicial review of the exercise of this power and Mr. Justice Frankfurter suggests that to secure unity and coherence the role of the judiciary should be channelled into this

75. This point was stressed by Judge A. N. Hand in his opinion for the Circuit Court of Appeals in *United States Navigation Co. v. Cunard S.S. Co.*, 50 F.2d 83 (2d Cir. 1931), *aff'd*, 284 U.S. 474 (1932), discussed in text at note, 63 *supra*.

76. In *Far East* the action was dismissed because if the Board's order were favorable to the United States, the United States could reapply for equitable relief.

There is some uncertainty as to when the action will be dismissed and when stayed. If prior resort is in aid of an action (as for breach of contract) the action will be stayed rather than dismissed. *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422 (1940). In recent anti-trust cases seeking damages which the agency could not grant the action has been stayed. *S.S.W., Inc. v. Air Transport Ass'n*, 191 F.2d 658 (D.C. Cir. 1951). No doubt the action will not be dismissed if there is a potential action for damages which may be barred by limitation.

single course. One might be afraid that the agency will defeat even this check by failing to take action. Under *Far East*, however, the Court has announced that the Department of Justice may file a claim before the Board. Furthermore, the statute makes it clear that the Department may initiate a prosecution for failure simply to file the agreement which is made in itself a crime punishable by a penalty of \$1,000 per day.

Immediately following *Far East* a district court held that a criminal action was within its doctrine.⁷⁷ This case alleged a conspiracy almost identical to that in the early *Pacific & Arctic* case discussed above,⁷⁸ not only in its legal character but actually again involving the Alaska carrying trade. The court either did not know of the case or regarded it as overruled by *Far East*. More or less paraphrasing the opinion of Mr. Justice Frankfurter, the judge, in deciding that a criminal case is no different from a civil case, says: "The *Far Eastern* [sic] *Conference* case constitutes another milestone in the tendency we have already noted—a tendency to rely more and more upon administrative 'expertise.'"⁷⁹

This decision would indeed appear to derive more from a "tendency" of judicial decision than from a direct reading of the statute. It cannot be said here, as it was in *Far East*, that judicial action would be futile since the judgment would have been a penalty for past misconduct. Furthermore the statute appears to make it clear that the exemption is limited to the future.⁸⁰ The crime, therefore, has been committed whatever the agency decides. What then is the function of prior recourse? It could be said, perhaps, that the agency's judgment will have relevance to whether the agreement is a violation of the anti-trust laws, that the anti-trust laws themselves are to be read as modified by the concept of regulation, by, as it were, a rule of reason. It thus becomes a condition of criminal prosecution that the Government first prove its case before the agency. If the Government then prevails it *must* if it chooses to enforce a criminal penalty retry the litigation before a jury. This is a high price to pay for "expertise." It is doubtful that it should be imposed without more warrant than the ill-defined tendency indicated in the existence of a related administrative jurisdiction. The criminal

77. United States v. Alaska S.S. Co., 110 F. Supp. 104 (W.D. Wash. 1952).

78. United States v. Pacific & Arctic Co., 228 U.S. 87 (1913). See text at note 59 *supra*.

79. United States v. Alaska S.S. Co., 110 F. Supp. 104, 111 (W.D. Wash. 1952).

80. In *S.S.W., Inc. v. Air Transport Ass'n*, 191 F.2d 658 (D.C. Cir. 1951), a suit for treble damages, the court assumes that immunization would relate back. The statute there, however, is not explicit, as it is here, concerning the effect of immunization.

sanction has a role different from the injunction and consequently distinct from the administrative cease and desist order. In its purpose and in its method it is peculiarly within the province of the judiciary and it is not easy to attribute to Congress a purpose to subject it to a requirement of prior recourse. If it is doubtful policy to apply criminal sanction to the ill-defined proscriptions of the anti-trust law, it is then good policy to apply them where they speak most clearly and in a way that will preserve that clarity. Most of the agreements in question here are, unless immunized, ipso facto violations of the anti-trust laws. If the administrative judgment developed on prior recourse is to enter into the determination of past violation, this clarity is lost.

Let us finally focus our problem in terms of certain recent cases in which the pleader has alleged a conspiracy which upon the face of it the agency either has no jurisdiction to consider or no ultimate power to approve.

In a recent case, *Seatrains Lines, Inc. v. Pennsylvania R.R.*,⁸¹ a common carrier by water of loaded railroad freight cars complained of a twenty year conspiracy by the railroads to drive it from business by refusing to supply it with cars. The matter has been long fought out before the ICC. The ICC has held that it is without power to compel a rail carrier to permit delivery of its cars to a water carrier unless a through route has been agreed upon or ordered by the Commission. At the same time the Commission purports (rather contradictorily) to have power over carrier rules with respect to the use and interchange of cars. The railroads had filed with the ICC rules agreeing to free interchange of cars among rail carriers but providing that cars shall not be delivered to a water carrier without permission of the owner. Seatrain alleged an agreement among carriers to deny Seatrain this permission, and to discourage shippers from using Seatrain. Seatrain asked the court, among other things, to undo this conspiracy by ordering the railroads to participate in shipments. This the court held itself incompetent to do under *Cunard* (*Keogh*, too, would seem in point), nor could the court pass on the validity of the agreement filed with the ICC which in essence appeared to embody the alleged conspiracy or at least to embody its effects. But Judge Hastie in a meticulously careful and scrupulous opinion held that a complaint limited to the conspiracy to influence individual carrier action would state a cause of action. He was mindful that this aspect of the conspiracy, and the relief available to Seatrain under it, was incidental to the larger grief arising out of the agreement per se and the failure to secure relief from the ICC. But he further stated:

81. 207 F.2d 255 (3d Cir. 1953).

"A division of jurisdiction between court and commission in the interest of orderly administration does not minimize the seriousness of conspiracy in restraint of trade and should not deprive a litigant of the privilege of seeking judicial relief for even the 'less important' aspects of such conspiracy when the court can consider and act upon them without invading the administrative province." ⁸²

It should be noted that Judge Hastie's technique and result are perhaps inconsistent with the Court's handling of a similar problem in *Cunard*. There, as here, the pleader alleged practices which prima facie the agency either could not or would not approve. Justice Sutherland answered that whether the agreement appeared to be lawful or unlawful on its face the whole matter should first be explored by the agency.⁸³ It must be admitted that there is much good sense in this view. The court may suspect that the pleader has drafted his allegations with an eye to avoid primary jurisdiction and that the allegations do no more than characterize somewhat tendentiously what the court regards as basically an administrative issue. The court, therefore, would at the least have discretion to evaluate the substantiality of the controversy alleged to be beyond the reach of administrative judgment. The *Cunard* approach was taken recently by one court⁸⁴ and rejected by another⁸⁵ in connection with an alleged conspiracy by the certificated air carriers against non-certificated carriers or their agents.

On the other hand, the method of the majority in *Georgia v. Pennsylvania R. R.*,⁸⁶ supports Judge Hastie. There is to be sure a possible

82. *Id.* at 262.

83. *United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474, 487 (1932).

84. *S.S.W., Inc. v. Air Transport Ass'n*, 191 F.2d 658 (D.C. Cir. 1951).

85. In *Slick Airways, Inc. v. American Airlines, Inc.*, 107 F. Supp. 199 (D.N.J. 1951), Judge Forman denied a motion to dismiss, without prejudice to a renewal of the motion, if after the proofs it appeared that there existed an administrative problem. The defendant then sought a prohibition against the judge on the ground that he was without jurisdiction. The petition was dismissed, *American Airlines, Inc. v. Forman*, 204 F.2d 230 (3d Cir. 1953). Judge Hastie held that there was no clear statutory requirement of prior resort. There was a need "... for judicial appraisal of the less than apparent interrelation of legislation under which it is argued that primary resort should be to an administrative tribunal and other provisions of law which standing alone would empower a court to proceed forthwith." *Id.* at 232.

86. In *Pennsylvania Water & Power Co. v. Consolidated Gas Co.*, 184 F.2d 552 (4th Cir.), *cert. denied*, 340 U.S. 906 (1950), the court (more or less) follows the same technique. The plaintiff, a producer of power and a subsidiary of defendant, a distributor of power, alleged that defendant had imposed on plaintiff exclusive and restrictive contracts concerning the production of power and that it had depressed the price paid to plaintiff. The court held that the complaint stated a cause of action under the Sherman Act even though the production arrangements and rates had been approved by the Federal Power Commission. Later the court held the contracts void despite the approval by the FPC of the rates; *Consolidated Gas Co. v. Pennsylvania Power Co.*, 194 F.2d 89 (4th Cir. 1952). But thereafter the orders of the FPC requiring the parties to act more or less as they would under the

difference in jurisdiction between the ICC, on the one hand, which has power simply to enjoin violations of the Transportation Act and the CAB and Maritime Board which have jurisdiction over unfair methods of competition. But this narrow ground has not been, I would think, the deciding factor. I do not feel assurance as to which of these views is correct and I shall conclude by stating the truth I find in each position.

Judge Hastie does not agree with the minority in *Georgia* as to the futility of his course. Surely the lane left open by his analysis is cramped and discouraging, surrounded, paralleled and crossed as it is by the broad avenues of administrative power. Yet it does not follow that the court should declare the road closed. It should be put squarely up to Congress to make such a decision. Congress may find it politically unfeasible completely to exempt the railroads from the anti-trust law, however much it might welcome virtual repeal by judicial action. Nevertheless, that very difficulty reflects a significant opinion that there is a value in this judicial jurisdiction. Whatever its "expertise" the Commission is not well situated to censure the kind of abuse which is in question. The peculiar and elaborate involvements between regulator and regulated have already been mentioned. But even putting that aside there is the sheer bulk of day-to-day administrative business. There is the continuing refusal of Congress to vote the Commission, despite its almost frantic expressions of distress, the funds needed to maintain personnel adequate to its work. After *Georgia* the railroads prevailed upon Congress to approve the conference method of rate making condemned by the Court. But the conference agreements were made subject to ICC approval. In successive reports the ICC has noted that its staff is inadequate to police these activities.⁸⁷ If it be said that judicial relief is nevertheless futile where only general injunctions can be issued, it is at least arguable that judicial condemnation, even though the remedy is inadequate and abstract, may exert a leverage, may add at least one more pressure to the whole complex pressures that go to condition and shape the administrative process.⁸⁸

contract were upheld by the Supreme Court. *Pennsylvania Power Co. v. FPC*, 193 F.2d 230 (D.C. Cir.), *aff'd*, 343 U.S. 414 (1952). The majority argued that the FPC had not required the parties to act under the invalidated contracts. The dissenters thought otherwise. The lower court had argued that the regulatory scheme impliedly repealed the Sherman Act pro tanto.

87. See 65 ICC ANN. REP. 57 (1951).

88. Professor Louis B. Schwartz believes that *Seatrain* does not go far enough in rejecting primary jurisdiction. He would have the judiciary whether on original or review jurisdiction impose competition "... to the maximum extent consistent with the technical or other defined objectives of the applicable legislation." Schwartz, *Legal Restrictions of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 475 (1954).

But *quaere* if such a result can be reached without a more explicit statutory warrant than now exists. I am exploring this broader question in a forthcoming article in Volume 67 of the *Harvard Law Review*.

The argument to the contrary is this. The basic or polar standards of the anti-trust laws and the regulatory statutes are opposed. It is true that the opposition is somewhat softened in practice. The anti-trust laws' insistence on competition may be in some measure mitigated by the practical considerations derived from our economic structure. And on the other hand the regulatory standard embraces competition as one of its mechanisms. But neither, however tempered, quite approaches the other. In so far as a given competitive or monopolistic tactic is adjudged to be closely related to practices which are admittedly subject to administrative control it is intellectually arbitrary to tear the complex apart and apply different standards to the fragments. If Congress has not explicitly repealed the anti-trust laws in toto, it may be because there remains always the possibility of practices *not closely related* to the regulated area. To these the anti-trust laws apply. Furthermore, in the regulated area, judicial power may be needed when prior resort has been completed, as where exemption is refused by the administrative agency in part or in whole. It would be very difficult to draft a statute drawing these distinctions. They must be left to judicial development. If this gives too much leeway to agency indulgence of restrictive practices, it is nevertheless doubtful that judicial nibbling at the edges of the central core of administrative power can make a contribution sufficiently great to run the risks of intellectual confusion.⁸⁹ The indicated remedy, then, if one is needed, is with Congress.

CONCLUSION

The primary jurisdiction, in conclusion, is in danger of becoming a stereotype, an automatic judicial response to an abstraction labelled "expertise." The competence of an administrative agency is defined by statute. I do not argue for a narrow, begrudging construction of that definition. I do not suggest that nothing is granted except what is set out in so many words. The construction should allow to the agency the powers needful to a rational and integrated administration of the statute in so far as such powers can be implied or are not more particularly excluded. These implied powers will rest in some measure on a concept of special competence. But original jurisdiction granted to the courts under statute or common law presumptively serves valuable purposes. These purposes should not be impeded by costly or delaying deference to administrators' "expertise" beyond the decent needs of the administrative process. We should not insist on expert-

89. Compare the solution suggested in Note, 64 HARV. L. REV. 1154 (1951).

ness as an absolute condition to the solving of all problems in which it potentially is capable of playing a role. Expertness today, as embodied in our administrative agencies, is in important respects the day-to-day reflection of the forces which it seeks to govern. Its role as a solvent is accordingly conditioned. The doctrine of primary jurisdiction is a valid one so far as necessary to avoid contradiction, confusion, and wastefulness. Beyond that, its use should be sparing.