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Administrative Law—Primary Jurisdiction: State ex rel. State Corp. Comm'n v. Zinn, 380 P.2d 182 (N.M. 1963)

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ADMINISTRATIVE LAW—PRIMARY JURISDICTION*—The doctrine of primary jurisdiction can be used by a court as a guide in deciding whether or not it should refrain from exercising its jurisdiction over some aspect of a case in favor of an administrative agency.[1] The court may decide that the agency should assume prior jurisdiction in determining some issue in the case.[2]

The doctrine originated in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*[3] In that case a shipper, claiming that a duly published rate was "unreasonable," sued the carrier for the excess in a state court. The United States Supreme Court, reversing the state court, held that the action did not lie because

> a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, *primarily* invoke redress through the Interstate Commerce Commission, which body alone is vested with power *originally* to entertain proceedings for the alteration of an established schedule . . . .[4]

The act to regulate commerce did provide that nothing in it shall "abridge or alter the remedies now existing at common law or by statute . . . ." [5] Mr. Justice White admitted the action would lie at common law but felt that if courts and juries could determine the reasonableness of published rates and be able to revise them, no uniformity would exist and enforcement of the act would be impossible.[6]

Thus, the Court created a doctrine to govern the priority of jurisdiction between a court and an administrative agency when both have the authority to determine the issue in question.[7] Some state courts, when faced with the

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* State *ex rel.* State Corp. Comm'n v. Zinn, 380 P.2d 182 (N.M. 1963).

1. 3 Davis, Administrative Law Treatise § 19.01 (1958).

2. The Supreme Court stated the principle in Far East Conference v. United States, 342 U.S. 570, 574 (1952):

> [I]n 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 be passed over.

3. 204 U.S. 426 (1907).

4. Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 448 (1907). (Emphasis added.)

5. 24 Stat. 387 (1887), as amended, 49 U.S.C. § 22 (Supp. 1962).

6. Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 441 (1907).

7. For a review of the use of the doctrine of primary jurisdiction in the federal courts since *Abilene,* see generally 3 Davis, *op. cit. supra* note 1, §§ 19.01—19.07; Convisser, *Primary Jurisdiction: The Rule and Its Rationalizations,* 65 Yale L.J. 315 (1955-1956); Jaffe, *Primary Jurisdiction Reconsidered. The Anti-Trust Laws,* 102 U. Pa. L. Rev. 577 (1953-1954); von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction,* 67 Harv. L. Rev. 929 (1953-1954); Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility,* 67 Harv. L. Rev. 436 (1953-1954).

problem of whether or not to take jurisdiction of an issue that is wholly or partly given to the authority of a state agency by the legislature, have developed doctrines similar to the federal doctrine of primary jurisdiction.[8]

Considerations comparable to those that govern the use of the doctrine might have been a factor underlying the New Mexico Supreme Court's decision in *State ex rel. State Corp. Comm'n v. Zinn*.[9] The New Mexico State Corporation Commission ordered a hearing to determine whether McWood Corporation was engaged in the transportation of property for hire and therefore subject to the motor carrier regulations.[10] McWood was seeking a declaratory judgment in the district court on the same issue and an injunction against the Commission.[11] The State of New Mexico, on the relation of the Commission, brought an original prohibition proceeding in the New Mexico Supreme Court to prohibit the district judge from hearing the declaratory judgment action. *Held*, Alternative writ made absolute. The court found[12] that the Commission had the authority, under its constitutional[13] and statutory[14] powers, to investigate McWood's status as a carrier. Since the statutes provide

8. See Schmidt v. Old Union Stockyards Co., 58 Wash. 2d 478, 364 P.2d 23 (1961); Union Pac. R.R. v. Structural Steel & Forge Co., 9 Utah 2d 318, 344 P.2d 157 (1959). See also 3 Davis, *op. cit. supra* note 1, § 19.08, for an analysis of some state court decisions.

9. 380 P.2d 182 (N.M. 1963).

10. See N.M. Stat. Ann. §§ 64-27-1 to -81 (1953).

11. On April 14, 1961, McWood Corp. filed a complaint in district court against the State Corporation Commission seeking a declaratory judgment of the right of McWood to operate motor vehicles in New Mexico without complying with the Motor Carrier Act. (N.M. Stat. Ann. §§ 64-27-1 to -81 (1953)). The complaint also sought an injunction against the Commission to restrain it from interfering with McWood's operation. The case was set for trial on January 16, 1963.

On December 3, 1962, the Commission issued an order providing for an investigation of McWood's motor carrier activities and scheduled a public hearing for January 2, 1963.

On or about December 14, 1962, McWood applied to the district court for a writ of prohibition against the Commission to prohibit it from proceeding with the hearing. This petition was denied.

On January 5, 1963, McWood served notice on the Commission that it would apply to the district court for a temporary restraining order and preliminary injunction restraining the Commission from proceeding further with its investigation. The hearing on this application was set for January 8, 1963.

On January 7, 1963, the Commission applied to the New Mexico Supreme Court for a writ of prohibition to prohibit the district court from hearing the application for restraining order and injunction and from taking any further action in the declaratory judgment suit. Relators' Brief-in-Chief, pp. 1-4, State *ex rel.* State Corp. Comm'n v. Zinn, 380 P.2d 182 (N.M. 1963).

Respondent admitted relators' statement of these facts. Respondent's Answer Brief, p. 1.

12. State *ex rel.* State Corp. Comm'n v. Zinn, 380 P.2d 182, 185 (N.M. 1963).

13. N.M. Const. art. 11, § 7.

14. N.M. Stat. Ann. §§ 64-27-6, -38 (1953).

for judicial review,[15] and since the Commission had neither completed its hearing nor issued an order, the supreme court felt that the district court was without jurisdiction to hear the declaratory judgment action and issued the writ of prohibition.[16] Thus, the court actually based its decision on the doctrine of the exhaustion of administrative remedies and relied on *Myers v. Bethlehem Shipbuilding Corp.*[17] as authority.

Although the doctrine of primary jurisdiction has been identified with the doctrine of the exhaustion of administrative remedies,[18] the better view is that the exhaustion doctrine is applicable only when the statute has granted the agency *exclusive* jurisdiction. The doctrine is then invoked to forbid judicial interference until the administrative process is exhausted.[19] The fact that the Commission had the authority to conduct its hearing is not, of itself, reason to find that the district court had no jurisdiction of the declaratory judgment action pending before it.

It is submitted that in *Zinn* the district court probably had jurisdiction of the declaratory judgment action because the Commission's jurisdiction to determine McWood's status was not exclusive,[20] and because there was precedent for the district court to assume jurisdiction.[21]

The jurisdiction of the district court is found in Section 13 of Article VI of the New Mexico Constitution.[22] The district court is not deprived of its authority to determine the status of a party as a common or contract motor

15. N.M. Stat. Ann. §§ 64-27-68 to -72 (1953).

16. State *ex rel.* State Corp. Comm'n v. Zinn, 380 P.2d 182, 188 (N.M. 1963).

17. 303 U.S. 41 (1938), cited in *Zinn*, 380 P.2d at 186.

In *Myers*, the Supreme Court held that a district court had no jurisdiction of a suit by the corporation to enjoin a hearing by the National Labor Relations Board on an unfair labor practice complaint. The corporation had alleged it was not engaged in interstate commerce and, therefore, not within the jurisdiction of the NLRB. However, Congress had vested *exclusive* initial jurisdiction in the NLRB and had provided for adequate judicial review [National Labor Relations Act, 49 Stat. 449 (1935), added by 61 Stat. 136 (1947), 29 U.S.C. §§ 141-88 (1958, Supp. 1963)]. Therefore, the Board had authority to determine the initial issue of its jurisdiction over the corporation, and the corporation had to exhaust its remedies through the Board before resorting to the courts. Myers v. Bethlehem Shipbuilding Corp., *supra*, at 50.

18. Berger, *Exhaustion of Administrative Remedies*, 48 Yale L.J. 981, 994-95 (1938-1939).

19. See United States v. Western Pac. R.R., 352 U.S. 59, 63-64 (1956); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); Potash Co. of America v. New Mexico Pub. Serv. Comm'n, 62 N.M. 1, 303 P.2d 908 (1956); Smith v. Southern Union Gas Co., 58 N.M. 197, 269 P.2d 745 (1954). See also Jaffe, *supra* note 7, at 579. For a general analysis of the exhaustion doctrine, see 3 Davis, *op. cit. supra* note 1, §§ 20.01-20.10.

20. N.M. Const. art. 6, § 13.

21. Rountree v. State Corp. Comm'n, 40 N.M. 152, 56 P.2d 1121 (1936).

In the actions filed that lead to the *Zinn* decision, the district court assumed jurisdiction over the issue of McWood's status as a motor carrier before the Commission began investigating the same issue. See note 11 *supra*.

22. "The district court shall have original jurisdiction in all matters and causes not excepted in this Constitution . . . ." N.M. Const. art. 6, § 13.

carrier elsewhere in the constitution.[23] Perhaps, the only issues concerning motor carriers over which the Commission has exclusive jurisdiction are matters governing charges, rates, and safety devices.[24] Also, the Commission is not given exclusive jurisdiction to determine the carrier status issue by the Motor Carrier Act.[25]

Precedent for the district court's authority to hear the declaratory judgment suit is *Rountree v. State Corp. Comm'n.*[26] That case was a declaratory judgment action, identical to the one prohibited by the court in *Zinn,* to decide if Rountree was a contract motor carrier subject to the motor carrier regulations. Apparently, the Commission never challenged the district court's jurisdiction to hear the case.

If the determination of McWood's status was within the authority of the Commission, and if the district court also had jurisdiction over the issue, then the supreme court's decision that the determination properly should be for the Commission is actually based on the doctrine of primary jurisdiction.[27]

No invariable rule can easily be stated for the use of the primary jurisdiction doctrine. The reason originally given for its use was the desire for uniformity of rates for all shippers.[28] In 1922, Mr. Justice Brandeis added the rationale of administrative expertise as justification for the rule.[29] These two reasons, uniformity and expertise, can be stated too broadly, so that the doctrine might be applied automatically whenever, in the course of a lawsuit, a question arose which could be the occasion for administrative determination. No doubt, an aspect of the statutory (or constitutional) purpose in creating a specialized agency to deal with problems in a certain area is the desire for the development of special competency in that area. But if expertise is the dominant factor in applying the doctrine of primary jurisdiction, it would seem that the use of the doctrine should be narrowed to include only those questions so difficult or technical that a court should refrain from exercising its jurisdiction.

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23. See N.M. Const. art. 11, §§ 1-18.

24. N.M. Const. art. 11, § 7.

25. See N.M. Stat. Ann. §§ 64-27-1 to -81 (1953).

26. 40 N.M. 152, 56 P.2d 1121 (1936).

27. In fact, the Commission's counsel seemed to be contending for the use of the doctrine of primary jurisdiction:

> Here, there are vital factual disputes that can best be resolved by initial reference to the Commission, which can bring its expert knowledge and experience to bear on the nature of McWood's operations.

Relators' Brief-in-Chief, p. 19, State *ex rel.* State Corp. Comm'n v. Zinn, 380 P.2d 182 (N.M. 1963).

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

29. Great No. Ry. v. Merchants Elevator Co., 259 U.S. 285, 291 (1922):

> [T]hat 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 only in a body of experts.

However, some impetus for the court's decision in *Zinn* might have come from the fact that the State Corporation Commission is a constitutionally created agency.[30] This might imply a grant of authority over a general subject that is even stronger and more all-inclusive than authority created by the legislature, alone.

The doctrine of primary jurisdiction can be a useful guide to a court in deciding which of two competent bodies should make the initial decision on some issue. But rules for the doctrine's application and the limits of its use would have to be determined by judicial decisions in a given jurisdiction.

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30. N.M. Const. art. 11, § 1.