

Supreme Court of the United States

In the Matter of:

THE BALTIMORE AND OHIO RAILROAD COMPANY, et al.: Docket No.13 & 15
Appellants, :
vs. :
ABERDEEN AND ROCKFISH RAILROAD COMPANY,et al. :
Appellees, :
vs. :
INTERSTATE COMMERCE COMMISSION :
Appellant, :
vs. :
ABERDEEN AND ROCKFISH RAILROAD COMPANY, et al., :
Appellees. :

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Place Washington, D. C.

Date October 17, 1968

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C O N T E N T S

ARGUMENTS OF:

P A G E

Edward A. Kaier, on behalf of Appellants

3

Arthur J. Cerra, on behalf of Appellants

23

Carl E. Sanders, on behalf of Appellees

31

Howard J. Trienens, on behalf of Appellees

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* * * * *

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

The Baltimore and Ohio Railroad Company, et al.,

Appellants,

vs.

Aberdeen and Rockfish Railroad Company, et al.,

Appellees,

Interstate Commerce Commission,

Appellant,

vs.

Aberdeen and Rockfish Railroad Company, et al.,

Appellees.

Washington, D. C.

Thursday, October 17, 1968

The above-entitled matter came on for argument at
11:45 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

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21 * * *

1 P R O C E E D I N G S

2 CHIEF JUSTICE WARREN: No. 13 and No. 15, the
3 Baltimore and Ohio Railroad Company, et al., versus Aberdeen
4 and Rockfish Railroad Company, et al., and Interstate Commerce
5 Commission, versus Aberdeen and Rockfish Railroad Company, Inc.,
6 et al.

7 THE CLERK: Counsel are present.

8 MR. CHIEF JUSTICE WARREN: Mr. Kaier, you may proceed
9 with your argument.

10 ORAL ARGUMENT OF EDWARD A. KAIER

11 ON BEHALF OF APPELLANTS

12 MR. KAIER: Mr. Chief Justice, may it please the
13 Court. This is an appeal from the three-judge court for the
14 Eastern District of Louisiana, setting aside an order of the
15 Interstate Commerce Commission, which described the divisions
16 of joint rates to be received by the Northern and Southern
17 Railroads respectively from freight traffic moving between
18 official territory and the Southern territory in both directions.

19 Official territory may generally be described as that
20 part as the Northeastern part of the United States and Southern
21 territory the Southeastern part.

22 More particularly, official territory would be the
23 territory east of the Mississippi River, north of the Ohio,
24 and certain cities in Virginia.

25 Southern territory is east of the Mississippi and

1 south of the official territory.

2 The appellants are the Interstate Commerce Commission
3 and the Northern Railroads. The appellees are the Southern
4 Railroads and two associations, one the Southern Governors
5 Conference and the other is the Southeastern Association of
6 Railroad and Utility Commissioners.

7 Your Honor will recall, I believe, that a joint one
8 is one which applies two or more railroads but is stated in a
9 single sum. The divisions in issue in this case were primary
10 divisions; that is to say, divisions which applied to and from
11 certain gateways between Northern and Southern Railroads and
12 there was more than one railroad north of the gateway, those
13 two railroads or three railroads would get their share of the
14 revenue from sub-divisions of the primary divisions and likewise
15 south of the gateways.

16 Those sub-divisions are not in issue in this case,
17 only the primary divisions.

18 The railroads evidence, both that submitted by the
19 Southern lines and that submitted by the Northern lines, was
20 on a group basis in which all the Northern lines were grouped
21 together and their figures submitted are on the group basis and
22 likewise for the Southern lines.

23 It was decided by the Commissioner on a group basis,
24 except that the Norfolk Southern Railroad, one of the Southern
25 group, was awarded divisions higher than that granted to the

1 Southern lines generally.

2 This was in recognition of its greater revenue needs.
3 There is no issue about that before the Court.

4 The commissioner is empowered by paragraph 6 of
5 section 15 of the Interstate Commerce Act to prescribe just
6 and reasonable divisions whenever, after hearing in its opinion
7 it finds that the existing divisions are unjust, unreasonable
8 or inequitable.

9 The case before the Commission was one that was
10 originally decided in 1953. Before that decision, the
11 divisional factors prescribed for Southern lines were generally
12 25 percent higher mill for mill than those prescribed for
13 Northern lines.

14 On the very important item of citrus fruit which
15 moves in great volume from the South to the North, and earlier
16 case had fixed the divisions as high as 85 percent higher than
17 the Northern lines.

18 I should correct that. The Southern lines didn't
19 get divisions 85 percent higher, but the factors which go into
20 making them were 85 percent higher so that the Southern lines
21 got something less than the percentage of 85, but have
22 substantially more than the Eastern and the Northern lines.

23 In the 1953 decision, which is in the decision of
24 the same docket of the Commission as the order here under
25 review, in the 1953 decision, the Commission concluded that if

1 it were to give controlling weight to the Northern lines cost
2 studies, it would have to give them higher divisions than the
3 Southern lines.

4 But it regarded some elements of the cost as being
5 tranient in nature. It found that it would be the safest
6 assumption for the future that neither group of railroads would
7 have a substantially lower basis of operating expenses than the
8 other.

9 So the prescribed equal factor divisions for both
10 groups of lines.

11 In 1959, that same proceeding was reopened upon
12 petition of the Northern Railroads. They alleged in the petition
13 that the experience of the intervening years had confirmed their
14 contention that their costs were higher than those of the
15 Southern lines.

16 The commission reopened the case. Evidence was
17 taken between 1959 and 1961 resulting in what the lower court
18 called a massive record. There were extensive briefs, proposed
19 report by two examiners recommending inquiries into the
20 divisions for the Northern lines, exceptions, replies and oral
21 argument.

22 The Southern lines contended before the Commission
23 that the relative costs of performing the service involved
24 constitute the decisive measure in determining just and
25 reasonable divisions.

1 They urged the Commission to find such costs on the
2 basis of the average territory costs as shown by the Commission's
3 rail form A, form for official territory lines and for
4 Southern territory lines respectively, but subject to 12
5 adjustments in those territorial averages costs which the
6 Southern lines opposed.

7 The Commission accepted five of the adjustments and
8 rejected seven. The resulting unit costs, costs per ton for
9 certain services, per ton mile for certain others, for train
10 miles for others, those unit costs were then applied to the
11 Southern lines traffic study which those lines stated and the
12 Commission agreed accurately measured the transportation
13 characteristics of the precise traffic to which the divisions
14 involved applied.

15 The Commission found that the costs at which it
16 thus arrived --- that is, the form A territorial cost with the
17 five adjustments that were permitted --- were reasonably
18 accurate and reliable for determining the relative contribution
19 by the groups on a cost of service basis.

20 It found that both groups of carriers are being
21 efficiently operated. It examined each of the other factors
22 specified by section 15, paragraph 6, and on all the other
23 facts of record. It concluded that everything was equal except
24 the cost of performing the service.

25 It found the Northern lines cost higher than those

1 Southern lines.

2 It concluded therefore that the relative costs of the
3 parties in performing the service could properly serve as a
4 guide for the determination of just, reasonable, and equitable
5 divisions.

6 That then was the end of everything except to translate
7 the cost findings into the division scales. The Southern lines
8 asked the Commission to base the divisional scales to be
9 prescribed on their cost evidence as modified to the extent
10 that any of their proposed adjustments might be rejected and
11 the Commission did precisely that.

12 Its formal finding, of course, was that the present
13 divisions were unjust and unreasonable, inequitable. It
14 prescribed the new divisional scales from the Southern lines
15 costs as adjusted. Ten of the eleven commissioners concurred
16 in the majority opinion. One commissioner thought that the
17 Northern line should have increased divisions, but not as great
18 an increase as had been prescribed in the majority opinion.

19 Overall, the divisions of the Southern lines were
20 reduced by three percent. That is a stipulated figure.

21 Upon review by the Southern lines and the two
22 conferences that I have mentioned, the Southeastern Association
23 and the Southern Governors, the district court held that the
24 cost evidence should have been more refined than the territorial
25 averages, that the Commission itself was obliged to see that

1 evidence of the cost of performing the specific traffic was of
2 record, and that the order should therefore be set aside for
3 lack of substantial evidence and adequate findings.

4 The district court's order was stayed pending
5 disposition of this appeal. The Northern lines had been
6 receiving revenues based upon the higher divisions since April
7 of 1965, but subject to a refund provision under which, if the
8 Commission's order is permanently set aside, the Northern lines
9 would have to refund the difference, an amount now approxi-
10 mating \$30 million.

11 MR. CHIEF JUSTICE WARREN: We will recess now.

12 (Whereupon, at 12:00 noon, a recess was taken.)
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AFTERNOON SESSION

12:30 p.m.

MR. CHIEF JUSTICE WARREN: Mr. Kaier, you may continue your argument.

ORAL ARGUMENT OF EDWARD A. KAIER (resumed)

ON BEHALF OF APPELLANTS

MR. KAIER: Thank you, Mr. Chief Justice. I would like now to discuss the question whether the use of official and Southern territorial costs is supported by substantial evidence and adequate findings of the Commission, or whether in truth the District Court's opinion represents a substitution of its judgment for that of the Commission as to the weight to be given evidence and the degree of refinement necessary with respect to the complex question of railroad cost.

Then I plan to discuss the passenger deficit issue, the Commission having included in the freight service costs a portion of passenger deficits.

Q Before you start, would you straighten me out. What is the difference between the costs and revenue need?

A Cost, if Your Honor please, is fully distributed cost, and revenue need ---

Q Does that exclude any need for profit?

A No, there is a return element in that, fully distributed cost is a return of 4 percent on the value of the property.

Q What is revenue need then?

1 A Revenue need is something over and above that kind of
2 cost.

3 Q Investment?

4 A No, it is a continuing operation. If a railroad is
5 badly in need of revenue and division is based on relative cost
6 alone, even though fully distributed if they are not sufficient,
7 then the Commission has the power to award higher divisions in
8 order to keep that railroad in operation.

9 The Commission does have that power to grant something
10 over and above the cost of performing the service.

11 Q For what?

12 A I mean, it does not relate to anything, the railroad
13 needs the money.

14 Q Who doesn't? What does it need it for?

15 A It needs it to continue operation, it is not getting
16 enough money to continue operation and therefore it has to have
17 something over and above its fully distributed cost. The classic
18 case on that is the New England Division Case, decided in the
19 '20's by Justice Brandies, in which that kind of a need was used
20 by the Commission.

21 Now, first, as to the Commission's findings, I believe,
22 Your Honor, that a review of Appendix B to the Commission's report,
23 which contains 42 pages of discussion of the adjustments proposed
24 by the Southern lines will be convincing that the Commission has
25 set forth the reasons why it disposed of these cost issues in the

1 manner in which it did. I will not at this point have anything
2 further to say about findings in general.

3 As to the factual support for the use of territorial
4 average costs, I would like to point out these things to the
5 Court.

6 First, the investigation brought in issue the divisions
7 of rates on virtually all articles moving between the North and
8 the South from every station in the North to every station in the
9 South over every Northern railroad and every Southern railroad.
10 It was territory-wide, both in the northern end and on the south-
11 ern end.

12 The fact that the proceeding was of such great scope
13 itself, a territory-wide proceeding, I submit established a
14 strong case for the use of territorial costs both generally and
15 with respect to such factors as car costs, switching, empty return
16 ratios, and other large factors of that nature, as to which the
17 Southern lines said our higher costs, that is, they said that the
18 higher cost of the Northern lines were attributable to these
19 facts.

20 Now in the Class Rate Case, which was affirmed by this
21 Court in New York v. The United States back in 1947, the Commis-
22 sion said there are different degrees of refinement in costs
23 depending upon the purposes for which they are intended. The
24 ascertainment of the costs of transporting a particular commodity
25 over a single railroad or a group of railroads obviously requires

1 more refinement in procedure than the calculation of relative
2 costs for transporting all traffic for important and well-defined
3 segments of traffic by territorial groups of carriers.

4 The present case was clearly one involving relative
5 costs for transporting important segments of traffic by territorial
6 groups of carriers.

7 Q Do the Northern roads and the Southern roads devote the
8 same percentage of their cars and their property and so on to the
9 north-south traffic?

10 A No, I don't think they do, Your Honor.

11 Q What are those percentages? Give me an illustration
12 in some respect.

13 A The only illustration I can give you, Your Honor, is
14 that the north-south traffic involved for Southern lines is very
15 much greater than for Northern lines. I believe that it is about
16 20 percent for Southern lines and about 6 percent for Northern.

17 Q Just off hand and a matter of first impression, that
18 is what makes it kind of surprising, off hand, that the Commission
19 would use totality costs of any of these items as a basis instead
20 of correcting it for the particular traffic involved. That is
21 what it did, is it not?

22 A It did that, except to the extent that it allowed five
23 of the adjustments that were submitted by the Southern line and
24 declined seven, so you see, Your Honor, on the great body of
25 the cost, the territorial cost evidence, the Southern lines

1 themselves used the territorial costs. It amounted to almost 90
2 percent of all the costs they submitted were the territorial aver-
3 ages.

4 Q I know, but however that may be, it did strike me as
5 being rather odd that the Commission would use this aggregate
6 basis in considering such a relatively small factor of the base
7 of the Northern roads, particularly, and of the Southern roads
8 and especially with the fact that a percentage was different in
9 the case of the North and the South, radically different?

10 A If Your Honor please, in the Class Rate Case which was
11 the first case in which the Commission used cost evidence under
12 this formula -- before this formula was devised, they had no
13 reliable way of getting service costs -- in that case the percent-
14 age that class rate traffic was of total traffic of the railroads
15 involved was an even lower percentage than that involved here for
16 either Northern or Southern lines, and then there was the Moun-
17 tain Pacific Class Rate Case in which it was lower than this, very
18 substantially low.

19 In the Transcontinental Divisions Case, which Your
20 Honors decided very recently in Chicago, and Northwestern v. Santa
21 Fe Railway Co., in that case the Commission made a number of
22 adjustments and it concluded that in a case dealing with territory-
23 wide application of rates or divisions, that the territorial costs
24 and the refined costs are substantially the same.

25 I don't mean to suggest that there was more refinement

1 there than there was here.

2 Q Was there such a finding here?

3 A No, Your Honor, there was not a finding in those words.

4 Q Was there anything like it?

5 A Yes, there was a finding that the costs, as adjusted,
6 accurately and reliably represented the costs of performance of
7 the north-south service.

8 Q That is not quite pinpointed to the problem I have in
9 mind, is it? I think you are going to get to the commuter prob-
10 lem and to my mind, that perhaps most vividly presents the issue
11 that has troubled me.

12 A Very well, Your Honor.

13 Q There wasn't any commuter problem isolated as such in
14 the Chicago-Northwestern Case?

15 A No, there was not.

16 I would just like to say in pursuance for a moment of
17 the point I had been arguing that the present record establishes
18 that the north-south traffic is handled as an indiscriminate
19 part of the whole with all of the other traffic of the Northern
20 railroads and in view of the way the railroads are operated, the
21 same was true in the South. This related to all the large opera-
22 tions, switching at origin terminals, line haul service in rod
23 trains or way trains, empty return ratios and all of those vari-
24 ous large categories of traffic.

25 I was going to say more on this first point, but I think

1 maybe I had better get to the passenger deficit point.

2 At the outset I want to point out that when the Northern
3 lines brought forth their cost study, they predicated it upon
4 great service costs alone. They had nothing in it for any kind
5 of passenger service. The Southern lines explained that contrary
6 to the practice of the cost finding section of the Commission,
7 we have not included the passenger deficit, and they said, and
8 I quote their words, "The Northern lines study is defective in
9 computing constant costs without consideration of passenger defi-
10 cits."

11 Now although it was to the disadvantage of the Northern
12 lines that the Commission consider passenger deficits, because
13 we would have done better just on freight service costs alone,
14 we stated that we would have no objection to their inclusion,
15 but that we did object to the Southern lines proposal that there
16 be culled out of the passenger deficits so much thereof as might
17 be attributable to commutation service, which was the proposal of
18 the Southern lines.

19 They sought to justify that proposal, the proposal to
20 exclude commutation deficits upon the theory that commutation
21 service is frequently performed over facilities that are used
22 for that purpose alone and not used for freight or other passen-
23 ger service, whereas they said it is generally true that the kind
24 of passenger service other than commutation incurs a deficit
25 principally or wholly because of the allocation of expenses to the

1 passenger service which are common with freight.

2 They say that in the case of the regular passenger
3 service, intercity passenger service, if the passenger service
4 were discontinued, the costs would go on and have to be borne
5 by freight service.

6 Now the Commission analyzed the Southemlines' conten-
7 tion in the context of the distinction which the Southern lines
8 thus urge between commutation deficits and the others being
9 allocated. The Commission found that although many individual
10 items of expense could be regarded as solely related to suburban
11 service, that this was not true of the service as a whole and it
12 found that it could not be treated entirely apart from the freight
13 service and in concluding its analysis, the Commission said that
14 because the suburban service deficit includes common costs which
15 must be incurred to provide freight service and intercity passen-
16 ger service, the deficits from commutation service should not be
17 excluded from the constant cost allocated to the north-south
18 traffic.

19 Q Does either side challenge that it could not be com-
20 puted?

21 A I did not intend to say it could not be computed. The
22 Commission's finding was because the suburban service deficit
23 includes common costs with freight service, the deficits from
24 commutation service should not be excluded from the constant costs.

25 Q I asked that question because I have been wondering

1 how strongly one can say officially, can accurately figure the
2 cost of passenger service and the cost of freight service for a
3 whole system of railroads, North and South.

4 A Your Honor, it imposes very great problems.

5 Q How much of it is judgment, how much of it is findings,
6 and how much of it is guesswork?

7 A Your Honor, in the case called Rail Passenger Train
8 Deficit, in 306 ICC at 714, decided in 1959, I believe that you
9 will find there an expression of the Commission to the effect that
10 in deciding how much of the common costs should be allocated, it
11 is largely a question of judgment and a rather speculative fact.

12 Q 307 ICC, what page?

13 A 306 at 417.

14 Q You started off by saying that they found the cost.
15 carried by the Northern railroads was more than the cost to the
16 Southern railroads?

17 A Yes, Your Honor.

18 Q Can they make that finding?

19 A Oh, yes.

20 Q How?

21 A They make this on the basis of the application of a
22 cost formula which they use day-in and day-out. This is a formula
23 used by the Commission and by all the parties before it, includ-
24 ing the Southern lines, week-in and week-out.

25 Q I understand that.

1 A I am speaking for the formula ---

2 Q Is it the whole formula or does it take samples?

3 A Oh, there is some sampling in it, but by and large it
4 is an analysis of the accounts of the railroads which are kept
5 in accordance with the Commission's uniform system of accounting
6 and they will get a unit cost of performing this service or that
7 and then a traffic study is made to find out how many units of
8 that service are involved in the service you are studying, and
9 they will apply the unit costs to that. This is done day-in and
10 day-out by the Commission.

11 Q I understand it is done, but how much of it is, really,
12 as you read there from 306, a question of judgment or a question
13 of an accurate finding of fact?

14 A My reference to it being a matter of judgment had to
15 do with the passenger service and only those expenses of the
16 passengers that are common with freight. I did not mean to say
17 this formula of the Commission for determining freight service
18 costs was dependent upon judgment.

19 Q Do they have to get it from the books of the railroad?

20 A They get it from annual reports of the railroads which
21 account by account are submitted to the Commission.

22 Q Do they analyze it in any way to see if it is correct?

23 A The Commission regularly has an investor going and
24 checking the books of railroads.

25 Q Kind of a supervision?

1 A Yes, sir.

2 Q But do they ever investigate those to see if they are
3 put down on the books accurately, or do they just accept it and
4 add them all up?

5 A Your Honor, I don't know to the extent to which they
6 audit, how deep it goes.

7 Q The initial Northern lines' position, as I understood
8 you, was that all this cost was limited to freight?

9 A Yes, Your Honor.

10 Q The Southern lines insisted that the passenger ratio
11 also be taken into consideration to the extent of intercity, but
12 not commuter?

13 A Correct.

14 Q I gather intercity uses the same facilities as freight?

15 A Sometimes it does, and other times there is enough of
16 it that there has to be an extra traffic, and certainly there has
17 to be stations and then you have direct expenses such as train
18 crew wages, locomotives, car yards. You have all of these facili-
19 ties which are attributable only to passenger service on the
20 intercity side as well as the commuter.

21 Q Anyway this is the South justification, distinguishing
22 between intercity and commuter?

23 A Yes.

24 Q Because the South, I take it, does not have a commuter
25 problem?

1 A That is correct. There is one Southern line that has a
2 big commuter operation, the Illinois Central, but by and large
3 they do not.

4 Now I would like to develop that point that the non-
5 commutation passenger service has a great deal of expenses that
6 are solely related to that service, the kind of service that is
7 rendered down South, a local train service, intercity passenger
8 train service. They have these solely related expenses and the
9 Commission did not exclude those when it made its calculation of
10 the passenger deficit to be allocated to this north-south freight
11 service.

12 Now I believe it to be of great importance in connec-
13 tion with this point, Your Honors, to point out to you that the
14 Commission allocated the overall deficit, that is, from all pas-
15 senger operations, to the north-south service, both for Northern
16 and Southern lines.

17 The Northern lines passenger revenues exceeded the
18 solely related passenger costs. We had a deficit only when com-
19 mon costs were added. Now the Southern lines, on the other hand,
20 their direct passenger cost, their solely related passenger costs
21 exceeded their passenger revenues.

22 The District Court found that it was proper in the
23 north-south traffic, north-south service, in costing it out to
24 include common expenses, but not solely related. We are the
25 ones, therefor, who satisfy that stand. The Commission's

1 allocation of costs included for us only common expenses which
2 the report says will be allocated for the Southern lines it
3 included not only common, but the solely related expenses, too.

4 Now, I should like to call attention to the fact that
5 there is no question of the Commission's power to consider pas-
6 senger deficits in making freight rates and submitting provisions.
7 You held in the King Case that it was proper for the Commission
8 to consider passenger deficits in fixing freight rates and the
9 Court did not distinguish there between solely related costs and
10 the other costs.

11 Q Is this limited to the division?

12 A This is limited to the division.

13 Of course, the Commission has considered the passenger
14 deficits in fixing the general level of freight rates and it
15 seems fair, therefore, to consider the passenger deficits in
16 dividing the freight rates; but if they do, it ought to be the
17 overall deficits.

18 I would like to take just a minute from my rebuttal
19 time, if that is proper, Your Honor. I would like to say that in
20 the C&NW Case which you decided very recently, fixing divisions
21 between transcontinental lines, called Mountain Pacific, and
22 the Midwestern lines, you had substantially the same cost ques-
23 tions involved here except that you didn't have this passenger
24 deficit matter.

25 Q Are they the most expensive to operate?

1 A Oh, I don't think so, Your Honor, and I really don't
2 know.

3 Q Over the mountains, I mean.

4 A Over the mountains, well, for that factor they would
5 be, surely, but they are not involved here. I just cite that
6 case as a precedent. In that case, Your Honor, the two confer-
7 ences which are here allied with the Southern Railways filed a
8 petition for leave to file a brief. They made the point if this
9 Court were to decide the cost issues in that case, it would
10 prejudice the decision and it would control the decision in our
11 case in the lower court.

12 They said to all intents and purposes the cost issues
13 in that case were exactly the same as the cost issues in the
14 present case. I submit to Your Honors that decision is a very
15 important precedent in the decision of this case.

16 MR. JUSTICE BLACK: Mr. Cerra.

17 ORAL ARGUMENT OF ARTHUR J. CERRA

18 ON BEHALF OF APPELLANTS

19 MR. CERRA: If it please the Court, my name is Arthur
20 Cerra, and I am the Associate General Counsel of the Interstate
21 Commerce Commission.

22 These appeals present a major importance to the ICC,
23 Section 156, Duty to Assure Just, Reasonable and Equitable Divi-
24 sions as Between Connecting Rail Carriers. As Mr. Kaier has
25 indicated, the District Court held that Rail Form A territorial

1 costs are not a proper yardstick for measuring north-south traffic
2 and that the Commission was required to produce more refined data
3 to ascertain the actual costs of that service.

4 In reaching that conclusion the Court below disregarded
5 key determinations made by the Commission. First, in rejecting
6 the Commission's comprehensive analysis of Rail Form A and its
7 application to all of the units of service that were rendered in
8 north-south traffic, these units of service being the ones that
9 comprise what is being measured, the District Court paid little
10 attention to these findings and analyses of the Commission.

11 Secondly, the Court disregarded the findings made by
12 the Commission after its review of all of the evidence submitted
13 by the parties that these costs reliably and accurately reflect
14 the traffic in question. Those findings were based on evidence
15 that the traffic moves over all railroads and between all sta-
16 tions in both territories and is not handled as a distinct entity
17 at all, but rather its average traffic handled as an indiscrimi-
18 nant part of all traffic and possesses no distinguishing charac-
19 teristics.

20 This Court observed in the C&NW Case that the ascer-
21 tainment of costs and the treatment of accounting problems con-
22 cerned factual matters relating entirely to a special and complex
23 matter of the railroad industry. The Court below had no famili-
24 arity with these problems and either sought here to obtain more
25 accuracy or to restrict the consideration that the Commission

1 could give to these matters solely to the costs directly pertain-
2 ing to the traffic in question.

3 We believe that such an effort to achieve a theoretically
4 perfect cost formula really does constitute an unwarranted encour-
5 agement of the administrative domain. For this reason railroads
6 are multi-purpose facilities, they produce a number of transpor-
7 tation services to the common use of physical facilities and
8 employee services.

9 Now how do we obtain the costs for these services?
10 When there are direct costs, we can allocate them to the traffic.
11 When there are not direct costs, there are common costs, there
12 have to be some kind of empirical judgments made on determining
13 how to allocate this. How is it done? It is done on a revenue
14 basis.

15 I am where a railroad is a multi-purpose facility and
16 produces a number of transportation services, when we try to
17 ascertain, as here, if any given body of traffic uses physical
18 facilities in common and employee services in common with other
19 traffic, and it has been shown that it has no distinguishing
20 characteristics from any other type of traffic, it would appear
21 to us that the application of Rail Form A costs is plainly proper.

22 Q Would you apply that principle to all problems under
23 the act?

24 A I did not quite understand your question.

25 Q Suppose you had a particular plan to ascertain the

1 costs of carrying particular types of commodities, you do that,
2 don't you?

3 A We do.

4 Q And most of those costs are part of joint costs that
5 involve many other operations, but somehow or other by the
6 wizardry of accounting techniques we do disentangle them and do
7 make a segregation. I am not saying that it always makes sense
8 to do that or it always is worthwhile or that is the duty that
9 should always be imposed on the ICC, but certainly you do it
10 in some instances for some purposes.

11 What I have not got clear in my mind is what are the
12 special reasons here why you did not do it, particularly in view
13 of the relatively small amount of the overall costs and overall
14 traffic represented by the north-south traffic and especially on
15 the Northern roads? What is what I have not heard yet or read so
16 far as I recall.

17 A Mr. Justice Fortas, this is precisely what the Commis-
18 sion did hear. This traffic was shown to be not distinguishable
19 in any characteristics from any other traffic that the railroad
20 handled.

21 Q It is distinguishable. It has a different point of
22 origin, different point of destination, it is north-south thru
23 traffic, and I don't suppose you are going to say that it would be
24 impossible or even impractical as a matter of accountancy to
25 break out costs for that segment of the traffic. You wouldn't

1 say that, would you?

2 A The question I would ask is how do we get these costs?
3 We would get them by starting out with Rail Form A and trying to
4 make a segregation of all of the services that were performed
5 on north-south traffic.

6 Q Don't you think that is a very sensible way of doing
7 it?

8 A That is precisely what happened in this case.

9 Q But you did not break it down. What you relied on was
10 the Rail Form A aggregate costs, as I understand it, without
11 making any segregation whatever?

12 A But the aggregate costs, Your Honor, are all of the
13 services that are performed by the railroad, all the work units
14 it takes to provide any amount of traffic the railroads handle.
15 When you throw this all in one pool and you are using common
16 facilities, you get a unit cost for each type of service. Then
17 you go to the railroad's traffic study for a year which shows
18 all the service units that were rendered in performing north-
19 south traffic and you multiply those unit costs of service against
20 the revenue units and you come out with the costs for the traffic.

21 That is what the Commission did here.

22 Q But a further refinement beyond that would be possible
23 would it not? For example, isn't it necessary to decide here
24 whether it was or was not appropriate, just to take an illustra-
25 tion, to use these commuter cars?

1 I think I understand your Commission's reason for it.
2 The Commission says that there are no separate facilities that
3 were there to use for the commuter passenger traffic and there-
4 fore the Commission says we did not break out those costs and
5 eliminate them for this particular purpose. But that presents
6 a problem, wouldn't you agree, a problem of standards?

7 A Here the Commission used fully distributed costs.
8 In the C&NW Case they used out-of-pocket costs, they did not
9 consider any of these overhead items and distribute it as to that
10 traffic. So the distinguishing feature here is the Commission
11 used fully distributed costs.

12 Q Now you get the question of should it?

13 A This is a determination of costs which depend on
14 policy. The Commission has formulated a policy of following this
15 Court's decision in North Dakota in 1950, we cited it in our
16 brief; when costs are being considered, the Commission must not
17 only ascertain the costs directly pertaining to the service, but
18 it also must ascertain and apportion those costs which are joint
19 are not directly pertaining to it and every railroad has certain
20 overhead expenses.

21 Now if we have these overhead expenses and we are going
22 to say it should not be apportioned on a regular unit basis
23 between all given bodies of traffic, we are going to find out
24 that sooner or later the railroads are not being able to recoup
25 these overhead expenses from any part of traffic.

1 So as a policy matter, the Commission has said here
2 fully distributed costs meaning "apportionment of all overhead
3 burdens" must be divided and the parts will be divided here in
4 accordance that this north-south group traffic bears to the
5 railroads.

6 Q I will make the suggestion to you that the basic problem
7 here, as I understand it, arises from the fact that the Commis-
8 sion said we are going to review these divisions on the basis of
9 comparative costs, isn't that right?

10 A That is correct, Your Honor.

11 Q That other factor is costs, not what the railroads
12 need, but costs. Then the Commission, I should think, would
13 have a duty, if any standards are to be applicable here, to show
14 that it was an applied cost standard, namely, that it has ascer-
15 tained costs under some proper sensible basis.

16 I am very much in favor of latitude to the ICC and
17 its terrible jobs as I have expressed at various times, but there
18 have to be some standards here and instead of that, what the ICC
19 did hear was to take a gross figure, costs of the total operations,
20 including some other elements and off-hand they are rather sur-
21 prising, such as computer charges and the unsegregated car char-
22 ges, whatever that all means.

23 Then you have arrived at your conclusion on that basis.
24 That is what is bothersome here and it is not because you could
25 not make a further refinement of these costs, is it?

1 A Your Honor, the refinements we made were based on the
2 Rail Form A computations, and based on the fact that parties who
3 seek to show that there are differences in one given body of
4 traffic as compared to average traffic were shown here. The Com-
5 mission reviewed the attempts by the Southern lines to show these
6 bodies of traffic distinguishing from average traffic and they
7 rejected seven and accepted five.

8 I did want to cover quickly the points of the Southern
9 Governors Conference. They paralleled the arguments of the
10 Southern lines, but they claim as a matter of law that even if
11 the Northern lines experience higher costs of service, the Com-
12 mission must find that such higher costs reflect inherent terri-
13 torial disadvantages before.

14 This contention is based on the premise that the Com-
15 mission made no adequate finding to dispose of their claim and
16 therefore its order is going to produce dire consequences upon
17 the economy of the South and effectively nullify the present and
18 future economic gains that the South was scheduled to receive by
19 virtue of the New York Case.

20 We ask the Court only to consider the findings that
21 the Commission did make in response to each one of these conten-
22 tions. The findings that rejected contentions which explained
23 why the Commission could not accept them were clearly expressed
24 in its reports.

25 We don't think any further findings are required.

1 MR. JUSTICE BLACK: Mr. Sanders.

2 ORAL ARGUMENT OF CARL E. SANDERS

3 ON BEHALF OF APPELLEES

4 MR. SANDERS: May it please the Court, my name is Carl
5 Sanders. I represent the Southern Governors Conference. I also
6 represent the Southeastern Association of Railroad and Utility
7 Commissions.

8 I come to the Court with a little different view of
9 what this case is all about. Of course, we have been in this
10 case since the very beginning and we have had to listen to the
11 arguments between the Northern and Southern railroads, and we
12 have heard all of this evidence about the question of costs. But
13 we contend and we respectfully insist today that this is not just
14 a private dispute over revenue between Northern and Southern
15 railroads, but that this case involved a much bigger question
16 than that.

17 This case really involves the fact that the Commission
18 has abandoned the territorial relationship of equality between
19 the North and the South. They have done this without any explana-
20 tion and whatsoever so far as we have been able to ascertain.

21 Q Equality in what?

22 A Equality that there are differences. This Court in
23 1947 in New York v. The United States determined that there were
24 no differences between the official territory of the North and
25 the Southern territory and by virtue of that, you established

1 the uniformity of rates and then subsequent to that, uniformity
2 of divisions.

3 We have been in this case and it has been our observa-
4 tion that there has been no determination or no adequate reasons
5 given why the decision in the New York v. The United States Case
6 is not just as sound today as it was in 1947 and that this busi-
7 ness about it costing more money to run the railroads in the North,
8 as compared with running a railroad in the South, is not based
9 on any inherent difference which is the words that this Court
10 used when it became necessary to adjust divisions or adjust rates
11 that there should be some inherent difference.

12 So you put us on an equal basis and we have been on
13 that equal basis and we see no reason under the evidence that was
14 submitted before the Commission, to change this basis and give
15 the North now a preference in divisions for operating railroads
16 in the North when they have not proven to anybody's satisfaction
17 that it costs any more money to operate a railroad in the North
18 than it does in the South today.

19 If Your Honor please, of course, this is an inflation
20 matter. What it amounts to is this, it amounts to the fact that
21 under this order of the Commission they are going to give them
22 an average of 17 percent or up to a maximum of 34 percent more
23 for carrying the same amount of freight over the same distance
24 in the North, as it relates to the South, and that is what it
25 amounts to.

1 Q I understood that the net average change in the divi-
2 sions was 3 percent?

3 A That is the net average change in the amount of money
4 it would cost the Southern railroads, I think that is what Mr.
5 Kaier said. But the division preference that they are giving in
6 this case is an average of 17 percent more to the Northern railroad
7 for carrying.

8 If you have a haul of 50 miles in the North and we have
9 an identical haul of 50 miles in the South, they are going to
10 give them an average of 17 percent more in the North for carrying
11 that same amount of traffic over that same distance as we would
12 get for carrying the same amount of traffic over the same distance
13 in the South, and it does go as high as 34 percent in the record.

14 So this is not something new.

15 Q Now tell me what is the 3 percent?

16 A The 3 percent they are talking about is the amount of
17 money that is going to take away from the Southern railroads'
18 operating revenues, I believe is the direct interpretation of
19 that.

20 Q What is the theory on which this is based? Are the
21 costs of operating more?

22 A The theory, if there is a theory, is that they say
23 there is a difference. They say it costs more money to operate
24 a railroad in the North.

25 Q Why?

1 A They don't give any reasons. This is our point, this
2 is what the Southern Governors Conference and the Southeastern
3 Railroad Commissions are complaining about. We say that if they
4 have made a finding that under the Administrative Procedures
5 Act they have to give the reason for the finding. We say if
6 there is a finding, they have to have evidence to support that
7 finding.

8 Now I can quote what they have said in this case. The
9 ICC said this -- this is from the record: "Other factors being
10 equal, the cost differences between the North and the South are
11 the product of and reflect inherent advantages and disadvantages
12 in the two territories."

13 Now this is what they said. We contended, of course--

14 Q Which one did they claim had the most disadvantages?

15 A They claim that the North has the greatest disadvant-
16 age, may it please Mr. Justice.

17 Q What is that disadvantage?

18 A The only disadvantage that we can ascertain from this
19 record is, (1) perhaps an over-capacity of railroad facility in
20 the North. We think if there is any cost difference between
21 operating a railroad in the North today as compared with operat-
22 ing one in the South, from this record it would be because they
23 have more capacity in the North than we have in the South.

24 Q You mean the competition is keener?

25 A No, sir, I mean back in the day and times when the

1 Northern railroad system was first built, to be perfectly candid
2 about it, all the industry in this country was located in the
3 Northern part of the country. At that time, of course, there
4 was a great deal of railroads that were built.

5 Since that time, of course, much of the industry in
6 this country, some of it, thank goodness, has come to the South.
7 Now the fact that we do have industry in the South, we have an
8 over-capacity of railroads in the North and so they say, well,
9 as a result of that they have maybe more wages, they have perhaps
10 some of these transitory costs that are attendant to operating
11 an oversized railroad.

12 Now since that time, since this decision, and they
13 recognize this in the Commission but they didn't do anything
14 about it, they said we raise the question what is going to happen
15 when they have these mergers? They said we can't go into mergers,
16 we can't consider that other than to recognize there will be
17 mergers.

18 Since that time in the Penn-Central Merger Case the
19 Commission found that the Penn-Central merger would save \$80 mil-
20 lion a year and yet there is not any recognition given whatsoever
21 in this proceeding for these savings that are taking place in the
22 North.

23 Mr. Justice Douglas, in his opinion in New York v. The
24 United States said that of all the things we don't want to happen
25 is we don't want to create a man-made trade barrier and we are

1 going to have a man-made trade barrier as the rate structure then
2 existed and so we are going to equalize the rates and at the
3 same time equalize the divisions. What the Northern railroads
4 are asking this Court to do now in a subtle fashion is to reim-
5 pose in another manner this same manmade trade barrier between
6 the North and the South, except in doing it through the structure
7 of rates they are now asking you to do it through preferences
8 in divisions and it creates the same problem that we had 25 years
9 ago.

10 Q What is the difference in consequences?

11 A If you allow this situation to stand as it stands now
12 with the preference in divisions, the difference in consequences
13 is this. First of all, we are going to have to pay for this
14 inflation. It is going to come out of the hide of the Southern
15 shipper, it is going to come out of the hide of the Southern
16 economy, it is going to come out in one fashion or another.

17 We can't operate railroads in the South and give the
18 North 17 percent more for that same traffic. So we are either
19 going to have to raise the rates in the South, that means the
20 Southern rating back up and we have a rate in the South greater
21 than in the North; or if we don't raise the rate in the South,
22 we are going to have to reduce the service, and that means
23 instead of being able to provide the same service that you can
24 get in the North, instead of being able to buy, say, with the
25 amount of money involved in this case, we could buy several

1 freight cars in the South for these railroads that operate in the
2 South. But if this Commission order is allowed to stand, that
3 means that these freight cars that we could buy and be using in
4 the South, they are going to be using them in the North.

5 Q What percentage of the total revenues of the Southern
6 railroads are we talking about here?

7 A We are talking about 3 percent, I believe.

8 Q No, I mean overall, how much of the revenues? What
9 percentage of the total revenues does the Southern division
10 derive from these ---

11 A 20 percent.

12 Q The next thing I am going to ask you is this. As I
13 understand what you are seeking is a fairness of the District
14 Court order?

15 A Yes, sir, I sure am.

16 Q The question before us is whether or not we will affirm
17 this District Court order or not, whether we like what happened
18 or not?

19 A Yes. If it please Mr. Justice Fortas, I think if the
20 Court will affirm the other point I am seeking, and I want to
21 conclude my argument, if this Court will affirm the District
22 Judge's decision, all we want and all we have ever asked for and
23 we have raised the question at every level from the beginning up
24 is to ask the Commission to go into all of the economic facets
25 and all of the economic factors in the Northern territory and in

1 the South and if they go into all of those factors, which they did
2 not do in this case, then we are perfectly willing to stand by
3 whatever the decision might be.

4 Q Provided it comes out right?

5 A We believe it will come out right. The other point I
6 want to make before I sit down, if I might, the other thing the
7 Commission is doing in this case that I think is very significant
8 is that for 30-odd years they have followed the principle of
9 primary local responsibility and that is that the territory where
10 the cost factors are involved should bear the costs of that ter-
11 ritory, not superimpose itself on some other territory.

12 What they are asking us to do in the South is subsi-
13 dize Northern railroads.

14 I have one other factor and I will sit down, these com-
15 muter deficits.

16 Now you gentlemen know, if it please the Court, that
17 the South has come a long way in the last 20 years. You also
18 know that according to every economic indicator in this country
19 today, we are still below any other section of the country regard-
20 less of the progress we have made. They have saddled us, the
21 Commission has in this case, with commuter deficits in the North
22 which have no relationship whatsoever to us in the South at this
23 time. However, I happen to have the privilege this month of
24 heading up a committee in Atlanta, Georgia, to go to the people
25 in metropolitan Atlanta for a \$433 million bond issue, knowing

1 to do with the railroads now, \$433 million bond issue for rapid
2 transit, and we are coming to grips with that problem because we
3 know we have to come to grips with that problem and we don't
4 think that we should have to subsidize the commuter deficits in
5 the North and at the same time come to grips with the problem
6 ourselves in the South and pay that ourselves.

7 In conclusion, we simply feel this way. We want equal
8 treatment with all sections of the country. We want a free
9 economy unhampered by any man-made trade barriers. We think we
10 are entitled to equality, of equal treatment with any other sec-
11 tion of country. And certainly if we are going to receive less
12 than that, we think that the Commission should at least give us
13 some explanation why we are going to have to be relegated to a
14 second-class status.

15 Thank you very much.

16 ORAL ARGUMENT OF HOWARD J. TRIENENS

17 ON BEHALF OF APPELLEES

18 MR. TRIENENS: I am Howard J. Trienens. I represent
19 the Southern railroads.

20 When we started out this case, we were equal partners
21 with the Northern railroads and we were divided on a uniform and
22 equal basis of rates. As Governor Sanders has pointed out, this
23 case has changed that relationship.

24 We are now unequal. This case was tried on the express
25 request of the Northern railroads that they were seeking a

1 disproportionate system of a uniform structure of rates. They
2 wanted a disproportionate share and they got it, for performing
3 exactly the same service on the same cars moving between the ter-
4 ritories, they have given a 17 percent inflation, 17 percent more
5 for performing the same service on these same cars.

6 I will show where that came from and why that is not
7 supported by any evidence.

8 Q You mean per mile?

9 A Yes, sir, 300 miles in the South, same car, 300 miles
10 in the North, they get 17 percent more compensation for doing
11 that same work on that same car under this order.

12 Q You say before the Commission acted it was equal?

13 A 50-50, when we each performed half the service with
14 an equal haul, we were splitting it equally on a uniform system
15 of rates.

16 Q Do you on your side of the case question the principle
17 that if it were shown that the costs to the Northern roads in
18 handling this class of traffic were more than the Southern costs,
19 would you question the division based on that?

20 A We would not question it unless they carried through and
21 did two more things, First, found that these differences in
22 costs were inherent, inherent in the difficulty of the territory,
23 they could not cure it by consolidations, they could not cure it
24 by becoming more modern, they could not cure it, it was inherent.
25 If this was an inherent difference like they had a mountain to

1 go over.

2 Q You mean necessary?

3 A That's right, a necessary difference in the costs, not
4 that they just happened to spend more money.

5 Q Or do you mean they had to make an efficiency?

6 A Efficiency in this case is a slippery word. We found
7 they were operating the systems as they then existed equally.
8 But they merged Penn and Central and New Haven to create effi-
9 ciencies that these railroad managements could not achieve by
10 themselves.

11 This situation of unequality puts the South in a uniquely
12 different position. Throughout the country, east of the Rockies,
13 the rates are uniform. The East and the West, Midwest, the East
14 and the Southwest, the divisions relate to the rates and they are
15 uniform. Even out in mountain Pacific territory where there is an
16 inflation, it is directed to the higher level of rates and the
17 Commission related them on the basis of consistency, as was
18 pointed out in the Transcontinental Case.

19 This was the only case where inner territorial rates
20 have been divided so one railroad gets a disproportion division
21 of uniform rates. This is the only case. How did it get that
22 way? Here is how it happened. They used Rail Form A as to
23 which there is no quarrel.

24 Rail Form A is the formula that chops these railroad
25 costs into various elements. We have no quarrel with how to

1 divide the costs as between elements, line haul, terminal or
2 otherwise. What we did was we analyzed these Rail Form A costs and
3 we said how come these Form A averages are 17 percent higher?
4 How does it happen?

5 We looked at the sort of thing we would all thing of
6 as railroad costs, first, running the train, paying the crew,
7 buying the locomotive, maintaining the roadway, fuel. Are these
8 things higher in the North on an average basis?

9 No, it does not cost any more to run a train in the
10 North. That is true whether you use these Form A averages or
11 you don't. The Rail Form A and these averages have nothing to do
12 with the inflations. So where did this inflation come from?

13 Here's where it came from. It came from a handful of
14 items, commuter deficits, border points interchange, car costs,
15 empty return ratios and just a handful of items we discussed in
16 our briefs. It is not surprising and should not be surprising
17 that the costs for some items are higher in the North. After
18 all, the North is a very different place. It is a highly indus-
19 trialized territory.

20 Of course, they have a lot of commuter service and the
21 South has none. That hasn't anything to do with north-south
22 freight traffic and, indeed, the Commission found as a finding
23 of fact that many items, many items of suburban service are
24 solely related to suburban service, meaning a finding that these
25 costs have not anything to do with north-south freight traffic.

1 Q May I interrupt you there for a minute?

2 In fixing freight rates, the Commission does take into
3 account deficits on passenger service, am I right on that?

4 A Insofar as fixing relationships between North and
5 South ---

6 Q No, I am not talking about, just in fixing freight
7 rates does the Commission take into account deficits on passen-
8 ger service?

9 A The Commission has in the past. I can't look behind,
10 but it has in the past said that it did consider deficits from
11 passenger service. It has also said that they treated commuter
12 deficits as a separate problem, which should not be dealt with
13 by the freight shippers subsidizing the service, but rather
14 should be dealt with by the local community.

15 Q Do you answer my question, yes?

16 A Yes as to passenger service, but no as to commuter.

17 Q Deficits on commuter service as distinguished from
18 intercity passenger service will not be considered?

19 A As a matter of Commission policy.

20 Q In fixing the freight rates?

21 A Yes.

22 Q But here your point is that they have considered defi-
23 cits on commuter service in fixing these divisions?

24 A That's right, and I want to draw another line here,
25 because in these rate cases the reason they consider passenger

1 deficit at all was to meet the revenue needs of these carriers,
2 they needed more money so they raised the rates to give them
3 this money, and they took into consideration passenger deficit.

4 In this case they have expressly disclaimed revenue needs
5 as a basis for decision. They say their order is based on the
6 cost of north-south freight traffic, freight traffic, and they
7 have found that the commuter deficits are based, at least many
8 items of the cost ---

9 Q Let me see if I can be precise about this. If I
10 correctly understand your last statement, you are telling us that
11 the Commission has not used the costs of passenger service,
12 intercity passenger service except for the cost of common facilities
13 for the purpose of arriving at costs for purposes of fixing
14 freight rates?

15 A Not quite, sir, not quite.

16 Q Let me hear you state it.

17 A They picked as their standard of this whole case the
18 cost of north-south freight traffic. They further found that
19 many items of commuter cost ---

20 Q I know that as to this case now.

21 A In this case they nevertheless went in and put the
22 whole passenger deficit into this cost.

23 Q I understand as to this case, but I am asking you
24 generally when the Commission figures costs for purposes of a
25 freight rate case, not a division case, does the Commission take

1 into account the costs of passenger service or does it not?

2 A I can't answer that, Your Honor, and the reason I can't
3 is that in the early '50's they did say they would reflect the
4 passenger deficits in a rate increase in 1959, they went to Con-
5 gress and said as to commuter deficit it should not be subsi-
6 dized by freight shippers and they have acted consistent with that
7 since that time.

8 There were no freight rate increases from about '59 to
9 '67 and in the latest decision I just can't answer your question.
10 I just don't know. I do know in their last decision they said
11 this, and this bears on the argument that we have to use Form A
12 costs in these averages because it is essential to our rate
13 cases.

14 In that case they had, among other freight commodities,
15 not merely citrus fruit, but all perishables from North and
16 South, territory-wide, and somebody put in Rail Form A unadjusted
17 costs with respect to these rates, and the Commission said, "Ter-
18 ritorial average costs are entitled to little weight in determin-
19 ing the costs of handling particular movements."

20 So the idea that anything you do here about Rail Form
21 A is going to embarrass them at all in their administration of
22 rate cases is out by their own statement.

23 Q When the Commission has been referring to costs, has
24 it been out-of-pocket costs?

25 A No, sir.

1 Q What does it include, the value of the property?

2 A The full costs of performing this north-south service,
3 it would include a return on the value of the property, for
4 example, a return on the value of the car used to haul this
5 traffic, that's right, sir, all the full costs of handling this
6 north-south traffic.

7 That is what I understood the Commission to mean and
8 I don't quarrel with it.

9 Q If you have a shipment of oranges from Florida, as
10 they are going through the South those railroads will get 17.5
11 percent of the division cut?

12 A Yes, sir, 17 percent less than the North for doing the
13 same service.

14 Let's see how it got that way. I have said it was
15 not operating the trains and the roadway, it was a handful of
16 items. I think I can illustrate how this inflation came to be
17 by giving an example as to one of these items. We will take
18 again a car coming from the South that moves across to the Potomac
19 yard right across 14th Street Bridge. That is where the Southern
20 Railway comes in and the Penn-Central and the B&O go north.

21 There is a service performed there. The cost of inter-
22 changing these cars. The same cars come in and go out and there
23 is a cost involved in interchange. When you look at the Commis-
24 sion's order in this case and see how they construct it, there
25 is a separate factor which they call 'cost of interchange at

1 gateway."

2 This is a separate factor, it is isolated and we can
3 think about just how this works. The railroad operates this
4 joint yard and the record makes it perfectly clear, uncontro-
5 verted that the costs for each railroad coming in that yard and
6 going out of that yard is exactly the same, exactly the same and
7 you know they have to be the same. They are in the same yard
8 dealing with the same cars, on the same joint facility.

9 The record is uncontroverted that the costs are exactly
10 the same. The record also shows the same thing at these other
11 interchange points, Cincinnati, Louisville, they are all in the
12 same yards interchanging the same cars.

13 How did they get the inflation? They said here is an
14 element of a cost of interchange. We will use the territorial
15 average. The territorial average per car interchange throughout
16 the South is used and the territorial average throughout the
17 North is used, and it happens those averages are 58 percent
18 higher in the North.

19 Now I don't question that on the average for all the
20 traffic the average cost is 58 percent higher in the North. After
21 all, as was pointed out earlier, 94 percent of the Northern total
22 traffic is something else. It is not in traffic, it is something
23 else. It is interchange with Western lines in the expensive
24 Chicago District. It is lots of things.

25 Some of it is due to the fact that the North uses more

1 coal and it rents coal cars.

2 But when we are talking about a boxcar handling north-
3 south traffic and it is the same car moving through the South
4 through an interchange to the North, the same car, there is no
5 rational explanation or effort to explain why for that car it
6 could be 32 percent higher in the North.

7 That is the whole question here. We are talking about
8 north-south freight traffic. The question is whether there is
9 any evidence to support these higher costs for the items where
10 the whole inflation comes from to show that they, in fact, happen
K 11 on this north-south freight.
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1 Q Is this due partly to the increased costs in the
2 North?

3 A Partly to the findings. They don't go to the question
4 of how the costs could be higher. Partly the findings do not
5 go to that. There is no substantial evidence that these costs
6 are in fact higher in the North on these cars. So it is
7 findings which really don't address themselves to this question,
8 and there is a complete lack of evidence.

9 Q Is that what the court found?

10 A Yes, sir. I think it is important here at this
11 stage to say exactly what this court found, and I will read
12 three or four sentences here and also say what they didn't find.

13 Because just what this court below found is critical. The
14 court analyzed the facts as follows. They pointed out that only
15 a relatively few elements of the costs are higher. It is un-
16 controverted that many items of costs are no lower on northern
17 railroads than southern railroads. The inflation is
18 attributable to relatively few cost items, commuters, inter-
19 change of cars, cost of freight cars, and a few others.

20 As to these controverted items, the court below said, and
21 there is no denying this: "The Commission relied exclusively
22 on territorial average costs."

23 Q What does that mean, precisely?

24 A It means as to such things as the interchange work
25 out here at Potomac Yard they use territorial average costs of

1 all traffic in the North, all traffic in the South, both of
2 which have nothing to do with this North-South freight traffic.
3 And the average was 58 percent higher, so they divided these
4 rates so that it cost us 58 percent more to do the same work in
5 the same yard.

6 And that points, your Honor -- it is like this court said
7 in the McLean Barge case. It was a barge-rail relationship.
8 The court said the unsifted averages put forward by the
9 Commission do not measure the allegedly greater costs of the
10 carriers nor, indeed, show they exist. These territorial
11 averages don't show the costs are 58 percent higher to do this
12 work out in Potomac Yard nor, indeed, show there is any
13 difference at all.

14 Q You don't deny the fact that on some segments of their
15 traffic, the northern roads have higher costs?

16 A Yes, I do.

17 Q Like, for example, car costs on some segments, they
18 really do have a substantially higher car cost?

19 A No, sir.

20 Q I said on some segments of their traffic, and your
21 point is that you want to look at this North-South traffic to
22 determine car costs. It may be between New York and Buffalo
23 the car costs two or three times as high?

24 A Different cars---

25 Q Your point is that point should not be used to

1 measure the North-South traffic?

2 A Should not be used under the very standard selected
3 by the Commission itself, which was the costs of the North-
4 South freight traffic. It is different cars. Forty-nine
5 percent of their traffic is different commodities, different
6 traffic, more specialized cars. They are just different
7 things.

8 I was about to give the basis of the decisions below.
9 I would like to read slowly, if I may, just exactly what the
10 court below held. It is on page 349 of the Appendix, Volume I
11 of the Appendix. The Commission stated its exclusive standard
12 to be the relative cost of handling the specific freight traffic
13 to which the divisions apply.

14 "We are persuaded that the order is not based on
15 substantial evidence nor supported by recent findings within
16 the meaning of Sections 8-B and 10-E of the Administrative
17 Procedure Act because the use of territorial averages account-
18 ing for the northern inflation has not been supported with
19 findings or evidence related to any such inflation to the
20 North-South freight traffic."

21 That is the holding below. Let me also quote from the
22 court to make it plain what the holding below was not.

23 This morning it was suggested the court substituted
24 its view of the case, that the court below reweighed the
25 evidence. That is not so. Here is what the court said:

1 "With the Commission's expertise in mind, it is our
2 duty to review the record and the conclusions reached as
3 required by the provisions of the Administrative Procedure Act.
4 As to the sufficiency of the evidence to support the order, it
5 is not the proper function of this court to substitute its judg-
6 ment or to weigh evidence.

7 "On the other hand, it is our duty to ascertain
8 whether or not the findings and conclusions are supported by
9 substantial evidence."

10 You could not find a clearer statement of what the
11 court's function is and what the court's function is not. I
12 want to emphasize again it was not the District Court that
13 substituted any view of its own that the test here ought to be
14 North-South freight traffic costs. That was the Commission's
15 own announced standard. This court took that standard as it
16 had been and determined whether there was substantial evidence
17 to support this inflation with respect to those several cost
18 items that accounted for the entire inflation.

19 Q How old is the cost material in this record?

20 A 1956 costs.

21 Q I suppose if this case goes back, the whole thing
22 will have to be done over again.

23 A It took the southern lines between the time the
24 North completed their case until we completed our case. The
25 rest of the time was taken in the northern lines' deciding to

1 use '56 costs in 1959 and other procedures in which we played
2 no part.

3 I know it is a great problem for this court to have
4 one of these old, stale cases come up. I don't think we should
5 be penalized and we should have to forego uniform divisions
6 because other people and other agencies took an inordinate
7 amount of time. We were not accountable for any delay before
8 the Commission.

9 Q This case was before the Commission nine years?

10 A 1959 was when the North got around to starting this,
11 really, to 1965 -- six years, really.

12 Q And in the courts since then?

13 A Yes, sir. We would be back there trying it now if
14 the Commission, I presume, had not decided to appeal this. We
15 have no control over that.

16 Q The whole proceeding might have been over if you had
17 decided not to appear?

18 A That is right.

19 I think I want to emphasize that the District Court
20 took the decision which the Commission decided to use, and did
21 its duty under the Administrative Procedure Act. This is not
22 a matter where they had a choice. The Administrative Procedures
23 Act directs that the Commission shall set aside. This is a
24 part of the District Court's job, the reviewing court to look
25 into these records and see whether there is substantial
evidence.

1 I also realize that this court is very busy with
2 many constitutional issues and it can't take upon itself the
3 job of going over these records. But I do submit the District
4 Court fulfilled their responsibility in this case and used
5 precisely the standards that the statute required.

6 Now there was a statement this morning that this
7 court had somehow immunized from judicial review cost findings
8 in anything as complicated as a railroad division's case in
9 citing the so-called Transcontinental case of two terms ago.
10 That just is not so.

11 At the time that case was tried there were common
12 issues. The East was involved in that case when the Trans-
13 continental case was first brought. There were complications,
14 some of these car costs, and other issues were involved.
15 Commuter never was.

16 By the time it got to this court, the eastern roads,
17 the northern roads had settled out, and the court observed that
18 many of these issues did not have to be reached and were not
19 reached. When this court itself reviewed the cost
20 determination of the Commission, it did not say, "You are
21 immune from judicial review." It looked as to whether there
22 was substantial evidence. And on the only item which is
23 common to the two cases there was evidence -- there was a study
24 of the specific traffic in that case. There is not study in
25 this case. The North refused to make a study.

1 Q How long did it take for the Commission to make that
2 study?

3 A Your Honor, the way I look at it, it is this way. It
4 would be very easy for the Commission to get through with this
5 case directly. The northern lines wanted inflation in their
6 division. The Commission said, "All right, the costs are the
7 North-South freight traffic."

8 There is no evidence on the record as to these items
9 that make up every inflation. There is no evidence that it
10 costs more in the North on this traffic.

11 What the Commission ought to do is say: "Dismissed.
12 You have not proved your inflation."

13 Q I say, how long would it take to have this study?

14 A The kind of findings I think should be made, right
15 now until the northern lines or anybody presents some evidence
16 that the costs are, in fact, higher on this traffic, the
17 findings ought to be they have not proved their case.

18 Q The direct answer is somewhere between five minutes
19 and 15 years, isn't it?

20 A The lower court recognized, your Honor, that in say-
21 ing there was not substantial evidence it did not mean that the
22 Commission was the captive of the northern railroads' failure
23 to present it, that the Commission had the right and the power
24 to go out and make any kind of comprehensive cost study they
25 wanted.

1 If they did that, it would take time. But the
2 Commission has no duty to do that. The Commission's duty is to
3 decide the case on the record. If there is no evidence to
4 support inflation, their duty is not to give it.

5 Q That isn't the point, is it, because the Commission
6 has made a finding that the existing divisions are not fairly
7 divided and that finding is not presented here. The District
8 Court did not make a judgment on it, as I read it. Right? The
9 District Court said the Commission's result was in error in
10 making these adjustments and did not find that the existing
11 divisions were fair and reasonable, did it?

12 A No, I don't think it did either.

13 Q All right, so the northern roads here, or whoever
14 wants to do it, has a right to obtain a Commission determina-
15 tion as to what adjustments would be necessary to make the
16 rates fair and reasonable, so that if a decision of the ICC is
17 set aside here, and we think it would necessarily follow,
18 would it not, that there would have to be further Commission
19 proceedings, and those proceedings will be quite lengthy? It is
20 just a fact of life.

21 A I don't agree with that for this reason. This is not
22 a case like the Southern case was 15 years ago, like the
23 Transcontinental case was a couple of years ago, where the
24 divisions were a big, scattered mess and, everybody agreed,
25 were wrong.

1 This is a case where they had the uniform-scale
2 divisions to fit the uniform rates in existence. If this case
3 is sent back to the Commission, you don't go back to some chaos
4 that everybody recognizes has to be changed. You go back to the
5 uniform, equal partners divisions and rates.

6 If the northern lines want to persist in obtaining
7 inflation, let them start by presenting some evidence.

8 Q You say "obtaining inflation." What do you mean?

9 A I mean as contrasted with the way it was before this
10 order.

11 Q You mean if they want to insist on getting more?

12 A If they want more than an equal share, they ought to
13 prove it.

14 Q Under this order what is it, something like 58-42,
15 something like that?

16 A Specifically the way it is worked is there are
17 two scales, a northern scale and a southern scale. And on
18 this order the northern scale is 17 percent higher for
19 300 miles. It is the difference between 56s and 44s, instead
20 of being equal partners. That is the way it goes.

21 Q I suppose the same findings by the Commission would
22 support in a sense an increased rate, an increased joint rate.

23 A It did not so indicate here.

24 Q I mean that is normally what you are talking about
25 when you are talking about inflation in costs?

1 A No, I don't believe so, your Honor.

2 Q What are you talking about?

3 A The revenue needs of the rails, the costs. I have
4 read these last two rate cases, and I am not able to recite what
5 they are based on, except the revenue needs of the railroads,
6 certainly not 6 percent of the traffic.

7 Now I would like to turn to the last illustration.
8 I think all of these are merely illustrations of the use of
9 these averages to inject something into the costs that really
10 have nothing to do with the costs of North-South freight
11 traffic. This is this passenger deficit problem.

12 Now, in the Transcontinental case this court noted
13 in an argument in which the western railroads were urging
14 their passenger deficits be reflected -- the court said:
15 "While the Commission has sometimes acted to offset passenger
16 deficits in freight rate cases, the issues are quite different
17 when in a division's case it is argued that carriers in one
18 part of the country should subsidize passenger operations of
19 carriers elsewhere."

20 The court did not get into this matter in that case
21 because the East was out of it, and they held they were out of
22 the case. Here the Commission has included the total passenger
23 deficits, and I think we are entitled to ask why should any
24 passenger deficits be included when we are talking about North-
25 South freight cars.

1 The southern lines' theory is that there are common
2 costs. Taking in this bridge right next to the 14th Street
3 bridge, it is a railroad bridge. It has to be painted and
4 repaired, and it is used by passenger trains and freight trains.
5 If you cut out all passenger trains, you still have to paint
6 and repair it. And it is proper if the passenger revenues
7 can't pay for the paint -- it is proper to charge that common
8 cost against the freight.

9 Now, I don't quarrel with the Commission on that
10 concept. The Commission adopted that concept. They said the
11 common costs should be reflected. I don't quarrel with that.
12 The northern lines and the Commission counsel have some quarrels
13 with that. They have quite a number of theories about how
14 this passenger deficit should be treated. They were not
15 accepted by the Commission, and many are inconsistent with the
16 Commission.

17 What the Commission did was say that where there are
18 common costs that must be incurred to provide freight service,
19 such costs are properly chargeable to freight service. So far,
20 so good. The problem here is that these commuter lines up
21 North contain many items of cost, many items of cost, tracks,
22 yards, stations, separate facilities, that can be considered
23 solely related to suburban service, solely and exclusively
24 related to suburban passenger service.

25 Those are not my words. Those are the findings of

1 the Commission in this case.

2 Q The same thing is true of intercity passenger cars,
3 isn't it? The fact of the matter is that the southern roads
4 have very large costs for intercity passenger services and
5 deficits and the northern roads have great costs in deficits
6 with respect to commuter service and the impact of those
7 two things.

8 But you are going to talk about segregated common
9 costs and then make the allocation. Are you clearly arguing
10 for the difference between passenger costs on the one hand and
11 commuter costs on the other hand? Or how can you do that,
12 except on the basis that it is better for the South to do it on
13 that basis? But logically you can't argue that way, can you?
14 Don't you have to say that the right thing to do is to make
15 your argument, is to take your common costs as between passenger
16 or commuter, on the one hand, and freight, on the other hand,
17 and then allocate it as between freight, on the one hand, and
18 passenger plus commuter, on the other?

19 A That is exactly what we argued, exactly what we
20 argued. And what we did was go in and say there is a large
21 body of costs that are not common and should not be allocated,
22 because these large bodies of costs are solely related to the
23 northern commuters. They have nothing to do with the North-
24 South freight traffic.

25 We got our evidence on that from a presentation of the

1 northern railroads to Congress at a time that they were going
2 to Congress, as they still are, saying that local communities
3 ought to support this commuter service.

4 Q Didn't the Commission say that even if there are a lot
5 of costs of the commuter service that are not common but solely
6 related to the commuter service, nevertheless they should be
7 included and allocated?

8 A That is not the way I read it. They say because the
9 commuter deficit includes common costs which must be incurred,
10 such costs are properly chargeable.

11 Q But they also conceded there were some solely related
12 charges, but they nevertheless included them?

13 A That is exactly the point where the District Court
14 said: "You have given no reason why you should flip in these
15 solely related costs."

16 We said: " If you think they are solely related
17 costs in the South -- and we can measure those for you -- throw
18 them both out. Under your standards in the costs of freight
19 traffic, throw them both out, and the South would still be
20 better off than the way you did it."

21 The Commission never even mentioned that exception.
22 They say the South has all of this. Sure we do. And if it is
23 out in the South, it should be out in the North. We don't
24 question that. We have urged it. We got brushed off on that
25 one.

1 Now I have given two illustrations, the border inter-
2 change situation, the commuter -- I have briefly addressed
3 myself to the car cost feature. All of these items are
4 essentially the same situation. It is an inclusion in the
5 North-South freight costs of things that have not been shown to
6 have anything to do with this inflation.

7 I want to simply summarize by saying that the District
8 Court did exactly what the Administration Procedure Act required
9 that it do. It reviewed the Commission's findings and reviewed
10 the record to determine whether this inflation was supported
11 by recent findings and substantial evidence without invading in
12 any way the provision of the Commission to set the policy
13 standards upon which decisions should be made. The court
14 found that the inflation was not supported by substantial
15 evidence relating---

16 Q Excuse me. This is what bothered me. It is on
17 page 31 of your brief. This is what I recall.

18 You say there: "It is generally agreed that the inter-
19 city passenger deficits must be considered as part of the costs
20 of providing freight service, for such deficits are usually the
21 result of costs allocated to passenger operations from common
22 facilities which must be maintained in order to provide the
23 freight service." Suburban deficits, however, are "another
24 matter."

25 Do I understand what you have just said in colloquy with

1 me to supersede this statement and that you do agree that the
2 costs solely allocable to intercity passenger operations, on the
3 one hand, and to commuter operations, on the other hand, should
4 be treated the same way?

5 A Yes, sir. I don't regard this as superseding it,
6 because the testimony I refer to says that the great bulk of the
7 passenger deficit---

8 Q I am looking at what you said in your brief, not at
9 the testimony.

10 A I said to the extent that you have to qualify this
11 by the existence of solely related deficits, to that extent
12 they should go out in both territories.

13 I know the District Court had not intruded in any
14 way on the policy decisions of the Commission. It is not like
15 your barge and railroad case last year, where the court decided
16 it should say what the standard ought to be. Here the
17 Commission fixed the standard. The District Court did not touch
18 it at all. It simply found where there was sufficient evidence
19 to meet that standard.

20 Now we feel the District Court, having performed its
21 duties, its judgment remanding the case to the Commission,
22 should be a proper one.

23 MR. CHIEF JUSTICE WARREN: Mr. Kaier.

24 MR. KAIER: Mr. Tretins agreed that the Class A
25 formula is a good cost formula. The territorial cost as

1 developed by that formula goes to the pre-size elements of
2 service incurred in performing this North-South traffic as
3 revealed by the southern lines' cost data. The southern lines
4 knew where to look for size in which territorial average costs
5 may not accurately reflect the cost of this service. They
6 look for those places.

7 They presented to the Commission their reasons why
8 they thought that territorial average costs were not good.
9 The Commission minutely examined each one of those reasons in
10 Appendix B to its report and showed that these adjustments of
11 southern lines were based upon assumptions and wholly invalid
12 evidence. They showed why they thought the territorial
13 divisions were good.

14 Mr. Tretin talked about car costs. He said they
15 wanted to get the costs closer to the North-South traffic, and
16 what do you suppose they offered in substitution for the
17 northern and southern line costs on car costs? They used the
18 average car costs of all the railroads in the United States.

19 The Commission minutely examined that and said, no,
20 that was not representative. The northern and southern lines'
21 own costs were more representative of their own costs than the
22 U. S. car costs.

23 The southern lines said the car costs of the northern
24 and southern lines are not represented here because mostly in
25 this service box cars are used, whereas the northern and

1 southern lines have more open-hopper cars.

2 The Commission analyzed that, and they found it costs
3 more to own and maintain open-hopper cars than box cars. So to
4 that extent the territorial costs would be an overstatement
5 rather than an understatement.

6 Now, if your Honors please, they also said there was
7 a difference in utilization. They analyzed that and found that
8 wasn't a fact. The Commission said it is known what factors
9 caused northern lines to have higher car costs than southern.

10 In the first place, northern lines have more and
11 higher wages, pay higher wage rates than southern lines. They
12 say the northern lines pay higher taxes than southern lines.
13 And, overall, there is a greater utilization in the South than
14 in the North.

15 I think we pretty adequately covered that in our brief.

16 Q Is it true that railroad rates in the North are
17 higher than in the South?

18 A I will answer with a reference to the Commission. Our
19 friends on the other side have said that the rates are equal.
20 They are talking only about class rates. Class rates move
21 only 1 percent of the traffic.

22 The Commission said in the cases cited on page 14 of
23 our reply brief, rate levels within the North have become
24 higher than within the South. They said that in a case back in
25 '56. And we have shown that since that time in general

1 freight rate increase cases the Commission has allowed even
2 greater increases within the North and from and to the North.

3 Q I had an idea the rate----

4 A The increases are generally the same, but they are
5 imposed on generally higher base rates than in the South.

6 I submit this case could be controlled by the C&NW
7 case.

8 Thank you.

9 MR. CHIEF JUSTICE WARREN: We will adjourn until
10 tomorrow at 10 o'clock.

11 (Whereupon, at 2:15 p.m. the Court recessed, to
12 reconvene at 10:00 a.m. on Friday, October 18, 1968.)
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