Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

Docket No. 99

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, ET AL.

Petitioners,

vs.

REDERIAKTIEBOLAGET TRANSATLANTIC,

Respondent.

Place Washington, D. C.

Date October 22, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

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REDERIAKTIEBOLAGET TRANSATLANTIC,

Respondent.

Washington, D. C.,
Thursday, October 22, 1970.

The above-entitled matter came on for argument at 1:40 o'clock p.m.

BEFORE:

WARREN E. BURGER, 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
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

APPEARANCES:

JOHN M. REED, ESQ.,
73 Tremont Street, Boston, Massachusetts
Counsel for Petitioners

DANIEL FRIEDMAN, ESQ.,
Office of Solicitor General,
Department of Justice
Counsel for the United States as amicus curiae

APPEARANCES (Continued):

GEORGE F. GALLAND, ESQ.,
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Washington, D. C.
Counsel for Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in No. 99, Port of Boston Marine Terminal and the respondents.

Gentlemen, we have got an hour and twenty minutes, the total amount allocated for this case is an hour and forty, and if you want to finish it up tonight, it rests entirely in your hands.

ARGUMENT OF JOHN M. REED, ESQ.,

ON BEHALF OF PETITIONERS

MR. REED: Thank you, Your Honor.

On behalf of the Port of Boston Marine Terminal Association and the other petitioners, who are the port terminals of the City of Boston, I am going to divided my argument into three sections. I will state the case, I will then deal as briefly as I can with the problem of administrative res judicata, which is the first point raised on the petition for certiorari, and I will conclude with the problem of whether the issue of the tariff in issue here was a modification of the conference agreement of my client, the Port of Boston Marine Terminal Association.

This case, if the Court please, began in the summer of 1965, when the Port of Boston Marine Terminal Association and the member terminals of the Port of Boston brought a petition for a declaratory judgment from the Superior Court for Suffolk County in Massachusetts. That case was removed by

the respondents who were the Boston Shipping Association and its member, also joined with respondent in the original case, to the federal district court sitting in Boston.

And I should point out who those respondents were. They were the shipping association itself, an organization which engages in labor negotiations for the steamships in Boston, with the IOWA locals, the members were the steamship carriers in some cases, in some cases steamship agents, whose function it is in ports to negotiate on behalf of vessels for berth space and ancillary needs of the vessel.

The case was removed on September 1, 1965 to the federal district court in Boston and in March of the following year the Port of Boston Marine Terminal Association and the other petitioners made a motion for a pretrial order or something like a summary judgment, which would have given the respondents an opportunity to apply to the Federal Maritime Commission to show the invalidity of the tariff charge being made.

It had already taken place in this case, as I will come to, that there had been discussions to try to press the Boston Shipping Association and its members into filing a complaint with the FMC, which is the only place where the validity of these tariffs could be adjudged in the opinion of the petitioners.

Nothing had been done up until that point, but the

federal district judge, hearing this motion in the spring of 1966, entered an order that the case should be stayed until the defendants did have an opportunity to make their complaint under section 21 of the Shipping Act with the Federal Maritime Commission. And that order appears two places in the record here.

In one place it is set out in full in rather formal language. In the other place, it is in the docket entry that will appear in the record appendix. The language of the order may become important in what follows in that the order was not really a reference to the Federal Maritime Commission. The order, rather, was one which gave the declaration that the FMC had initial and primary jurisdiction to determine the validity of the charges in question, and that the within proceeding was stayed until the parties involved, namely the defendants, had made that application.

In other words, it was not like a court referring a case to a master or the FMC referring a case to an examiner. The proceeding which was contemplated would be a collateral proceeding, one not in a court proceeding but one on its own legs. And in fact that is what actually occurred.

On April 21 --

Q Mr. Reed, what is the significance of this?

A The significance of that, if Your Honor please, is that we will have argument later, I believe, that the

district court which referred the matter should have jurisdiction to review the propriety of what the Federal Maritime Commission did, and that has a lot of appeal, if I may say so. A court that refers any kind of a jurisprudential question to an agency or a master or anybody else ought to have the power to determine whether that person to whom it has made the reference has done it right.

And in this case -- and indeed in all such cases, where we talk about reference -- we are really using an illusion. There really wasn't a reference in this case. What took place was there was an opportunity to make the application and the proceeding in the FMC was really separate from the proceeding in the federal district court.

The case went to the Federal Maritime Commission under a complaint that was filed there by all the defendants that were then before the federal district court. That included all the members of the Boston Shipping Association. I think that is stipulated and it appears several places in the record.

The Federal Maritime Commission then investigated the matter with a trial examiner and the trial examinder made a ruling on the three issues that had been raised by complaints in the FMC, one each under the sections of the shipping act that are involved, Sections 15, 16, and 17 of the act.

The examiner had made an adverse determination to the terminals under sections 16 and 17 issues, those are really

reasonableness issues. Under the section 15 issue, the examiner decided in favor of the terminals.

The terminals appealed to the full board of the commission and obtained a partial reversal. The commission reaffirmed what the examiner had said about section 15 -- that is the question as to whether these tariffs had to be approved under section 15 of the shipping act as modifications -- the commission reaffirmed that, but on the reasonable issue under sections 16 and 17, the commission held first as to certain cargo, namely cargo on which free time had not expired at the outset of the longshoremen's strike. The charges were valid. And as to certain other cargo, namely cargo which was on demurrage at the outset of a longshoremen's strike, the charges were not valid.

I will come back briefly to the factual background there as part of stating this case, but I am not going through the procedural aspects, even though I am dividing up a little here.

The commission's decision ends with an order, and why am I going into this, what difference does it make how the order ends -- because my brother is going to say this order isn't a final order, and I say it is a final order.

The commission's order ends with a conclusion that the assessment of strike storage against the vessels for cargo on which free time has expired constitutes an unjust and an

unreasonable practice under section 17 of the shipping act and the respondents will be ordered to amend their strike storage rule accordingly. And then the final statement in the order is the respondents herein -- those are my clients -- shall amend their terminal tariff number one in a manner not inconsistent with the commission's decision herein.

It is going to be said -- and I pause on this -- that this was not a final order. The parties regard it as a final order at the time, certainly ordered the terminals to do something and it wasn't just a reaffirmance of everything that the terminals had been doing up to date.

And in fact, the Boston Shipping Association, my opponents and their members, applied to the federal district court in Boston on July 27, 1967, after this decision came out on June 23, 1967, applied to the district court in Boston for an amendment of the original order that the court had granted on the question of primary jurisdiction. And that amendment was one which the court allowed, by the way, was one which would recognize that all normal rights of appeal from agency decisions -- that hadn't been clear in the original order. It was the Boston Shipping Association that asked that to be amended.

Unfortunately, when the Boston Shipping Association got to filing its petition for review with its member terminals, it was late, although the case was fully briefed in the

District of Columbia Court of Appeals, with a record and some of the transcript that will put evidence before the commission, when it got there it was late and the court dismissed the case without determining any of the merits, and that order of the D. C. Court of Appeals is printed in the record appendix of our brief on pages 66 and following.

It was about that time that this court decided the Volkswagen case. This court decided the Volkswagen case on March 8 or thereabouts 1968, and the D. C. Court of Appeals was about to throw the Boston Shipping Association out on March 18.

Sometime after that, the Swedish Transatlantic Line, whom Mr. Galland represents, on my left, filed a petition with the Federal Maritime Commission for reconsideration on the ground of the Volkswagen case. And that petition, which I filed a reply brief to, was sent back to the counsel for Swedish Transatlantic without action by the commission, as being time barred.

The case before the federal district court in Boston still was pending, and the Swedish Transatlantic Lines, represented by Mr. Galland, then petitioned to intervene in the Boston case. Things were coming up for trial before the federal district court in Boston and Chief Judge Wyzanski allowed that petition for intervention, in which they said on pages 26 and 27 of our record appendix, that at all times

relevant to the issues involved in this case, Transatlantic was represented in the Port of Boston by its agent, Furness, Withy & Company, and in which they also said, on page 27 of our record appendix, on September 4, 1968, Transatlantic, which at all times prior thereto had been represented by counsel for Furness, Withy, petitioned the Federal Maritime Commission in its own name, the point being that they would rather themselves, as having been in the case, up until that point -- but the trouble was that they were dissatisfied and one can understand with the posture of the situation as it then stood before the federal district court in Boston.

The federal district court heard the parties on a stipulation of all the facts, including the Federal Maritime Commission's decision, and made a two-point decision.

First, he said that it would be incumbent on the objector, Transatlantic, to intervene in the FMC proceedings and claim normal rights of appeal if it wanted to get into these issues which were presented; and, second, even if this court were to review it -- meaning the federal district court -- we would reach the same result that the Federal Maritime Commission did, and for reasons that are amply set forth in the commission's decision itself and therefore the district court entered an order of judgment against all the defendants, including Transatlantic.

Transatlantic only appealed. Transatlantic appealed

to the First Circuit Court of Appeals and won a reversal, and the First Circuit Court of Appeals held first on the res judicata issue, they weren't a party and, as a party, they weren't bound by the FMC's decision; and, second, the United States Supreme Court, in the Volkeswagen case, took an expanded reading of section 15 and under that expanded reading a number of cases ceased to be authoritative, which are collected in a footnote in the court's opinion on page 15 of the record appendix, and these charges would become modifications of the original section 15 agreement.

Now, that was the procedure in the case and the factual background is not complex. The factual background is this: In the Port of Boston, the terminals have organized under a terminal conference agreement numbered 8785, and that terminal conference agreement authorizes the members to issue a tariff to fix charges and rates on wharfage demurrage and other terminal services.

The exact language of the agreement is printed entirely in the record appendix. The following subject matters and also the facilities rates and charges incidental thereto, wharfage, dockage, free time, wharf demurrage, usage charges, passenger charges, water and electricity.

It was under that agreement that the members issued that tariff initially in 1962, amending it in 1964. The amendment of the tariff changed the charge for wharf demurrage

over to the vessel, in cases of longshoremen strikes, when as a practical matter the consignee can't get his cargo off the pier.

That was a practical judgment of the terminals, of something that was fair to do, and they ought to do. It has nothing to do with bill collections or anything like that. They were charging people for wharf storage or wharf demurrage on cargo where the man physically couldn't get his truck in to pick off the cargo, and so they transferred it under the tariff to the vessel where it was a longshoremen's strike. And under the same provision in the tariff, if it is a terminal employees' strike, and longshoremen are not employeed of the terminals, but if it is the terminal employees' strike that prevents removal, then there is no charge to anybody.

That was the practical situation that led up to this thorny administrative law question. The question of the review by the district court of this Federal Maritime Commission decision is one that can be easily answered from examination of the terms of the statutes. I don't see how the Administrative Orders Review Act could defer when it says exclusive jurisdiction to review orders of the Federal Maritime Commission under section 830 of chapter 46, is in the court of appeals. If that is what it says, presumably that is what it means.

And I realize that my brother has made a talented

argument to call ICC procedures into this case, but in a nutshell the argument cannot carry. The cases that he cites in particular won't support him. I think they are contradictory to his argument.

The only one which I am going to mention, before passing on to the section 15 issue, is Pennsylvania Railroad vs. United States, in 363. In that case, the reference so-called wasthe same kind of reference we had in this case. In that case, the court of claims stayed the proceeding before it, which was a proceeding by the Pennsylvania Railroad vs. United States, stayed it so the complaining party could go to the ICC, which the complaining party did. And under the statutes governing that particular situation, the loser before the ICC would have a right to go to the district court in the Interstate Commerce Commission situation and this court held that as a result the court of claims had no review jurisdiction.

It is a holding that is quite parallel to our situation and quite operable to what my brother will argue. And, moreover, the court pointed out there that where the ICC had reached a divided determination on the issue, that is the railroad won on some of the issue, and the U.S. as the shipper won on some of the issue -- where that happened, the order was not merely advisory, the order was just as final as it could be. And it was in this case. There was nothing more

that could be done after these commission proceedings, and for that reason we say it would appear that these issues ought to have been litigated before the commission by Transaltantic if it wanted to get in at that time. It was represented in the commission's proceedings, and there is nothing unfair in holding them to that.

But if this court -- now, this is the third and last part of my argument -- does decide that there is something unfair in what has taken place or that Transatlantic, in some way that I cannot fathom, has missed a day in court when it was represented by its agent, Furness, Withy, before the commission, if this Court reaches that point, and I rather hope it will because the issue here on the merits is so important, then the argument is resolved, not by looking at the first instance at the Volkeswagen case, not as far as I as counsel am concerned, because I am arguing to those who wrote the Volkeswagen case -- you can tell authoritatively what that case means -- but I look first to the statute to see what it says.

It says that all agreements, modifications of agreements between persons subject to the act, ocean carriers or persons subject to the act, shall be filed with and approved by the commission where they allocate fares or fix rates, et cetera, et cetera.

8785, the original conference agreement, did relate

to the fixing of rates. It was filed with the commission. It was approved by the commission. There is not a word anywhere in 8785, the original conference agreement, that says who is going to bear the brunt of any particular charges. There are a lot of other things that it doesn't say.

All it sets up is a means of operation by conferences, which has become extremely common in the ports of the United States, and sets up a means of publishing tariffs. It sets up the means whereby the tariffs are published with a certain notice, a notice of thirty days, so the public does find out about it, the public can come in and complain if they don't like it.

In this case, the tariff was issued the first time in September, sometime around the middle of September 1964. Right in the record is a letter from the Boston Shipping Association, a wire, dated September 29, 1964, that is months ahead of any longshoremen strike, saying we are not going to pay it, we object to it. They knew all about it, they could come right in to the Federal Maritime Commission then and make their objection. That is the procedure under these conference agreements. It is quite in compliance with the statute. There is nothing in the statute that calls the issuance of the tariff a modification of the agreement that provides for issuance of tariffs, except -- now here if the Court meant differently, the court will have the opportunity

to correct this situation. But the Volkeswagen case nowhere says that the issuance of a tariff under an approved conference agreement constitutes a modification of the conference agreement.

The Volkeswagen case didn't involve the conference agreement. It involved the MET fund arrangements on the West Coast. There wasn't any FMC approved agreement whatsoever. The court said in the course of its opinion, sure, if it is routine, don't bother to present it to the commission for approval. But this isn't routine. This involves assessing a gigantic fund, millions of dollars, which are going to be allocated among people whether they like it or not.

In our case, in complete contrast, there is a conference agreement. It provides for the issuance of tariffs, and the footnotes of the Volkeswagen case to me indicate that Court was aware of that situation, that is that conferences did operate by the use tariffs without obtaining separate approval of each one.

Q The other shipping companies are not directly involved in this case?

A All the shipping companies --

Q They lost their right of review when --

A If Your Honor please, all the shipping companies in Boston, at least indirectly, participated in the proceedings before the FMC.

Q Right.

A That includes not only Transatlantic but every other shipping company that calls at our port. The Furness, Withy Company, Patterson Wilder & Company, Norton Lily Company, those are the steamship agents named, the U.S. ones didn't operate through a steamship agency so they didn't have a steamship agent in there. Every one of those steamship agent companies represents a number of lines that call at Boston. So that at least indirectly, through their agents, they were represented. And Mr. Flynn, who tried this whole matter before the FMC, represented the carrier interests.

All the bills of lading issued by these carriers went into evidence at the Federal Maritime Commission. As we pointed out in our brief, that includes the bill of lading on Mattawanda that resulted in the $8,000 demurrage storage in this case.

Q What is the name of this company, Transatlantic Company?

A Swedish Transatlantic.

Q Were they in any different position as far as the earlier proceedings are concerned than the other shipping companies?

A They were a little bit different from the U.S. lines. The U.S. lines we named as an original defendant in the proceedings in the Superior Court for Suffolk County.

Furness, Withy was involved, they were named as a defendant. This $8,000 charge which is presently up before Your Honor is one of the charges that is annexed to the bill of complaint in the original proceeding, but Furness, Withy was named as the defendant.

I also ought to call Your Honor's attention to a definition in the tariff, it is not going to turn this case one way or the other, but the tariff consistently with the practice in the North Atlantic ports, defines the vessel as including the agent. It is on page 18 of Volume II of the record. The term "vessel" refers to floating craft of every description and includes the owner or operator, or such other persons acting as agents thereof, and the practice in the Port of Boston is to regard the agent as identical with the vessel.

For those reasons we urge that this Court reverse the judgment of the Court of Appeals and affirm the -- direct that the judgment of the district court be affirmed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Reed.

Mr. Friedman?

ARGUMENT OF DANIEL FRIEDMAN, ESQ.,

ON BEHALF OF THE UNITED STATES

MR. FRIEDMAN: Mr. Chief Justice, and may it please the Court, I am appearing here on behalf of the United States

and the Federal Maritime Commission as amicus.

The dock as the primary jurisdiction this Court announced in the Western Pacific Railway case, in 352 U.S., comes into play whenever enforcement of a claim is originally cognizable in the courts, requires the resolution of issues which under a regulatory scheme have been placed within the special competency of an administrative body.

We think, without question, the issues raised in this case were that kind of issues and were properly referred to the Federal Maritime Commission. The respondent challenged that and said there was no need for the reference. The issues in this case, as they developed in the district court, was a most technical kind of issue, calling for specialized knowledge by someone familiar with the intricacies of the shipping business, whether or not when this particular agreement of the conference of the terminal was approved authorizing them to fix rates and charges, whether that approval carried with it authorization to shift the incidence of a particular charge for cargo kept on the pier after five days, when during the period of a longshoremen's strike it was impossible to remove that cargo.

The other question, assuming for the sake of argument as the Maritime Commission held, that this change was not a new agreement that required approval, whether the practice itself was illegal in violating of the shipping act. And

this is the kind of question that the Maritime Commission has to decide every day. And as far as the question of whether or not what was done in this case constituted proper implementation of an approved agreement or a new agreement of modification that required prior commission approval, this could only three or four years ago held in the Carnation case that that was specifically an issue appropriate for resolution by the Maritime Commission.

So I think there is no question in this case that Judge Wyzanski properly ruled that this was a matter within the primary jurisdiction of the commission. Primary jurisdiction of the commission was invoked, the commission fully heard the matter and the commission upheld the practices and the actions taken by the group of terminals in the Port of Boston. And then the question comes up how is that decision of the Federal Maritime Commission rendered on this reference to be judicially reviewed.

We think the answer that follows both from the decisions of this Court and from the language of the statute itself is that this decision of the Federal Maritime Commission is to be reviewed the same way as any other decision of the Federal Maritime Commission, by filing a timely and proper petition to review in the court of appeals, and that the referring court has no jurisdiction collaterally to review the correctness of the decisions of this agency.

Q Well, that is about what Judge Wyzanski said, isn't it?

A Basically, yes, Mr. Justice.

Q He also said that he agreed with the commission.

A Yes, he agreed. Under our analysis there is no need to reach the second question, but if the second question is reached, as we develop it somewhat in our brief, we think that Judge Wyzanski correctly upheld the commission's decision in this case.

Now, I think the starting point in this --

Q I gather that under the railroad, in the railroad situation, if the shipper sues for money, say, for reparations in the district court --

A Yes.

Q -- and claims the rate is unreasonable, there is a reference to the commission on the reasonableness of the rate.

A That is correct.

Q And if the commission finds the rate unreasonable, there is review provided but provided in the court that referred the matter to the commission?

A That is correct, Mr. Justice, under a very specific statute that --

Q That specific statute followed a decision of this Court in the railroad situation, doing precisely what you

ask us to do in the maritime situation?

A That is correct, Mr. Justice.

Q And under the Pennsylvania case, this Court decided precisely what you ask us to do here?

A That is right.

Q And Congress promptly adopted the contrary rule as to where review should be in a referred matter.

A Mr. Justice, I would have to disagree when you say in a referred matter. I think this statute --

Q In a reparation matter?

A -- referred to the Interstate Commerce Commission.

Q Oh, I agree with you, but that was the case we had.

A Yes, but the statute, Mr. Justice, specifically speaks only of the Interstate Commerce Commission.

Q I understand that, but that is hardly responsive to my question as to whether or not the Congress in effect reversed the Pennsylvania case.

A Oh, yes, we have no question about that. The Congress did reverse the Pennsylvania case, but we --

Q And thought it was a more economic employment of judicial resources to have review in the referring court.

A That is correct, Mr. Justice, and it may well be that as a matter of sound policy, had Congress considered

this problem, it would also have more broadly provided for reference back to you by the referring court in case of --

Q Now, in the -- don't you think the Atlantic Coast Line case is relevant here at all, because there the Court dealt with the situation where there is a reparation proceeding in the Interstate Commerce Commission itself, and there was no specific statute for review of the decision of the commission that the rate was unreasonable other than the provision that that order would be reviewed in the three-judge court, right?

A That is correct.

Q And this Court decided, not because there was any specific statute anywhere, but on various grounds, that review was confined to the shippers' enforcement action in another district court.

A That is correct, Mr. Justice, but I would suggest two or three things, if I may, with reference to this statutory provision.

First of all, it seems to us that this congressional amendment, the provision for review of orders of the Interstate Commerce Commission, it seems to us manifests a clear congressional intent within the light of the Pennsylvania Railroad case, that unless there is specific language providing for a review by the order of the agency in the refined court that the regular practice has to be followed.

Q I think you are driven to that argument.

A Yes, I think so, Mr. Justice, and we think it is a sound argument.

Q Yes.

A And let me make one further point, which I think is conclusive on this. Even if the court would agree with the respondent on that point, that doesn't help the respondent in this case, because when Congress amended and changed the procedures for review of orders of the Interstate Commerce Commission where there had been a reference, it not only provided that the referring court would have exclusive jurisdiction, but it also provided that any such proceedings review in the referral court would have to be filed within ninety days from the date the order of the Interstate Commerce Commission became final.

Q But in the Atlantic Coast Line case, no one said, for example, that the carrier couldn't seek review in some other court if the shipper didn't file his own action.

A That is correct, Mr. Justice, but I respond that under the Urgent Deficiencies Act, which governs review of Interstate Commerce Commission, holds there is no time limit for seeking judicial review. Unlike most of the review provisions, there is no time limit. You can come in a year later after an Interstate Commerce Commission order and seek judicial review. But under this provision, under section

1336(c) of title 28, it says explicitly any action brought under subsection (b), which provides for review in the referring court, shall be filed within ninety days from the date that the order of the Interstate Commerce Commission becomes final. That is, if you go back to the referring court following a decision of the Interstate Commerce Commission on a reference, you have to go back to the referring court within ninety days after the order of the commission becomes final. And that was clearly not done in this case. I just want to refer briefly to some of the dates --

Q Could I ask you, let's assume a shipper asks for reparations before the Maritime Commission and he gets it, and the Maritime Commission says that the rate is unreasonable. May the carrier then resort to the court of appeals, which you say is the exclusive way of reviewing such an order of the Maritime Commission?

A I would think not, Mr. Justice, in that type of an order, because --

Q Why?

A -- because of the basic decision in the Consolo case.

Q Well, I know, but, you see, Consolo didn't have anything like 1336 to rely on.

A I would say --

Q All it had in Consolo was the statute which says

exclusive jurisdiction is in the court of appeals to review an order of the Maritime Commission, correct?

A That is correct. But you had the basic policy of --

Q And yet you concede that in the reparation situation the carrier would have to seek review, not in the court of appeals but before the -- in the shipper's enforcement act?

A That is right, the carrier himself could not seek review at all under the decisions of this Court. The carrier -- only the shipper could seek review if there was no cease and desist order, only the shipper could seek review either directly or the carrier could defend if the shipper sought enforcement. But as I read the decisions of this Court here --

Q Not if there is -- I don't think you are correct in that. I would say if there was a cease and desist order --

A Yes, then the carrier can seek review, but I thought you posed the situation where there is only a reparations order. As I --

Q Well, let's take the cease and desist situation then.

A Yes.

Q And the carrier and the shipper seeks to

enforce his reparation order in the district court.

A Yes.

Q Where may the carrier seek review of the cease and desist order?

A I think there in the district court.

Q He has to?

A Yes, but --

Q And not in the court of appeals?

A No, but he --

Q Even though the statute says exclusive jurisdiction in the court of appeals?

A To review orders because, I think, Mr. Justice, both the statutory scheme -- and this court has recognized that when you are dealing with reparation orders, you have a very special situation and Congress has provided --

Q Okay. I am sorry I interrupted you.

A Let me, if I may, just come to some of the chronology of this thing, because it is very clear that there was no attempt made to get into the referring court here, the district court, within ninety days after the order of the Federal Maritime Commission became final.

However you define it, the decision of the Federal Maritime Commission in this case was rendered in June 1967, and Transatlantic's motion to intervene was filed in the district court in April 1969, so that is almost two years.

Now let us assume, however, that the decision of the Maritime Commission did not become final until the court of appeals had dismissed as untimely the petition to review that was filed by the conference. In that event, it became final in March of 1968 and again more than a year elapsed before they went back into the district court to seek intervention.

Now, let's look at the case from the most favorable point of view as far as the respondent is concerned. Let us assume that the decision of the Maritime Commission did not become final until the Maritime Commission had rejected the petition for reconsideration; and let us further assume that the final rejection of that petition for reconsideration was not the letter in October that is contained in the record but the subsequent letter which we have quoted in our brief which was sent to us in December 1968, December 2, 1968; again more than four months had elapsed, more than 120 days between the receipt of that letter which under any theory closed the case and the action of the respondent in seeking to intervene in the district court.

So that it seems to us under any theory, under any theory, even assuming that it will be appropriate to rely on the policy of 1336(b) to say that we will apply the same principles to review an order of the Federal Maritime Commission as we do the orders of the Interstate Commerce Commission -- they still don't come within the terms of that because this

was not filed within 90 days from the date that the order of the Federal Maritime Commission became final.

Q Well, Congress did at one point say that -- as a matter of fact, it still says that the Maritime Commission orders are to be dealt with, to be reviewed like Interstate Commerce Commission orders, except to the extent that the Administrative Procedure Act changes it, is that it?

A Well, except to the extent that the Administrative Orders Review Act, and it says the procedure for review of Maritime Comission orders is to be the same as that of the Interstate Commerce Commission orders, but in 1950 review of Maritime orders transferred from the three-judge district court to the courts of appeals. I assume the procedure is basically the same, that is the same considerations of finality, parties, et cetera.

Again I come back to say that Congress -- the sole problem that was before Congress, when it amended the statute, was the problem of reference to the Interstate Commerce Commission. And it seems to me very difficult, very difficult to interpret a statute that speaks explicitly of referring a question to the Interstate Commerce Commission and it speaks about how you review a pending order of the Interstate Commerce Commission, and it says that any proceeding to review to a referring court must be a review of the order of the Interstate Commerce Commission to interpret that as saying

that the Congress, despite this very specific and limited language, must have meant to treat the Maritime Commission as well as covered by this section.

Now I would like just briefly to refer to two other things in the time I have. One relates to the question of whether or not Transatlantic should be deemed to be a party to the commission proceeding. The court of appeals in refusing to follow the decision of the Maritime Commission in the district court in this case, made a statement that non-parties are not bound.

Now, it would appear that when Transatlantic filed its petition for reconsideration with the commission, at least at that point, must have thought itself to have been a party to the prior commission proceedings, because under the commission's rule of practice, rule 16(a), which we set forth at page 28 of our brief, that provides that only a party may seek reconsideration. And if Transatlantic was not a party, it seems there is no way in which it could seek reconsideration.

In addition --

Q Why wasn't Transatlantic made the original defendant?

A I don't -- I assume probably, Mr. Justice, because it is a foreign company and --

Q A matter of jurisdiction?

A -- there was a problem of jurisdiction, I suppose. They did --

Q They had this agent.

A I cannot answer that question. I did not conduct the suit. Perhaps Mr. Reed can. I assume there was a reason why they -- I think what they did is in the case of the foreign steamship carriers, they named as parties, not the carriers but --

Q But their agents?

A -- their agents, and I think the practice probably was that charges were such, not against the carriers but against their agents.

Q Right.

A Now, what they did say, of course, in seeking to intervene in the district court, they said that prior to seeking reconsideration before the commission, they had at all times been represented by counsel for their agent, Furness, Withy.

So as we see this case basically, on this aspect of it, what we have here is full opportunity and complete litigation by people who represented the respondent before the Federal Maritime Commission on a proper reference from the district court. In addition to that, these people tried to follow the statutory procedure for judicial review by filing a petition for review in the court of appeals for this

circuit; that petition unfortunately was untimely and was properly dismissed.

A very belated effort by Transatlantic to get the Maritime Commission to reconsider this case -- these people filed their petition for reconsideration with the Federal Maritime Commission six months after this court had decided the Volkeswagen case. Obviously they could not have filed petition for reconsideration before the Volkeswagen case but the commission has a rule that says except for good cause petition for reconsideration must be filed within thirty days. And certainly it was incumbent upon these people, if they wanted the commission to reconsider its decision in the light of Volkeswagen to move promptly, not to wait for six months.

And therefore it seems to us that this is a case in which the question of the validity of the commission's decision as to whether or not this particular agreement was a separate agreement that required prior approval or whether it was within the authority conferred by the original agreement as the Maritime Commission held, was a matter that was not open to the district court when it came to consider the complaint following the completion of the Maritime proceedings, and we think in the circumstances, the First Circuit had no warrant in itself overturning that decision, revieving the commission's decision de novo and concluding, as we develop in our brief, improperly --

Q That last position of yours, namely that Transatlantic were parties, that is the end of this case right at that point?

A That is the end of this case right --

Q You don't get into the jurisdictional question, you don't get into the Volkeswagen --

A That is correct, Mr. Justice, but we --

Q -- res judicata or estoppel or liquidity or whatever you choose to call it.

A That's right. We are afraid of this because of the fact that the court of appeals for some reason apparently concluded that Transatlantic was not a proper party, was not represented properly before the commission.

Q I didn't read -- correct me if I am wrong -- Judge Aldrich, as I read his opinion, made no findings of any kind as to -- that was the predicate for his statement that Transatlantic was not bound by the earlier proceeding.

A Well, the only thing I can find, Mr. Justice, is the statement at page 51, where he said we must hold that the decision did not bind non-parties to charges sought to be imposed for services rendered prior thereto.

I take it he is suggesting that Transatlantic was not bound by the Maritime decision, because it was not a party to the Maritime Commission proceeding. I take it what he is saying doesn't explain why they are a non-party, but he

seems just to assume that and then goes on to say they are not bound.

Q Mr. Friedman, did the party objecting to the Maritime Commission decision seek review of it in the district court in which this case started?

A Oh, no. Oh, no. They sought review of it in the Court of Appeals for the District of Columbia, and, of course --

Q They were on time, weren't they?

A They were on time -- but, of course, if the respondent is correct in his interpretation of what the statute means, they are in the wrong court. They should have been in the District Court of Massachusetts.

Q Yes, if they should have been in the District Court in Massachusetts, they never did go there even with a petition to review it?

A Oh, no.

Q They never brought any cross action in the District Court of Massachusetts --

A No, when the case came back they naturally opposed the -- I don't know all of the details, but Trans-atlantic basically took the laboring oar. It was the one who filed an answer which attacked the validity of the Maritime Commission.

Q But it never sought review in the District

Court in which these other parties had been sued. It never sought review in that court of the commission action within the time that it is supposed to bring that action.

A Oh, no. It did not go into the --

Q Even if the Court of Appeals wasn't the place for it to go to, and that it had to go to the District Court, it never went there?

A It never went there on time. It ultimately went into the District Court.

Q That's right.

A Yes.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Friedman.

Mr. Galland?

ARGUMENT OF GEORGE F. GALLAND, ESQ.,

ON BEHALF OF RESPONDENT

MR. GALLAND: Mr. Chief Justice, may it please the Court, as the interrogation from the bench has indicated, this is a very hard case to compress and focus. It tends to break itself apart into an uncommon number of issues for a case of its size.

I come to think that the item of wisdom dispensed by this Court a good many years ago in the Southern Steamship case offers good guidance here. The Southern Steamship case was a case where a crew of the steamship company had mutinied in a foreign port and were fired. When they got home they

brought a proceeding against the employer charging unfair labor practice in the firing because they had mutinied and the Labor Board said that was right, it was unfit. This Court upset that determination and said it's sufficient for this case to observe that the board has not been commissioned to effectuate the policies of the Labor Relations Act so single-minded that it may wholly ignore other and equally important congressional objectives. Frequently, the entire scope of congressional purpose calls for a careful accommodation of one statutory scheme to another and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

Now, it seems to me that to determine this case within the confines of the explicit language of the Administrative Orders Review Act, and the one sentence that says the Court of Appeals has exclusive jurisdiction to review certain final orders of the Maritime Commission, is to perpetuate the list of additional administrative horrors that should not be countenanced by this Court or by any court in the judicial system if there is any rational way to get away from it.

This case started out with a law suit in Boston, first in the State Court, was transferred over to the United States District Court which sought to enforce the provisions of something called a tariff which had been filed by a group of terminal warehouses with the Federal Maritime Commission.

They say it was called a tariff because it was truly just a price list that had no sanction except a private agreement among the parties that had been approved at one time in 1962 by the Federal Maritime Commission and which had a provision in it saying that the parties should file with the commission the rates that they adopted.

Terminals were not then and are not now covered by any statute that either authorizes or requires them to file tariffs. Since the events that are before the Court now transpired, a regulation was adopted by the Maritime Commission which said terminals should file tariffs but doesn't command obedience to such tariffs. There is such a regulation but there was not such a regulation at any relevant time.

The agreement that authorized the terminal companies in Boston to adopt port-wide uniform rates, the tariff that was filed -- I mean that agreement, contained a series of definitions, one of which was a definition of something called wharf demurrage. And it said that wharf demurrage is the charge that is imposed against the consignees of import cargo when the cargo stays on the pier beyond free time, and free time was defined by these terminals. They were the only people who prescribed this rule. Free time was defined as five days, meaning that after the cargo is landed the consignee has that much time to pick it up before somebody makes him pay storage on it. And whard demurrage was explicitly characterized as a

charge against cargo, not merely as a charge against carto but as a charge against the consignee of import cargo, and that is exactly what we have here.

Consignees don't like to pay charges on cargo when it is tied up on a dock by a strike, nobody does. You can't move the cargo off because the pier is picketed. So the consignees were giving the warehouse -- the terminal people trouble in collecting the charge, so the terminal interests said, well, let's try getting it out of the carriers. Maybe they will be easier to collect from.

So, well the tariff still contained a definition of wharf demurrage as a charge against cargo and against the consignee of import cargo. The provision was added to the tariff which said contemporaneously with what I have just explained, that where the cargo was non-removable because of strike conditions, wharf demurrage would be collected from the ocean carrier.

Eventually the term "wharf demurrage" in that connection was supplemented by a term "strike storage," which initially appeared in the tariff under the heading "wharf demurrage" when that inconsistency was proceeded, it was moved to some place in the back of the tariff, but the terminal interests were so confused about what they were doing that they even defined strike storage as a charge against cargo and against the consignees of import cargo, not as a charge against

the vessel. So they had inconsistent definitions in the tariff the entire time.

Now, a good question here is what were they entitled to do under Agreement 8785, under which the terminal organization created itself and which was approved by the Maritime Commission.

What the agreement said was on the subject of its coverage was said in four lines in paragraph three of the agreement, and it said that the terminals could impose -- it could adopt and impose uniform charges for standard services. They were listed specifically. The only one of them that was relevant here was wharf demurrage. And wharf demurrage was not only about to be defined within a few days in the tariff, which was to be filed under this agreement, but it had been the subject of half a dozen or a dozen cases before the Maritime Commission, which we cite, under which the commission had always held that demurrage -- that wharf demurrage was a charge against cargo. It had case after case to determine the assignment of particular charges for particular terminal services, and they always come out with the settled and unbroken line of decision that these charges were charges against cargo.

Consequently, it is our position that when the Maritime Commission approved an agreement which authorized terminal operators to make collective charges for wharf demurrage, they were authorizing charges which were recognized by

industry, recognized by the commission, recognized by everybody as subsequently proved by the definitions in this tariff as to be charges against cargo remaining on the dock after the period of free time.

The question as to what the agreement meant is of foremost importance in this case because whatever it meant originally was wharf demurrage was imposed as a charge against cargo, it suddenly became to mean something the exact opposite when wharf demurrage was assessed against the vessel.

In other words, there was an explicit change in the incidence of this explicit charge. It was as radical a change as you could possibly get.

The participation of the Swedish Transatlantic Line in this case came about in stages. Swedish Transatlantic is a Swedish corporation operating Swedish flag vessels, and it is based in Gothemberg, Sweden and, like many foreign steamship lines, its interests are served in the United by an agent and in the Port of Boston its agent was Furness, Withy & Company.

Furness, Withy & Company was one of the -- was a member of the Boston Shipping Association. Swedish Transatlantic Lines was not. When this law suit was started for the recovery of terminal charges, whard demurrage for cargo that was tied up in consequence of a strike, Furness, Withy was made a defendant in the case, Swedish Transatlantic was not made a

defendant.

There are a number of statements quoted by Mr. Reed on our part to the effect that Furness -- that Transatlantic was represented by Furness, Withy. There is even a statement some place that it was represented by counsel for Furness, Withy. I don't know that that is saying anything different.

When I first heard about this case from Swedish Transatlantic Lines, the Maritime Commission had made its decision after Judge Wyzanski in Boston had stayed the case pending before it in order to let the defendants in that case seek a ruling from the Maritime Commission on the lawfulness and reasonableness of the contested demurrage charges.

Promptly, upon receiving a communication from Swedish Transatlantic, which was in something of a quandary as to what was going on in Boston and where it stood and what its relations of the case might have been; I took measures to call to the attention of the Maritime Commission that the switch in the incidence of these tariff charges for wharf demurrage appeared to be in conflict with this Court's decision in the Volkeswagen case. The Maritime Commission decision preceded this Court's decision in the Volkeswagen case.

My reference to the Volkeswagen case in the petition to the Maritime Commission for reconsideration came after some delay following the Volkeswagen case. It came immediately upon the inception of my relationship with Swedish Transatlantic.

Now, whether, Mr. Justice Harlan, whether Swedish Transatlantic was a party to the Boston proceedings in these circumstances under the Maritime proceedings is conceivably arguable, but Judge Aldrich in Boston held distinctly, as I read his opinion, that it was not in any event -- whether it was a party or not a party, it was not a party in any sense that was meaningful as regards the protections of its own interests because Judge Wyzanski admitted Transatlantic to intervention in his case on a representation that Transatlantic was inadequately represented by Furness, Withy & Company.

One reason it was inadequately represented was the judgment against Furness, Withy wasn't going to cost Furness, Withy anything as far as Transatlantic was concerned, because it was going to claim indemnification.

Q Well, if you are in privity, apart from whether you are a party or not, you would still be stuck with this judgment, would you?

A Stuck with the District Court's judgment, by which I don't concede that we didn't have a right to appeal from it or that --

Q No, I meant the Maritime Commission judgment, if you were --

A If we were in a relationship which this Court holds to be --

Q What do you say to that?

A I say that we are not, because the Furness, Withy & Company had no incentive to resist. The judgment against them, as agent, was not going to cost them a thing. There was another factor, that Furness, Withy had caved in and already paid some of the charges when Swedish Transatlantic came along and said it was going to look pretty silly to some of its other principals if Transatlantic upset the applecart.

Furness, Withy's lawyer filed an appeal weight from the Maritime Commission for the District of Columbia Court of Appeals. So our position was that Furness, Withy didn't have an incentive to do a good job, an adequate job of representation, and it didn't in fact do a good job of representation and that is why Judge Wyzanski admitted Swedish Transatlantic in the case before him.

It seems to me that when he admits Swedish Transatlantic because its interests weren't otherwise adequately protected, it makes no sense at all to say that Swedish Transatlantic had its day in court before the Maritime Commission.

Now, getting back to the consequences of a ruling of the District Court and the evil that fell from it, I would like to cite the following circumstances:

Such a ruling will mean that the Maritime Commission's decision, which we claim to be at odds with the Volkeswagen case, would become the governing decision controlling a subsequent judgment of the United States District Court, in the

event of reversal of the United States Court of Appeals, even though this Court had subsequently to the Maritime Commission's decision decided the Volkeswagen case to the effect that the Maritime Commission's decision was wrong.

Now, I see no reason in the world why a Maritime Commission decision that is corrected should be permitted to stand in conflict with the subsequent decision of this Court. And the conflict involves not a quibble and not a detail but a matter of high administrative policy. It has to do with the administration of section 15 of the shipping act, which is the rule gut of that act as a regulatory mechanism.

Regulation under the shipping act is different from regulation under the Interstate Commerce Act, because the shipping act deals with foreign commerce and the government of the United States has hold of only one end of the transaction. Every bit of FMC regulation of foreign shipping has diplomatic overtones, and the commission can't do a great deal by way of direct regulation. And therefore what it does do is done by way of governmental policing of the system of self-regulation carried out by the shipping conferences.

And it is -- most rates in ocean trade are conference made, conference controlled, on the basis of tariffs filed under approved agreements. It is important to understand how these agreements are made and what the procedure is for their approval or their disapproval. The agreements are

negotiated in conversation among the lines that will adopt the uniform rate schedule under them, and they are then filed with the commission.

In the old days the commission used to post them on a bulletin board in a dark corridor and if nobody objected within twenty minutes they would get out their little round rubber stamp and put "approval" on it. It would be approved. That system was condemned by Judge Frank in one of the early Isbrandtsen cases, in 96 Fed Supp. In the course of that case, one of the attorneys brought out on cross-examination that the commission didn't even own a little round rubber stamp that said "disapproved."

Now when an agreement is filed, it is noticed under internal procedures of the internal administrative orders of the commission. It is filed with the Federal Register and an announcement of the agreement appears in the Federal Register. The Register is read by people who are interested in commission proceedings, and anybody who sees an agreement which appears to affect his interest is then at liberty to file a protest or a comment and to demand a hearing if he is so advised.

Now, the importance of the Volkeswagen decision and all decisions like it, having to do with changes in the incidence of charges under such agreements, is that when an agreement is announced to the public, only the people upon whom that agreement has a recognizable incidence has any motivation

to oppose the agreement or to appear in proceedings concerning its approval for the purpose of protecting their interests.

If we may read a summary of the agreement in the Federal Register, they find that it affects only their antagonists in the business transaction, they stay away and the agreement is approved. When Agreement 8785 was noticed in the Federal Register, announcing that the terminals were seeking the right to make uniform rates relative to whard demurrage, no ocean carrier had any incentive to appear to object to that agreement because by long and settled -- a long and settled series of determinations of the commission, wharf demurrage was payable not by the carrier interests but by the cargo interests.

The agreement was approved without participation by the carrier interests, and after a period of imposing wharf demurrage on the cargo and not being able to collect it, then the parties to the agreement say let's try and get it from the carriers instead of the cargo, so an overall tariff switch, and without seeking any amendment to the agreement that the carriers would have any opportunity to oppose, they make this a charge against the carriers.

The government says that the agreement was approved and the only thing that wasn't fixed is the question of who pays the charge. And I have a footnote in our brief saying the question of who pays the charge is usually the difference

between judgment for the plaintiff and judgment for the defendant and it is more than the trivial item in most law suits.

In any event, there is simply no limit on the possibilities for economic predation if a group of price-fixers is permitted to organize itself and advertise that it plans to fix prices to be paid by one group, if after it gets approval for such an agreement it can without any control whatever swith the incidence of its price-fixing arrangements to a different group. It seems to me that the entire mechanism of control under the shipping act is destroyed if that type of administration of the shipping act is countenanced. And consequently I say that in terms of the precept of the Southern Steamship case, this Court should do everything possible to see that that kind of administration is not tolerated.

An additional black mark against the Maritime Commission in this case is that in writing a 16-page opinion construing the agreement of this terminal association, it never quoted the four lines of language which were the only four lines that are relevant to its decision. It paraphrased them and it distorted them in the paraphrase.

Another very basic feature of the Maritime Commission's regulatory program under the shipping act is the integrity of the tariff system. For quite a long time under the shipping act, tariffs were not required as they are required under all transportation and public utility statutes of

domestic utilities and carriers. By administrative regulation it used to be that the carriers in foreign commerce had to file their tariffs thirty days after they became effective, merely as a matter of information. But there was no requirement that any carrier had to adhere to a tariff rate because he could always change it and file the change within thirty days.

In 1961 Congress changed that with amendments to the shipping act, which added tariff filing requirements, some more to those in the Interstate Commerce Act, the Federal Aviation Act and the Federal Communications Act and all the others.

So that there is now a provision that a tariff of a common carrier in foreign commerce must (a) be filed in a public place, and (b) must be observed so that the tariff rates become the lawful rates for ocean carriers in foreign commerce as they are for railroad companies or an airline.

And the tariff that was filed by Swedish Transatlantic Line said in two places -- one, in the rules of the tariff itself, and the other was in the bill of lading filed as a part of the tariff pursuant to law -- that the obligation of Swedish Transatlantic Line began when it picked the cargo up at ship's tackle and ended when it put it down.

And the commission's decision totally ignores that tariff in favor of a tariff which is totally non-official,

filed by the terminal operators in this case so that the force of law is attached to the terminal tariff, which is filed only pursuant to a private agreement and is nowhere sanctioned by statute, and was not even sanctioned by a commission regulation at the time, and it disregards the legally mandatory tariff of the ocean carrier. To do that, in conjunction with the erosion of control under section 15 of the shipping act is to throw away every wholesome and useful aspect of the regulatory program administered by the Federal Maritime Commission. And I suggest that if there is any way out, this Court should certainly not enshrine as the law of this case and for future cases the decision of the Federal Maritime Commission and of the District Court in Boston which blindly adopted the decision of the Maritime Commission if there is any good way to rationalize a contrary decision.

I have submitted in our brief -- and Mr. Justice White has suggested some of the arguments for such rationalization. It has been true in at least three major recent cases, fairly recent cases of this Court, beginning with Mr. Justice Black's decision in U.S. vs. ICC, and on through the Consolo case and the Atlantic Coast Line case, written by Mr. Justice White, that the Court has recognized the statutes in this area as such a hodge-podge that some sense has to be breathed into them judicially.

But it is not hard to breath rationalization into

the -- into an affirmance of the court of appeals in this case, because you have available to you an explicit connective between the procedure under the shipping act and the procedure under the Interstate Commerce Act. Now, it is true that the exclusive jurisdiction to review certain Maritime Commission orders was lodged in the Court of Appeals instead of in the District Courts, but for a very limited purpose. One was to avoid the inconvenience of convening three-judge district courts, the other was to save this Court from mandatory appeal from the three-judge district court.

There is no sense that I can see, because there was no further purpose, that expanding the judicial review act to necessitate multiple proceedings in order to get rid of cases. Everything that the government has told this Court in this case as to how desirable it is to reverse the Court of Appeals is exactly the opposite of what the government -- of what the Justice Department told Congress when the Justice Department sponsored the amendment to title 28 which provided that when cases are referred to the ICC the ICC is reviewed by the referring court.

Now, I think I can finish in the next two or three minutes, if the Court would permit.

MR. CHIEF JUSTICE BURGER: Very well. Proceed, Mr. Galland.

MR. GALLAND: Let me --

Q Mr. Galland, there has always been some time limit in going to the court?

A There hasn't always been, sir, but there is in going to the Court of Appeals, under the Judicial Review Act. There is not in going to the District Court, except under 1336 (c) of title 28, which as Mr. Friedman mentioned, and I really don't -- I have a little trouble connecting up what the statute says with the argument that he made from it.

Paragraph (c) of section 1336 --

MR. CHIEF JUSTICE BURGER: I think your papers are hitting the microphone, Counsel.

MR. GALLAND: Thank you -- any action brought under subsection (b) of this section shall be filed within 90 days from the date that the order of the Interstate Commerce Commission becomes final.

The action in this case was always on file, from long before the commission made its decision. Judge Wyzanski explicitly retained jurisdiction and called for periodic reports back from the parties as to how they were doing over there before the commission. So the action was always pending and I don't see that there is the slightest impediment in terms of this 90-day limitation, Mr. Justice White, to the intervention of Swedish Transatlantic Lines to make the point that it made.

Thank you.

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Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Galland. We will accept your explanation.

You have two minutes left, Mr. Reed.

ARGUMENT OF JOHN M. REED, ESQ.,

ON BEHALF OF PETITIONERS -- REBUTTAL

MR. REED: If Your Honor please, the question arose as to the reason for not joining Transatlantic in the District Court and the Superior Court proceedings. Someone in the court suggested that it was that they are not subject to the jurisdiction of the court agents under the tariff are liable for tariff charges.

I counted up in the petition five of the respondents were carriers and the other eight respondents were agents, and all the cases against agents, all the bills against agents were bills where the carrier would be liable over and, indeed, as Mr. Galland says, that was the reason that Transatlantic came into this case.

The only other point I want to make is that the unbroken line of decisions about wharf demurrage that Mr. Galland refers to, where the commission has steadily held demurrage is a charge against cargo interests, is a non-existent line of authority as far as I can tell, and on page 46 of our brief we cite a commission decision that is quite recent, dealing with wharf demurrage where the vessel has cancelled or been delayed, and so that the charge isn't fairly

assessable to the cargo interests. It is not their fault. In that situation the commission says the demurrage charge ought to be against the vessel. That is all we are asking in the FMC proceedings here.

The relief we ask, again, is that the District Court's decision be affirmed and the Circuit Court's reversed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Reed. Thank you, Mr. Friedman.

The case is submitted.

(Whereupon, at 3:05 o'clock p.m., argument in the above-entitled matter was concluded.)

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