

OCT 28 1971

In the

# Supreme Court of the United States

PORT OF PORTLAND, et al.,

Appellants,

v

UNITED STATES OF AMERICA, et al.,

Appellees,

No. 70-31

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Pages 1 thru 43

Washington, D.C.  
October 20, 1971

HOOVER REPORTING COMPANY, INC.

Official Reporters  
Washington, D. C.

546-6666

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Appellants,

v.

UNITED STATES OF AMERICA, et al.,

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No. 70-31

Wednesday, October 20, 1971.

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM O. DOUGLAS, Associate Justice  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice

LOFTON L. TATUM, ESQ., 15th floor, Standard Plaza,  
Portland, Oregon 97204, for the Appellants.

FRITZ R. KAHN, ESQ., General Counsel, Interstate  
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for the Appellees.

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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. 31, Port of Portland against the United States.

Mr. Tatum, you may proceed whenever you're ready.

ORAL ARGUMENT OF LOFTON L. TATUM, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. TATUM: Mr. Chief Justice, and may it please the Court:

This case is before the Court upon appeal from a three-judge court of the District of Oregon, affirming a decision of the Interstate Commerce Commission.

The jurisdiction of this Court is conferred by 28 U.S.C. 1253.

This case arose when two of the four railroads serving Portland filed an application with the Commission for authority to acquire control of the Peninsula Terminal Company, under Section 5(2) of the Interstate Commerce Act.

The two acquiring railroads were Union Pacific and Spokane, Portland and Seattle Railway. The latter, SP&S, at the time of the application, was a subsidiary of Great Northern and Northern Pacific. It is now a part of the Burlington Northern system, under the approval granted by this Court in the Northern Lines Merger. I shall hereafter refer to them as Burlington Northern.

In their application, the acquiring railroads stated



that it was anticipated that within the foreseeable future substantial new traffic and revenues would be derived from Peninsula Terminal, as a result of the development of the Rivergate Industrial Tract by the Port of Portland.

It is this substantial new traffic and revenues which will be generated by Rivergate that has prompted the great interest in this case.

Rivergate is the key to the public interest here. It's an area of approximately 3,000 acres, located at the confluence of the Willamette and Columbia Rivers. We have a --

Q This map on page 354 of the Appendix, is that the area?

MR. TATUM: That's a much more detailed map, Your Honor. If you would refer to the schematic which we have appended to the end of our brief, I think it will be simpler to follow than that complicated map which you have before you.

Q At the end of your brief?

MR. TATUM: At the end of our brief there's a simple schematic, yes, sir.

Q All right. Thank you.

MR. TATUM: Rivergate is marked on this at the confluence of the Willamette and the Columbia Rivers. It is owned and is being developed by the Port of Portland, for whom I am general counsel. I am also appearing today for the Milwaukee and Southern Pacific, who are joint appellants,

and for the Oregon Public Utility Commission.

A great amount of time and money has been invested by the Port Authority in planning this modern, attractive, industrial and port complex, to provide for the future economic development of the area. Here is where all modes of transportation will meet to provide efficient and economical interchange of goods.

The Port has already invested more than \$5 million of public funds, and it estimates it will expend a minimum of \$50 million in the full development of Rivergate. A conservative estimate in the record of the public and private investment in this area exceeds \$500 million.

The further evidence which is undisputed is that Rivergate, at full development, will require the handling of some five to six hundred railroad cars per day.

In order to orient the Court with the various railroads involved here, I would refer again to our schematic which is appended to our brief.

The Peninsula Terminal Company, the railroad in question here, is marked in yellow at the upper northern end, just south of the Columbia River.

The record shows it is a railroad of some 3.79 miles. Its importance is not its size, but its strategic location as a gateway for Rivergate.

To the south and west there is another Rivergate

entrance, which is shown as No. 9 on our schematic.

There's a small mark in the one corner, of north; north is at the top of the page, Your Honor.

No. 9 is Barnes Yard, which is owned by the Union Pacific. The Burlington Northern has an agreement for use of that yard and access to Rivergate over the track shown in red.

Where the track enters Rivergate, as is shown in blue, the track has been built and is owned by the Port.

The record also shows that the railroad pattern in Rivergate will essentially be a loop system around the periphery of the entire district, with one outlet, through the south at Barnes Yard, which now shows in red; and the other through the northern outlet, which is where the Peninsula Terminal Company acquires its importance.

To achieve Rivergate's goal, it is necessary that --

Q Wait a minute -- excuse me, I'm trying to follow you on the map.

MR. TATUM: Yes, sir; excuse me.

Q I'm lost on Peninsula Terminal.

MR. TATUM: Peninsula Terminal is --

Q Oh, I see it, it's up there in the corner, near that 7.

MR. TATUM: It's marked in yellow.

Q Yes, I see it. One other question, since I've interrupted you. Now, where is the Milwaukee to come in on

this?

MR. TATUM: I will discuss the Milwaukee's entry to Portland, sir.

Q All right.

MR. TATUM: But they come down the green line, which is the Burlington Northern main line into Portland.

Q Right.

MR. TATUM: And go right by Rivergate, and go right by this yellow line and the red line.

Q And under that decision they're entitled to use that passage of it?

MR. TATUM: Yes, sir.

Q I see.

MR. TATUM: And to come into Hoyt Yard, which is marked No.3 on the map, down in the lower right-hand corner.

Q Thank you.

MR. TATUM: To achieve Rivergate's goals, it's necessary that all modes of transportation be afforded the most modern methods of bringing goods to and from the district. All shipping lines that serve Portland may bring their vessels to Rivergate's docks. All truck lines that serve Portland may bring their vehicles to their customers' doors in Rivergate.

So, also, it is our contention that the public interest requires that all four line-haul railroads serving Portland must also have direct access to Rivergate shippers and

receivers.

Accordingly, when Union Pacific --

Q Could you pinpoint for me where that connection would be on your plat here?

MR. TATUM: At Point E, Your Honor. Point E, which is described as -- I mean in the testimony -- as Crown Zellerbach Pole Yard. Just south of what's marked Hayden Island. It's actually in Rivergate.

And the track will take off from there in a loop system. There is some discussion in the record about another potential access, which I will cover later in my remarks.

Q Now, would they connect on the markings which are already shown here by the yellow? That is, they'd come off of the green line, which is the Burlington Northern, is that right?

MR. TATUM: Yes, sir.

Q And is there a line on here which shows the actual connection, or --

MR. TATUM: There are three lines, the red one, the green one, and the yellow one, which indicate the interchange between Union Pacific, Burlington Northern, and Peninsula Terminal.

There is considerable controversy in the case of whether or not mere equal ownership of Peninsula would permit Southern Pacific or Milwaukee actually to get to Peninsula.



So, to be very careful, counsel for both of those lines filed applications under Section 3(5) --

Q Well now, why does Milwaukee have to have a piece of Peninsula in order to get into Rivergate?

Doesn't their right to use the SP&S track give them access to Rivergate, --

MR. TATUM: No, sir.

Q -- over the Peninsula Terminal?

MR. TATUM: No, sir. The position has been taken because they have no rights on the jointly owned tracks, which are those three different colors there.

Q And therefore no right to use those tracks?

MR. TATUM: They therefore have no right to use those, any more than Southern Pacific.

Q You mean under the decision, under the merger proposal they don't have the right to come in on, say, the Burlington Northern?

MR. TATUM: Well --

Q I thought they -- from the white yard down here, 3, they don't -- can't they get trackage rights over Burlington Northern and come up in here to the Peninsula?

MR. TATUM: I think in attempting to make our schematic simple, we may have misled. These lines that you see marked in the different colors up here by Peninsula are actually all joint-ownership lines, they are owned jointly by

Burlington Northern, Union Pacific, and Peninsula; or combinations of them.

So that under the language of Condition 24 of the Northern Lines, which starts out: To the extent that the new company is unable to do so, they will grant trackage.

They now take the position that because Union Pacific is a partner in this, Burlington Northern does not have the right, under Condition 24 of the Northern Lines, to grant them access.

Q You mean from Point 3 on the Burlington Northern all the way to Point 8, Milwaukee has no rights now?

MR. TATUM: Yes. They can go over it, Your Honor, but the testimony is that in order to get a car from Milwaukee to Peninsula they will have to bring that car into Point 3 and then turn it over to Burlington Northern to switch it back to Peninsula Terminal.

This is one of the real arguments in the case.

Q Well, that isn't -- I gather that isn't exactly what your opponents say isn't so, is it?

MR. TATUM: Well, I --

Q Well, all right, go ahead. I'm sorry.

MR. TATUM: Our opponents say it doesn't make any difference.

I shall not continue further with the discussion of how the case got here; I think the Court is informed of the

facts of how we are here.

When we went into the district court with the complaint by the Port and the Public Utility Commissioner, Southern Pacific and Milwaukee joined us. The United States, as nominal defendant, filed a brief in support, saying the case should be remanded; in this case the United States has likewise filed a brief, in support of remand.

Let's turn to the Milwaukee ownership which we discussed under the Northern Lines case.

We contend that by refusing Milwaukee a part ownership in the Peninsula Terminal, the Commission has turned its back on what it said in approving the Northern Lines Merger, namely, that competition lost between Great Northern and Northern Pacific would be substantially offset by greatly enhanced competition from Milwaukee.

And here, in the very first time this comes up, in the very first context, as they come into Portland they're told you have to go right by and go down to Hoyt Yard and come back.

The entire purpose of Condition 24, as I read it, in the Commission's decision and in this Court's decision, was to permit Milwaukee to become a line-haul competitive carrier with the new Burlington Northern, replacing the Northern Pacific and Great Northern.

This was going on at exactly the same time as the

Commission was handling the Great Northern Merger case.

In fact, we contend, and it's set forth in very brief summary in the Justice Department's brief on page 14, that this agreement and this acquisition of Peninsula Terminal may well have been done to thwart what was coming in Condition 24 of the Northern Lines agreement.

Q Now, does Condition 24 assure Milwaukee of trackage rights on that green line, from 3 to 8?

MR. TATUM: Yes, sir. It assures them of trackage lines from 8 -- yes, sir?

Q Well, isn't 3 to 8 also jointly owned by --

MR. TATUM: No, there's some joint use, but it's not jointly owned.

Q Oh. The only one that's jointly owned is which? Just Peninsula?

MR. TATUM: No, some of those -- those three turnouts that we have, by Peninsula Terminal, all of them are jointly owned.

Q I see.

MR. TATUM: And it's because of that joint ownership that they say they can keep it out.

Let me point out that down at Point 9, which is Barnes Yard, which is a Union Pacific facility, in May of 1967, Exhibit 39, which is in the Appendix at page 303, a contract was entered into between Union Pacific and Burlington Northern.

By virtue of that contract, Union Pacific permitted Burlington Northern to get into Rivergate through the south entrance, through Point 9. But in that they agreed that they would let no one else in unless they had the approval of the other party. So they have effectively foreclosed Milwaukee at that point.

As a further provision in that agreement, they said if there was ever a new line which pulls off of the Burlington Northern main line and goes into Rivergate at the northern end, forgetting about Peninsula, if there's a new line that goes in there, that too will be subject to the same terms. It will be only BN and UP and no one else can be admitted without their concurrence.

The Peninsula contract was signed in February 1967. This agreement I've just referred to, Exhibit 39, was signed in May '67. In July '67 they filed the petition for acquisition which is now before the court, and in November '67 Condition 24 was imposed in the Northern Line -- by the ICC. And certainly it's apparent to us that this was well in the mind of all the parties at the time the transaction was being taken up with Peninsula Terminal.

Q Well, are you saying that they are now giving effect to both agreements that predated the final Burlington Northern Lines Merger agreement?

MR. TATUM: Yes, sir.



And the condition, as I said earlier, starts out with the parenthetical statement: To the extent that Burlington Northern, or Newco is permitted to do so, it shall permit Milwaukee in.

And yet their hands in Portland have been effectively tied, certainly as far as this great public industrial development at Rivergate is concerned, by these restrictive agreements that they have entered into. And we contend that therefore Milwaukee, in this acquisition case, should be granted the right to control Peninsula or have a share in the control of Peninsula, and also should have a right to get trackage rights to get in there, under the Northern Lines decision.

We also feel that the public interest requires Southern Pacific to get in there, so that all four major line-haul carriers will be able to serve Portland.

Q Mr. Tatum, if you prevail here, would this be a precedent with respect to any other industrial development, wherever instituted?

MR. TATUM: We feel that cases that we have cited in our brief, and which Justice has cited in theirs, that similar kinds of port developments have been granted equal access by all of the line-haul carriers in there. The Calumet Port case is one which comes to my mind immediately that was cited.

Q Well, suppose, as was not the case here, one railroad was instrumental in creating the industrial development, would it have to share, then, with everybody else?

MR. TATUM: That is a circumstance that we don't have, and therefore I don't know. This is not a railroad development, this is a public development. The railroad just happened to go by at the time, and it's only through the infusion of public money that this lowlying land is being able to be developed into this excellent port and industrial facility. So therefore it belongs to no railroad. This is one of the points that the Commission got off on as deciding that this was an invasion of Union Pacific and Burlington Northern's territory.

Q Let me ask one on the other side of the question, then. I take it that Rivergate was very little developed, if at all, at the time of the Northern Lines agreement.

MR. TATUM: It was just getting underway, Your Honor; that is correct.

Q Do you think that if it had been brought along four or five years further in its development at that time it would have been taken into consideration in the Northern Lines agreement?

MR. TATUM: I don't know whether it would have been taken into consideration in the Northern Lines case, but I

think had the Peninsula Terminal acquisition come up four or five years after the Northern Lines had been implemented, the Commission would have taken more cognizance of Rivergate and its importance than it did in its decision.

It's one of our contentions that all that the Commission did was concentrate on this little 3.79-mile railroad with a declining number of cars -- I think only 2700 in 1967, the evidence year. Of which Southern Pacific had but 17 percent, and Milwaukee had but one percent. And the ICC said -- the Commission said, Well, such a little railroad as this and such a small amount of traffic, let's not worry about this industrial development. And in so doing cut Milwaukee out of the single biggest industrial area that possibly could be in Portland.

Q Well, you'd be making the same argument, I suppose, if Milwaukee and the Northern owned jointly that trackage from 3 to 8?

MR. TATUM: Well --

Q You'd be making the same argument that it is entitled to jointly own the Peninsula?

MR. TATUM: Yes, sir. It not only is access, but joint ownership enables them to participate in routes and divisions and rates, which they could not do if they merely had access.

Q Well, isn't Peninsula obligated, as a common

carrier, to serve Milwaukee like any other road with the same rates?

MR. TATUM: Yes, sir; but this is a peculiar hybrid type of railroad, and --

Q So they could get into it -- so they can get the switching service to get into Rivergate --

MR. TATUM: Yes, sir.

Q --- from Peninsula?

MR. TATUM: Yes, sir.

Q At the same rates as anybody else?

MR. TATUM: Yes, sir. They can switch --

Q Well, then, what's the importance of the joint ownership?

MR. TATUM: Well, they can go to Barnes --

Q I know that one advantage is if it's a profitable railroad they'd share in the profits; that's for sure. But --

MR. TATUM: They can go to Hoyt Yard and switch back to Peninsula and absorb the switching charge and lose a day's advantage over the other.

Q Well, now, let's talk of -- let's just assume that Northern and Milwaukee jointly own the track from 3 to 8. Then you'd still be making the same argument. --

MR. TATUM: No, that's not --

Q --- about jointly owning this one?

MR. TATUM: I'll try to address myself to that.

The Peninsula Terminal Company, as the record shows, does not get its money by a switching charge. There is a switching charge from Point 3 to Point -- to Peninsula Road; that's the switching charge.

Q I see.

MR. TATUM: But when it gets to Peninsula, then it's a division rate, which is a negotiated rate. Now, there is a lot of confusion in this in the Commission's brief.

Q Well, but doesn't it have to have the equal terms with everybody?

MR. TATUM: No, sir. No, sir.

I'll cite a case to Your Honor, the L&N Railway Company v. The United States, 242 U.S. 69, which holds that a railroad in this situation does not have to treat others on the same basis as they treat their owners.

Q So, what you're saying is it will cost -- because of the joint ownership of Union Pacific and Northern, it may cost the Milwaukee more to get that switching service than --

MR. TATUM: And also joint ownership will permit every industry that locates in Rivergate and is served by Milwaukee to be an on-line Milwaukee industry, if there is joint ownership.

Q Well, yes, but that isn't -- it's only on-line in the sense that they jointly own another railroad company.



MR. TATUM: But they are then entitled to publish their through rates. They issue the billing. It's handled as if it's their own car, and it's -- I'm getting into different parts of my argument ahead of time.

Q Well, that's all right; I'm sorry. I didn't --

MR. TATUM: Well, that's all right.

It'll be single carrier routing, it will be improved terminal service if they're a part of the owner. Common ownership assures the use of modern railroad technology, and there will be rate benefits by them, all three, being common owners.

I should also like to comment on the strange procedure that Burlington Northern and Union Pacific adopted in this case. In the brief which is filed to this Court, they made a settlement offer to Milwaukee, which is an extremely strange place in a proceeding to try to make a settlement offer.

We contend it's a last-minute recognition of the fact that the Commission was wrong, when it decided there would be no detriment to the public.

This offer really doesn't give Milwaukee anything other than the saving of an unnecessary switch charge -- this goes to Mr. Justice White's question -- to deliver cars to Peninsula, and possibly a savings in time.

However, Burlington Northern and Union Pacific, under

the offer they made, will still control Peninsula. They can control its development, as well as the development of Rivergate. They have still been able to insert themselves between Milwaukee and Rivergate by this controlled company.

We think that this recognition of their -- their own recognition, certainly demands that it be remanded.

Now, I've spoken a great deal about Milwaukee in this argument, because they are in a slightly different factual situation because of the Northern Lines Merger case. But we feel the public interest equally requires Southern Pacific to have access to this industrial area.

The same benefits of single routing, improved terminal service, modern technology, and rate benefits would apply if the Southern Pacific was equally there.

The testimony in this case is that there is an appalling, over 30-hour delay in delivering a Southern Pacific car from Point 6 to Point 7. It takes them over 30 hours to traverse that 5.2 miles. Now, obviously, that traffic isn't being handled as expeditiously as it can, even on this little small volume that the Peninsula Terminal carries now. How can they possibly handle five to six hundred cars a day with delays like that?

Mr. Chief Justice, I would like to reserve the balance of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Kahn.

ORAL ARGUMENT OF FRITZ R. KAHN, ESQ.,

ON BEHALF OF THE APPELLEES

MR. KAHN: Mr. Chief Justice, and may it please the Court:

Peninsula is a very small terminal railroad, which runs a few hundred feet inland of the Columbia River, more precisely the Oregon Slough in the northern part of Portland. And the distance from the one extremity -- and I personally prefer using the map at Appendix 273 rather than the stylized map in the brief of the appellant.

The map at 273 indicates that Peninsula extends a distance of about a mile and a half from the Multnomah County fairgrounds on the east to a pole in the debarking and storage facility of the Crown Zellerbach Corporation on the west.

Now, if that railroad were superimposed on Pennsylvania Avenue, the entire railroad would not extend from the Capitol to the White House.

Q Well, how does that have very much to do with it when we're talking about strategic location, Mr. Kahn?

MR. KAHN: I shall be getting into the alleged strategic location in just a moment, Your Honor.

Q That's this map here you're talking about?

MR. KAHN: Yes, Your Honor.

There are some 13 industries that are served by the

Peninsula, and they together can generate approximately ten cars a day. But the interest is not so much in the Peninsula as it's presently organized and the industries that it presently service, but, rather, the interest stems from the adjacent North Rivergate Industrial District property and the expectation that it might be developed, and that the Peninsula might be a railroad access to a portion of that property, so-called North Rivergate.

Rivergate is an area of about four and a half square miles, situated at the confluence of the Willamette and the Columbia Rivers, and it is indeed being developed as a port and industrial facility. It is expected that upon completion it will generate approximately 5 million tons of railroad traffic annually, requiring the use of 100-car trains, totaling about five hundred to six hundred cars a day.

In their brief, the appellants fault the Commission for seemingly ignoring the potential growth of Rivergate and its need for railroad service. We respectfully submit that the Commission's report recites the evidence, the summary of the evidence pertaining to that. We submit that the appellants' quarrel, really, is with the Commission's weighting of the evidence of matter clearly for the agency.

Against that evidence, and there was evidence of record that the Rivergate currently is a marshland, and it is subject to flooding periodically. Practically all of it remains

to be filled, graded; practically all of it remains to be supplied with utilities, roads, piers, and docks. And the completion of, and the plans for Rivergate is some 15 or more years distant and will require the expenditure of in excess of \$500 million.

That even if we were to assume that the Rivergate district were to be developed, were to become the source of traffic that the developers hope, is by no means certain, in that this railroad, Peninsula Terminal Company, will be the access into North Rivergate.

For one thing, Peninsula provides only one of three routes into the area. The first route to reach the North Rivergate area would be an extension of an industrial spur that is already through the Rivergate property, the industrial spur that already serves most of the plants presently situated there.

Q And that's owned by the Port of Portland?

MR. KAHN: Yes, Your Honor.

A second alternative would be a spur to be built directly from the main line of the Burlington westwardly, directly into the North Rivergate property. And the land for that has been acquired, much of it has been filled, and graded, to permit the construction.

The witnesses for the Port of Portland readily acknowledged that there were these alternatives, and that no



selection of the route into North Rivergate had been made.

The condition of the Peninsula Terminal Company and its structural limitations suggests that it really will never become the route into North Rivergate. Its tracks, which are of relative light weight, are built upon sand. Its clearances, passing as it does through a trestle and carrying the main line of the Burlington Northern overhead, is of limited dimensions. Finally, the line itself is limited by the heavy curvatures.

As the Peninsula line leaves the trestle beneath the Burlington Northern, it crosses at grade and without electric warning device the North Portland Road, which connects, just a few blocks away, with Interstate Highway 5.

Indeed, the leading witness for the Port of Portland, Dr. Grosvenor Plowman, acknowledged that Peninsula could not handle the projected traffic to and from Rivergate; he acknowledged, on cross-examination, that Peninsula would have to be redesigned, rebuilt. And the fact established that the 100-car trains, which he indicated the development of Rivergate required, could not even fit upon the tracks of the Peninsula Terminal Company.

Q I assume now you are going to get to a point that I'm in doubt on, how this relates to whether it should be owned in a limited way or a broad way.

MR. KAHN: Yes, Mr. Chief Justice.

The significant thing in this case, really, is that

effective service on a terminal company does not require ownership.

Joint and equal ownership of a terminal company has never been required to enable connecting trunk-line railroads to effectively serve industries upon that terminal company.

Just within the Portland area -- and I would like at this point to refer the Court to the map which is at Appendix 355 --

Q You are talking about the stock ownership?

MR. KAHN: Stock ownership is not required to permit effective service upon a terminal company.

Q The Commission went further than that, did they not, in its decision?

MR. KAHN: In this case, Your Honor? It simply held that the Southern Pacific and Milwaukee should not be included as equal owners together with the Burlington Northern and the Union Pacific.

Q Only the stock ownership is involved?

MR. KAHN: That's correct, Your Honor; yes, sir.  
Right.

There are two other terminal companies in the Portland area. On the west side of the Willamette River there is the Portland Terminal Company, which is owned jointly by the Southern Pacific, Burlington Northern, and Union Pacific. And on the other side of the river, crossing the steel bridge

and going somewhat south, on the east side of the Willamette River is another terminal company, the Portland Tracking Company, which is owned only by the Southern Pacific and the Union Pacific.

There is not the slightest suggestion in this case that these terminal companies perform any less effectively for the other trunkline railroads reaching Portland than they do for their owners. And this comes about because the trunkline railroads serving Portland, in cooperation with the terminal railroad, has entered into what we term a reciprocal switching arrangement.

Under the reciprocal switching arrangement in Portland, which is not at all unlike those that exist at most major railroad terminals, the cars of any one railroad can reach the industries of all of them upon the line-haul rate, with the switching charges being absorbed by the railroads, not being added as an added burden upon the shippers.

Q What about the argument that no, that's not so, there has to be an agreement upon a division of rates?

MR. KAHN: I beg to differ with counsel on the other side. We respectfully submit that the Milwaukee and the Southern Pacific stand competitively, vis-a-vis the shippers, in trying to reach Portland, trying to ship from Portland, exactly as do the Burlington Northern and the Union Pacific.

The situation will be --

Q What you're saying is --

MR. KAHN: Excuse me.

Q -- they're getting exercised over nothing here.

MR. KAHN: I'm afraid so, Your Honor.

Q Was that a finding of the Commission?

MR. KAHN: In the finding of the Commission, it was expressed in terms of no showing really having been made of any advantages that might flow to the Southern Pacific and the Milwaukee as a result of four-part ownership.

Q Do you have any comment about the delay of 24 hours or 30 hours from one point to the other?

MR. KAHN: Yes. This comes about as follows:

The lines of the Southern Pacific terminate in East Portland, some distance from the Peninsula Terminal Company. For its cars to reach the Peninsula Terminal Company requires that the Southern Pacific turn over its cars to the Union Pacific. Well, that transfer occurs at the so-called Albina Yard. And the cars, as they are turned over by the Southern Pacific to the Union Pacific, include cars destined for other points, other industries on the Union Pacific line, they are mingled in the transfer trains with other Union Pacific cars. The trainmen proceed to effect the deliveries to the various industries along the line and goes to the Canton Yard and eventually does wind up at Peninsula.

Now, at such time as the Southern Pacific tenders

sufficient traffic to justify it, the Union Pacific is perfectly delighted to take a train on through and effect that connection more rapidly.

Finally, I submit, Mr. Justice Blackmun, there simply was no complaint by any shipper on the Peninsula of the service currently being received.

I started to say that the Peninsula, in its dealings with the trunkline railroads reaching Portland, will be no different following the ownership by the Burlington Northern and the Union Pacific than obtains presently on the Portland Tracking Company or the Portland Terminal Company. And the Southern Pacific and the Milwaukee, no less than the Burlington Northern and the Union Pacific, will be able to publish single-line rates to and from Portland, and under such rates render service to industries on the Peninsula.

In fact, they have done so. As I hope to develop later on, Southern Pacific has participated to the extent of 20 percent of all Peninsula's traffic.

I think that the appellant railroads misconceived what are the rights and the opportunities afforded the Union Pacific and the Burlington Northern as a result of their ownership of the Peninsula Terminal Company. And the support of the public bodies I think is equally incorrectly premised.

First, they contend that as owners of the Peninsula, Burlington Northern and Union Pacific will be able to operate

their trains on the Peninsula tracks, thereby avoiding a time-consuming interchange and a switch of equipment. We submit they are wrong. The record shows that Peninsula Terminal Company will remain a separate company, that in order for the Union Pacific and the Burlington Northern to get on the tracks of the Peninsula they will need to file an application with the Interstate Commerce Commission for trackage rights under Section 5(2) of the Interstate Commerce Act, and protestants will have an opportunity to be heard at that time.

Q Apparently the Department of Justice disagrees with you on that.

MR. KAHN: I think the Department of Justice, with all due respect, did not understand that, as a result of this transaction, the Burlington Northern and the Union Pacific were not accorded trackage rights upon the Peninsula track. That is correct, sir.

Secondly, --

Q They'd have to get stock ownership in order to get trackage rights?

MR. KAHN: No, sir.

Q Absent a bilateral agreement?

MR. KAHN: No, conceivably, even in the absence of the acquiescence of the owning road, another road can acquire trackage rights over it through authorization of the Interstate Commerce Commission.



Q Then, are you saying that stock ownership doesn't automatically give them trackage rights?

MR. KAHN: That is correct, Your Honor.

Q They file for those in a separate ICC proceeding.

MR. KAHN: Yes, sir.

Q Under Section 5(2), or whatever it is.

MR. KAHN: Right.

Q Even though they do solely own.

MR. KAHN: That is correct, sir.

Q They don't give trackage rights, because it's a separate corporation.

MR. KAHN: Yes, sir.

Q Is that it?

MR. KAHN: That is it exactly.

Although Burlington Northern and Union Pacific jointly own Peninsula, they will not be able to operate on the Peninsula track, because they will not have gotten trackage rights.

Q You mean -- are you saying that they must apply to the ICC just as though they were strangers in the same way as the Southern Pacific and the Milwaukee?

MR. KAHN: Yes, Mr. Chief Justice. They would, indeed.

Q Then they would appear to be exercised over nothing.

MR. KAHN: I'm afraid so.

Q Yes, but if the Union Pacific and the Burlington Northern applied for trackage rights, it may be that Peninsula isn't going to oppose it very much.

MR. KAHN: Well, I suspect that's right, and --

Q I suspect it's right, too; and yet if the Milwaukee applies for trackage rights, it may well be that Peninsula will oppose it.

MR. KAHN: Right. And I think the --

Q Well, isn't that a rather major difference?

MR. KAHN: I think the record shows, Mr. Justice White, that --

Q It may be -- it may not be much in the light of Condition 24.

MR. KAHN: Condition 24 --

Q I mean, isn't that intended to get Milwaukee into this port fully?

MR. KAHN: Milwaukee is there. Its trains run daily into Portland.

Q I know, but if it were cut out -- if it were not allowed rights over Peninsula tracks equal to that of the Burlington Northern and the Union Pacific, wouldn't that be questionable under Condition 24?

MR. KAHN: Very possibly. In fact, if that circumstance ever arose, the Commission would be receptive to reopening

the Northern Lines case. It expressed a reserve in that in this report; in the report and order.

I started to say that a second advantage that the appellants claim, and that the Burlington Northern and Union Pacific will have through their ownership of Peninsula, is that somehow Peninsula will accord them more favorable rates and more favorable divisions.

But I think, as Mr. Justice White, I believe it was, pointed out, Peninsula will remain a separate railroad; it is subject to all the provisions of the Interstate Commerce Act, and the Commission has many times held -- and we discuss that fully at page 23 of our brief -- that a terminal railroad simply cannot, under Section 3(4) of the Interstate Commerce Act, assess one connecting carrier a higher charge than another for like services.

Finally, with respect to the suggestion that somehow Burlington Northern and Union Pacific, as owners of the Peninsula railroad, will be able to more favorably allocate traffic, I beg to invite the Court's attention to the fact that, in connection with attached conditions, conditions which require that the past policy of neutrality in the allocation of traffic, a policy of neutrality to which the new owners have committed themselves, must be observed.

These conditions are enforceable, and, if need be, they can be strengthened by the Commission.

Q If this is the law of the situation, the legal posture of these parties, why do they need any agreement about neutrality?

If the statute requires that it give the same service to strangers as to their corporate parents.

MR. KAHN: This was just to pin it down further, Mr. Chief Justice. Just to --

Q But that did not satisfy your friends.

MR. KAHN: I doubt very much that they are that much concerned about the allocation of traffic. I think ultimately this comes down to the price at which the Milwaukee gets on to the Peninsula. This, as we see it, is the essence of the case.

Q As it pays the switching charges?

MR. KAHN: It pays the switching -- it doesn't pay a switching charge to reach the interchange tracks; that work is being done for the Milwaukee by the Burlington Northern under contractual arrangement that they entered into, it's a so-called joint facility contract charge, considerably less than the switch charge. And of course, as Mr. Tatum has indicated, the Southern Pacific and the Union Pacific had agreed -- have offered to permit the cars to go directly onto the interchange tracks, so that a direct physical connection with Peninsula can be made under a similar joint facility contract arrangement.

Q Mr. Kahn, you said this comes down to whether --

how much it's going to cost Milwaukee to get on the Peninsula. That is, relative to what it's going to cost Burlington and the other lines?

MR. KAHN: Yes, sir.

Q Well, now, what is the answer? What is it?

MR. KAHN: The share going to Peninsula, approximately \$30 per car, is identical.

Q For everybody?

MR. KAHN: Everyone.

Q Then the Commission's answer is it doesn't cost them a penny more than it costs other lines?

MR. KAHN: Yes, sir.

Q Well, of course there is an interest. Is the Peninsula going to be a profitable railroad?

MR. KAHN: I -- there's no --

Q Well, let's assume it were. And I suppose Milwaukee would have an interest in sharing those profits. That may not have much to do with serving this Rivergate area, but it certainly would be an advantage.

MR. KAHN: I don't think the case was postured before the Commission, nor is it being presented to this Court, in terms of deriving an ownership profit from the railroad.

Q Well, --

MR. KAHN: I think the real concern is in whether Milwaukee and the Southern Pacific can reach the Peninsula

industries and hopefully the developed Rivergate upon equal and competitive terms.

Q Well, what was the basic approach here? This was an agreement that had to be approved by the Commission?

MR. KAHN: The inclusion of the Milwaukee and Southern --

Q No, I mean the purchase of the Peninsula by the two railroads.

MR. KAHN: Yes, sir.

Q Now, is the Commission's approach that, well, we have to approve that unless there is something illegal about it?

MR. KAHN: No, sir. The statutory --

Q Well, what would be contrary to the public interest in letting the Milwaukee have a share?

MR. KAHN: Oh.

Q What was the reason the Commission decided against the Milwaukee?

MR. KAHN: The articulated reason of the Commission, in the report of the Commission beginning, I think at about page 31, was to the effect that Peninsula and the Union Pacific and Burlington Northern had developed this area and they should not be deprived of the fruits of their labors, if you will.

Q You mean the profits?

MR. KAHN: Yes, sir.



Q Well, that's -- profits from what?

MR. KAHN: Profits from the operations of the Peninsula.

But certainly in --

Q I gathered, though, that you were purely coming in because there weren't going to be any profits from the Peninsula anyway. It's a sloppy railroad that can't carry any traffic anyway.

MR. KAHN: I would not have invested in it --  
[laughing] -- but the Union Pacific and Burlington Northern felt they should.

Q Surely they must have had a reason. Was it only the profits they might realize? Is that the only reason they want to invest in it?

MR. KAHN: That, and of course, in the event that the railroad were rebuilt, were redesigned, and did indeed become the access to Rivergate, I am sure that Burlington Northern [Union] and Northern Pacific would want its share of the traffic.

Q Yes, but they also wanted to be in position to show whether or not Peninsula is going to be rebuilt and expanded.

MR. KAHN: And that would be one of their opportunities of --

Q And get control of another possible entry into Rivergate.

MR. KAHN: But the selection of the two other alternatives would be beyond their control.

Q Well, that may be true, but this is still a third entry that they could decide whether or not to spend the money to make Peninsula an effective entryway or gateway into Rivergate?

MR. KAHN: Yes, Your Honor.

Q Well, now, why shouldn't Milwaukee have a share in that decision-making?

Q Or, to put it another way, why is it in the public interest to keep the monopoly just in the hands of two connecting carriers?

MR. KAHN: The response of the Commission was that the close-working relationship between Peninsula and the Burlington Northern and Union Pacific, extending back to the turn of the century, entitles these carriers in the area to the present and potential traffic so long as the Milwaukee and the Southern Pacific were not disadvantaged in their competing for the traffic in and out of the Peninsula industries or the Rivergate Industrial District.

Q Yes, but as Mr. Justice Douglas suggested, the standard is whether it's in the public interest, not whether they're entitled to something so long as others are not disadvantaged.

MR. KAHN: Right. The Commission viewed it in terms

of the National Transportation Policy and assuring that Peninsula and the railroads connecting with it will remain viable industries -- railroads. Beg your pardon.

Q Well, the details of the Northern Lines Merger are certainly not in the front of my mind right now; but Milwaukee of course, as I recall it, was very much concerned about a great many factors, including things just like this. And their opposition was, finally, as I recall, drawn away by the conditions, including particularly Condition 24.

Isn't this generally within the reach of the kind of thing that was contemplated to reassure Milwaukee?

MR. KAHN: The promise the Northern Lines case made to the Milwaukee, made to this Court, we submit, has been kept. And Milwaukee is in Portland, it is in Portland as an effective competitor. It can compete for traffic to and from Peninsula on its local rates, on rates that are no higher than the rates of the Burlington Northern and the Union Pacific.

That promise has been kept. And the ownership of Peninsula by two of these roads in no way will diminish Milwaukee's opportunities.

Q Any reason -- any idea why the district court didn't write an opinion in this case?

MR. KAHN: None, Your Honor.

With respect to Mr. Tatum's reference to the Lake Calumet Harbor case, and the proceedings of the Commission,

where it has permitted --

Q Incidentally, has that happened very often?

MR. KAHN: The no opinions?

Q Yes. In a three-judge court?

MR. KAHN: Happily not too often, Mr. Justice Brennan.

Q Well, I would suppose the whole scheme contemplates that there shall be, and save us the trouble of having to do everything that the three-judge court should have done.

MR. KAHN: Yes, Your Honor.

I was going to say that the Lake Calumet Harbor case, known before you as the Illinois Central vs. Norfolk & Western case, 385 U.S. 57, is distinguishable in that there, as this Court noted, one trunkline railroad actually operated into the port area under consideration. And all other trunkline railroads seeking to serve that port had to depend on the facilities of that one railroad.

That situation does not here obtain.

The Burlington Northern and the Union Pacific will not operate on the tracks of the Peninsula and their cars, just as the cars of the Milwaukee and the Southern Pacific, will need to be interchanged and switched to the Peninsula, and the solicitation efforts of the four railroads each will stand on an equal footing.

The Southern Pacific, as I indicated earlier, heretofore has participated in 20 percent of the traffic to and from

Peninsula. Even with the disadvantage of its lines terminating five, six miles from Peninsula, at East Portland, and its being dependent on intervening movement by the Union Pacific or the Burlington Northern to reach the Peninsula industries.

I think the hard facts of this case show that we have a little railroad with light traffic and little prospect for great expansion.

And the Commission, on balance, determined that there simply were not sufficient advantages in four-part ownership to be able to find that the inclusion of the Milwaukee and the Southern Pacific would be consistent with the public interest.

Q What would be bad about it? What are the negatives on four-party ownership as against two?

Just from the public interest standpoint; forget about the parties.

MR. KAHN: Certainly it's, as the applications were postured, Mr. Chief Justice, such ownership included the right to operate, and of course that was part of the application, it had decided disadvantages of congestion and disruption of the operations of that small railroad.

Q Well, when you say congestion, you mean that the corporate owners are going to get preference?

MR. KAHN: No. I meant by that, Mr. Chief Justice, that the track simply is not capable of sustaining the operations of four railroads.

MR. CHIEF JUSTICE BURGER: Mr. Tatum, you have five minutes left.

REBUTTAL ARGUMENT OF LOFTON L. TATUM, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. TATUM: Mr. Chief Justice, and if it please the Court:

I will just very briefly answer a few comments.

I refer the Court, in the length of time we have allotted, to our brief and the Justice Department brief, which points out what the Commission did and did not find as contrasted to what the Commission now argues before this Court.

They made no findings similar to what is being argued here today, and I commend our briefs to you on that point.

Counsel has made much in his brief and much in his argument of matters that are entirely outside the record in this case.

He spends a great deal of time, in his brief and in his argument, on the reciprocal switching arrangement, which was not entered into at all before this case was decided and on its way up here. So how can the Commission have taken into account the reciprocal switching arrangement, when it wasn't even entered into?

I am also advised by counsel for Milwaukee that my statement that I made on Peninsula insisting upon a division of rates is absolutely accurate. And it has had a great deal of



difficulty in publishing these rates upon its entry to Portland. That is outside the record.

But we have been arguing outside the record, as counsel has begun.

Q Was there oral argument before the district court?

MR. TATUM: Yes, sir, there was.

Q Any reason why they didn't write an opinion?

MR. TATUM: None that I know of, sir.

Q May I inquire how long the case was before those three judges? How much time did you spend actually in the hearing?

MR. TATUM: We must have spent a couple of hours, Your Honor. We were each granted a half an hour, and I took my full time, and Mr. Shapiro of the Department of Justice was granted about the same time. The Commission and Union Pacific each presented arguments. And we all ran over our allotted thirty minutes. I think we must have spent close to two hours in argument.

Q Did anyone ask the three-judge court, after they came down with that order for rehearing, for an opinion?

MR. TATUM: No, sir.

I practice before that court, Your Honor.

[Laughter.]

Q Well, I gather that two of the members have

retired already; is that right?

MR. TATUM: Judge Kilkenny was the circuit judge assigned to that case. He has just taken retirement within the last thirty days. Judge Solomon was chief judge of the Oregon court, and he has gone to senior judge status within the last thirty days.

Q But they still are as available as they ever were.

MR. TATUM: Yes, sir. Yes, sir; and are still in Portland.

Our real summary of this case, Your Honor, and gentlemen, is that the real issue in this case is not the right of the railroads to serve; the real issue, as we see it, is the right of the public to be served in this great Rivergate area.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Tatum, and Mr. Kahn.

The case is submitted.

[Whereupon, at 2:23 p.m., the case was submitted.]