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In the

Supreme Court of the United States

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants,	)	
vs.	)	No. 71-227
ALLEGHENY-LUDLUM STEEL CORPORATION, et al., Appellees.	)	

Washingotn, D. C.
March 27, 1972

Pages 1 thru 40

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v.	:	No. 71-227
ALLEGHENY-LUDLUM STEEL CORPORATION, et a., Appellees.	:	

Washington, D. C.

Monday, March 27, 1972

The above-entitled matter came on for argument at 10:05 o'clock a.m.

BEFORE:

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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

SAMUEL HUNTINGTON, ESQ., Office of the Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, for the Appellants.

MAX O. TRUITT, JR., ESQP. Wilmer, Cutler, & Pickering 900 - 17th Street, N.W., Washington, D. C. 20006, for the Appellees.

WILLIAM M. MOLONEY, ESQ., 1920 L Street, N.W., Washington, D. C. 20036, for the Appellees.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 71-227, United States and others against Allegheny-Ludlum Steel Corporation.

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

ORAL ARGUMENT OF SAMUEL HUNTINGTON, ESQ.,

ON BEHALF OF THE APPELLANT

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

This case is here on direct appeal from a three-judge district court sitting in the Western District of Pennsylvania. The question presented is whether the District Court erred in enjoining the enforcement of two service rules adopted by the Interstate Commerce Commission to govern the movement of freight cars. The rules were promulgated under Section 1(14)(a) of the Interstate Commerce Act which authorizes the commission to establish reasonable rules with respect to car service.

For more than a century railroads have freely interchanged freight cars so that freight could be shipped from point of origin to point of destination on a single car. To govern the return of freight cars to their owners, railroads as early as 1902 adopted a code of car service rules. Some of the rules are now published by appellee, the American

Association of Railroads, or AAR, and virtually all railroads in the country have agreed to abide by them. The railroads' record of compliance with the AAR car service rules, however, has been poor, particularly during times of general freight car shortage. The commission in this case determined that a number of the AAR rules should be enforced and thus adopted them verbatim as commission rules.

The two rules here under attack, Rules 1 and 2, generally require that unloaded freight cars be returned either empty or loaded in the direction of the railroads owning the cars.

Freight car shortages have been a serious and recurring problem throughout most of this century. In the 1940's, for example, the commission concluded after a general investigation that railroads as a group had failed to provide adequate freight car service. The commission at that time did not adopt mandatory rules in the hope that the railroads would take steps to solve the problem themselves.

By the 1960's, however, it became apparent that the problem was getting worse. Clearly voluntary action by the railroads had not provided the solution. To meet the crisis, the commission acted on a number of related fronts. These actions included adjusting the per diem charges that one railroad paid for the use of another's cars, enforcing the requirement that boxcars be free of debris when unloaded,

and the sponsoring of remedial legislation.

The commission's attempt to add an incentive element in the per diem charges is a subject of another appeal pending before this Court. That's the Florida East Coast Railway appeal, No. 70-279.

The instant case was initiated by the commission to investigate all aspects of freight car shortages and to consider the prescription of mandatory car service rules. The evidence in this case shows that the total number of freight cars owned by railroads declined from 1955 to 1964 by more than 12 percent, while the individual capacity, the average capacity of individual cars, increased during that period; the aggregate capacity of all cars also declined by five percent. The decline was sharpest, more than 22 percent, with respect to plain boxcars. Plain boxcars, which make up about one-third of the number of freight cars in the country, are the workhorse of the car fleet.

Many railroads and practically all the shippers participating in these proceedings acknowledge the existence of a current national freight car shortage. In fact, appellee at the National Industrial Traffic League testified--a witness testified--that the number of freight cars in the long run should be doubled in order to meet the needs of the shippers.

To combat the shortage and dislocation of freight cars, the commission's Bureau of Operations proposed that certain car service rules be made mandatory. Appellees have attempted to paint a picture of virtually uniform opposition to the imposition of mandatory rules. In fact, however, some railroads and more than some shippers testified that enforceable car service rules were needed.

The strongest opposition to mandatory enforcement of car service rules came from the steel industry. Witnesses for the industry testified that steel companies have special problems with respect to the loading of freight cars. The companies introduced studies to show that full compliance with the car service Rules 1 and 2 would be impractical. The same studies, however, which are cited at page 44 of the steel appellee's brief, these same studies indicated that a vast improvement in the percentage of compliance with the car service rules was possible, albeit at some cost to the steel companies.

On completion of the hearings, the Examiner filed a report recommending discontinuance of the proceedings on the grounds that no shortage of freight cars existed and also on the ground that prescription of the car service rules for mandatory observance was unwarranted.

Q Mr. Huntington, you told us earlier that the commission moved on several related fronts in attacking this

basic problem, one adjusting the per diem and another requiring that the debris be removed from cars before they were returned. You mentioned sponsoring legislation in Congress. No new legislation relating to this problem has been enacted, has it?

MR. HUNTINGTON: No, it hasn't; no.

Q There have been hearings.

MR. HUNTINGTON: There have been hearings but nothing--no final action has taken place.

In rejecting the Examiner's conclusions, the commission fully analyzed the data on shortages and found that there is in fact a freight car shortage. The commission also found that an alarmingly low percentage of freight cars are on the lines of their owners at any given time. The commission concluded that because freight car owners have such little use of their cars, they are less able to meet the particular needs of their shippers and they have little incentive to spend money purchasing new cars or spend money to maintain their existing cars to high standards.

The commission therefore prescribed AR Rules 1 and 2, among others, for mandatory observance, stating that the primary objective was to increase the availability of cars to their owners. In that way, railroads could better provide for their shippers, and those railroads with

deficient car supplies would be identified and compelled to purchase new cars.

Rules 1 and 2 as adopted by the commission had a built-in exception provision; on petitions for reconsideration the commission adopted Rule 19 which established an additional procedure for obtaining exceptions.

To determine the validity of the commission's action here, the starting point is, of course, the statute Section 1(14)(a) of the Interstate Commerce Act. We have traced the legislative history of that section in our brief, and I will not go into that here. The one point I would like to make, I would like to meet the appellee's contention that the statute was designed solely to deal with distribution problems of freight cars as opposed to problems of an inadequate number of freight cars. I'd like to just make three points with respect to that.

First, a look at the original Esch Act, of which Section 1(14)(a) was a part, shows that the act was indeed concerned with the supply of freight cars. The part of the original act conferring emergency powers on the commission conditioned the exercise of such powers on a determination that an emergency exists in respect of "the supply or use" of cars. When later an additional provision, which is now Section 1(14)(a) was added to confer powers upon the commission in non-emergency situations, the Congress simply

did not put in that prerequisite requirement for a finding that there was an emergency. So, the supply or use language was simply left out of that provision.

The second point I'd like to make is that the House report on the Esch Act, which is cited at page 21 of our brief, clearly reflects a concern with the under-equipment of the roads or the lack of sufficient cars.

Finally, any doubt as to the coverage of the original Esch Act was removed in 1920. The original act had defined car service to include the movement, distribution, exchange, interchange, and return of cars. In 1920 the definition was amended to include the huge control, supply,movement, et cetera, of cars.

The primary thrust of appellee's attack on the commission's adoption of Rules 1 and 2 is that the commission failed to make certain findings and failed to give proper attention to the adverse effects of its order. It is claimed, for example, that the commission should have made a finding with respect to the shortages on high ownership lines. I think it would be useful here to define what I mean by high ownership lines.

High ownership roads, as I shall use the term, are those which come relatively close to meeting their responsibilities to provide a fair share of the nation's freight cars. As thus defined, a high ownership railroad

could be a small carrier, owning in absolute terms a small number of cars, provided the carrier was meeting its general responsibility to provide a fair share of the nation's supply of cars.

The District Court faulted the commission for failing to find that freight car shortages were more acute on high ownership railroads than on low ownership railroads. Appellees appear to assert more generally that the commission's order is defective, since the commission did not find that high ownership railroads have a need for the return of their cars. In our view, there are several reasons why neither of these findings was necessary.

First, as I have said, the purpose of the commission's order was to increase the overall supply of freight cars. Clearly, some railroads would have to purchase additional cars. While the order in general is expected to provide an incentive for all railroads to acquire cars, it in particular puts the onus on the low ownership line where it rightly should be.

Second, even if there were no shortages on high ownership lines, enforcement of the rules would not necessarily create an excess or surplus of cars on those lines. While high ownership railroads will have their own cars returned to them more expeditiously, they in turn, of course, will have to return foreign cars on their systems to

the owning roads.

Finally, in the event that a surplus should develop on a particular railroad, the road could make the surplus cars available to other railroads who had a need for those cars. This could be done under the exception provision provided in Rules 1 and 2. And, moreover, the commission always has the emergency authority under Section 115 of the act to order the cars shipped--to order any surplus cars shipped to an area where they are needed.

Appellees also assert that the commission should have made a finding with respect to the financial capacity of low ownership railroads to acquire new equipment. But the commission's order does not direct any particular railroad to purchase equipment. What it does do is to provide an incentive for railroads to purchase equipment. There are a variety of methods of financing new equipment, many of which do not require substantial initial capital outlays.

A witness for the Southern Pacific, for example, testified that that company had acquired a leasing corporation and was prepared to lease freight cars to railroads who were unable to purchase them outright. And a special provision in the Bankruptcy Act which we have cited at page 30 of our brief makes it possible for railroads undergoing reorganization to purchase new equipment. The

Penn Central, for example, has been able to acquire new equipment while it has been in reorganization. And one of the railroads that supported the adoption of mandatory rules here, the then New York, New Haven, and Hartford, was itself in reorganization at the time of the proceedings.

In general, the argument that specific findings should have been made with respect to shortages and financial capacity must be put in the context of what was and what was not possible in these proceedings. The commission squarely acknowledged that it was unable to make findings of shortages on particular carriers. Obviously, therefore, it could not make findings with respect to the financial ability of low ownership roads to acquire equipment. Yet the commission could find and did find that the railroads as a whole did not own an adequate number of freight cars.

To say that in spite of this finding the commission was powerless to act until every aspect of the shortage was fully analyzed and characterized, categorized, would be to restrict unduly the commission's authority under Section 1(14)(a) to meet shortages by adopting reasonable car service rules.

Finally, appellees fault the commission for failing to find the rules would in fact increase the supply of freight cars. But no one can predict exactly what the outcome of mandatory enforcement of these rules will be.

The commission's conclusion that its order should have the effect of increasing supply, we submit, was entirely reasonable and fully justified by its reasoning, which is disclosed by its opinion.

And, finally, the commission recognizing that in the light of experience, modification to the rules might be necessary, specifically held the proceeding open so that as experience developed they could take steps to modify the rules.

Apart from the alleged absence of required findings, appellees contend that the enforcement of Rules 1 and 2 will impose undue hardship on shippers and railroads alike, and will completely alter the traditional methods of moving traffic.

To begin with, particularly this latter charge, it rings a little bit hollow, since it is in fact the railroads' own rules which are being enforced here. But more to the point, enforcement of the rules will not, as is suggested, result in the abolishment of a national pool of freight cars. The rules do not prohibit the loading of foreign freight cars. They simply prescribe the circumstances under which it can be done. Railroads, both large and small, will continue to use a mixture of foreign and home cars to meet the needs of their shippers.

With respect to the undue hardship argument,

everyone recognizes that one hundred percent compliance under the AAR rules will not be possible. Indeed, a Commission witness testified that it was impossible to write any set of car service rules which could be complied with a hundred percent of the time.

The exception provisions adopted by the commission, we submit, provide the necessary relief which will allow these rules to be workable. The first provision is contained in Note B to Rules 1 and 2. That's at page 34 of our brief. That provision permits the railroads involved to negotiate exceptions to the rules where inequities arise.

These negotiations will be subject only to the concurrence of the car service division of the AAR. Prior approval of the commission will not be necessary. It is expected that the AAR will keep the commission informed as to what sort of exceptions it was approving. But the initial responsibility would be on the railroads themselves to negotiate exceptions and then to obtain the approval of the AAR.

There is no requirement that requests to the AAR be in writing, and none is sought to be imposed by the commission. Nor will a separate exception be required with respect to each individual freight car that is supposed to be loaded not in compliance with the rules. Negotiated exceptions may, in fact, involve many freight cars, so that

appellees' assertion that there will be a flood of requests for exceptions--I think they predicted something like 40,000 a month--we submit is a very gross exaggeration indeed.

Where an agreement between the railroads cannot be attained or where the AAR car service rule does not endorse such an agreement, then Rule 19 comes into play. Rule 19, which was adopted by the commission on reconsideration, grants very broad--is a very broad grant of authority. I'd just like to quote from that rule. Under that rule the Bureau of Operations is given the authority to grant exceptions "for the purpose of further improving car supply utilization, increasing availability of cars to their owners, improving the efficiency of railroad operations or alleviating inequities or hardships."

The commission's order promulgating Rule 19 goes even further and specifically authorizes the Bureau of Operations to modify the car service rules for the purposes specified in Rule 19.

Q How much paperwork would one have to go through to get an exception under Rule 19?

MR. HUNTINGTON: Under Rule 19, I'm not sure this has been worked out. I would imagine that for broad exceptions, say, which might cover the operations of an entire plant, the submission would have to be in writing.

For more casual exceptions covering only a matter of a few cars, I think it might be done simply by telephone.

Another attack made by appellees is that the commission has not provided the Court with a basis for determining whether its adoption of car service Rules 1 and 2 is consistent with the national transportation policy adopted by Congress. Under that policy the commission must administer the Interstate Commerce Act to promote an adequate, economical, and efficient national transportation system. But clearly the commission's action here comports with that policy, since the whole purpose of the adoption of the rules is to promote adequate freight car service, and it is this adequate freight car service which the railroads have thus far been unable to provide by themselves.

I would like to reserve the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Huntington. Mr. Truitt?

ORAL ARGUMENT OF MAX O. TRUITT, JR., ESQ.,
ON BEHALF OF THE APPELLEES

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

I will present the argument on behalf of the shippers in this case, and Mr. Moloney will argue on behalf of the railroads. We have agreed to divide our time evenly.

On behalf of the shippers, let me say that we are willing to accept the finding of the conclusion that there is a freight car shortage. I don't believe it is fair to characterize it, as Mr. Huntington did, as a chronic national shortage, and I don't believe the record will support that. But we are not willing to accept the commission's proposed remedy, for two reasons.

First, is that when you take car service Rules 1 and 2 and make them mandatory, they are not, we contend, reasonable car service rules as required under Section 1(14) of the Interstate Commerce Act, because they will work enormous injury, both to shippers and carriers and without, we contend, any offsetting benefit and because in fact they cannot be complied with because the exceptions provisions to which Mr. Huntington has referred are wholly inadequate.

Secondly, we contend that the imposition of these rules for mandatory observance as a method of solving the freight car shortage problem is a method of causing an increase in the number of cars that exist simply is not rational. The thrust of car service Rules 1 and 2 is this. When a railroad unloads a car that it does not own, car service Rules 1 and 2 oblige it to return that car to its owner. The purpose of re turning the car to the owner, as the commission concedes, is to make the car available to its

owner. And the obligation to return takes precedence over the needs of any shipper that may be located on the lines where the car was unloaded to have their freight moved.

As an obvious correlative of returning cars to owners, it is perfectly clear that some railroads are deprived of the use of those cars and some shippers do not get their freight moved by the mere accident of being located on a line which does not happen to have a car of proper ownership in which its freight can be loaded.

At the present time the railroads have access either by owning cars or by renting them to a national car pool, and access to this pool enables car car pooler roads--that is, those that don't own enough--serve their shippers by using the cars that belong to other roads. This has been worked out as a result really of a national policy in favor of moving freight as opposed to returning cars merely to their owners.

For example, if, for instance, the Southern Pacific loads up all of its own boxcars and sends them off in the direction of the East, it does not have to stop sending traffic and wait until it gets the cars back. It can send the cars of other railroads. It can load them and send them wherever the freight needs to go.

The commission's order changes all of that and, as I say, creates an absolute claim by an owner on the use

of his car and it gives his shippers a preferential access to rail transportation.

Our first argument is that the commission's order cannot be sustained as an order which prescribes reasonable car service rules, because the rules are not reasonable when they are made obligatory. As the record reflects, the absolute compliance with the rules would cause enormous injury to shippers. The injury to the shippers--and I must say that the steel industry was only one of several which opposed these rules vigorously--is detailed throughout the record. The gypsum industry opposed, the grocery industry opposed, the chemical industry opposed, every industry which brokers its products in transit opposed because obviously if you are located on the West Coast and you're sending a load East and you're going to sell it on the way, and you don't know until it gets midway across country whether it's going to end up in Portland, Maine or Miami, Florida, you can't very well load that car in compliance with the rules.

The steel industry particularly detailed an absolute inability to forecast the needs at the loading dock in order to order cars of appropriate ownership, even if the roads which serve the plans happen to have proper ownership cars on hand.

The Hearing Examiner found, for example, that at the Youngstown plant at Campbell, Ohio the obligation to

comply with the rules would create a situation which couldn't be dealt with. The steel company simply did not have the room and the switching facilities to load cars properly. And it was this kind of evidence and that kind of finding which the commission I think rather cavalierly characterized as some extra switching and short delays.

Other shippers, as I say, also opposed the observance of these rules on a mandatory basis vigorously. The commission indeed acknowledged or the Hearing Examiner acknowledged that the shippers presented a solid opposition to the rules.

Against that solid opposition and against the evidence that mandatory observance would injure shippers, one would suppose that the commission would have found that there would be some offsetting benefits in terms of car service, but there isn't. The best the commission can do is to say that return of cars to the owners will improve utilization by making them available to the owners. And it is here, I think, that we and the government so fundamentally disagree. If making cars available to the owner is really going to improve car service, then it must be because there is freight on the owners' lines to be shipped or there's more freight on the owners' lines to be shipped or that whatever freight there is there is in greater need of shipment than the freight which is located where the car is unloaded. But

there is no such evidence anywhere in the record. And it is for that reason, of course, there is no finding.

Moreover, in the 1947 proceeding to which Mr. Huntington referred, entitled Car Service, Freight Cars, alluded to on page 20 of our brief, the commission found that in times of car shortage maximum utilization of the existing freight car fleet required ignoring car service Rules 1 and 2 and instead of taking an unloaded empty and sending it back to the owner--to or toward the owner--if there wasn't a load ready to go with it, that the maximum utilization of the freight car fleet was achieved by taking that empty and sending it to the nearest freight and moving that. In this proceeding the commission has offered absolutely no justification whatsoever for departing from that precedent. Accordingly, we urge as our first point that the rules cannot be sustained as reasonable car service rules. A second--

Q These Rules 1 and 2 go back how far?

MR. TRUITT: I believe the present per diem in car service agreement, Mr. Justice Stewart, goes back to about 1920. The rules have existed in this form for about that long. I don't mean in this particular form of words but in this set of--

Q Instructions.

MR. TRUITT: It isn't a set of instructions really.

It's a statement of preference. If the Southern Pacific Railroad has a load of freight that is bound for Maine and it has one of its own cars and it has a car of a northwestern road and it has a Boston and Maine car, the rules state a preference for loading the B & M and sending that car back towards its home road. But it has never been obligatory and it has never been enforced so that freight is left unshipped. So that if the only cars the southern railroad has are the Boston and Maine cars and it has a load going to Seattle, Washington and it doesn't have a Seattle, Washington car, then it can use a B & M car and send the freight up there. Under the commission's proposal, of course, it won't be able to do that. That would be a violation.

Q Under the wording--or am I wrong--under the wording of Rules 1 and 2 as adopted voluntarily by the association and its members, the Southern Pacific or whatever your road was, wouldn't have been free to do that.

MR. TRUITT: The rules, although they may read on their face--

Q In fact, the common law of the--

MR. TRUITT: In fact, the common law of the railroad industry is such that they have been always allowed to make commonsense transportation officer good judgments about whether a violation of the rules is going to move the freight. And, in fact, in 1967 when the current version of the AAR

rules was adopted, it was a good faith--a standard of good faith diligence was written into the rules expressly. So that it has never been an absolute prohibition or an absolute injunction about how cars should--

Q Even though its literal words might imply otherwise?

MR. TRUITT: Yes, sir, that is correct.

Q But these rules voluntarily agreed upon have not prevented boxcars and freight cars from sitting empty in one part of the country for long periods when they are desperately needed in other parts; isn't that true?

MR. TRUITT: I believe there is evidence of that in the record, Mr. Chief Justice, yes.

Q It found that?

MR. TRUITT: I believe it did find that. The question, though, is whether the rules--the argument to which I am about to come is whether the imposition of these rules for mandatory observance is a rational way of expanding the size of the freight car fleet, for that after all is what the commission is really about. That's what it was really trying to do.

The theory of the commission's order is simply to make the poor poorer. If you take railroads that don't own enough cars and you don't let them rent cars, then in theory they'll have to go out and buy cars, and that is, I believe,

the acknowledged purpose of the rules. But we contend that there are simply no findings to support such a proposal. In the first place, there are no findings of which shippers will be deprived of cars or of what type and volume of freight would be delayed or transferred to competitive modes of transportation. Nor is there any explanation in the commission's report of how depriving some unidentified shippers of their access to railroads and thus depriving those railroads of the revenues they could earn if they could use the cars to move freight is consistent with the goals of the national transportation policy which are to foster adequate, economical, and efficient service.

Although the commission is obliged under the national transportation policy to administer the act so as to foster sound economic conditions among carriers, to prevent destructive competitive practices and to prohibit unjust discrimination, there are no findings in the commission's report concerning the impact of its order on any aspect of competition.

The Hearing Examiner noted that evidence existed in the record that the rules would have an effect on competition. And, indeed, he chastised some of the commission witnesses for failing to develop what precisely the impact would be. But the commission's report here is absolutely silent and it gives absolutely no consideration

to what effect these rules will have on shippers, on carriers, rail carriers, or indeed on one class of carrier as opposed to another class of carrier. So, we don't have any idea what the commission's rule will really do.

The final and I think most glaring omission is the failure to find that any road will be financially able to purchase cars. Since the objective of the commission's proceeding is to cause railroads to increase their ownership, it seems only reasonable that the commission should determine that they're able to do that. It didn't. The reason it didn't, I suppose, is perfectly clear. As we mention in our brief, Commissioner Stafford of the commission, when he was testifying on one of the bills you asked about, Mr. Justice Stewart, just last year, testified before the Senate Commerce Committee that the railroads simply didn't have economic capability of solving the freight car shortage. That I think is why there is no evidence about which roads could buy. That is why there is no finding that the roads deprived would in fact be able to buy.

Indeed, when you consider the whole statute, you will discover that there is one section, which is Paragraph 21 of Section 1, which authorizes the commission to acquire railroads, to acquire facilities, but it doesn't permit the commission to do that unless the commission finds that the roads which will be ordered to acquire facilities can in fact

do so without impairing their financial ability of serving the public and discharging their common carriage obligations.

Mr. Chief Justice, one word in response to the question you asked me specifically. The evidence to which the commission adverted, boxcars sitting idle, was in its discussion of assigned cars. Those are cars assigned by a road to a particular shipment. It was not in respect to general purpose freight cars, which is the classic cars to which this order applies. Accordingly, we urge that the decision of the District Court should be affirmed. Thank you.

MR. CHIEF JUSTICE BURGER: Very well, thank you, Mr. Truitt.

Mr. Moloney?

ORAL ARGUMENT OF WILLIAM M. MOLONEY, ESQ.,

ON BEHALF OF THE APPELLEES

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

I am here representing the Association of American Railroads and its member lines. It is my purpose and it is my hope that I will be able to highlight some of what we consider to be the unusual aspects of this case or at least aspects that we consider to be out of the ordinary.

The rhetoric used in this case may be the inevitable result of the case. And you heard a part of that

from government counsel a moment ago when he referred to owner railroads or the railroad that owns almost as many cars as it should own. But there is nothing in this evidence to identify that railroad or any other railroad or how many cars that railroad should own or whether it owns a relatively high percentage of cars or a relatively low percentage of cars. This is the rhetoric mish-mash that this case really finds itself, well, bogged down in. We find the use of such descriptive terms, for instance, as owner railroads and non-owner railroads. And we find descriptive terms such as railroads owning an inadequate supply of freight cars and railroads owning an adquate supply of freight cars.

We find such terms as a railroad's responsibility being shifted for car ownership. We find such terms as the use by one railroad of the car belonging to another railroad which latter railroad owns a relatively high number of freight cars.

In a word, what we find here is an apparent alignment of the haves against the have-nots, as far as the railroad industry is concerned. There is no evidence in this record from which to define those terms or from which to identify those railroads. And yet it is argued by the government that the commission's order will benefit the haves and that it will deprive or penalize the have-nots. There seems to be a very clear implication that the have

railroads do or at least that they should support the commission's order and that only the have-not railroads oppose the commission's order. But do not be misled. The railroads have been unanimous in their opposition to this commission's order from the very moment it was first proposed by the commission's Bureau of Operations. The government says this proceeding was instituted to determine whether mandatorial rules should be proposed. The first statements that were filed in the proceeding before the commission were addressed to absolutely nothing. That is, the commission's order did nothing except to say, "Come in with your hat in hand and let us hear from you." It was only when the commission's Bureau of Operations put in their own statements and they proposed mandatory car service rules that the railroads then said, "We cannot live with any such provision," and they said that practically unanimously.

When I said come in with your hat in hand and it was directed at nothing, there was a series of questions that the commission had attached to its order. And our proposals or our statements were addressed to that. But, as the Examiner says, it was pretty much in a vacuum, and he laid out the reasons why it seemed to be pretty much in a vacuum.

This record contains no evidence at all as to which railroads own an adequate or which railroads own an inadequate supply of cars. And, indeed, the most significant thing is

that it contains absolutely no standards by which to judge what is adequate or by which to judge what is inadequate either by individual railroads or, indeed, by all railroads collectively.

I think the Chief Justice asked the question about cars sitting around the country. You heard government counsel say the commission admitted that it was unable to find a shortage of freight cars on any particular railroad. Obviously, if it was unable to find a shortage of cars on any particular railroad, it was unable to find a shortage of cars on any particular area of the country, because it would be very simple to find car shortages on railroads in the West, car shortages on railroads in the East, car shortages on railroads in the South, and to point to the railroads. But the answer was that the commission could not do that. And we understand why. No evidence in the record.

Now, the same uniform front of opposition to the commission's order applies to the shippers. And a peculiar thing about that is that it applies to the shippers whether they happen to be located on the so-called have-not railroads and supposedly thereby be benefited by the commission's order, or whether they are located on the unidentified have-not railroads--that is, the haves being benefited, the have-nots being hurt. Wherever those shippers are located, we find them unanimous--unanimous in

opposition to the commission's order. Indeed, you have in this case the National Industrial Traffic League and you have the National Association of Shippers Advisory Boards. Put together those organizations represent somewhere in the neighborhood of about 35,000 shippers in the United States. And, indeed, it has been estimated that they account for over 80 percent of the commercial traffic in this country.

The commission justifies its order on the basis that its primary purpose is to give the railroad owners greater use of their own cars. But, as I pointed out to you, these same railroads, because we are practically unanimous in this, these same railroads tell the commission no thank you; "Your order will be unreasonable, injurious, and detrimental to us, and it will hurt the shippers that we serve, and furthermore your order is unlawful and we cannot live with it."

Now, let there be no mistake. The railroads are not aligned in groups contending for and against this commission's order. They are before you as they were before the commission and before the court below. They stand here united, for all practical purposes, united in their opposition to the commission's order.

Q Mr. Moloney, twice you said "for all practical purposes." This infers for me a reservation in part. Is there any reservation?

MR. MOLONEY: I have to make reservations for certain things that were pointed out, such as the New Haven Railroad which we think is a very unusual situation. I have to make exceptions, for instance, to some terminating railroads--well, let's take the Florida East Coast Railroad. As I have often said, it's rather hard to load a car off the peninsula of Florida without loading it back in the direction of the owner. Someone must own it somewhere.

The court below is not misled by any implication of contending factions within the ranks of the railroad industry or within shipper ranks or indeed of any contingent between those two ranks.

Q What was the genesis of the order?

MR. MOLONEY: The genesis of the order to return the cars to the owners, Mr. Chief Justice, I think the genesis of the order was a determination by the commission in this instance--and we said so in our brief below--a determination by the commission in this instance that it was going to come out with an order, period. And this is the order that the commission came out with.

Q Nobody wanted any change in the status quo?

MR. MOLONEY: No one that I know of, and I say that, I mean no significant group of shippers. Indeed, in the government's brief they refer to, for instance, the commission of the State of Oregon as supporting mandatory

car service rules. But the Examiner in his report took up in detail the testimony of the commission of the State of Oregon and, indeed, the commission's rules said that when you file your evidence before us, we want you to file evidence and we want you to file argument, and we want you to distinguish between the two. And everything that the commission of Oregon said about mandatory car service rules the Examiner said, "I find that in the argumentative section of your presentation and I do not consider that evidence."

As far as the Department of Agriculture is concerned--and that's cited in the commission's brief--the witness for the Department of Agriculture when he took the stand and submitted himself to cross-examination, he admitted that they did not favor mandatory car service rules except on a temporary basis and for the sole purpose of accumulating statistical information which was absent from the record. And, indeed, when I asked that witness what he considered to be the worth of this record, he said he did not think that the record permitted the commission to make an intelligent decision.

So, the ICC bureau is practically the only one that proposed this. The origin, the genesis, what made them do that, I have no idea. But the proposal of mandatory car service Rules 1 and 2, for whatever reason, originated with the Bureau of Operations of the Interstate Commerce

Commission. And, as I point out later, with one man actually. In fact, we have referred to it as inspired vision almost, and that witness is the only one that I know of that came out with this firm demand.

The national transportation policy has been mentioned. We feel that the united front in opposition to the commission's order makes the national transportation policy and the measuring of the commission's order in this case against that policy highly important, because here you have for all practical purposes the shippers and receivers of freight and the railroads that service those shippers and receivers standing before you and saying, "This order is unlawful and it is harmful."

Is it not then proper that you look more carefully at the national transportation policy and how this order comports with it?

As applied to this case, that national transportation policy really means that the commission's order here must be in the interest of providing fair and impartial regulation of railroads, of providing the shippers with economic, adequate, and efficient railroad service, and of fostering sound conditions in the railroad industry.

I suppose we may treat all of these provisions of the national transportation policy as something that would be embraced within the general term of public interest. But

to the question of wherein lies the public interest to be served in this case, we are compelled to submit that the answer to that question can only be found in the interest of the receivers and the shippers of railroad freight and of the railroads it is serving. And if that public interest can be found anywhere else, it escapes us.

Another twist that we find a little peculiar in this case is the commission's abrupt departure from long-established policies and principles and with little or no explanation as to why they departed; until the decision in this case, there had not been a shadow of a doubt that in times of car shortage the railroads had an obligation to achieve and without regard to car ownership the maximum utilization of all freight cars available. Indeed, the national transportation policy and the public interest to be served seemed to us to permit of no other course of action.

But here the commission finds a car shortage. But it says, "We're no longer interested in obtaining maximum utilization of freight cars during that shortage." Instead it orders a movement, a car movement pattern which it says itself is inconcsistent with the maximum utilization of freight cars during the time of a shortage. And it does this on the theory that that will force some unidentified railroads to buy an indeterminate number of freight cars and

regardless of their financial condition to do so. Now, how a deliberate aggravation of an existing--what they found to be an existing chronic freight car shortage--how a deliberate aggravation of that shortage could possibly be in the public interest and comport with the national transportation policy is something that the commission's report and order leaves entirely to the imagination of the Court.

As we see it, the commission has taken what I term a page from the international diplomacy book, and we think it has embarked on a course of brinkmanship. I say that not in jest but in seriousness, because in both the jurisdictional statement and the brief the government says that the order here in issue is one of a series of actions that it has taken to alleviate the crisis which it finds to exist.

I'm sorry, I think my time has expired.

MR. CHIEF JUSTICE BURGER: Mr. Huntington, you have about nine minutes left.

MR. HUNTINGTON: Thank you, Mr. Chief Justice.

REBUTTAL BY MR. HUNTINGTON

MR. HUNTINGTON: With respect to Mr. Justice Blackmun's question, I'd simply like to point out that the New York, New Haven, and Hartford Railroad was not the only railroad to support mandatory enforcement of car rules. The B & O, C & O supported the rules. That's at page 188-189 of

the appendix. The Great Northern supported the rules at page 190 of the appendix. And the Pennsylvania Railroad supported the rules at 198 of the appendix. These are not small railroads.

With respect to the argument that these rules will not increase the utilization or not improve the utilization of cars, I would simply like to stress again that the purpose here is not to increase the utilization, the primary purpose, but to increase the supply. If the supply continues to diminish, you can have the best utilization in the world but still be faced with a crisis.

Q I'm a little puzzled as to how you can separate the two things. You have idle cars. Doesn't that create a pressure for more cars to meet the same demand?

MR. HUNTINGTON: I think if we look at it in terms of the short-range effect and the long-range effect, clearly if you're interested only in the short term, then you will want to load whatever cars are available with whatever freight to go anywhere. But if you are interested in the long term to increase the supply, then you want to create a set of circumstances which will encourage the roads to purchase new cars, and that is what the commission has sought to do here. They have sought to provide the railroads with an incentive, they have sought to give the railroads greater use of their cars so that they will then have some incentive to go out

and purchase cars. They have also sought to put the onus on the particular low ownership roads that should be purchasing new cars so that they can know that they are deficient; there will be pressure on them to purchase new cars, and they can justify their needs.

Penn Central, for example, which is in reorganization has been able to purchase cars because there is pressure on that railroad and they can go before the Bankruptcy Court and they can justify the need, and this is essentially what the commission is seeking to do here, to put railroads in a position where they will have to meet that need by taking whatever steps are available to them.

Q Mr. Huntington, what type of evidence was submitted to the commission in support of its finding that there is an acute shortage of cars and from what sources did the evidence come?

MR. HUNTINGTON: The evidence came from, first, submissions to the commission by the railroads showing that over a ten-year period from 1955 to 1964, the total number of freight cars in the nation had decreased particularly with respect to plain boxcars and the total aggregate capacity had also decreased.

Q Had the demand increased during that period?

MR. HUNTINGTON: The demand had decreased but at a much lower level. The demand had decreased by about three

percent, whereas total capacity had decreased about five percent. With respect to plain boxcars, though, where the shortage is the strongest, the total capacity had declined, I believe, around 12 percent.

In addition to that, there is evidence that there were indeed shortages being reported by shippers, and these were compiled in various reports submitted to the AAR and introduced into evidence in this record. These reports did come under heavy attack as being somewhat exaggerated and the commission fully dealt with that in its opinion. It recognized the fact that shippers sometimes order more cars than they need. The AAR had in its treatment of these figures, reduces them by 50 percent and that perhaps would be a good ballpark method of dealing with the statistics.

Q Was the commission motivated to act by complaints from shippers or did it act on its own motion?

MR. HUNTINGTON: It initiated this investigation on its own motion. The fact is, though, that virtually all the shippers testifying and participating in this proceeding testified that there was indeed a national shortage.

One other question I would like to address myself here is the effect that this order will have on competition and the effect that it will have on low ownership railroads. In their brief and here in argument, the contentions that competition among railroads will suffer seems to be based on

two assumptions; one, that small carriers no longer will have access to a national freight car pool and, two, that it is the small carriers who will suffer most from the rules. But neither of these assumptions is justified. First, as I stated before, railroads will continue to load foreign cars. They will use a mixture of foreign and home cars. There is no absolute rule here that you have to send the car back empty. You simply have to find a car of the right ownership and then you can load it and send it back in that direction.

Second, many small railroads may be high ownership roads. That is, they may already contribute their fair share of cars to the national pool. And, finally, even the assertion that the financially weak railroads will be affected the most is somewhat undercut by the experience in Penn Central where indeed it is shown the necessary steps can be taken.

In conclusion I would like to say that the commission here could not make specific findings as to the ownership levels on particular roads. The data wasn't available; to take care of this, the commission adopted a formula in this very proceeding and the railroads are compiling data and they already are submitting it to the commission, and in the future the commission will have much better data in which to act. The proceeding is open for

that very reason. As the data comes in, the commission can take the necessary steps to modify its rules. But what they did find here was that there was an overall shortage and that something had to be done, not five years from now but right now. And we submit that under these circumstances the mandatory adoption of these rules at this time is fully appropriate. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Huntington. Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:03 o'clock a.m. the case was submitted.]

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