In the

Supreme Court of the United States

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Appellants,

vs.

FLORIDA EAST COAST RAILWAY COMPANY and
SEABOARD COAST LINE RAILROAD COMPANY,

Appellees.

No. 70-279

Washington, D. C.
December 7, 1972

Pages 1 thru 41

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v.	No. 70-279
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Washington, D. C.,

Thursday, December 7, 1972.

The above-entitled matter came on for argument at 1:46 o'clock, p.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
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

SAMUEL HUNTINGTON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C., for the Appellants.

A. ALVIS LAYNE, ESQ., 915 Pennsylvania Building, Washington, D. C., 20004, for the Appellees.

R. A. HOLLANDER, ESQ., P. O. Box 27581, Richmond, Virginia, 23261, for the Appellees.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments now in No. 70-279, United States against Florida East Coast Railway.

Mr. Huntington, you may proceed whenever you are ready.

ORAL ARGUMENT OF SAMUEL HUNTINGTON, ESQ.,

ON BEHALF OF THE APPELLANTS

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 middle district of Florida.

The District Court enjoined the enforcement of Interstate Commerce Commission rules describing an incentive element to be added to the daily rentals that one railroad pays to another for the use of its boxcars.

The basic question presented is whether the Commission should have afforded the appellee railroads an oral hearing prior to promulgating the rule.

The incentive per diem rules here in issue were promulgated under Sec. 1(14)(a) of the Interstate Commerce Act.

That section authorizes the Commission, after hearing, to establish reasonable rules with respect to car service, including the compensation to be paid for the use of freight cars.

Under a 1966 amendment to that section, the Commission may, in fixing that compensation, prescribe an incentive element to improve the use of existing cars and to encourage the acquisition of new cars.

Freight car shortages have been a serious and recurring problem throughout most of this century.

In recent years, the Commission, with the strong encouragement and support of Congress, has been moving on a number of fronts to combat this problem.

Just last term, in the Allegheny-Ludlum case, this Court upheld two car service rules promulgated by the Commission under Section 1(14)(a).

Those rules govern the return of unloaded freight cars to their owners.

The instant rule-making proceeding was initiated by the Commission in 1967 after an earlier proceeding had been dismissed for want of sufficient evidence.

In initiating this proceeding, the Commission ordered the railroad to participate in a nationwide study of freight car shortages.

During an eleven-month period in 1968, over 32,000 reports were filed from freight stations througout the country that were filed from about 2,600 freight stations throughout the country.

Each report listed for a given day, at a given station,

one, the freight cars ordered by shippers for delivery on or before that day; two, the number of cars available at that station for placement to shippers; and three, the number of cars actually delivered to shippers during that day.

Extensive field audits were conducted by Commission personnel to assure that the reports were filed and filled out correctly, and also to assure that they did not reflect overordering of cars by shippers.

The collected data were put on magnetic tapes and were available to the railroads.

In December, 1969, the Commission issued an interim report containing an anslysis of the data collected from the study and proposing a rule establishing the scale of incentive per diem charges for plain boxcars.

In appendices to the report, the Commission described in detail the methodology employed by the study and set forth a series of tables and graphs showing the results of the studies -- the study for plain boxcars.

The study showed that there were deficiencies in placements of freight cars with shippers throughout the year, but that the deficiencies were most severe during the heavy traffic months from September through February each year.

The study also revealed that at the same time that deficiencies were reported by some freight stations, surpluses of cars would be reported by other stations frequently on the

same railroad.

Analyzing this data, the Commission concluded that at least during the peak period from September through February each year, the surpluses were not sufficient, so that the railroads could be expected to eliminate the deficiencies simply byusing their boxcars more efficiently.

The Commission thus concluded that the existing supply of plain boxcars was inadequate. It, thus, proposed the incentive per diem rules to be applicable during the six months heavy traffic period of each year.

Now, the proposed incentive rules were designed by the Commission to do two things.

First, they were designed to improve the utilization of existing cars, and, second, they were designed to provide funds to those railroads who earned more per diem income than they paid out with which to purchase new freight cars to augment the national supply.

Q Would the purchasing railroads own the new freight cars outright?

MR. HUNTINGTON: Yes, they would.

The interim report noted that proposals were tentative and invited the railroads to submit verified statements of fact and briefs with respect to the proposals.

The Commission ordered that any party requesting an oral hearing should set forth in detail its need for an oral

hearing and the evidence it intended to adduce.

In response to the interim report, numerous railroads filed verified statements and briefs, some supporting the proposed rules and others opposing them.

Several railroads requested oral hearings, including both appellees here.

Seaboard, in its statement to the Commission, primarily argued that the Commission should not impose incentive charges on plain boxcars without also imposing them on specially equipped cars.

Q What weight, if any, should be given here and now to the fact determinations of the District Court? Or at least a mixed fact and law determination that -- relating to prejudice?

MR. HUNTINGTON: Well, in our view, it is not so much a question of fact as it is a question of the proper standard to be applied in determining prejudice.

Our primary argument on that point, which I will come to in due course, is that the District Court simply applied the wrong standard.

Well, Florida East Coast did file two verified statements setting forth its position under the rules in some detail, and it also requested an oral hearing, and it specified four factors which it intended to show at the oral hearing, and I will also discuss those.

In 1970, in April 1970, the Commission entered its

final report and adopted the rules virtually in the same form as had been proposed in the interim report.

The Commission specifically answered and rejected the policy argument advanced by Seaboard and Florida East Coast for not applying the rules to them, and it also rejected all the requests for oral hearing on the grounds that no party had showed prejudice.

Both Seaboard and Florida East Coast then brought actions in the Florida District Court, and the District Court set aside the Commission's order for failure to hold oral hearings.

Now, appellees base their claim to an oral hearing, in addition to on the provision of Section 1(14(a), they place their claim on Section 5(56)(d) of the Administrative Procedure Act.

That section provides that in rule-making, quote, "an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission for all of part of the evidence in written form."

Appellees claim that they showed prejudice in their submission to the Commission.

Before reaching this issue, though, there is a threshold issue of whether Section 5(56)(d) applies at all to this rule-making proceeding.

Now, Section 5(53) of the Administrative Procedure Act,

sets forth the basic procedural requirements for rule-making.

And Section 5(53)(c) requires agencies to give interested parties, quote, "an opportunity to submit written data, views or arguments, with or without opportunity for oral presentation."

Clearly, this was done in this case by the Commission.

Section 5(53(c), however, goes on to state that, quote, "when rules are required by statute to be made on the record, after an opportunity for agency hearing, Sections 5(56) and 5(57) apply, instead of this subsection."

Now, Section 1(14)(a) of the Interstate Commerce Act, under which the incentive rules here were promulgated, requires a hearing, but it nowhere states that the Commission's decision must be on the record of that hearing.

Now, unless the on-the-record requirement can be inferred from the context of the statute, Sections 5(56) and 5(57) of the Administrative Procedure, would not apply to this case.

Now, this precise issue was decided by this Court in the Allegheny-Ludlum case last year.

In the applicable passage, this Court stated, "We do not suggest that only the precise words on the record in the applicable statute will suffice to make Sections 5(56) and 5(57) applicable to rule-making proceedings. But we do hold that the language of the Esch Car Service Act, Section 1(14)(a),

is insufficient to invoke these sections.

Q Could your opponents come back and argue that because of the 1966 Amendment and its language, saying that the additional determination should be made upon these considerations, that that is an implied requirement?

MR. HUNTINGTON: Well, they do, and our response to that is that the 1966 Amendment simply builds on what was there before, and it does require the Commission to take into account certain factors before imposing an incentive element. But it in no way suggests that in considering those factors, the Commission must do so only on the basis of the record.

The hearing requirement, whether you are considering a proceeding as in Allegheny-Ludlum, under the first part of the statute, or whether you are considering incentive per diem proceedings under the second part, the hearing requirement is the same. And that requirement is imposed in the very beginning of the statute.

In short, we believe that the Allegheny-Ludlum holding is controlling here.

But, I would like to turn now to the second part of our argument which assumes that Section 5(56) does apply to this proceeding.

In that event, the Commission was justified in doing away and not holding oral hearings unless appellees had established before the Commission that they would be prejudiced

by the absence of an oral hearing.

The critical question here then is what showing is necessary to establish prejudice and did appellees make that showing?

In our view, there are two basic tests that a request for an oral hearing must meet to establish prejudice, and, getting back to your question, Mr. Chief Justice, we would maintain that the District Court did not apply these tests. Therefore, its finding of prejudice was based on an erroneous standard and it not a finding of fact which this Court should refer to.

The first, and most obvious, test is that the request must show a need to establish facts at an oral hearing that could not be adequately established through written submission.

Both appellees have failed to meet this initial test.

Florida East Coast's basic opposition to the rule stems from the fact that it is located on a peninsular and terminates far more plain boxcar traffic than it originates. And, because a lot of the traffic terminates in the southern part of Florida, as the verified statements it submitted show, the railroad must continue to pay per diem charges until it can get the unloaded boxcars back to the northern part of its line and onto a connecting railroad.

Florida East Coast argues that because it owns sufficient plain boxcars to satisfy the limited needs of its

shippers for plain boxcars, and because it operates an efficient operation and generally returns empty cars as fast as it can, the incentive per diem rules would neither prompt it to purchase new cars nor result in the faster return of freight cars and therefore the rule shouldn't be applied to them.

While these arguments show that the application of the rule may not be in Florida East Coast's best interest, they do not show that an oral hearing was necessary to establish these facts. In fact, these facts I have just outlined were set forth in verified statements in some detail submitted by Florida East Coast.

And the Commission's final report shows that it considered the arguments advanced by Florida East Coast, these policy arguments, and considered the verified statements, but concluded that an exemption from the incentive rules for all terminating roads would not be in the public interest.

Now, Seaboard's basic opposition to the rules is based on its ownership of a large number of specially equipped boxcars to which the rules do not apply.

Although Seaboard did not submit any verified statements, it has made no showing that it could not have established this fact by written submissions, and that it has made no showing that an oral hearing was necessary here.

Now, perhaps recognizing that an oral hearing was not

necessary to establish the adverse effect of the rules on them, both railroads argue that an oral hearing was necessary to cross-examine Commission personnel on the preparation and analysis of the freight car study.

Here, too, however, appellees could have challenged the Commission's conclusion from the study by written submissions and arguments.

The appendices to the Commission's interim report set forth in plain terms the methodology of the study.

No one has suggested that this methodology was unsound.

I would like to quote from a verified statement submitted by the Penn Central. This is on page 151 of the Appendix, where the Penn Central concedes the study data appears to have been gathered by recognized methods of sampling and statistical techniques.

Penn Central then goes on to quibble with the conclusions reached by the Commission.

I don't understand appellees to suggest that the statistical methods used here were inappropriate. What is challenged are the Commission's conclusions from the tables and graphs that the incentive per diem rule should be adopted to improve the utilization and supply of freight cars.

They challenge the analyses that the Commission made from the data and the Commission's conclusion that there was

indeed a national shortage of freight cars, and that the rules are reasonably adopted to combat that shortage.

Well, if appellees believe that the conclusions are unsound, their remedy is not to cross-examine Commission personnel who assisted the Commission in analyzing these data as part of the decision making process. Their remedy is to analyze the data on their own.

As I stated before, the data were available to them and, on the basis of their own analyses, to argue against the Commission conclusions.

Or, for that matter, they could start with the Commission tables and graphs in the interim report and argue that the Commission's conclusions based on that data were inappropriate.

Q What if they wanted to challenge the underlying data itself?

MR. HUNTINGTON: Well, they have not chosen to do that other than to -- well, I will backtrack a little bit -- Florida East Coast does challenge the way in which part of the data was obtained, and that is when I said that the reports submitted to the railroads requires each freight station to list the number of cars ordered by shippers for placement on or before the study date.

Florida East Coast maintains that it is unreasonable to include in the orders orders which were received on the study

day for placement that day.

And, this, I think can properly be construed as an attack on the method of the study.

I think the Commission recognized that this, perhaps, was a deficiency in the study. In fact, they proposed a further study in 1969, which was opposed by both railroads in which they would have remedied that particular point and they would have only listed as orders orders received by the beginning of the study day for placement on or before the study day, and would not have included orders received on the study day for replacement that day.

But, to the extent that Florida East Coast wants to establish that, that's conceded that there is a deficiency there.

Well, the second basic test that a party must show -- as you will remember, I said there are two tests -- the second basic test theymust show to establish prejudice from the absence of an oral hearing, is to show that the facts it desires to establish at an oral hearing are material and have a reasonable chance of influencing the Commission in reaching this decision.

And, with respect to their asserted need to cross-examine Commission personnel, both appellees have completely failed this test.

Seaboard has failed to indicate in any way what facts

it would wish to establish.

Florida East Coast, on its part, did list what it hoped to establish. One thing it hoped to establish was this 24 hour business about freight cars ordered for placement on the study day.

The other facts -- and I put facts in quotation marks -- that it wished to establish were, one, that the deficiencies reported in the study "may not" be affected by the supply of cars in other regions; two, that the addition of new plain boxcars "would not necessarily" reduce the number of deficiencies; and, three, that no one could tell exactly how many boxcars were needed.

I believe it is highly unlikely that the establishment of these facts would have surprised or impressed the Commission.

The Commission, throughout its report, does not contend that they are operating on a perfect set of data here, or that they can guarantee that the rules they are adopting will, in fact, work.

What they are saying -- what the Commission did say is that we have this valid statistical evidence, that in our best judgment this evidence shows that there is a shortage, and in our best judgment the proper way to go about it is by trying these incentive rules.

The Commission said that the rules were designed, and

I quote, to test whether a financial incentive can be employed to augment the car fleet.

This is in the nature of an experiment.

The Commission at several points said that the proceedings would remain open and that the rules could be revised in view of the experience of the railroads after they had been in effect.

Q Mr. Huntington, what are the practical aspects of this? Suppose that the Court rules that the oral hearings are required? Do you have any estimate as to delay factors and this kind of thing, that might ensue?

MR. HUNTINGTON: Well, I think, had it ruled -- at this point, the rules are in effect against -- apply to every railroad in the country, except Florida East Coast and Seaboard, so a remand would just involve those two railroads.

So, I cannot say that the delay would be a matter of tremendous significance to the entire country, but these hearings do drag on, and if it gets into a battle of expert witnesses over the proper interpretation to be given a set of data, I believe there could be quite a substantial delay.

Q You mean by that, years or months or --

MR. HUNTINGTON: I think probably years.

Q But you don't anticipate, or do you, many intervenors and their participation, and this kind of thing?

MR. HUNTINGTON: Well, I would like to backtrack on

what I said a minute ago.

I think we have stated in our jurisdictional statement that if oral hearings are held, the other railroads would be likely to seek to intervene, and that the whole proceeding probably would be reopened, and it might be a very protracted proceeding indeed.

Q Because it is rule-making, they wouldn't be bound by their failure to themselves?

MR. HUNTINGTON: I think that might be one factor. Another factor is the Commission's statement that the proceeding would remain open.

In fact, I understand from the Commission that there are petitions before the Commission right now seeking to reopen the proceeding and seeking to modify the rules.

Q Did I understand from your reference that only these two roads would be involved, has the rest of the railroad country accepted the Long Island decision?

MR. HUNTINGTON: Yes. The rules have been applied since 1970 to the rest of the railroads in the country.

Q In the Allegheny case, how many railroads were actually appearing? I have forgotten.

MR. HUNTINGTON: How many were appearing?

Well, there were a group of railroads, the AAR, the American Association of Railroards; there was the shipping interest --

Q Multiple parties?

MR. HUNTINGTON: Yes, there were multiple parties and numerous verified statements and the proceedings went on for some time.

Q And some of the railroads in Allegheny were satisfied with the proceedings of the ICC, were they not?

MR. HUNTINGTON: Some of them were, yes.

There the issue was not procedural. The issue was the underlying reasonableness of the rule.

Well, finally, we suggest that if the Court agrees with us that an oral hearing was not required here, the Court should affirm the Commission's order outright without remanding to the District Court for consideration of other issues.

Now the District Court, in deciding that an oral hearing was necessary, did not reach several other issues raised by appellees.

And these issues are, basically, whether the Commission complied with all the requirements of 1(14)(a), whether the rules are reasonable, and whether Florida East Coast should be exempted as a terminating road.

Now, the reason we suggest that a remand is not necessary is we believe that these issues are not substantial. We believe that a reading of the Allegheny-Ludlum opinion and a reading of the Commission reports, and keeping in mind the very limited scope of review which the Allegheny-Ludlum case

underscored, that the rules should be simply upheld in their entirety by this Court.

And, then, finally, for the reasons set forth at pages 28 to 30 of our brief, and I won't go into them here, we urge that appellees should be ordered to make restitution of the incentive charges that they would have paid other railroads but for the restraining order and injunction entered by the District Court.

In conclusion, we respectfully submit that the judgment below should be reversed.

MR. CHIEF JUSTICE BURGER: Mr. Layne.

ORAL ARGUMENT OF A. ALVIS LAYNE, ESQ.,

ON BEHALF OF THE APPELLEES

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

I represent the Florida East Coast Railway Company.

With the consent of the Court, Mr. Hollander of the Seaboard Coast Line Railroad and I will divide the time available to the appellees, and we hope to avoid repetition in our arguments.

I shall undertake to discuss whether the Commission's order is required to be made on the record of a hearing, that is, whether the parties were entitled to an oral hearing, under Sections 5(56) and 5(57) of the Administrative Procedure Act.

I will also discuss whether the Florida East Coast was prejudiced by the denial of its request for hearing and oral argument, a request to cross-examine Commission agents on their audits and studies, and the request to subpoena Commission experts to present testimony to contradict the basic facts assumed and asserted in the Commission's report imposing incentive per diem charges on the railroad industry and on the Florida East Coast.

Now, Sections 5(56) and 5(57) of the Administrative Procedure Act are applicable, we think, because the Commission action in fixing compensation to be paid for the use of freight cars is quasi-judicial action.

Like agency actions considered in Morgan, a rate case, the Ohio Bell Telephone case and the division cases which this Court has recently decided in north-south divisions, the Commission order must be based on the record of a hearing.

The nature of the Commission's action in this case, that is to say you must pay another railroad so much for the use of its equipment, in freight car compensation proceedings, distinguish this proceeding from the Commission's order prescribing operative rules, and that's the rule that was involved in Allegheny-Ludlum.

Q Mr. Layne, is your claim based on something outside of the Administrative Procedure Act, or is it based on the Administrative Procedure Act alone?

MR. LAYNE: On two, Mr. Justice Rehnquist.

I would say that the Administrative Procedure Act itself, as this Court noted in Allegheny-Ludlum, would say that the scope and nature of the hearing required to discharge the duty in this case, in this kind of instance, fixing compensation, is within 5(50)and5(57)and the hearing to which Section 1(14)(a) refers must be a hearing on the record.

I would go farther, however, and say, as the Courts have said in, for example, Palmer v. United States, dealing with compensation for freight cars, that the fixing of compensation that one railroad must pay to another railroad for the use of a car, which it must accept, to further the through movement of freight, is a judicial action and that you are entitled to due process in the fixing of that.

And, like this Court's decision, for example in Londoner v. Denver, 210 U.S., concerned with a taxation problem, if that compensation is to be imposed, we are entitled to due process.

So I would say that beyond the question simply of the Administrative Procedure Act, yes, we are entitled --

Q You have a Constitutional --

MR. LAYNE: Oh, yes, I say that there is also, beyond the Administrative Procedure Act, a due process issue.

Q You had a good deal of process. You said you didn't have enough.

MR. LAYNE: That's right.

But, of course, in Londoner v. Denver, 210 US, the Supreme Court, this Court, said, no matter how brief, no matter how informal, you cannot relegate someone simply to the filing papers. They must have an opportunity for oral argument and they must have an opportunity for an oral hearing, orally to present their material.

Q Let me over-simplify it. And I think I am asking the same question Justice Rehnquist did.

If we agree with the Solicitor-General that 5(56) and 5(57) do not apply, then it does not follow, in your view, that you necessarily lose the case?

MR. LAYNE: No, because I think the next question arises as to whether you can -- the Commission can be invested with the kind of power that it exercised in this case to take the money, or as it has been somewhat popularly said in the railroad industry, a kind of a reverse Robin Hood effect. You rob from the poor and give to the rich railroads so that rich railroads can buy more cars and they can have the poor railroads pay for them.

Q While I have you interrupted, let me ask you the same question I asked Mr. Huntington.

If we go along with your position here, what is the practical effect in your view of prolonged hearings, delays, and the like. After all, this problem has been with us a long

time.

MR. LAYNE: Certainly. And I think that the question of delay is minimal. I think that the Interstate Commerce Commission is empowered and has full authority, both under the Administrative Procedure Act, its own rules of practice, and its statute, to regulate the content and control the time of and the extent of hearings.

I do not think that what I requested would have delayed the Interstate Commerce Commission in its disposition of this case.

Q But, of course, if Florida East Coast can request oral argument, presumably 200 other railroads can too and by then you are talking about a rather significant delay.

MR. LAYNE: If those railroads could show that the failure to grant them a hearing prejudiced them, as the Florida East Coast Railway showed to the Court below and, as I hope to show to this Court, then, I think, they would be entitled to that hearing.

Q You say that the delay factor there ought not to prevail over their claims --

MR. LAYNE: Certainly not. And this Court's repeatedly said it shouldn't.

Q Would that kind of participation be limited to the people who are involved in this case or all the affected railroads?

MR. LAYNE: Well, I should think, when we started out with this case, it would have been limited to people in this case.

But, to be frank with you, Mr. Chief Justice, the Interstate Commerce Commission has had a petition pending before it since July 17, 1972, by a number of railroads, including among them the largest creditor railroad. The largest one to receive incentive per diem, asking the Commission to reopen this because of the failure of incentive per diem.

Now, I don't know what they will do with that.

Q Is there any chance that the problem would be solved by the time the hearings were over?

MR. LAYNE: There is no shortage, sir.

A committee of Congress in September 6, 1972, reported that there was no such thing as a shortage.

There is a great deal of mythology, as well as methodology, about this.

I think, and a number of railroads have testified since that time, that there is now no shortage of boxcars.

As a matter of fact, there is a surplus of boxcars. Not because they were purchased. Boxcars have continued to decline.

Q Does the ICC agree with you?

MR. LAYNE: I don't know whether they do or not. They

haven't taken any action on the materials that have been filed with them.

As I said, they were filed in July, 1972, asking them, because there was no shortage, to reopen the proceeding, to change the incentive per diem, to eliminate it, or at least modify it, and no action has been taken.

I can't tell whether they agree or disagree.

Q But, I take it, implicit in your position, that you have just taken, is that absent the shortage, surely these rules are invalid.

MR. LAYNE: Certainly.

But I thought that I would be able to prove before the Commission some of the things that I held were essential to their taking action in the first place, if they had given me an opportunity to do so. Let me talk for a moment.

Let me just conclude our argument on this question of what we are entitled to by way of a hearing, and say that we think the statute itself sets up standards and requires findings, and that statute prohibits, for example, the Interstate Commerce Commission from making an incentive per diem applicable to any type of car the supply of which is adequate.

Now, surely, it was open to me to demonstrate that under any measure of adequacy that there was an adequate supply of the plain boxcars to which the Commission referred and

to which it made incentive per diem applicable.

And that's what I attempted to do.

Now, we say that the statute requiring these considerations clearly indicates that the Commission must make findings and that those findings are quasi-judicial in their scope and character.

We also say that this is supported not only by the statute but,by the legislative history of this section of the statute, it is supported by the Commission's own determinations.

This proceeding was not started without reference to 5(56) and 5(57). The Commission said that it was complying with Sections 5(56) and 5(57) when it initiated the proceedings.

It initiated them under those sections and it purported to decide them in compliance with those sections of the Administrative Procedure Act.

It is only for the first time in this Court that it is claimed that 5(56) and 5(57) and the hearing requirements of those sections do not apply to this proceeding.

Now, let me turn for just a second to this question of what I attempted to do by way of evidence.

I attempted to subpoena Commission personnel familiar with and expert in freight car supply,allocation and movement, people whom the Commission had themselves testified in prior proceedings, the testimony of persons that had been offered as witnesses in prior proceedings on these very points.

And I offered -- and I wanted to prove with that testimony that the standard of adequacy that was applied by the Commission in this case was improper, was not right, that it was an unreasonable one, and I wanted to do it with expert testimony.

I couldn't do it with my own expert because every expert that testified that it was a railroad was referred to by the Commission as,"that is an opinion of a railroad official."

You will see it in their report.

I wanted to present the testimony of a nonrailroad official with nationwide experience with respect to this matter. Not Florida East Coast.

Q You mean you wanted to find out from him what his interpretation of the word "adequate" was?

MR. LAYNE: No. I wanted to ask him what an adequate supply would be and whether a railroad could respond to a request for a -- whether in his expert judgment, a supply could be termed adequate, whether you could measure the adequacy of a supply by saying you must report that car, you must place that car on the day it is ordered, which is the standard that the Commission applied in this case.

I also wanted to have that person testify, those people testify, that if you apply a standard, that you should furnish the car on demand on the day it was requested, that such a supply of plain boxcars would be so great -- mind you,

this is at all stations, all locations, throughout the United States, this kind of a standard would apply.

The supply would be so great that you would have so many boxcars, you would have so many cars that the traffic wouldn't move on the railroad. You couldn't get an engine on a railroad.

Q Isn't the problem largely one of having the right kind of cars at the right place when they are needed, not necessarily what the total picture is?

MR. LAYNE: Of course, obviously. And this is what I was trying to prove, and what I was trying to reach and get at in proving.

Now, the next thing -- I expected, threfore, to present expert testimony. It was not available to me.

Q Why couldn't you use your own experts?

MR. LAYNE: Because I had no such expert with nation-wide experience.

And the expert outside the railroad industry that would know about this was precisely the same people that the Commission had had testify on these same points in prior proceedings, and I had every reason to know how they would testify because I had copies of their testimony, or at least I had indications of their testimony.

Now, they had presented their own experts on this same point, as long ago as 1947, to give these very self-same

kinds of opinion evidence to support their action.

I didn't have any wide term of that.

My 15 minutes has expired.

Thank you.

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

Mr. Hollander.

ORAL ARGUMENT OF RICHARD A. HOLLANDER, ESQ.,

ON BEHALF OF THE APPELLEES

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

The Seaboard Coast Line raised three questions before the Jacksonville Court.

We said, first, that there was a lack of a proper hearing, and Mr. Layne has covered that subject.

I simply want to say that I agree with points which he raised.

We also charged, in the Court below, that the ICC had failed to comply with the requirements of 1(14)(a), and then we said that the Commission's conclusions lack sufficient evidentiary support.

The Court below found for us, as you know, on the hearing issue, and for that reason said that it would not, and in fact it did not discuss the other contentions.

In its reply brief, the Government has said that these other issues are not substantial, and, of course, we disagree

with that.

Mr. Huntington, in his argument today treated lightly, if at all, with the other issues. He should not, I submit, because he is asking you to overturn the lower Court's decision and to reinstate the decision of the ICC.

Now, Section 1(14)(a), as certainly you know by now, is three sentences in length. The first one, the one you dealt with in Allegheny-Ludlum, is from the 1917 Esch Car Service Act.

We are talking about the other two sentences that were the result of Public Law 89-430. And those sentences tell the Commission what factors they must consider in determining the payment of compensation.

Q Was the 2nd Circuit case -- was Judge Friendly -- was that a three-judge court, too?

MR. HOLLANDER: Yes, it was, Your Honor.

Q Was Judge Friendly's opinion in conflict with the Florida court?

MR. HOLLANDER: It was not, Your Honor.

The only --

Q Well, was it in conflict only on the record question?

MR. HOLLANDER: It was not, Your Honor, because of this reason.

I was going to join Long Island in that proceeding, had my papers all ready when the attorney for the Long Island

called me and told me that he had stipulated with the Government to a single very limited issue, that is, whether in the Long Island circumstances they were entitled to a hearing.

And I was not willing to go to the District Court before Judge Friendly --

Q Did Judge Friendly decide the on-the-record question or not?

MR. HOLLANDER: He decided very definitely that 5(56) and 5(57) govern.

Q But you don't think that was in conflict with Allegheny-Ludlum because it deals with different sections of the Act?

MR. HOLLANDER: For the reasons stated by Mr. Layne, that's correct, yes.

I am, of course, now talking about these other points, and I say that the Court below had it reached those points, which it did not, would have found in our favor.

I am pretty confident about that because I use as a starting point the Commission's own 1967 incentive per diem decision, the one that Mr. Huntington mentioned to you a few moments ago. The decision which led up to the one which is involved here.

That 1967 decision, itself, demonstrates in the Commission's own words that what it did here was arbitrary and was not rationally supported, and, of course, Section 706 of

the Administrative Procedure Act, says that a reviewing Court ought to hold such a decision unlawful.

The 1967 decision, which is in 332 ICC, listed a number of specific factors which the Commission felt it had to consider in deciding upon incentive per diem compensation, and which weren't considered here. And it concluded in that proceeding, after extensive hearings, and, incidentally, including oral hearings in which ICC personnel were examined, that incentive per diem would not improve operating practices, nor would it lead to more efficient use of cars, nor would the building of more cars be generated.

That's what the Commission said.

Without considering those factors which it said in 1967 it had to look into and which I submit 1(14)(a) says it must look into, it decided here, in the case now before Your Honors, that it wouldn't examine into those factors, and it did a complete about face and prescribed incentive per diem.

Now, insofar as car ownership is concerned, my railroad, my company, is a creditor road. It bought and built boxcars as the ICC directed to meet the needs of shippers on its lines.

Particularly prejudicial to us, then, was the Commission's decision that sometime in its entire consideration of the proceeding, and without in any way warning us in the convening notices that it would confine incentive per diem to

plain boxcars, to standard boxcars.

This was done after concluding in the 1967 decision that for much transportation the standard boxcar has been replaced, that equipped boxcars frequently are used for the same purpose as standard boxcars, and, after telling us in such decisions as the one you reviewed in Allegheny-Ludlum that any failure on our part to acquire cars to meet the needs of shippers on our lines would be unconscionable, to use their word.

Again, we did tailor our car fleet, but in equipping boxcars, they no longer could be designated plain boxcars, and they don't, therefore, qualify for incentive. So in the netting out of incentive per diem, we will be called upon to pay over to other railroads, one of them our major competitor, large amounts of money, and, of course, our overall freight car program, which we think has been pretty good, is going to suffer.

Q You had 90 days, didn't you, after receiving the interim report, in which to make objection on the grounds of the inadequacy of the originating notice, if you wanted to.

MR. HOLLANDER: Let me say several things. First of all, it was 60 days. We did respond. We did object on grounds which I have just been stating, and, furthermore, I would like to submit the proposition to this Court that what I received in the interim decision was a fixed anticipatory judgment and I

don't think it was ever meant to yield to any facts that we might submit later on.

We started studies in order to try to dispute some of the things that the Commission had raised. We asked for more time to do it and the Commission wouldn't give it to us.

Within two months time, it had come out with its final report, which was the same in all practical respects as its interim report.

Now, Section 1(14)(a), tells the Commission again that it must consider all factors affecting the national freight car supply. It didn't do that; as again I said in its 1967 decision, it told us it had to.

And if the Court below had gotten to that question, which it did not, I am confident that it would have sustained our position.

Now, you heard Mr. Huntington a few moments back say that what the Commission did was an experiment. That's not his word, that's the Commission's word. They said what it was doing here was an experiment.

In experimenting, it is going to take millions of our dollars, not as a penalty for doing something wrong, but simply to give to other carriers for reasons over which we have no control.

And I submit to Your Honors that there is no law that permits the ICC to do that, particularly in the absence of

due process.

Q Mr. Hollander, as a matter at least of theoretical operation, you are not required to use any other carrier's freight cars, and you are not required, are you, to lend your freight cars to anyone else?

MR. HOLLANDER: Let me say, Your Honor, that we are required to use other railroads' boxcars.

You see, we originate freight on our line. We use the cars which we have bought to meet the needs of our shippers. They go out and they head west, for example, and when we turn those cars over to our connecting lines, going west, they must take those cars.

Similarly, on cars coming east, south, onto our line, we must take them.

We may not have any need for them, but we must take them with the load. We must deliver the load, but immediately upon the taking of those cars, at our junction, we are at once charged with incentive per diem, which, as you know, is something over and above the regular per diem. This is a penalty against us for no wrong which we have done, except to follow the Interstate Commerce Commission's directive to acquire cars to meet the needs of the shippers on our line.

Now, of course, what the Commission is asking us to do now is don't do that. Forget the idea of buying equipped boxcars. Apply your revenues to the purchase of plain

boxcars which somebody else needs.

Let me take a moment to say, too, in arguing that there is no support for the Commission's conclusion, or little support. There is no support at all, not one bit, in the record, that the use and movement of cars would improve as a result of incentive per diem.

And the Commission never even bothered to look into the question of how the weak debtor railroads were going to be able to afford the additional investment for cars which the ICC concluded in its decision would be acquired by them because of this incentive per diem rule.

Now, Mr. Huntington, in answering your question, Mr. Justice Blackmun, spoke of 2½ years of experience now before the Commission in this incentive per diem experiment, and he mentioned, and so did Mr. Layne, there are pending petitions before the Commission.

The first one was filed in July. Not a word has been heard from the ICC. There have been a great many filed since then.

Over 20 railroad, including the Penn Central, in fact, have asked the ICC to abandon this incentive per diem concept because of the fact that it simply isn't working.

In fact, the Government itself -- I have in front of me the Government petition, the petition of the Department of Agriculture, which says that the national fleet of boxcars is

still shrinking, and it says that the Commission ought to reopen this proceeding to see if, in fact, there is a plain boxcar shortage.

Q Mr. Hollander, lead me on a little further. Both you and Mr. Layne have spoken of this petition to reopen having been pending since July. Now, that's four and a half months ago --

MR. HOLLANDER: There have been a series since July up until September.

Q Well, is that a long period in ICC experience? Or is it a very short one? Take me on.

MR. HOLLANDER: If there is a critical shortage of boxcars, I would say they should have acted immediately upon some suspicion that this experiment is not working.

It is more than two or three months, Your Honor. It is two or three years now. They have the same figures that we have that show that there has been a constant decrease in the number of plain boxcars in the railroad's fleet, a constant decrease after incentive per diem went into effect.

There are 45,000 less plain boxcars in the fleet today than there were when incentive per diem went into effect. And this has been a steady decline. This was known to the Commission in the first year after it put this experiment into order, into work. And, the Commission itself, in its order, said that it was going to take a look and if it didn't work then

it would reopen it and take another look at it.

And it has been 2½ years and the Commission simply has not done that.

My time is almost up and I want to point out to this Court what it has said in a number of cases, most recently, to my knowledge, in the B&O case in 393 US, which involved the division of revenues, that it is not going to be led off by a haze of so-called expertise, to use your word.

And you were not, you said, going to bridge the gap by blind reliance on expertise. And that is precisely what you are being asked to do here.

And it will not do for the Commission to come to you, as it has done in its jurisdictional statement, and tell you that it was moved to a decision by an impatient Congress, a Congress which told the Commission that it had enough facts in its record to go ahead and make a decision.

I submit that the Commission must, in fact, have that necessary information, and it did not here.

Thank you very much for your attention.

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

REBUTTAL ARGUMENT OF SAMUEL HUNTINGTON, ESQ.,

ON BEHALF OF THE APPELLANT

MR. HUNTINGTON: I would first like to correct one statement I made in response to a question by Mr. Justice

Rehnquist.

The Commission does not concede that the method of reporting orders on its study was deficient.

And this point is addressed in a response to an inquiry by the railroads while the freight car -- while the study was being done.

And that response is found at pages 189 to 190 of the Appendix, and I will simply refer the Court to that.

On the existence of the shortage and on most of Mr. Holander's points about whether the Commission did, in fact, comply with the standards of Section 1(14)(a), I refer the Court to the interim report and, specifically, to pages 66a to 70a of the jurisdictional statement appendix. That's the critical part of the interim report, and it is in Appendix A, and there the Court analyzes in considerable detail and shows exactly the steps it goes through in concluding that there is a shortage and that the rule should be adopted to combat that shortage.

To the extent, of course, that there is further evidence that now maybe the shortage isn't as bad, or maybe it is worse, of course, that can be submitted to the Commission now.

I would also like to point out that the -- in addition to these petitions which are now pending, the American Association of Railroads did petition for modification of the

rule some time ago, asking that the funds collected from the incentive per diem charges be available for leasing cars in addition to purchasing new cars. And the Commission now has that and will probably come out with a decision in the not too distant future.

Finally, in response to a point Mr. Justice White made, the Allegheny-Ludlum case, and this case involved precisely the same section of the Interstate Commerce Act, and the same hearing requirement, it is the third and fourth word in the Section 1(14)(a), and, therefore, we say that the requirement should not be different in one proceeding than it is in this proceeding.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:45 o'clock, p.m., the oral arguments in the above-entitled case were concluded.)