In the

Supreme Court of the United States

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Appellants,

v. No. 72-214

THE WICHITA BOARD OF TRADE, ET AL.,

AND

INTERSTATE COMMERCE COMMISSION,

Appellant

v. No. 72-433

WICHITA BOARD OF TRADE,

Appellee.

Washington, D. C.
February 28, 1973

Pages 1 thru 55

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., Appellants v. THE WICHITA BOARD OF TRADE, ET AL., Appellees, and INTERSTATE COMMERCE COMMISSION, Appellant v. WICHITA BOARD OF TRADE, Appellee.	No. 72-214 No. 72-433

Washington, D. C.
Wednesday, February 28, 1973

The above-entitled matter came on for argument at 10:43 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
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

EARL E. POLLOCK, 69 W. Washington, Chicago, Illinois, for the Appellants Atchison, Topeka & Santa Fe Railway Company, et al.

MRS. BETTY JO CHRISTIAN, Associate General Counsel, Interstate Commerce Commission, Washington, D. C. 20423, for the United States and the Interstate Commerce Commission,

DANIEL J. SWEENEY, 20 North Wacker Drive, Chicago, Illinois 60606, for the Appellees Wichita Board of Trade, et al.

WILLIAM A. IMHOF, Office of General Counsel, Department of Agriculture, Washington, D. C., for the Secretary of Agriculture.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 72-214, The Atchison, Topeka and Santa Fe Railway against Wichita Board of Trade; and No. 72-433, Interstate Commerce Commission against Wichita Board of Trade.

Mr. Pollock, you may proceed.

ORAL ARGUMENT OF EARL E. POLLOCK ON BEHALF OF APPELLANTS THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.

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

Within the past year this is the third case to have come before the Court arising out of efforts to relieve the critical shortage of freight cars on the nation's railroads.

The other two cases, Allegheny-Ludlum and Florida East Coast involved rules and rates intended to discourage delay in returning cars.

This case involves railroad charges intended to discourage the in-transit inspection of grain and in that way reduce the wasteful use of cars.

The new tariffs were published by the railroad almost exactly three years ago to become effective on March 28, 1970. But before the effective date the Interstate Commerce Commission, acting under Section 15(7) of the Act

suspended charges for the maximum 7-month period provided by the statute. The suspension was voluntarily extended by the affected railroads for an additional 6 months. The charges were finally put into effect in May 1971. After extensive hearings, the Commission found that the charges were just and reasonable and also found that the charges would make a substantial contribution to the improvement of the national freight car supply.

The District Court, the court below, set aside the Commission's order. In addition, without any request by the plaintiffs to grant such relief, without any discussion of its authority to grant such relief, without any finding of irreparable injury, and indeed without any injunction findings whatsoever, the District Court suspended the charges which had then been in effect for over a year.

Thereafter, this Court entered an order which stayed the judgment below and which permitted the rates to go back into effect.

Mr. co-counsel, Mrs. Christian, Associate General Counsel of the Commission, will present the position of the appellants and the United States on the District Court's suspension of the charges, while my argument will deal with the District Court's decision on the merits of the Commission's order.

These tariffs impose charges for interrupting grain

shipments for the purpose of in-transit inspection. This service involves stopping a car loaded with grain while it is already en route, switching the car to a separate track at a few locations in the country where the car is held for sampling and grading of the contents, waiting for disposition orders from shipper or his consignee after he receives the results of the inspection, and then eventually switching the car back into the regular line haul movement.

The car delay resulting from this practice amounts on the average to more than three days for each and every inspection. Now, this delay can readily be avoided by having the inspection, if an inspection is desired, made either at the point of origin or at the point of destination, after delivery, or by omitting the inspection altogether as is frequently done.

Historically, the nation's railroads have made separate charges for providing in-transit inspection service. But in the Western District, unlike the East, which has been doing this since 1963, these charges previously applied, although with a number of very substantial exceptions only to the second and subsequent inspections on any one grain shipment. The first inspection, in other words, was in the Western District provided without additional charge.

This extraordinary practice grew out of a legal requirement which no longer exists. Until five years ago the

inspection of interstate grain shipment was required by Federal law. But in 1968, Congress repealed this requirement. At the same time Congress authorized inspection on the basis of so-called submitted samples. The result of these changes in the law is that under the law at present, any shipping point in the country can also be an inspection point.

QUESTION: Under this inspection requirement, did the inspection have to take place while the grain was in transit?

MR. POLLOCK: No, Mr. Justice Stewart, it did not have to be done while it was in transit. But as the Commission pointed out, because of prior practice and because of convenience, the practice of in-transit inspection of grain continued.

QUESTION: But it wasn't a requirement.

MR. POLLOCK: It was not required. And in fact, one of the principal reasons for the Commission's decision in this case is to stimulate the grain trade so as to depart from this practice in the light of the Commission's findings that in-transit inspection is by no means essential.

QUESTION: But it wasn't essential, as you just told me under the old law.

MR. POLLOCK: That's right. It could have been done the other way, but it was not.

The Court below found with respect to this 1968

repeal that the primary purpose of the Congress was to effect an increased utilization of rail cars. Nevertheless, in-transit inspections continued in very large numbers, even after the repeal, amounting,in 1969,to over, or almost a half-million inspections in just the Western District alone.

Now, faced with this situation and an increasingly critical car shortage, the Western railroads responded by publishing the tariffs which are challenged in this case. These tariffs impose essentially the same charge for the first in-transit inspection that previously applied to the second and subsequent inspections. The tariffs, of course, apply only to grain shipments which are inspected while in transit. There is no charge if the shipment is inspected at origin or at destination after delivery, or if inspection is avoided altogether.

Before the Commission, the railroads even expressed the hope that they would not have to collect one single cent of these charges, because the purpose was to avoid the inspection and not to raise revenue.

The Commission summarized its decision upholding the charges in four chief findings. First of all, the Commission found that because of the repeal in 1968 and because of other evidence of record, in-transit inspection is no longer essential to the orderly marketing of grain.

The Commission found and said that this service

was entirely optional with shippers and with consignees and that the basic responsibility of the railroads with respect to transportation does not require them to provide this service.

QUESTION: Did the basic impetus, Mr. Pollock, for these inspections come from the consignee or the shipper?

MR. POLLOCK: Primarily the consignee, and indeed primarily from the grain exchanges which are the principal plaintiffs in this case. Indeed, there is a considerable economic advantage to these grain exchanges by virtue of the in-transit inspection of grain since if the shipment is made to a particular point for the in-transit inspection at that point, the grain merchants in that particular area have in effect a captive market with respect to that grain shipment. The grain being there, it then becomes exceedingly difficult for reconsignment of that grain to a distant market or to a market which would require a backhaul on the transportation. And indeed, it is this kind of dislocation, particularly among the grain dealers and the grain exchanges which has brought forth principal opposition to these charges.

In other words, the Commission found that this service was purely an accessorial service, it was a special service and it was quite unlike a service, for example, that was needed for delivery of the goods.

Second, the Commission sustained the reasonableness of the combination of the line haul rate and these inspection

charges. The Commission pointed out that under the tariffs, the aggregate charges could never exceed the maximum reasonable level determined by the Commission. And the Commission reaffirmed the vitality of the maximum level, pointing out that there was probably no segment of the country's railroad freight structure that had been reviewed more frequently and intimately than the one that has application to the movement of grain.

Third, the Commission found that the inspection charges themselves are just and reasonable because they were less than the cost of the service to the railroads.

And, fourth, the Commission found that the charges would materially increase car utilization and that the elimination of in-transit inspection of grain would increase the number of available freight cars by several thousand annually.

The Commission retained jurisdiction to determine whether any funds derived from these charges should be used to upgrade the railroad freight car fleets, and for this purpose the Commission ordered the railroads to file periodic reports showing just what was the actual operation of these charges. These reports dramatically confirmed the effectiveness of these charges in reducing the volume of in-transit inspections. They also served to demonstrate, as the Commission found, the purely optional elective nature of the

in-transit inspection service. The reports show that the frequency of such inspections before the charges became effective was nearly two and a half times higher than the frequency afterwards. Stated otherwise, there has already been in the short time that these charges have been in effect, a 60 percent reduction, and the frequency continues to decline because of the economic incentive which these charges provide.

The most recent report shows that there was only about one in-transit inspection for every five grain shipments.

The Commission's findings were sustained by the District Court, supported by substantial evidence. But the court set aside the Commission's order on the sole ground that the Commission did not adequately explain what the court viewed as a departure from an allegedly long-established Commission doctrine.

The court based this conclusion not on the Commission's findings, but instead on an expressly secondary reason cited by the Commission for distinguishing a 1969 decision by the Commission. Entirely on this very slim reed, just four sentences taken out of a 43-page report, four sentences constituting little more than a dictum, the court below held that the Commission had adopted what the court called an evidentiary rule which is discriminatory per se and that the Commission had thereby departed from its prior decisions which require consideration of the reasonableness

of the aggregate charges in these service cases.

QUESTION: What did it say about the Arrow case?

MR. POLLOCK: It said absolutely nothing, your Honor. There was not one word in the court's decision concerning Arrow or its authority to grant that relief. The only thing that appears in the opinion is that in the very last sentence of the opinion, Mr. Justice Douglas, after the court sets aside the order, it adds a sentence saying that the charges are suspended until further notice and permission of this court. There is no reference at all to this very important Arrow issue which my colleague, Mrs. Christian, will be dealing with in greater detail.

QUESTION: What if the District Court had held the findings of the Commission were not supported by substantial evidence and set them aside? Then could it have enjoined the rates under Arrow or not?

MR. POLLOCK: No, your Honor, because all that we would have in that case would be a situation where the Commission had intervened with respect to carrier-made rates and the entire 7-month period of suspension had expired.

QUESTION: You say that the only thing that would suspend the rates once the 7 months has expired is a finding by the Commission that they were unjust and unreasonable.

MR. POLLOCK: That's right. That's what the --

QUESTION: What happens when a court sets aside a

Commission's findings that they are just and reasonable, and a court sets them aside? What happens to the rates? Can the Commission just sit there and leave the rates in --

MR. POLLOCK: The matter would then go back to the Commission for consideration of the alleged error pointed out by the District Court.

QUESTION: But until and unless they find the rates unjust and unreasonable, the rates stay into effect?

MR. POLLOCK: That's right.

QUESTION: The court and the Commission can just bat the ball back and forth forever.

MR. POLLOCK: No, it isn't quite like that, your Honor. As was pointed out in the Arrow decision itself, as Mrs. Christian will deal with in greater detail --

QUESTION Oh, I'm sorry. I didn't --

MR. POLLOCK: No, that's quite all right, your Honor. I would like to answer that immediately. That is that Congress provided two very specific remedies for that situation. It dealt with that situation. It provided, number one, a reparations remedy by which any unjust charges can be collected. And, second, it authorized the Commission to institute an accounting and refund order whereby --

QUESTION: Why would the Commission ever do it if it didn't agree with the court?

MR. POLLOCK: It would be again within the matter of

the discretion of the Commission to grant such relief, your Honor, while it is considering whether the court's order is appropriate.

QUESTION: Yes, but it couldn't enjoin the rates, could it, after --

MR. POLLOCK: It could set aside the rates.

QUESTION: It could set them aside, but it couldn't do that except upon the finding they were just and reasonable.

MR. POLLOCK: That's right. That's right. But that's exactly the structure that was set up and the delicate balance which was established by Congress. And I am sure Mrs. Christian will spell that out even more thoroughly.

I find that my time is up, and I am sure that Mrs. Christian will deal further with that issue.

MR. CHIEF JUSTICE BURGER: Mrs. Christian.

ORAL ARGUMENT OF MRS. BETTY JO CHRISTIAN ON BEHALF OF THE APPELLANT INTERSTATE COMMERCE COMMISSION

MRS. CHRISTIAN: Mr. Chief Justice, and may it please the Court:

As Mr. Pollock has stated, my arguments this morning will be devoted to the second issue presented by this case, that is, even assuming that the District Court correctly reversed the Commission's decision on the merits and remanded the case to the Commission for further proceedings, did it

nevertheless act beyond the scope of its powers in ordering that the rates themselves be suspended unless and until otherwise ordered by the court?

On this issue, I am speaking on behalf of both the United States and the Commission. It is our position that the order of the court was beyond the scope of its powers.

Mr. Pollock has already stated the facts related to the suspension issue, and I will not repeat them in any detail. Briefly, these rates went into effect on May 4, 1971, and they remained in effect until the Commission had issued its original decision and during the entire pendency of this judicial review proceeding. It was over a year later in May of 1972 that the District Court issued its opinion reversing the Commission's decision and setting aside the rates. It is this portion of the order that we believe is beyond the scope of the court's power.

Resolution of this issue turns on Section 15(7) of the Interstate Commerce Act as interpreted by this Court in 1963 in Arrow Transportation Company against Southern Railway. Under Section 15, the right to initiate changes in their rates is essentially a matter for the managerial discretion of the carriers. The Commission is empowered to declare the rates unlawful only after full investigation. The only other limit upon the carriers' right to initiate changes in their rates is the provision of Section 15(7) which authorizes the

Commission in its discretion to suspend the rate for a maximum period of 7 months. The statute explicitly provides that if the proceeding has not been completed at the end of the 7-month period, the rates "shall go into effect."

In the Arrow case, this Court was faced with the question of whether a District Court would have jurisdiction to itself suspend or enjoin the rates after the 7-month period had expired, but before the Commission had issued its original decision in the case. This Court held that it could not do so. It stated at page 667 of its opinion that the intention of Congress in enacting Section 15(7) was to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief. The only difference between Arrow and this case is the stage at which the court has employed a judicial suspension. We do not believe that this is a sufficient difference to warrant a different result. In other words, we believe that the reasoning of Arrow applies here.

In the first place, the basic congressional policy of Section 15(7) as confirmed in Arrow is to allocate between the shippers and carriers the risks and burdens that are necessarily associated with any proposed rate change. Inevitably, a carrier proposing a change in its rates wishes to implement that proposal immediately, while the shippers on

the other hand would prefer to delay it until the lawfulness of the rate has been finally determined.

The policy of Congress as adopted in Section 15(7) was essentially a compromise. It provided that during the first 7 months the risks and the burdens on a proposed rate change should be placed entirely on the carriers. That is, if the Commission chooses to suspend, the carrier cannot implement its rate change and if the rates are ultimately found to be lawful, the carrier has no remedy, it can never recover the lost remedies or the other lost benefits of that 7-month period.

QUESTION: Mrs. Christian.

MRS. CHRISTIAN: Yes.

QUESTION: Do you attach any significance to Footnote 22 in the Arrow opinion?

MRS. CHRISTIAN: Footnote 22, your Honor, this Court pointed out that it was not reflecting in any way upon decisions recognizing a limited power of the courts to preserve the status quo pending judicial review. And added --

QUESTION: That is not this case, you say?

MRS. CHRISTIAN: That is not this case. To begin with, the order here --

QUESTION: What was on review was a final agency action.

MRS. CHRISTIAN: What was on review was a final

agency action, your Honor, but this footnote does not apply for two reasons. In the first place, it was not issued pending judicial review. It was issued at the conclusion of the review proceding pending reconsideration of the case by the agency.

Secondly, the suspension order entered here by the court did not preserve the status quo. These rates had been in effect for over a year. The effect of the court's order was to change the status quo. So the suggestion of a limited power to maintain the status quo pending judicial review simply is not this case.

We believe that the careful congressional balancing of the risks and burdens of suspension which this Court held in Arrow, Congress intended to place on the carriers for the first 7 months and upon the shippers thereafter subject to the protection of a possible accounting and refund provision of a reparations suit applies equally when the case is pending before the Commission on remand as when it was pending before the Commission in the first instance. In neither event has the lawfulness of the ratesbeen finally determined, and we believe that the congressional policy is that once the 7-month period has expired, the carriers are entitled to place their rates into effect and to keep them in effect unless and until the rates are finally adjudged unlawful. They have not --

QUESTION: I take it the courts don't have that

power, do they, to find rates unlawful?

MRS. CHRISTIAN: This is exactly the point I was coming to, Mr. Justice Stewart.

QUESTION: And until the Commission finds them unlawful, the rates stay into effect, is that it?

MRS. CHRISTIAN: That is correct, your Honor. In this case --

QUESTION: What about my question to Mr. Pollock where the Commission upholds the rates as lawful and they are in effect and the District Court finds that the judgment is not supported by substantial evidence and sets aside the Commission's findings, and let's assume the court is quite right that the Commission's findings weren't supported by substantial evidence, or for other reasons were invalid. They still stay in effect, I gather?

MRS. CHRISTIAN: Yes, your Honor. If it is solely a question of substantial evidence, it would be up to the agency as to whether to decide the case on the present record in which case they would be obliged to summarily find that the rates have not been shown just and reasonable and to order them cancelled, or to order a further hearing.

QUESTION: You think that automatically follows if the record remains the same, the Commission must then automatically enter a judgment finding them unlawful?

MRS. CHRISTIAN: I would not say automatically, your

Honor. Certainly I can conceive of a situation in which a court opinion makes it clear that under the legal standards established by the court the rates cannot possibly be justified. In that situation the Commission would have no alternative but to immediately enter an order --

QUESTION: Can a District Court order the Commission to find them unlawful unless the record is expanded?

MRS. CHRISTIAN: I think that the court could not order them to find the rates unlawful, but certainly its opinion could be written in such a way that under the court's legal standards, the Commission would have no alternative but to find them unlawful. In that situation, the Commission could simply enter an order finding in accordance with the legal standards established by the court that the rates have not been shown to be just and reasonable and ordering them cancelled. If it were strictly a question of substantial evidence which might be supplemented by further evidence, then there would be a matter for the discretion of the Commission as to whether to permit the carriers to reopen the record to offer further evidence.

QUESTION: Can the court itself enter a refund order contingent upon a finding of unlawfulness? Let's suppose that when the 7 months expire, the Commission doesn't enter any order about a refund in the event of finding of unlawfulness.

MRS. CHRISTIAN: Certainly, in connection with an appeal of the agency's final decision to court, the courts and the agency have assumed that the courts have the power to issue an accounting and refund order. As a matter of fact, this Court issued an accounting and refund requirement at the time that it granted a stay of the lower court's judgment in this case. We have always assumed that the court does have that power.

QUESTION: Even if it can't find the rates unjust and unreasonable or suspend them?

MRS. CHRISTIAN: Exactly, your Honor. Its other equitable powers to impose conditions for the protection of the shippers such as an accounting and refund provision are not affected in any way.

In addition to the congressional policy which I have mentioned that the carriers be permitted to put their rates into effect after 7 months and keep them in effect unless and until they are found unlawful, we believe the Arrow decision cited two additional policy reasons for denying the courts the power of judicial suspension which we believe are equally applicable when the case is pending before the Commission on remand as when it is pending in the first instance.

In the first place, this Court pointed out that the exercise of a judicial suspension power would interfere with the primary jurisdiction of the agency. And as I have just

pointed out in answering Mr. Justice White's question, the agency continues to have primary jurisdiction to determine the lawfulness of specific rates even though an error of law has been pointed out by the courts and the case remanded to the Commission. The actual determination of the lawfulness of the rates is still for the primary jurisdiction of the Commission, in the same nexus that this court found in Arrow between primary jurisdiction and the suspension power applies here as in the situation that existed in Arrow.

Secondly, this Court pointed out in Arrow that if the courts were permitted to suspend, the result might be different results to different shippers. This same situation could occur if the judicial suspension were permitted in connection with the remand because, as this Court is aware, any number of suits can be brought to set aside the same Commission order in District Courts all over the country. If those courts should reach different results, one sustaining and the other reversing the Commission, and if the reversing court were permitted to exercise a suspension power, then you would have this same type of different results to different shippers that this court was concerned with in Arrow.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Christian.

Mr. Sweeney.

ORAL ARGUMENT OF DANIEL J. SWEENEY, ON

BEHALF OF THE APPELLEES

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

Representing here the Wichita Board of Trade and 37 other grain industry groups which comprise in effect the farmers in the Western United States, the country grain elevator operators in that part of the country, as well as the boards of trade on which grain is bought and sold and many of the grain companies which are the people who buy and sell the grain.

First of all, this concept of inspection does not explain itself. What we mean here by inspection is a grading of the grain in order to determine the quality of the grain and the value of the grain. Grain is susceptible to moisture. It's susceptible to contamination of foreign material and kernel content and this kind of thing. So that to know that you have a carload of grain doesn't tell you anything about what its value is or whether it can be used for human food and things like that. So you have to get a grade in order to determine these things.

The practice over the years, as these gentlemen have told you, and the young lady, has been to take this grade at a market place, such as Chicago or Kansas City or Omaha. The cars come in there. The government-employed samplers go

out and they take the sample of the grain. They run it down to the Board of Trade, and it is inspected, analyzed by impartial government people and they say this carload is number two yellow corn and it has so much moisture in it, and so forth. At that point it becomes a salable commodity because we know what we have.

So the reason why the grain has been inspected in transit has not been because of the Grain Standards Act, it has been because this is the place to do it, this is where the market is, this is the condition of the grain on the day that it is sold on the market, and this is where the impartial inspection is available.

QUESTION: If it's in transit, that suggests that it was originally destined somewhere beyond this market, doesn't it?

MR. SWEENEY: No. It's shipped to the market. You go from a country elevator to the market, say, to Omaha for instructions and reconsignment. After the inspection is made, then whoever buys the grain says, "Ship it to Chicago," or something like that. You don't know who is going to buy the grain until it is inspected. That's the whole idea. In other words, when you bring it into a central grain exchange, they can bring that sample before the Board of Trade and people all over the country, all over the world can bid on that grain. And in effect the farmers gain the benefit of

this total market.

And the other way to go is for the farmer to ship his grain to Omaha to one of a handful, maybe half a dozen elevators that are located there. He is at the mercy of those people. He has to sell to them.

The other way he can go now is to ship it in there and have it inspected and pay the $17, in which case he is paying $17 extra a car for something that he has always done and which is already paid for under the line haul rate itself.

QUESTION: Are you suggesting there are no other alternatives for solving the problem?

MR. SWEENEY: Well, I think the alternative that many people have suggested is that if the railroads are really concerned about giving the shippers an incentive to eliminate the grain inspection, the thing for them to do would be to reduce their rates. In other words, let's say the rate is 20 cents from a point in Nebraska to Omaha --

QUESTION: Well, that is obviously an easy solution. The carrier has no interest in the quality of that grain, has he?

MR. SWEENEY: The carrier has no interest in the quality of grain. However, by providing a service which is of value, he is enhancing the attractiveness of the railroad service. But the point is that the carrier when they made the 20-cent rate, for example, they put into that rate 2 cents

specifically because of the costs of the grain inspection. This was stipulated in the record. If the rate was not a full service rate, if the rate did not include the grain inspection, that rate would be 18 cents. So what I am saying to you is that if they want to give them an incentive, let's do what they should do. They can't take away the service and continue to charge us the full 20 cents.

QUESTION: You agree with, I think it was Mr. Pollock's comments, that the railroads lose money on this inspection, that the inspection process costs more than the enhanced rate. Do you agree with that?

MR. SWEENEY: Well, if you are talking about the $17 car charge, the $17 approximates what it costs --

QUESTION: No, I am talking about his generalization. Do you agree with that?

MR. SWEENEY: The railroad is not losing money on grain traffic; they are making a very substantial profit. For example, somebody put some evidence in that on the whole they are making 150 percent of the direct costs.

QUESTION: No, that wasn't my question.

MR. SWEENEY: I am trying to get your question.

QUESTION: Are they losing money on the inspection process standing alone? That is, so that they would rather eliminate the whole process and from their point of view, they argue that they would be better off.

MR. SWEENEY: He hasn't said they are losing money on inspection process. What he has said is that part of the total transportation as has existed has been a portion in the middle whereby the grain has been inspected and it takes 3 days to do that. And he said they are occupying our cars for 3 days.

Now, if we can put something new into the tariff that will discourage that, eliminate it, then we can free up more cars and alleviate to some extent the grain car shortage. This is the basic proposition on which they present their case to the ICC.

QUESTION: But there is no disputa that the carrier isnot interested in this inspection business. They would just as leave get rid of it for once and for all. Is that correct?

MR. SWEENEY: I don't think that's correct, your Honor, because if they want to do that, they would have proposed and said, as of tomorrow, we will not perform any grain inspections regardless of price. They haven't done that. They have said, we will continue to perform grain inspections, but we will do it at an additional cost of $17 in addition to our rates, which already pay us once for that.

QUESTION: I understood Mr. Pollock to say that they would just as leave stop the whole business. What interest does the railroad have in having the grain inspected? What

possible interest could they have?

MR. SWEENEY: Well, they are competing with other modes of transportation. Railroads are not the only way you can move grain. And by having this grain inspection and allowing the grain to come to the market in a car, the man in the field, the farmer, he has an opportunity of bringing his grain to market and getting a price on a competitive market.

Now, the other way he can go is he can put it on a truck and he can send it to market. But if he does that, he is not going to get the same market structure. He is not going to have the advantage of nationwide buyers. He is going to get less money. For example, he could have a lower truck rate than the rail rate,and this many times happens, and he can ship by rail nevertheless at a higher price. Because when he gets to market, he is going to have the advantage of the market place.

QUESTION: So the inspection helps the carrier.

MR. SWEENEY: The inspection helps the carrier to get grain on his railroad instead of having that grain go down the river on a barge, instead of going by truck.

QUESTION: If on the other hand he is willing to give up that great asset, you object to it?

MR. SWEENEY: Yes, your Honor, we object to it for two reasons:

First of all, he is destroying the marketing structure which we have built up over 50 years. He is putting a lot of people out of business that are involved in this thing.

The second thing that he is doing is he is saying to us, "I am going to take the service away from you as I continue to charge you a rate which includes a specific cost for that service. We would have a much different case if they were here saying, "We took our rates and we took 2 cents off. We've published separate rates."

Now this is what has happened in the past. That is why this case is such a crossroads. In the past where the railroads wanted to put rates in without inspection, they have reduced their rate, they have said, "We will drop from 20 cents to 18 cents, we will now give you an 18 cent rate which you can use without the inspection. We will give you an incentive." And this is what has happened.

Now all of a sudden they have switched into this new position. They want to take away the grain inspection and they want to keep the higher rates which compensate them for it. They can't have it both ways. If they want to go down this other road, if they want to come back next week, they can publish a new tariff and say, "Every rate in the West shall be 2 cents lower whenever grain inspection is waived." This is the way that they could have gone. They

could have avoided all these problems. They could have solved the car supply problem that they have been talking about to the extent that they want. But they didn't want to do that. They wanted to add a charge so that the man who takes the grain inspection has to pay for it once in the rate and secondly with the $17. And the man who is prevented from doing it because he says, "I don't want to add another $17," he still pays the old rate which included the compensation.

So the people that are using the inspection are being deprived because they are paying double. The people who don't use the inspection are being deprived of a service that they are paying for right now, today.

QUESTION: Do you figure it's tantamount to an increase in the line haul rate?

MR. SWEENEY: It certainly is, your Honor. It's increasing the total charges and in effect it's increasing the line haul rate indirectly by reducing the service. You still pay the same price, but you get less service for it.

QUESTION: It's an increase in the total rate which the carrier doesn't want. It isn't very often carriers don't want increases.

MR. SWEENEY: Well, your Honor, as we figure it, they have collected between $4 and $5 million a year on this, so they have been getting money on this.

QUESTION: I am just relying on what they represent

in the argument.

MR. SWEENEY: I think if they are really sincere and all they wanted to do was get this goal of helping the car supply, they would come out with a very straightforward proposition. They would say, "We are going to knock two cents off every rate as of tomorrow,if you don't take your inspection, you are going to save 2 cents." This is what I can an incentive. What they have been calling an incentive is actually a penalty. They are saying, "You are already paying for it once, tomorrow you are going to pay for it twice." We can't go along with that.

Unfortunately, the Interstate Commerce Commission did.

Now, we get to the question of why are the Interstate Commerce Commission decisions reviewed at all by courts? The reason is because Congress put statutes, and they said, "You can interpret these statutes, and you can apply them to the facts, but you can't do it arbitrarily." And that's exactly what we have here. We have an arbitrary decision. We have a decision where the Commission was overwhelmed with all this evidence and repetitive testimony, all this legislative history from the Grain Standards Act about how important car supply is and how this thing is going to help car supply.

So the Commissioners are sitting there and they have got letters in their files, they have got complaints, they have

got people criticizing them in the newspapers about the car supply. And really the problem is that the railroads just don't buy enough cars to replace the old ones. In the last 15 years, they have dropped 300,000 boxcars. They used to have over 600,000. Now they have got 300,000 plus. So when they talk about a saving here of 3,000 cars a year or 6,000 cars a year, this is not the solution to the car shortage problem. It's a small step in that direction, but it's not the great solution that was presented.

So the Commission looked at it and they said, "This is a car supply case. We are going to approve this thing." And at that point they said, "We are not going to file the statute. We are not going to look at this pile of evidence over here. We at the Commission know well enough what is good for the public, what is good for the railroads' car supply. We don't have to look at the statute."

Then we have to look to the merits of the decision with this background because this is really the background on which the Commission decided the case. When the Commission came here, in their jurisdictional statement, they specifically said to this Court that they were not going to ask the Court to review the merits of their decision. Apparently at that time when they first came here, they were convinced that they couldn't defend their decision.

Now, in the last few months something has happened.

They filed a brief and they are now trying to defend themselves on the merits. I am not going to question their right to do that, but I think it does show a little bit that there was a certain lack of confidence in their own decision.

What do you have to prove in a case like this? You have to prove that the changes in the rates and charges are just and reasonable. This is Section 15(7) of the Interstate Commerce Act.

Now, one bothersome thing when you have concepts of just and reasonable, it's somewhat vague. And what is a just and reasonable rate? Well, in this particular case, in this particular Act, Congress put in specific standards that the Commission shall consider and determine what is a just and reasonable rate. The standards are in 15a(2) of the Interstate Commerce Act. One thing is that they must show that the rates are at the lowest cost consistent with the total service. And the other thing is they have to show the effect on the movement of the traffic, whether or not the traffic would be diverted.

So the Commission then had to come to grips with the situation. More specifically, within 3 months before these tariffs were published, the District Court in Ohio had affirmed a decision of the ICC in a transit charges case which was the same kind of situation. The Southern railroads decided that we have been providing transit on cotton for a long time at the

line haul rate. We will now add a charge of something like $50 a car for it. That case went before the ICC, and the ICC decided, one, you have got to present costs for the through movement, show us how much it costs to handle this traffic, how much your cost is for the transit, and give us your total revenue and your total cost. Otherwise, we can't determine the overall reasonableness of your proposal.

The other thing they said is that there would be a likelihood that you are going to lose a lot of traffic to trucks if you raise your rate like this.

That case went to the District Court in Ohio and it was affirmed by the District Court, and then went to this Court and was affirmed.

So here we are starting out and we are going to trial in this case and the railroads have got to prove these things. Yet they put in no evidence whatsoever on these issues. And this is how the case comes to the Commission and they are sitting, trying to write a report which is going to find these rates just and reasonable when the railroads have put no evidence in on two issues that are spelled out by Section 15a(2).

Well, they had quite a job on their hands, trying to do that. Here is how they went about it. They said, "Well, we don't have to follow the principles of the Southern Transit case," which incidentally are the statutory principles.

They said, "This case is different from the Southern Transit case where we said you have to have total costs of the total movement and show us how much money you are making on this traffic before we are going to let you tack a charge on top ofit." So they said, "Well, in this case we have got thousands of rates and a wide area. And where we have a big job on our hands like this, it's just too much to ask the railroads to come in with costs. They shouldn't have to do that."

Well, of course the Southern Transit case involved rates throughout the South and involved all the railroads and involved thousands of rates. So this distinction was, I would say, specious at this point.

I don't know how strongly these people are defending that in this case. They talk about it as a dicta. They walk away,virtually a dictum. This Court many years ago in the Aluminum Divisions? case said that there are means of meeting it when you have got thousands of rates involved, present typical evidence, and then with some kind of a sample show us representative rates and that's good enough. And this is how the business of the Commission is carried on. Every day over there we have got cases involving thousands of rates. Nobody throws up their hands and says, "There are thousands of rates, so don't put any evidence in." That's not true at all. Where you have got thousands of rates, the justification and necessity for putting in these costs required by the statute is even

greater because there are more people affected by a case like this. They could have broken this case into 50 different cases, let each railroad try their own case. There would be that much less rates in each one. But because they all come together and all simultaneously tried to put this thing across, it doesn't take them out of the statute and relieve them of the statutory burden of proof.

The other way the Commission went on this point is they said, "Well, we find that we back in 1934 issued a decision on grain rates and in that case we looked very closely and we decided what a reasonable level of rate would be. Now, if we take those rates and add to it every single general increase we have had the last 40 years, we would find that that total rate is still higher than what the shippers would get here if they add the $17 on top of the rates that they are paying today."

Now, what had happened is that the 1934 rates had become obsolete. They no longer moved the grain traffic today. If these were the only rates that we had in the tariffs, the grain traffic wouldn't move by rail at all. It would either be uneconomic or the barges and the trucks would get it all. There is no question about that. These rates are as high as the sky.

So the Commission said, "Well, we've got that, and as long as the railroads haven't exceeded those rates, which

their principal witness said are paper rates that don't move any traffic, as long as they don't exceed those rates, we find that this is all right."

QUESTION: But that at least amounts to a finding by the Commission, whether supported or otherwise, doesn't it, that even treating this as an increase in the line haul rate, it's justified.

MR. SWEENEY: I would treat that as a conclusion, rather than a finding. The findings that are required under Section 15a(2), the Commission shall consider the relationship between the costs and the revenue. Now, instead of doing what they are supposed to do under 15a(2), they went off into the wild blue yonder, and they say, "Well, we will consider the fact that these rates are not higher than the 1934 rates plus 150 percent over the last 40 years." They did not do what the statute said.

We don't deny that they have the right to throw this kind of language into a report and say, well, these rates areno higher than the 1934 rates plus 150 percent. But that doesn't excuse them in any way from fulfilling their function under 15a(2) which says, "You shall consider the costs and the revenues." They have to consider the costs and the revenues today. This is what it's all about. What's happening today? How much is it costing to handle the traffic today? They can't just simply say, "We've got res judicata, we have a rate that

was decided 40 years ago." There is no res judicata in administrative law in Commission cases. They have got to come and they have got to get evidence. They have to decide it on the facts. They have to know how much profit are the railroads making on these rates today? Can they afford to reduce the rate and give them a reduced scale of rates instead of adding something on top of them, on top of rates, in many cases, which are rather high?

They tried to get off the hook. They tried to walk away from the statute by referring to an old decision.

Now, if you stay with that for a moment, let's say they prescribed a rate in 1934 of 10 cents. That rate today is, say 25 cents, it's gone up 150 percent. There was never any prescription by the Commission that a 25-cent rate is just and reasonable. In order to bridge this tremendous leap from a 10-cent rate to a 25-cent rate, the Commission said, "Well, over the years those cases have gone up in these general increase cases, and therefore every time we have a general increase case, this rate now becomes the new maximum reasonable rate."

Well, that isn't true at all. They have been taken to court after general increase cases where shippers and groups of shippers have asked the court to review and say, "Our rates are unjust and unreasonable with this 5 percent increase." The Commission and the railroads say, "That's not

involved here. The level of the rates and whether they are just and reasonable are not involved in our general increase cases. All we are looking for in general increase cases is a total piece of money. We need $50 million to get by this year. And the justness and reasonableness of the rates on grain, the rates on potatoes, the rates on automobiles are just not involved in this case." And this Court sustained a decision of a District Court on exactly that point, that you can't even get a review of the justness and reasonableness of the rates established in these general increase cases.

Now, they want to have the other side of the coin and come back here and say, "Oh, yes, these rates are just and reasonable. They were established in general increase cases as just and reasonable." Those two concepts cannot live together, there is no room for both of those things to exist side by side. If they found them just and reasonable, then they should have been reviewed. I don't see how they could find them just and reasonable if they never looked at them. All they look at in those general increase cases is the total revenue need of the railroads, they need 5 percent more money, and if they find that they do, they give it to them.

I ought to say just something on this Arrow case. We have here a special situation, and all this talk about possible refunds gives us no help at all. These people have

put in a charge which they want to be a barrier. They have come into this Court and said that since the charge went in, 50 percent of these inspections no longer take place. So that on the shipments which they have precluded, nobody is going to get a refund of $17 a car on a shipment that wasn't inspected because the charge was so high that nobody could use it.

On the other 50 percent, what happened to the charge is that it was passed on to the farmer. When the purchase was made from the farmer, they deduct the freight rate and the $17 a car. That's taken right away from him. He is not a party to the transportation with the railroad. He has nothing to do with the shipment. He will never get that $17 back. Every day that this case goes on without restoring the District Court's decree, the farmer is losing $17 on every car that is inspected.

The other way he loses is that he is losing his market. He can't get this nationwide market that we have been providing him. So we have people going out of business. We have grain inspectors that have been fired. We had this whole system of marketing through grain inspection which is being gradually destroyed and taken apart while the litigation goes forward.

And the railroads understandably, and the ICC not quite so understandably, say that no one can do anything about

it. And they rely upon the Arrow case which said that we don't want single judge courts doing a job before the ICC decision which can only be done by 3-judge courts under the statute after an ICC decision.

We submit that the railroads lose a case, they can go to court, get the Commission set aside. And then they can put their rates in. On the other hand, the shipper should have the same power. They should have the same right. They shouldn't be just going to court to touch bases and to go back to the ICC again. They should be able to get some substantial relief while the case goes back to the ICC, bearing in mind particularly that it isn't necessary for the court to say this is just and reasonable or it is not just and reasonable.

QUESTION: What you are saying, Mr. Sweeney, is that Arrow doesn't apply then.

MR. SWEENEY: Because Arrow concerned itself with what could take place before the decision of the Commission, what would happen if the Commission doesn't make its decision within 7 months suspension, if it takes them a year. What happens in that 5 months before the Commission has discharged its function? And they said we do not think that the court should be taking a crack at this kind of a case before the Commission in its primary jurisdiction has completed the record and has made its findings. At that point, as it was noted in the footnote, the case belongs to the 3-judge courts.

It's up to them to decide, and it's up to them to decide whether the situation is such that they have to grant some kind of ancillary relief. And we asked that court to grant us ancillary relief. We didn't ask them to grant the specific relief that they did, but we asked them to order the ICC on remand to immediately have these rates cancelled.

QUESTION: What do you say to Mrs. Christian's argument that that footnote dealt only with the maintenance of the status quo?

MR. SWEENEY: Well, the status quo, your Honor, is the last peaceable status prior to litigation. In this case that was prior to the publication of the rates. Prior to this controversy arising there was no inspection charge. Now, because they have succeeded in maneuvering this case that by the time they got to the courthouse the rates had been in for a few months doesn't change the court's right to restore the status quo. The status quo existed before the case started.

QUESTION: You don't read the Arrow case as taking the judges out of rate-making then, in broad terms, as the opinion seems to read.

MR. SWEENEY: I don't think that affects rate-making one way or the other. I think for a court to issue an injunction like they did here, all they are saying is that you are required under Section 15(7) to fulfill a burden of proof

of showing the rate is just and reasonable. The District Court below found the statutory requirements that the railroads had to put in costs. There was no evidence whatever in the record. The railroads had failed to meet their burden of proof. And all the District Court was saying is, "Since you failed to meet your burden of proof in a case in which you had ample time to do so, as of this date, you have no further right to keep those rates in." Without prejudice. Down the road perhaps the ICC will give them another hearing. Perhaps some decision, some valid decision will be issued some day that will approve these. But in the meantime, the life of these rates as of September 1970, when the ICC issued its decision, was critically dependant upon whether or not the ICC found that they had fulfilled their burden of proof. And if they didn't fulfill their burden of proof, as of the next day they had no right to be in effect. And the court is in effect saying, "You made a mistake, you didn't follow the law, and therefore these rates have to go out until such time as you fulfill your obligation and prove that they are just and reasonable."

Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Imhoff.

ORAL ARGUMENT OF WILLIAM A. IMHOF, ON BEHALF OF THE SECRETARY OF AGRICULTURE

MR. IMHOF: Mr. Chief Justice, and may it please

the Court:

My name is Imhof, I represent the Secretary of Agriculture.

The Secretary is represented here today because both of the issues principally before the Court today are of vital concern to farmers. Farmers, after all, are the fellows who are bearing this charge that we have been fighting about. The grain farmer in the West sells his grain to a country elevator. He receives the price that day at Minneapolis, Chicago, less the cost of getting it there by railroad. Historically, line haul rates included a stop for inspection which facilitated the same of the grain at the market. Now the railroads have added a penalty charge over and above the line haul rate for the inspection, and that penalty charge, too, is deducted from the price the farmer receives for his grain. And this burden is especially bitter for the farmer because he knows, and indeed our friends the railroads conceded at the hearing below, that they were already collecting for this inspection charge out of the line haul rate. Therefore, the new inspection charge from a revenue standpoint for the railroads is largely gravy.

However, we are more greatly concerned, and I will confine my remarks to appellant's attack upon the equitable jurisdiction of District Courts upon review of ICC orders. And this issue is of concern not only to grain farmers, but

to farmers generally. Farmers rely heavily upon rail transportation, for both transportation of their products and also for their supplies. Their livelihood sometimes even their economic survival depends on there having available rail transportation at reasonable rates.

Of course, what is their first line defense against unreasonable rates? It's the Commission. But if the Commission makes a mistake, if it approves a railroad-proposed charge on less than the requisite amount of substantial evidence, where should they go? Until recently, it seemed clear enough that a shipper could bring suit in a 3-judge District Court which,if it sustained his charges about the Commission's failure, could enjoin collection of the charge. This was the view of the Alabama District Court and of the Fifth Circuit whose judgments you affirmed in the case, in Arrow. In this case, of course, it was the view of the District Court in Kansas. We believe it was also the view of the District Courts in California in the Cantlay case, and in the District of Columbia in the Ad Hoc Commission on Consumer Protection case. I think we might note in passing that it was also the view of the Illinois District Court in the Inland Waterways case which is relied upon by the railroads. This Court reversed the District Court in that case, but didn't question the exercise of equitable jurisdiction by the District Court. I think the District Court in that case did

go too far and foreclosed the discretion of the agency on remand. And that was the reason it was overturned by this Court.

Just over two years ago, however, a District Court, 3-judge District Court in New York, declined to enjoin collection of Commission-approved rates on the ground that the theory of the decision of this Court in Arrow logically extended foreclosed such relief. The Small Shipments decision, was, of course, pressed upon the Kansas Court in this case. But the Kansas Court declined to alter its judgment, and indeed refused a stay of its judgment expressly because the farmer who was bearing this inspection charge can be protected only if collection of the charge is enjoined.

Appellants argue that the injunction issue is controlled by Arrow and that under Section 15(7) of the Interstate Commerce Act only the Commission can suspend a railroad rate, and then only for the statutory period. Howev ·, they overlook the fact that the suspension provision in Section 15(7) is confined by its own terms to the period prior to Commission decision, and they also overlook the fact that in Arrow both this Court and the lower courts were careful to confine their holdings to the situation presented. That is, where the Commission had not yet completed its investigation or issued an order.

While both the District Court and the Court of Appeals

in Arrow denied the availability of injunctive relief at that stage, both concluded that after final order by the Commission approving railroad rates, the 3-judge court upon review of that order has the power to enjoin the effectiveness of the rates. In affirming those judgments, this Court also pointed out the judicial cognizance of the reasonableness of rates is confined to review by a 3-judge court of the ICC order. It can't take place before that.

We submit therefore that upon a fair reading Arrow lends no support to appellants' argument. This is not simply our conclusion. We would refer your Honors to the decision in the D. C. Circuit Court of Appeals which was referred to in the decision of the Ad Hoc Commission on Consumer Protection. We note also that in that case, the Court held injunctive relief to be available notwithstanding that there was a possibility of a motion for reconsideration before the Commission.

The dichotomy drawn by the courts in Arrow and Ad Hoc between the judicial role before and after decision by the Commission approving rates is entirely consistent with the statutory scheme. The Congress provided for two situations. The Arrow case dealt with one of them. That was shippers resorting to injunction prior to Commission decision and they amended 15(7) to provide for that.

But in this case we are not talking about 15(7). We

are talking about the urgent deficiencies of it which Congress provides espressly for judicial review of Commission orders. It created a Commerce Court and transferred the jurisdiction of that court in turn to the District Courts. It had no intention at any time of restricting the equitable powers of the Circuit Courts or the Commerce Court in making those transfers.

I think I would like to address a couple of specific points which have been of interest to the Justices in the arguments presented heretofore this morning.

QUESTION: Before you do that, what is your answer to Mrs. Christian's argument on status quo?

MR. IMHOF: On Footnote 22, your Honor?

QUESTION: Yes.

MR. IMHOF: First of all, I think we might argue, we might well remember that the Court here did not flatly remand it to the Commission and lose hold of it. The court retained jurisdiction over this case. So it is for all practical purposes pending judicial review. And Professor Jaffe, at least, has sanctioned that as a legitimate judicial device to retain jurisdiction of a case.

QUESTION: It certainly is anticipated that the Commission is going to take some further proceedings even meanwhile.

MR. IMHOF: Yes, your Honor, I suppose it would be.

Yes.

QUESTION: Well, I would think so, if you say, "We set aside your order because you haven't given decent enough reasons."

MR. IMHOF: I would assume it would be remanded with directions. It was not remanded with directions here. The proceeding is not inconsistent with this opinion, yes. So the answer would be, yes, your Honor. Yes.

I would like to address perhaps your Honor's question about the possibility of a decision being batted back and forth between the reviewing court and the Commission. I think if you logically extend the Commission's argument to its fullest length, you are reviving the negative order doctrine. As you remember, the Commerce Court produced the decision in Proctor & Gamble, and in Proctor & Gamble this Court held that an order such as the one we are referring to here is a negative order not subject to judicial review. Of course, then injunctive relief was not available because the court never even got jurisdiction over the order. But if you push their argument to its logical extent, I think we are getting right back to the negative order doctrine. And I don't believe this Court should take that action. I don't believe that this Court in overturning the negative order doctrine in the Rochester Telephone case had any intention of separating injunctive relief --

QUESTION: Wall, you agree the court itself couldn't hold the rates unjust and unreasonable, don't you? Or do you?

MR. IMHOF: I tend to, yes, your Honor. I believe that's it and I agree with that.

QUESTION: You agree with that.

MR. IMHOF: I believe it's the jurisdiction of the Commission.

QUESTION: And hasn't Congress provided, or has it, that the rates may not be suspended beyond 7 months until there is a finding that they are unjust and unreasonable?

MR. IMHOF: Until there is an order of the Commission, your Honor. I submit that that is a very valid --

QUESTION: Yes. Until there is an order of the Commission that they are unjust and unreasonable.

MR. IMHOF: Until there is an order of the Commission in the proceeding pending at that time before the Commission. The judgment made by Congress was to keep the court out of the Commission's hair for whatever period of time it required for the Commission to exercise initially at least its primary jurisdiction. That period --

QUESTION: So you say if the rates are in effect and the Commission finds the rates just and reasonable, the Commission itself could suspend the rates beyond the 7 months pending judicial review?

MR. IMHOF: If the rates were just and reasonable?

QUESTION: Yes, if they found them just and reasonable.

MR. IMHOF: No, no, your Honor, I do not.

QUESTION: You don't?

MR. IMHOF: No.

QUESTION: Even though a court could?

MR. IMHOF: A court could suspend the rates if it found that the Commission's decision was not supported in your example by substantial evidence. Therefore, the Commission's finding that the rates were just and reasonable would have no support, it would be invalid.

QUESTION: I know, but that still leaves the rates in effect under the 7 months rule.

MR. IMHOF: Not once the court has jurisdiction over the case, I would submit, your Honor, no. I don't think you can draw this dichotomy between judicial review of an order and equitable relief. And I feel this matter is perhaps disposed of in the footnote in the Rochester Telephone case as to the forms of direction which would be available to a court upon review of such an order. I believe it's footnote 29.

QUESTION: Have you fully answered my question?

MR. IMHOF: I am not sure if I did or not, your Honor. I believe I answered the first part as to whether or not the court is retaining jurisdiction pending judicial review.

Mr. Sweeney has pointed to the cases indicating that the status quo can be restored. And I submit to your Honor that perhaps that would answer the second part.

QUESTION: You associate yourself with that argument.

MR. IMHOF: With that argument, yes, I do, your Honor.

Thank you very much.

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

Mr. Pollock, you have about 4 minutes left.

REBUTTAL ORAL ARGUMENT OF EARL E. POLLOCK ON BEHALF OF THE APPELLANTS ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

MR. POLLOCK: May it please the Court, may I first of all point out that much of the argument made by the appellees here bears no relationship either to the findings made by the Commission, which I commend to your Honors, or to the proceeding that was conducted before the Commission. For example, Mr. Sweeney's principal argument here concerning the necessity of a cost analysis under Section 15a(2) was never raised before the Commission. And, of course, under this Court's decision in Tucker and other cases is barred.

But more fundamentally, the appellees' arguments -- I think this gets perhaps to the crux of it -- fail to take account of the nature of the rate-making function and the Commission's role and discretion in performing that function.

When it comes to carrier-made rates, there is, contrary to the appellees' suggestion, no single rate which is reasonable. There is instead a zone of reasonableness, and this zone is located between a reasonable maximum and a reasonable minimum. And a carrier is free under repeated decisions of this Court without a special permission from the Commission to adjust its rates as long as those rates stay within the zone of reasonableness and do not violate the Act.

Now, what did the Commission do here? On the basis of its own prior decisions and its particularized attention year after year after year, decision after decision after decision, the Commission reaffirmed the vitality of the current maximum reasonable level and said, thus, even if we add, even if we were to add these inspection charges to the existing line haul rates, the resulting combination would still not exceed the zone of reasonableness.

Furthermore, and in particular relation to Mr. Justice White's earlier question, I think it is important to recognize that under the statutory scheme, carrier-initiated rates are valid unless set aside by the Interstate Commerce Commission and not vice versa. In other words, under the statutory scheme, a carrier need not get permission to institute rates. Instead the carrier has that right. Congress gave the carrier that right, subject only to the Commission power to suspend the rates for this limited period of 7 months

and it was on that basis that this Court in Arrow said that that is the only exception made by Congress and neither the Commission nor courts can intervene beyond that.

With respect to the optional nature of the inspection, Mr. Sweeney has said that this is absolutely essential. But look at the facts. At the present time only one inspection is made for every 5 shipments, certainly indicating that it is not essential. Furthermore, in-transit inspection has never taken place, as the Commission pointed out at page 15 of the appendix, with respect to all barge traffic carrying grain, all truck traffic carrying grain, and now 80 percent of the shipments by rail go without any in-transit inspection. It is for the Commission to determine whether this is a necessity. And the Commission found at page 56 and pages 17 through 19 of the appendix that it was not essential. And certainly this is not the forum to reargue the nitty-gritty of rate-making issues. If there is anything which is committed to the discretion of the Interstate Commerce Commission, it is this matter of determining what constitutes a reasonable rate under established principles.

It is also instructive, I would say in closing, that although both appellees now argue for the necessity of the suspension power in courts, they do not even see fit to request such relief in the District Court.

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

Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:53 o'clock a.m., the argument in the above-entitled matter was submitted.)