In the

# Supreme Court of the United States

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| Bowman Transportation, Inc., Appellant v. Arkansas-Best Freight System, Inc., Et Al. | ) | No. 73-1055 |
| | ) | 73-1069 |
| | ) | 73-1070 |
| | ) | 73-1071 |
| | ) | 73-1072 |



Washington, D. C.
November 20, 1974

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| JOHNSON MOTOR LINES, INC., Appellant v. ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.: | No. 73-1069 |
| RED BALL MOTOR FREIGHT, INC., Appellant v. ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.: | No. 73-1070 |
| LORCH-WESTWAY CORPORATION, ET AL., Appellants v. ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.: and | No. 73-1071 |
| UNITED STATES AND INTERSTATE COMMERCE COMMISSION, Appellants v. ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL., Appellees. | No. 73-1072 |

Washington, D. C.

Wednesday, November 20, 1974

The above-entitled matter came on for argument at 11:08 a.m.

BEFORE:

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

APPEARANCES:

WILLIAM L. PATTON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, for the Appellants United States and Interstate Commerce Commission.

CHARLES S. RHYNE, ESQ., 400 Hill Building, Washington, D.C. 20006, for the appellants in Nos. 73-1055, 73-1969, 73-1070, and 73-1071.

PHINEAS STEVENS, ESQ., P.O. Box 22567, Jackson, Mississippi 39205, for the Appellees.

# I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 73-1055, Bowman against Arkansas-Best; No. 73-1060, Johnson Motor Lines against Arkansas-Best; No. 73-1070, Red Ball against Arkansas-Best; No. 73-1071, Lorch-Westway against Arkansas-Best; and No. 73-1072, United States and ICC against Arkansas-Best.

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

ORAL ARGUMENT OF WILLIAM L. PATTON

ON BEHALF OF APPELLANT IN No. 73-1072

MR. PATTON: Mr. Chief Justice, and may it please the Court: These cases are submitted on direct appeal from the judgment of a three-judge court sitting in the Western District of Arkansas. That court set aside orders of the Interstate Commerce Commission granting certificates of convenience and necessity to three motor carriers for service between points in southeastern and southwestern States.

The United States and the Commission bring this appeal because we believe that the district court erroneously relying on this Court's decision in Overton Park has misapplied the Administrative Procedure Act in a fashion which fundamentally alters the scope of review of administrative findings. And because of limitations of time, I do not intend to discuss the prior history of these cases in detail. That history is set forth at pages 3 through 8 of our brief.

I do, however, want to make a few brief comments about the prior proceedings. These cases are now nine years old. They originally involved ten applications for motor carrier service in the area generally lying to the east of Houston, Dallas, and Forth Worth, Texas, and to the west of Atlanta, Georgia; Birmingham, Alabama; and Pensacola, Florida.

Hearings began on these consolidated applications in early 1966. They were held before two examiners in eight cities, primarily in the Southeast. Hearings consumed 149 days and over 900 witnesses appeared and testified in support of the applications with some 60 witnesses testifying in opposition. Sixty-six rail and motor carriers appeared as protestants to the application.

The transcript of the proceedings exceeds 23,000 pages, and the documentary exhibits number almost 2,000.

This was, as the Commission found, probably the most extensive record ever compiled in a motor carrier operating license case.

In November of 1969, the Examiners rendered their report recommending that all of the applications be denied. Exceptions were taken to their report and the case was considered by the Commission, Division 1.

On December 30, 1971, the Commission issued its decision finding that present or future public need justified the grant of three of the certificates, and accordingly

certificates of convenience and necessity were granted to three carriers -- Red Ball, Bowman, and Johnson.

In September of 1972 motions for reconsideration were denied by the Commission by a two-to-one vote, and a petition that the case be heard by the entire Commission as involving a matter of general transportation importance was also denied.

In October of 1972, 19 protestants filed suit in the district court, and approximately a year later, in September 1973, the district court set aside the Commission orders finding that the Commission's evaluation of certain of the evidence was arbitrary and capricious.

Before discussing the scope of review question, I would like to deal with one preliminary matter. At page 1310 of the appendix, in conclusion 11 of the district court's opinion, the district court finds that the Commission's decision fails to meet the requisites of clarity.

QUESTION: There are two volumes to the appendix. I have only one.

QUESTION: Page 1310. Finding 11?

MR. PATTON: Finding 11, yes, sir.

The court finds the Commission's decision fails to meet the requisites of clarity, and as an illustration it says that they cannot determine whether the Commission rejected or approved the Examiners' principal findings.

The district court's finding is clearly wrong. The Commission's ultimate conclusions and subordinate findings are set forth in its opinion. Its ultimate conclusions appear at page 158 to 160 of the appendix, and its subordinate findings appear as follows: The Commission, like the Examiners, determined that all the applicants were fit and able to perform the service. That finding appears at page 121 of the appendix.

The Commission differed with the Examiners on whether there was a public need for the service authorized, and the Commission's findings appear at pages 128 to 131 of the appendix.

Now, the district court's conclusion is based in part on its labeling the appendices to the Examiners' and Commission's report as findings. They are not findings. Those appendices contain summaries of the testimony and exhibits introduced in this case. They contain no inferences or conclusions drawn through the evidence. And I think the clearest indication that they are not findings is that no party to this case objected to them. The district court found that they present a comprehensive summary of the evidence. We believe they do and they are not findings of fact.

Now, in considering the scope of review question, it is important to keep in mind what this case does and does

and does not involve. There is no question here of the Commission's statutory authority to issue certificates of the legal criteria governing the issuance of such certificates or of the propriety procedures used by the Commission. The only question is whether the Commission erred in finding that there is a present or future need for the service proposed. That is an essentially factual question, and the judicial review of the Commission's determination is, in our view, governed by the substantial evidence test.

Our position as to the scope of review is this: Judicial review of the evidentiary basis of findings made on a record after hearing is governed by the substantial evidence test. The arbitrary and capricious test does not apply. That is not to say that the arbitrary and capricious test has no application in an adjudicatory proceedings. As we say in our brief, there are many actions taken in such proceedings that would be subject to the arbitrary and capricious test. But it is not basically an evidentiary test. The arbitrary and capricious test is really directed at review of discretionary policy decisions. It is less stringent than the substantial evidence test.

Now, our position as to the proper application of judicial review is best illustrated by discussing a certificate of convenience and necessity case such as this one. Judicial review would proceed as follows. The court

would first ask whether the Commission has considered all relevant factors. And the factors relevant to a grant of a certificate of convenience and necessity are provided by statute, by section 307 of the Interstate Commerce Act, which is set out at page 95 of the appendix.

Section 307 provides that the Commission shall issue a certificate if it finds (1) that the applicant is fit and able to perform the service, and (2) that there is a present or future need for the service.

As I have indicated, the Commission made those findings in this case.

The next question would be whether the Commission's finding as to those factors is supported by substantial evidence. And the district court did not apply this substantial evidence test in this case. Rather, it held that a mere review of the sufficiency of the evidence is not enough where agency findings are alleged to be arbitrary and capricious. It consider the arbitrary and capricious test a more stringent test than the substantial evidence test, and it clearly viewed the test as permitting it to weigh the evidence.

Now, appellees say that the district court did not weigh the evidence, that it simply reviewed the Commission's treatment of the evidence. But the district court --

QUESTION: Will we have to read these 42,000 pages?

MR. PATTON: You will not, Mr. Justice Marshall; no,

sir. And let me explain why. This is an error of law. We think it is a clear misapplication of the standard of review. In fact, the complaint in this case never alleged that the decision was not supported by substantial evidence. And this massive record is summarized in the appendices to the Commission's report, and there is really no dispute about what the evidence said. The question is over inferences drawn from the evidence, and that involves weighing it. That is something for the Commission.

QUESTION: Mr. Patton, if we were to agree with you, what do we do? Remand to the three-judge court to apply the proper test?

MR. PATTON: Mr. Justice Brennan, we believe that the case should be remanded with directions to dismiss the complaint. We recognize that this Court frequently when standard of review is misapplied does remand for further proceedings under the proper standard.

QUESTION: Is there any occasion for considering remanding to the Commission?

MR. PATTON: I don't believe so, Mr. Chief Justice. I think that would only arise if you agreed with the district court, and there, as we have said in our brief, we think that the case should have been remanded to the Commission, if the district court had been correct, for further proceedings before the Commission. But at this stage, I think the case should

either be sent back for further proceedings consistent with this Court's opinion or with directions to dismiss the complaint.

QUESTION: I don't understand the latter. If, in fact, they should have and did not apply the substantial evidence test, how can we get them to dismiss?

MR. PATTON: Mr. Justice Brennan, of course, the Court would ordinarily not apply it on its own motion unless it were asked to review the findings.

QUESTION: Well, can we? Is that not the responsibility of a three-judge court under the statutory --

MR. PATTON: It ordinarily is.

QUESTION: Not ordinarily, always.

MR. PATTON: Well, there are cases where this Court has made some determination. For example, the Illinois Railroad case which is at 385 United States Reports, where a case has gone on a long time, where it is clear from the opinion and from things in the appendix that the decision is supported by substantial evidence, there is no need to send it back.

QUESTION: As I get what you are saying is that the issue isn't even in the case about substantial evidence.

MR. PATTON: That is correct.

QUESTION: If you say the district court was wrong on the standard it used, what you in effect are saying is that the fact that there is substantial evidence is accepted by the

other side. They didn't raise it.

MR. PATTON: They did not raise it, but --

QUESTION: If that isn't your position, then, we, ourselves, you are suggesting, would have to look at the record and decide about substantial evidence.

MR. PATTON: Yes, sir, that is right.

QUESTION: But don't you also say that the district court, in effect, conceded there was substantial evidence but said there is something more needed?

MR. PATTON: That is correct, because its finding, it says a mere review of sufficiency of the evidence is not enough. Now, to be perfectly candid about it, Mr. Justice Rehnquist, there are some conclusion in the district court opinion which are ambiguous. So that I don't want to press my position too far. But substantial evidence was not alleged.

QUESTION: Technically, you think then it would not be acceptable just to say the issue of substantial evidence isn't in the case. And then we either have to remand to determine it or determine it ourselves.

MR. PATTON: I believe that is correct, Mr. Justice White.

Now, there isn't any doubt that the district court weighed the evidence in this case, and you don't have to look any further than again page 1310 of the appendix, look at conclusion 12 where the district court says that the Division

could not weigh the evidence under the substantial evidence test, but it has held that it may avoid that limitation simply by invoking the arbitrary and capricious test. We think its decision must be reversed for that reason. Surely Congress did not intend to prohibit weighing the evidence under one provision of the Administrative Procedure Act and permit it under another one.

Unless the Court has any questions.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Patton.

Mr. Rhyne.

ORAL ARGUMENT OF CHARLES S. RHYNE ON BEHALF OF APPELLANTS IN NOS. 73-1055, 73-1969, 73-1070, and 73-1071

MR. RHYNE: Mr. Chief Justice, and may it please the Court: I would like first to address myself directly to the question raised by Mr. Justice White. I have here the complaint that was filed by the appellees in the court below. And when they come to the point of telling what was wrong, they speak of the Commission giving substantial evidence, the wrong evidence, they think, and they go to the next paragraph, substantial evidence, no weight. Go on down, substantial evidence. On over, substantial evidence, substantial evidence.

Now, they started out, never once do they -- I mean, they say substantial weight, I am sorry. They gave substantial weight, substantial weight, substantial weight, never once

mentioning substantial evidence.

So actually, their complaint doesn't state a valid legal reason to set aside the Commission's decision. And so I would certainly urge, and I will come back to that in a moment, that the proper action for this Court is to send it back with instructions to dismiss because they raised no legal objection to the Interstate Commerce Commission's decision.

Now, I come into this case representing shippers. And in this particular forum I am also representing the three carriers who were authorized to carry out the service which the Interstate Commerce Commission authorized but the court below took away.

These shippers first came into this case after the Hearing Examiners handed in their report and turned down all service to everyone. And from the very outset the shippers then who came in as parties to fight for the service then have focused on the monopoly, the competitive situation.

Now, this is in brief the way I see the motor carrier ... they are talking about. The southeastern carriers come down through North Carolina and South Carolina, all this burgeoning area of the United States, they go over to Birmingham, to Memphis, and to New Orleans, and they have to unload there. And then the southwestern carriers who come in from points west, Dallas, Houston, they come in and pick up the packages and take them on to the Southwest. And this

was kind of grandfathered in in 1946, and of course the services have increased a lot since then.

But the biggest thing that the shippers -- and there has never been a case where there were so many shippers came out to testify. Nine hundred thirty-three shippers testified orally in this case, out of 1009 witnesses who testified. So you can see how enormously important it is to the shippers and their coming in here as parties, I think, demonstrates that as much as anything else. So they wanted to break through these gateways; that is their big argument, they want single line service. There is very little breakthrough in those gateways now, and most of these major carriers that come down to the Southeast and go into Birmingham, Memphis, Atlanta, and New Orleans, they just stop there. They can't go on. And what these shippers wanted was a breakthrough and the breakdown of the whole monopoly situation.

So we asked the Commission to face up to this and we took exception to the Examiners who said, Well, we see monopolistic tendencies but they didn't do anything about it. And we urged the Commission to do something about it.

So what did the Commission do? The Commission spent about a year regrouping the evidence in this case. It's set forth in Exhibit E, it's an appendix to the opinion. I'm sorry, it's 130-something pages, you need a microscope to read it, but it's because the evidence is so massive of the shippers.

But the Hearing Examiners had assembled this evidence according to commodities and kind of broke it up, someone said, atomized the whole thing. And so that didn't show the picture. But when the Commission itself regrouped the evidence according to points where the shippers were demanding more service, why, it was quite clear where the points were and what the service was, and it also helped the Commission in deciding which of the carriers could furnish that service.

So I say the shippers came in here pushing hard on monopoly. Now, the court below said this is politics, not judicial. Well, I say it's policy, policy, and that the policy agency in this whole case is the Interstate Commerce Commission, not the court. I think if there is any one thing that epitomizes what the court did below, it's what happened to the Walter-Logan bill as compared to the Administrative Procedure Act. The President vetoed the Walter-Logan bill because, above everything, it wiped out the expertise of administrative agencies. It had in there the clearly erroneous rule. And so the President vetoed it on the ground that all of the expertise, the specialized knowledge, and at least in the agencies' case, the uniqueness was being wiped, and all the agencies would be, would be simply fact assemblers for the courts, and all the courts would have to reweigh the evidence under the clearly erroneous rule like they can do in a bench trial.

And that's what this court did here. It never

mentioned or considered the expertise of the Interstate Commerce Commission in focusing up on the competitive situation, in allowing the breakthrough in these gateways. That's the big thing the Interstate Commerce Commission did.

Now, in the court below, their major error not only was reweighing the evidence -- and I agree with Mr. Patton, that's what they did -- but they treated this case as a battle between carriers, forgetting that in every administrative agency hearing of this kind the public interest is a party, and the public interest is the biggest interest, and that's the interest to which the Interstate Commerce Commission responded here. They would have been derelict in their duties not to have responded to this tremendous outpouring of shippers saying what is wrong with the service they have now. They pointed out that it took sometimes anywhere from 2 to 15 days to get their goods through these gateways. They wanted to break down the barriers and have single line service between these great growing areas of the United States, the Southeast and the Southwest.

So when the court treated this as a battle between carriers and focused only on the evidence that was favorable to the appellees, they didn't get the fair view of what the case was all about. They never once looked at the findings of the Interstate Commerce Commission as to need. And I submit that they are so overwhelming that no one can say that

substantial evidence doesn't exist. And that's why they talk about the weight. That's why in their complaint they talk about the substantial weight.

They talked about substantial weight there, and then in the findings and opinion of the court itself they talk about late, inferior evidence, superior evidence, all that kind of thing. And now here they talk about treatment of the evidence. But I sincerely urge upon this Court that unless you want to wipe out the expertise of the administrative agencies, unless you want the courts of this land to weigh the evidence of every administrative proceeding, this case must be reversed.

I give one illustration of the type of thing that you are faced with in looking at what the court below did. The very first thing they talk about here is the court said that the Commission didn't give proper weight to a summary of shipper evidence prepared by one of the parties, one of the -- it's not an appellee here, but one of the parties below, East Texas, made a summary of the shipper evidence which they said was favorable to them. And they say it's applying a double standard because in this case the Commission looked at all of the shipper evidence and found some of it favorable to the appellants, but didn't say anything about this exhibit.

Well, for Heaven's sake, that's Exhibit No. 1,839, according to their complaint. Now, no court, no agency, has to mention every partisan brief that is presented to them.

I think the Commission certainly didn't apply a double standard when it went to all the trouble to regroup all of the evidence and to state it according to geographic points which there just can't be any doubt when you do that, the need points stand out, and also the carriers who could supply the service stand out.

The interesting thing to me is that the court below never even considered the need. They just wiped out the service that these people had come in here to fight for. They never even considered the Commission's findings as to these carriers and why it was that they chose them.

QUESTION: Mr. Rhyne, a district court does have to make up its own mind as to whether there is substantial evidence, I suppose.

MR. RHYNE: Well --

QUESTION: And just some evidence isn't enough, is it?

MR. RHYNE: What the district court did was, it focused only on the appellee's evidence, and it didn't talk about substantial evidence ever. They would say, this little bit of the appellee's evidence, this little summary exhibit, was presented and the Commission doesn't mention it in its opinion, so therefore it didn't consider it. And that's applying a double standard because you look at the shippers' evidence that applied to appellants and you didn't look at

the shippers' evidence that we pointed out to you.

QUESTION: I know, but there is some suggestion in your argument that it's wrong for the district court to weigh the evidence.

MR. RHYNE: Yes, I think it is wrong.

QUESTION: Well, they have got to decide whether it's substantial.

MR. RHYNE: Well, I don't think they have to weigh it to look at the record and find out whether it's substantial. Now, if there is no evidence at all, that's kind of easy for them.

QUESTION: Well, but just any evidence isn't enough either, is it?

MR. RHYNE: No. Oh, no, it has to be substantial evidence. And in this case they conceded that portions of the record -- they don't say which portions -- support the Commission's findings. Now, they don't say whether those are substantial or not. And our distinguished adversaries say the court below didn't say whether they were substantial evidence, they didn't say whether it was there or not.

Now, we urge upon you that the only consideration before that court is to take a look and see whether there is substantial evidence.

Now, the big point --

QUESTION: You make that argument in contradistinction

to the idea that the court should reweigh the evidence and see whether the Commission weighed it correctly. You say the function of the court is limited to determining whether there is substantial evidence that supports the result it reached. Is that correct?

MR. RHYNE: And if there is, the court's function is over.

QUESTION: That's not a reweighing function, is it?

MR. RHYNE: No, it's a looking at the evidence to see whether there is substantial evidence. I suppose you have to weigh it a little bit to see whether it's substantial, but --

QUESTION: It is not the same kind of a function as the primary trier engages in.

MR. RHYNE: No. And that's what they did here, you see. They conducted themselves as a primary trier here. So the peculiarity about this case is that they don't even mention the substantial evidence, the court doesn't, the complaint doesn't, and I come back to the fact that since they didn't initially complain that substantial evidence doesn't exist, they admit that it does, and the proper action for this Court is to send it back with instructions to dismiss the complaint because it's not a proper complaint. It doesn't raise a legal basis for court review.

They asked the court to weigh all the evidence, and over and over again they talk about substantial weight,

not giving substantial weight, or giving substantial weight.

Now, that is not a proper, legal appeal from an order of the Interstate Commerce Commission.

Now, above all, on this remand, let me say this from the viewpoint of shippers: This case has been under way since 1965. If this case is sent back to the court or sent back to the Interstate Commerce Commission and you start that process all over again, that means that these shippers have to wait maybe 20 years, because if there is any one thing that is demonstrated in this record, that is that the people who don't want a particular service can stymie things within the administrative process of the Interstate Commerce Commission for a long, long time. And we feel that this Court in its administrative capacity, looking at justice in this country, ought to say there ought to be an end sometime and that the time has come when the public interest should be paramount rather than the interest of these people who are disturbed simply because they were not chosen to render the new service or because it might interfere a little bit competitively with them. And we say to you that these people four times argued all of their points before the Commission. Their biggest point, I suppose, is that there have been a lot of changes in service, it's increased during the pendency of this case. But the Commission considered all of that specifically in Exhibit G. It listed increases in footnotes and in their

summary of the pleadings, it listed it.

So the Commission considered all of that.

So then when you come to the claim that you don't need it because of these many services that have come along since then, well, the Commission said it considered all of that. They talk about taking business away from existing carriers. That's bad. Diversion. Well, the Commission considered that and rejected it. And it ought to know what it's talking about. It said the demand for this service is so great that a little bit of diversion is not going to matter. And if these people would do their job and furnish the service, they are not going to lose out in competition with other carriers. After all, competition is the life blood of this nation. So I don't apologize for having raised the issue of monopoly and competition before the Interstate Commerce Commission and fight it on through to this Court, because this Court has in a number of cases said that antitrust, competitive, monpoly principles do apply in motor carrier cases.

So I would urge upon this Court that you not simply reverse, but that you reverse with instructions to disiss because there has got to be an end to litigation sometime. And ten years is enough;to make these people wait even another year is too much after waiting ten years. There has never been so many shippers come out to demand service in the

history of the Interstate Commerce Commission. I again say they would have been derelict in their duty if they hadn't found that the paramount public interest, not these various carriers who were fighting among themselves, but the paramount public interest demands this service and that this Court should really in the public interest order that that service be put into effect as quickly as possible.

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

Mr. Stevens.

ORAL ARGUMENT OF PHINEAS STEVENS ON

BEHALF OF THE APPELLEES

MR. STEVENS: Mr. Chief Justice, and may it please the Court: At the outset I believe it appropriate to put straight two things that have been raised in oral argument.

First is the what I would term demurrer that my distinguished brother has just filed to our complaint. That's the first time we have ever heard that our complaint was in any way inadequate. Our complaint was never challenged below, Our complaint raised the identical issues that were ruled on by the court, specifically --

QUESTION: Where is this in the appendix?

MR. STEVENS: It is not in the appendix. It is in the record,and no question had ever been raised before oral argument here concerning the adequacy of the complaint.

We have a copy here, your Honor, and over and over

again the allegation of error was that the Division's order constitutes an abuse of its discretion, constitutes arbitrary and capricious action, and is without rational basis.

It is true we regard the substantial evidence rule as being the rule uniquely designed to testing the propriety of the finding of fact, the sufficiency of that finding of fact. The findings of fact are not in issue. They have never been in issue. So we did not allege that any finding of fact itself was not supported by substantial evidence. We allege that the treatment of these findings, the conclusions drawn from the findings lacked the rational basis,they were arbitrary, they were capricious, they constituted an abuse of discretion.

Now, what are the findings of fact? Distinguished counsel for the Government has said, for the first time, that the appendices do not constitute findings of fact. That, quite frankly, may it please the Court, comes as a surprise. They are the findings of fact. They are the findings of fact in the Examiners' report, and in the Division report. And what are they? He says they are summaries of evidence, but I do not know what a summary of evidence is unless it is a finding of fact.

QUESTION: Is there some difference, Mr. Stevens, between deciding whether a particular witness may have spoken truthfully and then going on from that to make what you would call

findings of ultimate fact that would be the basis of the Commission's decision?

MR. STEVENS: The latter, your Honor, is what I would call a conclusion drawn from the facts. What the witness said is not in dispute.

QUESTION: But what Rule 50 of Federal Rules of Civil Procedure would call findings of fact and you would call ultimate conclusions.

MR. STEVENS: No, I do not know that, your Honor. I think that I would call findings of fact the statements as to what the witnesses said, what the exhibits establish as set forth in the appendices to the report. And there is no difference as to what the witnesses said, what the exhibits said.

QUESTION: Well, that's really no more than a concession that none of them lied, isn't it?

MR. STEVENS: No, it's not just a question of testing of credibility, but what is it? What did they say? What did they establish? What did they prove in their testimony?

Our complaint, your Honor, lies with the treatment of that evidence, what conclusions can be drawn from those facts.

QUESTION: You mean you don't think the substantial evidence test is sufficient or adequate or intended to test out

the conclusion that there is a need for more service?

MR. STEVENS: Mr. Justice White, I think, as the court below thought, that the arbitrary or capricious standard, arbitrary, capricious, and abuse of discretion is a test, a standard that more suitably describes that particular --

QUESTION: Your answer is no to my question.

MR. STEVENS: No, I won't go so far as to say that. I believe that the court could have reached every conclusion that it reached in terms of the substantial evidence rule. When the court said --

QUESTION: If we disagree with the district court in terms of arbitrary -- either disagree with it that it's applicable at all, the arbitrary and capricious test, or that even if it is there was nothing arbitrary and capricious about this order, the case is over as far as you are concerned.

MR. STEVENS: Not at all, your Honor. I would say that every finding or conclusion of the lower court could have been expressed in terms of lack of substantial evidence.

QUESTION: Is there substantial evidence of need in this record?

MR. STEVENS: No, your Honor.

QUESTION: Why not?

MR. STEVENS: Because when you consider the entire record, there is so much evidence that shows to the contrary.

QUESTION: I didn't ask whether there was other

evidence; I asked was there any evidence in this record of need.

MR. STEVENS: Phrased in that manner, your Honor, yes, there is some evidence.

QUESTION: I said "substantial evidence."

MR. STEVENS: In terms of substantial evidence, no, your Honor.

QUESTION: Why wasn't it substantial?

MR. STEVENS: Because, your Honor, you would have to consider only, for example, the direct testimony of the witness. If you looked at his cross-examination and if you looked at the evidence submitted in protestants and weighed it all together, the substantiality would disappear.

QUESTION: You just disagree with their finding.

MR. STEVENS: The court disagreed with --

QUESTION: That's all it was. Are you substituting your judgment for theirs?

MR. STEVENS: Not at all, your Honor.

QUESTION: You sound like it.

MR. STEVENS: No. What I am trying to explain is that the way the Commission looked at this was to consider only bits and pieces of the record. And they said, We will not consider the rest of the evidence --

QUESTION: What statement do you have that says that, that that's what the Commission did?

MR. STEVENS: Well, the principal statement, I think, is summarized very succinctly in the reply brief that the appellants filed just a few days ago. They say that the treatment of the evidence by the Commission is fully supported by reasonings set forth in its report and these reasonings are illustrative of the Commission's "careful weighing of the evidence." That's on page 6 of the reply brief.

QUESTION: Pardon me. I don't understand one word of that.

MR. STEVENS: Beg pardon?

QUESTION: I don't understand one word of that in answer to my question. Aren't you really putting your judgment over the Commission's? If you were on the Commission, you would have found otherwise, right?

MR. STEVENS: I would have found otherwise, yes, your Honor.

QUESTION: Right.

MR. STEVENS: Because --

QUESTION: Isn't that what the district court did in this case?

MR. STEVENS: No, I do not think that it is because when you look at what I was coming to, when they cite, why did the Commission not give consideration to the evidence? They say that that constitutes a valid reason for not giving consideration to this evidence. We say it's no reason at all.

It's a completely arbitrary, unreasonable rejection of tremendous portions of the record.

Now, you do away with all of the evidence that was not submitted by these applicants and have it as an ex parte proceeding, you could find --

QUESTION: If you disregard all of the evidence, then you fall athwart of the rule of substantial and they didn't ignore all of the evidence. Right?

MR. STEVENS: They did not ignore all of the evidence. They did ignore the most important part of the evidence presented by one group of the parties. And they gave a reason why they were disregarding it. The reason they gave was no reason at all. It was completely arbitrary reason. The same reason they say we will not accord weight to this body of evidence would have required them to accord no weight to the body of evidence they did accord weight to.

What was the reason? The reason, they said, was that most of these studies relate to short periods of time. These were the same periods of time that they gave great weight to to the other evidence. They said, or they cover traffic handled for specific shippers. We will not accord weight to this body of evidence because it was directed to traffic handled for specific shippers. That is the reason they wouldn't accord any weight.

Of course it was directed to specific shippers. It

was designed to rebut specific evidence given by witnesses. A witness would come in and say, "I'm having some problems. I will give you some freight bills to demonstrate service that I do not think is satisfactory. This carrier did such and such and such." And he would give a few examples which he considered to be poor.

Then when the protestants, the existing carriers came in, they spent months searching their records. They brought in original documents of 120,000 shipments. They analyzed those. They brought in specific exhibits saying, "This witness said this service isn't satisfactory. Look, here are all of our records that we handled for that shipper during a period of time. He isn't correct."

QUESTION: Did you make all those arguments in your exception?

MR. STEVENS: We made all of those arguments in our briefs before the Commission. We have made them --

QUESTION: And the Commission considered them.

MR. STEVENS: The Commission did not consider them, your honor.

QUESTION: Didn't consider them?

MR. STEVENS: No, sir, they did not consider them. They rejected our petitions summarily 12 working days after the briefs were in, with no opinion whatever.

QUESTION: What could they do that rejected --

MR. STEVENS: They overruled it. I beg your pardon, I used the wrong term, your Honor. They overruled our petitions without an opinion.

QUESTION: So you gave all that argument there.

MR. STEVENS: Yes, sir. And they did not give any consideration to our argument.

This reason for rejecting this evidence was not a reason assigned by any of the parties. These parties were represented by the most able counsel at the Commission's bar. They did not suggest that this was a reason, because it isn't a valid reason. It lacks any logic, any justification whatever. It is of no more reason than if the Commission had said, "I reject this evidence because the witness that presented it was red-headed." It would be no more sense to what they said -- "We reject this evidence because it relates to specific shippers." Of course, it related to specific shippers. That was the entire purpose of it, to rebut specific evidence. One carrier alone brought in exhibits showing service rendered for 150 shipments. With one stroke of the pen all of that evidence went out of the window. That's the most important evidence that we presented in the case.

QUESTION: I think you would agree, Mr. Stevens, that at least a considerable part of this case involved evaluation of the credibility of the witnesses and the weight to be given to particular documentary evidence.

MR. STEVENS: Your Honor, no, sir, Mr. Chief Justice, not to the credibility of the witnesses. That is not in issue. What the witnesses said was recorded by the Examiners, no dispute as to that.

QUESTION: How do you square that with the statement that I thought you just made that they, the Commission, paid undue attention to the direct testimony but ignored the cross-examination. Now, isn't that a credibility, in part, evaluation of credibility of witnesses?

MR. STEVENS: I used that as an illustration because the Commission did in fact consider only that portion of the witness' testimony, for example, that had come out on direct. Everything that came out on cross, although that was recorded in the Examiners' findings to which no exception was taken, no weight was given to it, it was disregarded, that portion of the evidence was disregarded.

But more significantly, the rebuttal evidence, all of the evidence in opposition, was in effect thrown out of the window by this statement that "We will not consider this evidence as entitled to any weight for these reasons:"

Now, what the court said was, "Those reasons are not valid. We are not ourselves weighing the evidence, but we are saying that the Commission did not weigh the evidence." The Commission looked at only one side of the case, and when it came to the other side of the case, it said, "We won't give

consideration to it for these reasons:" And they are no reasons at all, they are not justifications. The court said this is an arbitrary, capricious, it lacks a rational basis.

That is why we couched our complaint more in terms of the first subparagraph of section 706 of the Administrative Procedure Act rather than in subparagraph (d) relating to substantial evidence. It's because that paragraph uniquely describes the type of error that was done in this case.

The lower court said this, your Honor. The lower court said that the Commission did not apply the basic rudiments of fairness, that the Commission's report indicates a predilection to grant these particular applications followed by a strained attempt to marshal facts to support such findings. The strain was too much for the court to bear, and it said, viewed in its entirely, the report sounds more in advocacy than an impartial adjudication.

But if I may venture to say so, this isn't good advocacy, may it please the Court, to say, We will not give consideration to this evidence because it relates to specific shippers. None of the advocates would make such a statement. The Commission did that of its own motion, and if that is grounds to disregard or not give weight to testimony, that ground automatically applies to every shipper that testified in the case, because he testified only about his particular traffic. Now, if that is an invalid reason for considering his

evidence, it applies to all of it.

The court said that the Commission applied a prejudicial and discriminatory double standard. It applied one standard to evidence presented by certain parties; when it came to other parties, it applied a different standard.

Let me illustrate one of those instances. In the early part of its report, the Commission was dealing with certain exhibits showing what the particular applicant had been doing. It says, You can test what I propose to do by what I am now doing, and presented statistical data showing that, for example, during a one-week test period in early 1966 this particular applicant was operating from Richmond to Memphis an average of two and a half days in transit.

Well, we came in and said what this two and a half days in transit really means. It is almost a meaningless figure. So we took those identical statistics, their figures, and we analyzed them in accordance with their proposal and we said, "Look here, what does it mean? It means that they are performing their service, they are getting the freight on time 55 percent of the time." Whereas all the witnesses testified, they said, "That's not the type of service we want." Yet that is the type of service that the applicant was performing, that is the type of service the applicant says you can test what I propose to do by what I am now doing.

Now, on page 116 of the report, the Commission made

a finding of fact that the applicant can do this because if you are now operating two and a half days from Richmond to Memphis.

Over in a subsequent part of the report, dealing with our contention that the applicant's own exhibit showed that they were not performing and could not perform in the manner in which they had represented to the witnesses they would perform, what did the Commission do there? The Commission says, "Proof of past performance cannot be used to test what an applicant proposes to do." They took the same exhibit, the same sheet of paper, and in the early part of this report they make certain findings based upon this exhibit. Later on, without apparently realizing they were talking about the same sheet of paper, they said this type of evidence is entitled to no probative value.

That is exactly what is in this report, and the court says that that shows a predilection to grant these particular applications followed by a strained attempt to marshal facts to support it.

Now, in the court below this applicant was still urging, "Test what we propose to do by what we show we have been doing." The Commission had said, "We won't look at that test except insofar as it is favorable. As to its unfavorable, we will not look at it.

QUESTION: Mr. Stevens.

MR. STEVENS: Yes, sir.

QUESTION: Did Judge Miller adopt your proposed findings of fact and conclusions pretty much verbatim?

MR. STEVENS: Pretty much verbatim, he did, your Honor. What he did was during the oral arguments on the case, counsel asked for permission to file proposed findings of fact and conclusions of law as required by a local court ruling. The court said, Yes, you may do so, but get them in early because we are going to work on our decision. All parties then filed proposed findings of fact and conclusions of law. The appellants filed them in the form of a proposed opinion with just signature lines for the court. We filed them in the more standard form, "We request the court to find this and conclude this," and the court said, "We have considered all of the proposed findings. We find those of the plaintiffs correct and we adopt them as follows:"

Yes, it was an affirmative adoption of most of the findings and conclusions. However, in its opinion the court added other things on its own, other cases and quoted from them, wrote an appendix that we hadn't even suggested.

As to the proper scope of review, the appellants say that substantial evidence rule is the only rule that can be applied in an adjudicatory proceeding, a case that comes before the court after an adjudicatory proceeding.

We submit that is not a correct statement. It is an

oversimplification. The substantial evidence rule, of course, does apply only to adjudicatory proceedings, but it is by no means the only rule or test that applies to adjudicatory proceedings. Adjudicatory proceedings must meet the standard of constitutional requirements, statutory requirements, procedural due process, as well as the rule that was elaborated on in the Overton Park case, arbitrary, capricious, and abuse of discretion or otherwise not in accordance with law. As stated in the Overton Park case, in all cases, this rule applies.

MR. CHIEF JUSTICE BURGER: We will resume there at 1 o'clock.

(Whereupon, at 12 noon, a luncheon recess was taken, to reconvene at 1 p.m. the same day.)

AFTERNOON SESSION

(1:02 p.m.)

MR. JUSTICE DOUGLAS: You may proceed. I think you have about 23 minutes left.

ORAL ARGUMENT OF PHINEAS STEVENS

ON BEHALF OF APPELLEES (Resumed)

MR. STEVENS: Thank you, your Honor.

Mr. Justice Douglas, and may it please the Court:

MR. JUSTICE DOUGLAS: The Chief Justice is necessarily absent.

MR. STEVENS: Yes, sir.

I think it may be helpful to the Court, sir, if I may go back and review briefly a few of the facts that I neglected to mention at the outset.

Mr. Rhyne has stated that the chief problem discussed by these shippers was that freight came out of the East down to certain points, then it had to change to another carrier and go forward. That is an oversimplification. On certain lines between certain points, that is correct; between other points there was one-line service all the way through, but the shippers would say, "We would like to have another one-line -- single-line service is the proper term -- from A to B. There is not enough service from that standpoint."

First, it must be borne in mind that there isn't a single point proposed to be served that did not have multiple

service at the time of the applications. Also, it must be borne in mind that they propose only a very highly limited selective type of service to go through the small communities and serve only the major communities and leave to the existing carriers the obligation to handle the less profitable freight to the smaller communities.

The Examiners found that the approval of any one of these 10 applications would result in a deterioration of service primarily to the smaller communities, but also to the larger communities, that the public interest would be damaged by the approval of any one of those. The facts upon which those findings or conclusions were based were adopted verbatim by the Division, but they reached a different conclusion from those facts.

I think it might be also helpful to note that this was not a general influx of citizens asking for service. This was not a general investigation by the Commission, which they could have done. These were individual applicants that had sought a particular service; they were consolidated for hearing. And we have here the most unusual situation of having 10 major applications heard on one record.

One of the things that resulted in, each time an applicant would call a witness to the stand, he would be criticizing other applicants. So we saw that there was no difference really between the applicants and the protestants.

Also, it should be noted that these shippers were not parties, they were witnesses. Forty-one of them were permitted to intervene as parties represented by Mr. Rhyne after the initial decision had been made. It was only then that any suggestion had been made of any antitrust issue. Up to then the considerations by the Examiners were just the opposite, there is so much service that it is really destructive competition at the present time.

Also, mention has been made of the fact that the affirmance of this case would result in denying service to a large number of shippers. With deference, may it please the Court, I submit that just the contrary would be true. In the first place, the most unusual aspect of this case is that while it was pending before the Commission, there was a massive increase in single-line service that took place with Commission approval.

Bearing in mind that the whole theory of the case was not that there is not sufficient service, but there is not sufficient single-line service, the Commission found, and all of the witnesses, all of the parties, acknowledged that there is a direct correlation between the number of times a shipment changes hands and the expeditiousness of the shipment. So single-line service per se is of utmost importance. The entire theory of the case was predicated upon that.

So what took place was that while these cases were

pending before the Commission, there were a series of mergers, consolidations, with Commission approval, and a few new grants of authority. The Examiners took note of that. For example, they pointed out that at the time of the hearing between the focal points of the application -- Atlanta and Dallas -- there were three single-line carriers. But at the time of their decision in 1969 there were seven such carriers. The Examiners said, giving effect to the present service available, bearing in mind the statutory criteria to determine the present and future public convenience and necessity, we find that there is a multiplicity of service available.

When it went before a Division composed of three of the eleven Commissioners, we petitioned to reopen, to present proof of the changed conditions. The Commission said, "No, that will not be necessary. Under our decision, citing primarily the West Brothers case, we will give effect to this increase in service."

Incidentally, the West Brothers case is particularly unique because it involved two of the points involved and the carriers involved. Briefly stated, the Commission had granted West authority to operate from Alabama to Louisiana, which included authority to operate from Birmingham to Baton Rouge. After that grant had been approved, certain protestants petitioned the Commission for reconsideration, as we did in this case, pointing out that in another case, while the West

Brothers case was pending, in the Mercury case the Commission had granted Mercury authority to operate between Birmingham and Baton Rouge. The Commission said, "That's right, we must give effect to our grants in other proceedings. We reopened the West Brothers case, we modified that so as to eliminate from that grant to West Brothers the authority to operate between Birmingham and Baton Rouge. We have given Mercury" -- now, Mercury wasn't even a party to the West Brothers case, but they properly gave effect to their other decisions. In other words, letting the right hand know what the left hand was doing.

In our case they cited West Brothers as authority for the proposition we must give effect, but what did they do? They granted two more carriers -- Red Ball and Bowman -- authority from Birmingham to Baton Rouge, that they had just said in West we can't do, and three more from Atlanta to Baton Rouge, all three of these applicants.

So at the time of the Commission decision they went back and looked at an exhibit that had been introduced by Johnson at the outset of the hearing summarizing all of the available single-line service and they said, based on that exhibit, we conclude there is a paucity of single-line service available. And in that respect we take note of the fact that in 1970 Census compared to '60 Census, there had been an increase in population.

So they judged -- and the only comprehensive analysis they made of the quantity of service available was based upon the condition in early 1966 -- they concluded there is a paucity of single-line service available, ignoring the Examiners' conclusion that giving effect to the changes there is now a multiplicity of service.

But what had taken place? Two more years had transpired between the Examiners' decision and the Division decision. And by then the seven between Atlanta and Dallas had grown to 13. At the time of the hearing there was one single-line carrier between Baton Rouge and Atlanta. At the time of the Division's decision, there were seven.

So the witnesses had been saying, "We would like to have another carrier available." Without exception they all had multiple other carriers available. The Commission in certain respects said this case is moot as to certain aspects of it that are not important here. We submit they could just as well have said the entire case was moot because the issue is a contention there is a need for additional single-line service and there has been a massive inflow of single-line service occurred while these cases are pending.

Instead of doing that, saying we must give effect to these recent grants, they did not give effect to the recent grants. Instead they continued on what the court termed a prejudicial and discriminatory double standard.

I would like to illustrate that a little bit further. I have mentioned these transit time studies. They were the most important part of our evidence, that's true. But they did other things. What about the transit time studies that the shippers themselves introduced? They were fragmentary, individual shippers showing different things. So after the applicants had all rested, there was a several-month recess. We took every single transit time study presented by every witness and made it into a composite analysis where you could look at it together and not fragmentary. What did it show? It showed that the protestant's service reflected by those exhibits between the points that we studied were superior to the applicants' service. But more significant is that overall the service was reasonably satisfactory even bearing in mind that the shippers set about, in most instances, to give the horrible examples of poor service.

The Commission would not give effect to our analysis, the composite analysis, but looked only to the fragmentary exhibits as they were introduced. The Commission said this: "Certain protestants have restrictions in their tariffs and engage in certain restrictive practices."

Well, in the first place, we don't think that's in point. The Commission has plenary power to require a carrier to do away with any restrictive practice or eliminate from its tariff any restrictive provision. We heard argument to

that effect this morning in connection with a different section of the act. But what did they do? They said, "One of the reasons we want to grant this is because the protestants have restrictions, ignoring the fact that the applicants had the identical restrictions and while the case was pending, published additional ones. We pointed that out; they paid no attention whatever to that, but just hung their findings on the fact that the protestants had certain restrictions. They went out of the record and out of their way, if it may please the Court, to take official notice of an industry publication that said that one of the protestants had closed one terminal subsequent to the hearing in one town in Mississippi. We had been arguing that the applicants' proposals were not realistic but also, among other things, there was Bowman proposing to establish a whole series of new terminals, whereas it served vast areas in the East where it had no terminals at all, over a hundred cities of comparable size where it had no terminals. We were pressing that point. They ignored that argument, but went outside of the record to take official notice of the fact that one protestant had closed a terminal in one point.

When they did that, we petitioned them, "But look here, the same publication will show that Red Ball, one of the applicants, had closed 35 of its terminals." But the Commission said one of the reasons we are going to grant authority to Red Ball is because it has 92 terminals. That

fact was not correct. It was correct at the time of the hearing, but it was not correct at the time it appeared in the Commission's report. We pointed that out, they had closed 35 of their terminals. The appellants did cite that in their reply brief to this Court filed a few days ago justifying the Commission's grant, the finding that there were 92 terminals, pointing out that really the closing of the terminals of Red Ball was not reflected in the same edition of that American Motor Carrier Directory, but in another edition. They could have pointed it out to the Commission if they had seen fit to do so, this is a changed condition, we bring it to your attention.

Again, one standard was applied to the applicants; a different standard was applied to the protestants. In every instance where there was a criticism as pointed out by the Examiners, those criticisms applied to the applicants as well as to the protestants. They did not give effect to any of those.

So we filed a petition. It was overruled by a two-to-one vote of the Commission without an opinion. We asked for the entire Commission to review it; again without an opinion it was denied. We it went to court on the basis of two of the Commissioners finally voting to grant, and we submit under conditions that violated the basic rules of fairness.

Now, we submit, may it please the Court, that the

proper standard of review is found in examining section 706 of the Administrative Procedure Act in its entirety. It's not necessary to decide whether the arbitrary or capricious standard is more strict as alleged than the substantial evidence test. Some text writer will say just the opposite. That is not involved in this proceeding, not necessary for this Court to make that decision. It's also not necessary for any court to compartmentalize its findings that this is a subsection (a) decision or a subsection (b) decision.

I make reference to the Atchison case in which there was a recital by the lower court and by one of the opinions -- there wasn't a majority opinion here -- that there was substantial evidence. But the court went on to set it aside or finding the setting aside by the lower court, not the lack of substantial evidence or not for any of the other grounds without specifying exactly what it was, but obviously it was because it was arbitrary, capricious, or abuse of discretion or not otherwise in accordance with law.

The applicants state time and again, "Look at this evidence. By themselves these facts provide the substantial evidence for the Commission's findings of inadequate service." But as stated in Universal Camera by Mr. Justice Frankfurt, the Administrative Procedure Act put that to a rest. You cannot look at evidence by itself. You must look at the entire evidence.

The court quoted from Professor Jaffe an excellent statement on this point: To abstract out of a case that part of the evidence which can be made to support a conclusion is to imagine an abstract case, a case that was never tried. A conclusion based on such abstracted evidence may be"rational" but it is not a rational decision of the case which was in fact tried. Evidence which may be logically substantial in isolation may lose its logical relevance,even its claim to credibility, in context with other evidence.

We say that the Division, the three-man Division, should have given effect to the entire evidence instead of saying, "We will not give effect to this evidence; we will give effect to the identical evidence if it helps the applicants; we won't give effect to it if it's detrimental to the applicants, and assigning a reason,that is to say, like the evidence relates to specific shippers which was equally applicable to all of the evidence that they did give effect to.

All in the world the court here was talking about is fairness. The Division did not treat these parties with fairness, and as a result the public would be damaged under this decision. Instead of saying, "We are going to grant three more carriers from Atlanta to Dallas" -- as I really believe the Division thought that they were doing. What they would be doing was increasing the 16 to 19. Instead of putting an additional carrier in operation from Atlanta to

Baton Rouge, they would increase the 7 to 10. Nowhere in there did they recognize what the present service was, although they said, "We must give effect to it."

Now, the lower court entered an order setting aside, holding invalid, and enjoining the implementation of the Commission's order in the statutory language. That's as far as the lower court went. The Government, but not the private parties, then filed a motion saying, "That order is beyond your power, your jurisdiction. You must supplement it or amend it to provide for remand." The court says, "No, remand isn't by statute or case law obligatory. It is discretionary." No one has ever suggested that remand would serve a useful purpose, and here, I believe, it's been admitted that remand will not serve a useful purpose to the Commission.

This record is old. The court didn't set it aside because it was old. But if it went back to the Commission with instructions to give effect to this record, this record deals with that Baton Rouge shipper talking about, "I need a second single-line carrier," whereas in fact today there are seven. It deals with apples; the issues is oranges. There is no need in the world to use that, And as the court said, it would impede rather than facilitate further proceedings that the Commission is free at any time to conduct. We do not go into the field of ultimate decision or the issue of public convenience and necessity.

QUESTION: Could I ask you, would the district court have remanded had it thought the record was not stale, but was current?

MR. STEVENS: Your Honor, that is pure speculation because --

QUESTION: Well, then, I will ask it the other way: Why didn't he remand?

MR. STEVENS: In the first place, the only suggestion to remand had to do with jurisdiction. That was all that was suggested, "You do not have jurisdiction to enter your order." It was never suggested that you ought to remand, that it would be helpful to remand, only that you must remand.

QUESTION: What reason did the district court give, though, in response to the motion to amend the judgment?

MR. STEVENS: First it says that we have the power to enter the judgment. That disposed of the technical question raised by the motion.

Then they went further in a very detailed opinion and gave the reasons why the court thought that a remand would impede rather than facilitate --

QUESTION: One of the reasons was that they thought the record was very stale.

MR. STEVENS: That was one of the reasons, yes. But, your Honor, I might suggest this: It wasn't simply because it was old; it was because the conditions after the

close of the record had changed to such an extent.

QUESTION: I understand that. Do you suppose that the district court, in view of the reason it gave in denying that motion, saying that whether there was substantial evidence or not at one time, the record is just so old and irrelevant to the current situation that the order can't stand?

MR. STEVENS: No, I do not think that they were saying that the order cannot stand. That decision had nothing to do with the age of the record, as I read the court's opinion, sir. It reached its decision without any reference at all to the age of the record. It considered the age of the record only as to where should we go from here?

QUESTION: Yes. Well, when it finally said "dismiss and enjoin permanently the issuance of these certificates," it must have had a reason for doing it.

MR. STEVENS: The reason it assigned is because the order was arbitrary and capricious, not because of the age of the record. The age of the record question came after that order was entered, and we permanently enjoin the enforcement of this particular order, that is, implementing the order that was before the court.

Then it addressed itself to the question, Should we amend that order and make it obligatory that the Commission have further proceedings on the present record or shall we just leave it up to the Commission as to what they are going to do.

And it said, "We think that the Commission would be better off starting over, citing the cases that it cited there, which the Commission has been free to do at any time."

But no one has yet suggested that it would be helpful in the further proceedings to test the issue of present and future public convenience and necessity. Obviously the present situation must be considered. No one has suggested that in making that determination, use of the old record would facilitate the determination of the issue.

We submit that basically here the court, as stated in the J. T. Transport case, that it recited, "We must give deference to the Commission. The issue of public convenience and necessity is for the Commission, but we do not have to accept the Commission's determination where we are convinced, as here, the Commission has loaded one of the scales." That statement fully applies to this.

Also, the statement in Burlington Truck Lines cited by the court that expert discretion is the life blood of administrative process. But unless we make the requirements for administrative action strict and demanding expertise, the strength of modern government can become a monster which rules with no practical limits on its discretion.

Thank you.

MR. JUSTICE DOUGLAS: Mr. Rhyne and Mr. Patton, as I am advised, the two of you have 15 minutes.

REBUTTAL ORAL ARGUMENT OF CHARLES S. RHYNE

ON BEHALF OF THE APPELLANTS

MR. RHYNE: Thank you, Mr. Justice Douglas, and may it please the Court: Frankly, in view of the concession by counsel that the findings of fact of the Interstate Commerce Commission were not in issue here or in the court below or in the complaint, I really see no useful purpose that I could perform by rearguing the evidence to this Court.

So everything that my distinguished adversary said, he argued over and over again to the Commission, everything has been updated several times. So unless some member of the Court has questions that they would like me to answer, I don't see what useful purpose I could perform by talking about findings that are not in issue. That's the whole case as far as I'm concerned. It's over. And I would simply urge that under the circumstances the Court send it back to the district court with instructions to dismiss. I don't see how there is any other alternative.

QUESTION: Mr. Rhyne, how about, for example, the Commission, its order was partly based on the fact that Red Ball had 94 terminals and now we are told it has closed 35 of those. The Commission doesn't mention that; you don't mention it; in fact, you talk about 94.

MR. RHYNE: In our reply brief we point out that the Commission at the time of its decision based its official

notice on one document that was a 1971 document, and what they are talking about on the closing is a 1972 document.

But, Mr. Justice Stewart, what they are really talking about is agency discontinuances and consolidations done by Red Ball. That isn't a major thing in this case at all.

QUESTION: Yet they went out of their way to, as I understand it, to point out that one of the protestants had closed a single terminal, one terminal.

MR. RHYNE: Well, again, they did that, yes, but they were talkir about they took official notice of this, they took official notice of that. So they took official notice of the facts as they were at the time of their decision. I really don't think that is a major part of their decision, because as I said before the Commission regrouped the testimony of the witnesses, these 933 witnesses,according to geographic points, which made the service stand out that was needed. That was the big issue here. And after that was done, they take a look at points that needed service and that's how they selected the three carriers. They just fitted into that picture. They could best serve those points.

QUESTION: Well,at the time of the hearing I think there was one direct line from Atlanta to Baton Rouge and the Commission's order is based on that. And now it turns out there are seven, aren't there?

MR. RHYNE: Your Honor, the Commission's order is not based on one line. If your Honor will look at Exhibit G, every increase in service is listed there, and if your Honor will look at Exhibit D, every increase in service is mentioned there. And the Commission said, "Sure, all of these arguments about increased are argued all the way through," and they say in spite of all this, "We find that the public interest requires this new service." So I think that since the Commission, the great expert in this whole area, has held that additional service, and particularly breakthrough service through the gateway, sure there was one or two before this started went through the gateway and there was probably one or two more that had increased. But getting through those gateways was an enormous breakthrough for the shippers that are involved here.

I don't really want to reargue my evidence, but I think, Mr. Justice Stewart, that every point that was raised here the Commission considered. And it was the one to consider it. It did. They don't challenge their findings. I really don't know what else I could say.

So, thank you very much.

MR. JUSTICE DOUGLAS: The case is submitted.

(Whereupon, at 1:30 p.m., the oral argument in the above-entitled matter was concluded.)