

In the
Supreme Court of the United States

INTERSTATE COMMERCE COMMISSION,)

Appellant,)

v.)

No. 73-1210 ^{c 3}

OREGON PACIFIC INDUSTRIES, INC.:)

ARTHUR A. POZZI CO.: TIMBERLAND)

LUMBER CO.: CHAPMAN LUMBER CO.:)

NORTH PACIFIC LUMBER CO.: and)

AMERICAN INTERNATIONAL LUMBER CO.,)

Appellees.)

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SUPREME COURT, U. S.

Washington, D. C.
November 20, 1974

Pages 1 thru 43

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IN THE SUPREME COURT OF THE UNITED STATES

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 INTERSTATE COMMERCE COMMISSION, :
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 Appellant, :
 v. :
 : No. 73-1210
 OREGON PACIFIC INDUSTRIES, INC.: :
 ARTHUR A. POZZI CO.: TIMBERLAND :
 LUMBER CO.: CHAPMAN LUMBER CO.: :
 NORTH PACIFIC LUMBER CO.: and :
 AMERICAN INTERNATIONAL LUMBER CO., :
 :
 Appellees. :
 :
 -----X

Washington, D. C.

Wednesday, November 20, 1974

The above-entitled matter came on for argument at
 10:05 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:

CHARLES H. WHITE, JR., ESQ., Interstate Commerce
 Commission, Washington, D. C. 20423, for the
 Appellant.
 SEYMOUR L. COBLENS, ESQ., 510 Corbett Building,
 Portland, Oregon 97204, for the Appellees.

I N D E X

Oral Argument of:	<u>Page</u>
CHARLES H. WHITE, JR., ESQ., for the Appellant	3
SEYMOUR L. COBLENS, ESQ., for the Appellees	24

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument first this morning in 73-1210, Interstate Commerce Commission against Oregon Pacific Industries.

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

ORAL ARGUMENT OF CHARLES H. WHITE, JR.

ON BEHALF OF THE APPELLANTS

MR. WHITE: Mr. Chief Justice, and may it please the Court: This is a direct appeal from final judgment of a three-judge district court setting aside a Commission's car service order rendered pursuant to 1(15) of the Interstate Commerce Act.

Although the case is couched in technical terms, the issue before this Court is quite simple. The issue is whether the lower court erred in finding that the order of the Commission was a rate order fixed without due process consideration, or instead, was it an order directed at the use to which the boxcars were put?

We submit that Service Order 1134 is a temporary order aimed at the extended use of the scarce boxcar resources as mobile lumber warehouses during a period of unquestioned transportation emergency, and as such well within the reach of 1(15).

This Court is well aware, given the light of the Allegheny-Ludlum case and Florida East Coast of the chronic

boxcar shortage facing the country today. There is no need to belabor that point.

However, the order that we are considering here today arises out of an emergency over and above the chronic shortage. In 1972 and early '73, the country was enjoying a tremendous economic boom. Record crops were being harvested and moved to these country elevators, and a completely unexpected event happened to create a transportation emergency. The unprecedented and unexpected Russian grain deal completely strained and placed an unsustainable strain on the boxcar fleet.

The Commission moved on many fronts to make sure that the cars moved in the public interest during this time of transportation emergency.

QUESTION: Wasn't that in the summer of 1973?

MR. WHITE: No, your Honor, this was in the fall harvest of '72, going into the early spring of '73. This was the time of the crisis that hit the Nation.

The Commission orchestrated a series of car service orders to move the cars expeditiously. For instance, in Service Order 1120, it limited the number of jumbo covered hopper cars that were available to any unit train shipper so that all grain shippers would have a fair share of this transportation resource to move the grain. In 1121 the Commission was faced with the situation of growing congestion

of the ports and a cutback on the free time available to the shippers of grain. In 1117, perhaps the most important of the car service orders in that series, the Commission diverted coal cars, the open top hopper cars, from the coal industry to the movement of grain. And, as pertinent here, the Commission decided in the face of the emergency that unrestrained, unlimited reconsignment by the lumber shippers was exacerbating the transportation emergency and Car Service Order No. 1134 temporarily limited the reconsignment privileges of the lumber shippers.

Reconsignment, the issue before the Court today, is markedly different from the transit privileges that this Court considered in the Wichita case. Briefly, a transit privilege allows the shipper to stop his movement for the physical activity of something like inspecting the grain or creosoting lumber and to continue on with the movement and still enjoy the benefits of the through rate.

Reconsignment, on the other hand, allows a stopping in movement simply to change the billing or the destination, but preserves to the shipper the through rate.

QUESTION: And is the stop just an arbitrary place or what? How does that work?

MR. WHITE: In the specific instance of lumber shipping --

QUESTION: They move from west to east.

MR. WHITE: Yes, your Honor. And there are various points that have the trackage facilities which the lumber wholesalers use to stop the cars to let the cars sit out as lumber warehouses while the market develops.

QUESTION: What are there, half a dozen or a dozen places that have these facilities?

MR. WHITE: Yes, Mr. Justice Stewart, in that order. There must be physical facilities to set out the strings of boxcars, and it's on the order of a couple dozen.

QUESTION: These are in the Midwest somewhere?

MR. WHITE: Primarily in the Midwest, but in the far West, possibly in Wyoming, in Washington State. But generally the movement is, as you correctly put it, from the Northwest towards the East, and reconsignment points might conceivably be any place in that quadrant of the country. And in fact that leads to an interesting point. Reconsignment, of its very nature, must involve some degree of circuitry because a certain percentage of the lumber that is reconsigned is reconsigned backwards or perhaps not in the most expeditious route to the final destination.

The lumber wholesalers are the primary users of the reconsignment technique. Lumber is marketed in two ways: Primarily there are large mills, lumber mills, that have their own storage capacity and their own sales force. There are also small mills which collectively provide the bulk of

the lumber that comes eastward. The small mills typically have no storage facilities, nor do they have a sales force. They look to the lumber wholesalers both to market the lumber and provide the wherewithal for storage. But the lumber wholesalers themselves have no storage capacity. They simply purchase the lumber and immediately cause it to be loaded onto the boxcars and set the boxcars in motion eastward. And the boxcars are held at the reconsignment point until a market is made.

The boxcars, while they are at a reconsignment point, are subject only to the external stimulus of demurrage. Under the tariffs that pertain there is no limit to the time that the boxcars can sit idle. Demurrage is the only incentive to get the cars moving. But in the case of a rising market, in the case of an inflationary time, the demurrage incentive has typically been found not to excite fast release of the scarce boxcars.

QUESTION: The shippers sometimes use the demurrage as a storage cost, in effect, do they not?

MR. WHITE: Yes, Mr. Chief Justice, I believe they do.

QUESTION: Mr. White, what would the problems have been had the Commission elected to increase the demurrage sufficiently to bring about the same result?

MR. WHITE: Well, your Honor, if the demurrage was

increased sufficiently, as you put it, the exact delimitation of the storage time would still be uncertain. Demurrage, as you know, is a gradual increase. The overriding need that the Commission felt was to get the cars back into motion quickly and within a time period that was reasonably determined to be five working days. An increase in the demurrage rate would provide incentive -- you are correct in asking the question -- in getting the cars back, but it's not certain when it would become economically feasible, economically of sufficient magnitude to get the cars rolling.

The Commission in this case felt a need to get the cars back in at least five days. And as the Commission stated in its service order itself, demurrage hadn't been working in this particular segment of the economy. It hadn't been providing a sufficient incentive to get the cars back in motion.

QUESTION: Demurrage goes progressively, doesn't it?

MR. WHITE: Yes, your Honor, it does.

QUESTION: It's not so much a day, it's so much --

MR. WHITE: Well, it can be structured any way the Commission chooses, I believe.

QUESTION: But it gets greater per day as the number of days increase.

MR. WHITE: Yes, Mr. Justice Stewart.

During the emergency period the Commission looked

very carefully at the statistics of just what distortions in the transportation system were being provided by the reconsignment technique. And it found that by early '73 the supply of the 40-foot wide-door boxcars was averaging on a daily basis over 600. The 50-foot cars were over 2,200 scarce, and of all boxcars, we were experiencing a scarcity of something on the order of 13,000 cars.

Meanwhile, the Commission studies showed that the average hold time at reconsignment point was 10 days and holding experiences of 20 to 30 days were not uncommon.

In this light, the Commission determined that the emergency was being exacerbated by the reconsignment technique and issued Car Service Order No. 1134.

In the face of the order itself, the Commission's rationale was completely outlined. The Commission found that the shortage of boxcars was impeding the movement of many commodities, that the cars were being held for excessive periods at reconsignment points, that the practice was immobilizing cars needed by shippers of other commodities and, perhaps, most important, that the demurrage technique was not a sufficient incentive to get the cars moving.

So the Commission suspended, as it can under 1(15)(a), the Car Service Rule which is embodied in open-ended reconsignment. It limited reconsignment to five days but did not eliminate reconsignment.

The Commission went one step further and explained in gratuitous language what the legal effect was of suspending the car service rule. It explained the purpose of the car service order; it explained the result that after the fifth day, after reconsignment privilege has terminated, the shipper must bear, as he would anyway, some of the local rates. Those words are not words of rate prescription; they are merely a description of what the legal effect of the order is.

QUESTION: (Inaudible.)

MR. WHITE: Yes, indeed, it does, your Honor.

QUESTION: Has there been any precedent for this sort of thing?

MR. WHITE: I'm sorry, sir?

QUESTION: Any precedent for this sort of thing?

MR. WHITE: Yes, sir. There is a case exactly in point that upholds a car service order of this --

QUESTION: Well, aren't you in a little bit of a bind in answering that question of my brother Brennan? Didn't you stipulate --

MR. WHITE: Yes, I am in a bind, precisely in a bind. And I explained candidly in a footnote I did not locate those car service orders until after the Court had rendered --

QUESTION: There is a stipulation that there is no precedent.

MR. WHITE: There is a stipulation.

QUESTION: And the fact is that there is at least one or maybe two precedents, right?

MR. WHITE: Yes, indeed, that's the case.

QUESTION: In any event, the result is that the rate basis changes on the fifth day.

MR. WHITE: No, your Honor.

QUESTION: Well, you charge some of the individual rates rather than the joint rate, or the through rate.

MR. WHITE: Mr. Justice White, I would like to try to answer your question this way: The Commission suspended, as it can under 1(15)(a) the car service rule which allows through rate privileges with reconsignment.

QUESTION: Well, that was in the tariff.

MR. WHITE: That was in the tariff. The fact that it was in the tariff does not limit the Commission's ability to suspend it. Under 1(15)(a) the Commission is given extremely broad powers to suspend any and all practices or rules during a transportation emergency.

QUESTION: Rates, too?

MR. WHITE: Yes, your Honor. This must -- the car service rule must embrace those that are embedded in tariffs.

The Commission did not set rates; it only limited the use of boxcars as warehouses for five days. And I submit, your Honor, that on the face of the statute, on the face of 1(15), it has the power to do that. 1(15)(a) gives the

Commission power in an emergency to suspend any rule, any and all rules, in effect, with respect to car service. Car service, in turn, is defined by 1(10) as to embrace the use to which cars are put. Reading 1(10) and 1(15) together the Commission must have, under 1(15) we submit it does have, the ability to suspend car service rules embedded in tariffs.

QUESTION: Can we say that the other side of Mr. Justice White's question is that if the car moves within the designated time, the rate isn't changed at all?

MR. WHITE: Precisely that, Mr. Justice Blackmun.

QUESTION: It depends on how we look at it.

MR. WHITE: Exactly that. The option is left with the shipper. As long as the shipper seeks only transportation and reasonable reconsignment, there is absolutely no change in the rate he must pay. And, in effect, Car Service Order No. 1134 reached precisely that goal. The average detention time was driven down to five days. There has been very -- I have not received any information that there has been much, if any, additional charges paid. The average hold time was brought down within the reach of the car service order, and the cars moved in the public interest during the crisis. The order worked.

QUESTION: Mr. White, before the Commission entered its order that's on appeal here, supposing that you put lumber in a boxcar in Portland and consigned it to Chicago

and then exercised your reconsignment privilege of the shipper to say it goes back to Denver, and it's ultimately sold in Denver. Now, what rate would that shipper pay?

MR. WHITE: The shipper would pay, Mr. Justice Rehnquist, the through rate from Portland to Denver.

QUESTION: You mean he could ship --

MR. WHITE: Even with that built-in circuitry that I alluded to earlier, that the circuitry is a part of the practice that is necessary if reconsignment is fully applied.

QUESTION: Even if it ended up, it went back to Seattle, he would pay only from Portland to Seattle?

MR. WHITE: I believe that's right, Mr. Justice Rehnquist.

And that leads me to a point that this Court touched upon way back in the Turner Lumber case that reconsignment privileges are, during times of economic crisis, anyway, inherently wasteful of transportation resources. They have been tolerated by the Commission; they haven't been formally promulgated in any way. The tariff provisions providing for reconsignment have been merely tolerated. And during times of unquestioned crisis, transportation crisis, the likes of which we experienced during the Russian grain deal, that practice has not been and should not be tolerated when weighed against the overriding public need to keep the cars moving for all commodities.

That leads me to another point, Mr. Justice Rehnquist. My brother is concerned that Car Service Order 1134 eliminates the reconsignment practice. It does not. It, during its duration, during the crisis, limited the practice to five working days. It did not eliminate reconsignment. And because it did not eliminate reconsignment as a marketing technique, I submit that the mechanism in 1134, mechanism for adjusting the needs of a particular segment of the economy, vis-a-vis the overall economy, must be preserved to the Commission. 1134, I submit, is a careful accommodation of the public interest and the interest of a segment of the economy.

The Court did not throw out the particular accommodation. The Court, instead, threw out the whole mechanism.

QUESTION: Mr. White, let me theorize a little bit. If the ICC didn't have this emergency power, do you think it would have by this time have devised some solution to this longstanding, chronic problem?

MR. WHITE: Mr. Justice Blackmun, which chronic problem do you mean? The car shortage or the reconsignment?

QUESTION: The car shortage. It seems always to be with us and never can get solved.

MR. WHITE: I can report that the Commission has taken a very significant and important step just this week, I believe, in Ex parte 241. This Court had the earlier phase of 241, the Allegheny-Ludlum case. The Commission is exercising

its authority which it firmly believes it has to order the nation's carriers to augment their boxcar fleet. There is a motion to show cause, a show-cause order outstanding today ordering the nation's railroads to restore their boxcar fleets to the standards that pertained in the 1970 to 1972 period.

QUESTION: The financing of that, I gather, is public (inaudible).

MR. WHITE: The financing is a mixed problem because some of the nation's railroads, as you know, Mr. Justice Brennan, are in deep financial trouble, but others are not.

QUESTION: This applies uniformly?

MR. WHITE: This applies uniformly and it is aimed at increasing the fleet by some 69,000 units, and reducing the bat order ratio. So the Commission is taking forceful steps.

And Congress is taking forceful steps. There is legislation pending right now, Senate 1149, looking towards financial aid from Congress and looking ultimately towards the creation of a national boxcar fleet if financial aid doesn't work. So very important strides are being made.

But I think we can predict with some certainty that it will take time. And during the time it takes, there will be, we can state with certainty, continuations or periodic reoccurrences of transportation emergency, and because we can safely predict that transportation emergencies will be in our future, the Commission needs to have a full array of remedial

tools to cope with emergencies as they come over the horizon. That means it must have a full array of demurrage techniques, it must have a full array of free-time limitation techniques, and it must in this particular instance preserve the technique --

QUESTION: Did this order ever become effective?

MR. WHITE: This order was effective during the -- and it worked. The first step of the judicial review in this case was a TRO hearing in which the TRO was denied. And the service order worked. It was in effect from May until the three-judge hearing, I believe it was in August or September.

QUESTION: Has the emergency that prompted it --

MR. WHITE: The emergency --

QUESTION: That's over? That's over, is it?

MR. WHITE: I would say, given the lumber prices in the housing industry, it probably is over now. But the order was allowed.

QUESTION: I meant the grain deal. That was the emergency that created it.

MR. WHITE: No, your Honor. That was -- yes, that was a part of this tremendous unexpected emergency. But the emergency itself was being exacerbated by the lumber reconsignment practices which, using the plaintiff's --

QUESTION: Independent of the grain deal.

MR. WHITE: Independent of, but it was an event that could not be tolerated in the face of the overriding need

to get the cars moving.

QUESTION: In the past three years we have had, three or four years we have had two or three car shortage cases here before us, have we not?

MR. WHITE: Yes, indeed, Mr. Chief Justice.

QUESTION: All emergency situations stemming from other factors.

MR. WHITE: No, I respectfully would not call them all emergency situations. You have had ---

QUESTION: It was a car shortage problem.

MR. WHITE: Chronic shortage problems. That is not what I am here talking about today, your Honor. We are talking about a very unusual emergency existing on top of the chronic shortage.

QUESTION: There is nothing unique about the car shortage problem in this country from time to time, is there?

MR. WHITE: No. We are in a period of chronic shortage.

QUESTION: Sometimes we have the cars, but we have them in places where they aren't needed.

MR. WHITE: Indeed we do, and that's one of the reasons why we have to have, the Commission has to have the ability to order the cars to be moved to where we need them the most.

QUESTION: Well, Mr. White, the statute, of course,

confers this power only to shortage of equipment or other emergency. Now, you have just said that this is a chronic condition.

MR. WHITE: No, your Honor.

QUESTION: Is it chronic?

MR. WHITE: I am trying to find, if I may -- what I am talking about here is a series of car service orders and a car service order that was aimed at an emergency.

QUESTION: It's a never-ending emergency, though, isn't it?

MR. WHITE: No, indeed, I don't believe it is.

QUESTION: I understood your answer to be that there has been a chronic shortage for some time, but that this was an extraordinary emergency.

MR. WHITE: This was an emergency on top of the chronic shortage, an emergency that triggered the extraordinary summary powers the Commission has.

QUESTION: That being the grain deal?

MR. WHITE: The grain deal was one segment of it, as I mentioned.

QUESTION: That's over. That's over.

MR. WHITE: Yes, indeed.

QUESTION: Now what's left in the way of an emergency?

MR. WHITE: I don't believe that the emergency that supported 1134 still exists. And that's totally consistent

with ---

QUESTION: That's what I wanted to know. Then, if you prevail here, what happens to 1134?

MR. WHITE: If we prevail, 1134 might -- 1134 still is in existence, but it has been suspended by the court.

QUESTION: I know that, but if you prevail, what happens?

MR. WHITE: If we prevail --

QUESTION: Is it reinstated?

MR. WHITE: If we prevail, 1134 probably would be terminated because of the end of the emergency.

We are not here for that simple reason. We are here to preserve a technique, a remedy, an adjustment mechanism that might be used in the future and that must be available to the Commission in the future.

QUESTION: You don't think there is something like mootness about this thing?

MR. WHITE: Indeed, I don't, Mr. Justice Brennan. The Court recently looked at the mootness issue in the Defunis case. One of the exceptions to Defunis, as the Court pointed out, was the Southern Pacific Terminal case versus ICC, which in precisely the same kind of order we have here, in the sense that there were recurring short-term orders that could be mooted out, so to speak, that could be noneffective by the time the courts got the mechanism into reviewing them.

We precisely have the same situation here. We can predict future emergencies and we can predict the repetition of the same kind of question before the Court, and we respectfully submit that this is, indeed, if there ever was a situation where the exception to Defunis applies, that here we might have an issue capable of repetition, yet evading judicial review.

QUESTION: Mr. White, following through a little on this, didn't 1134 by its terms have an expiration date?

MR. WHITE: Indeed it did, as do all car service orders. And they last -- well, let me just --

QUESTION: Two and a half months in duration by its terms.

MR. WHITE: Well, it originated -- six weeks, I believe the first time around, and it was renewed. And this is precisely the -- it's a mechanism that is necessary in an emergency situation. At the expiration of the duration of the car service order, the Commission is compelled to again look at the situation to determine if the emergency still exists. If it doesn't still exist, the car service order terminates.

QUESTION: If you prevail here, does it go automatically back into effect at this late date?

MR. WHITE: Yes, it goes into effect, but the Commission will be compelled to consider the underlying economics to see if indeed the emergency still persists. And if it does not persist, Car Service Order 1134 will have been terminated and

will no longer apply.

QUESTION: If I follow that, if you prevail here, even though there has been no extension to November 20, 1974, it's your position that it will automatically go back into effect?

MR. WHITE: The Commission has, from time to time, extended the car service order, but it had no application. It extended it for this reason, Mr. Justice Blackmun: During this period the Commission has been very carefully building a record of statistics. If we are successful today and Car Service Order 1134 is reinstated, it will have the body of information upon which it can make a judgment whether the emergency still exists and more likely than not will determine that it does not exist and the car service order will be terminated.

QUESTION: Is there somewhere in the record, Mr. White, something other than the notations at page 17 of the appendix which indicate that the original expiration date was July 31, 1973, some indication that the Commission has renewed it?

MR. WHITE: Yes, indeed. It has been renewed on that date, and it has been renewed a second time. But, of course, it was held void abinitio by the court, so it had no effect other than the Commission has been gathering data all during this period and obviously will take it upon itself

to re-examine the underlying premises of the car service order at the termination of judicial review.

QUESTION: Well, did the Commission extend the order, enter subsequent orders extending the order?

MR. WHITE: Yes, it did, Mr. Justice Rehnquist. Yes. It appears in the Federal Register -- I can't cite you the pages, but when an order is extended, notice is given to the public by Federal Register publication. I certainly can provide --

QUESTION: It isn't in the appendix here.

MR. WHITE: No, it isn't, but I certainly can supply the Court with citations.

QUESTION: Copies, and, of course, your friend.

MR. WHITE: Indeed I will.

QUESTION: What is essential to extend a car service order?

MR. WHITE: The Commission's judgment, Mr. Justice White --

QUESTION: That the emergency still exists?

MR. WHITE: Still exists. And that judgment is subject to both administrative review by way of petition for reconsideration and judicial review on whether or not there is indeed --

QUESTION: It's been extended every two or three months since --

MR. WHITE: While this matter is pending before this court, yes, your Honor.

QUESTION: There are a whole series of extensions then.

MR. WHITE: Yes, your Honor. The order is alive but suspended, it has not been in effect.

QUESTION: Is there any reason why the Commission couldn't have sought a stay from this Court after the three-judge district court set its order aside?

MR. WHITE: No, your Honor, there is no reason why it could not have.

QUESTION: Mr. White, it is evident from what you said that the car shortage problem is chronic, although you suggest that this particular order was triggered by the Soviet wheat deal. Let's assume it is severely chronic and that this practice of affording what in effect you characterize as storage facilities has to be eliminated or modified on a long-term basis, not just an order for 60 or 90 days. Under what section of the Act would the Commission, and what would it proceed to do?

MR. WHITE: I suspect the Commission would undertake a rule-making procedure, probably under section 15(7) that basically allows the Commission to examine the rate structure. It would be a rule-making proceeding with full notice and full participation by the parties, something in line with the

proceeding, perhaps in Ex parte 241, perhaps even a sub-numbered proceeding in that case, the case, of course, that was reviewed here in Allegheny-Ludlum. The Commission would provide full due process protection in any kind of an overhaul or long-term change in the marketing practice. In my judgment, it would probably be something akin to Ex parte 241, investigation of boxcar adequacy.

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

Mr. Coblenz.

ORAL ARGUMENT OF SEYMOUR L. COBLENS

ON BEHALF OF THE APPELLEES

MR. COBLENS: Mr. Chief Justice, and Members of the Court, may it please the Court: In answer, since I do not get any rebuttal, I would like to answer some of the questions of my friend.

In answer to Mr. Justice Stewart's question, I believe, and possibly there was a misunderstanding, as far as I know, there is no judicial precedent upholding an order of this kind. There is an order that the Commission couldn't even find and nobody else could until they dredged it up, which they claim to be a precedent. That is number one.

QUESTION: Doesn't it make any difference if in fact it is there and overlooked?

MR. COBLENS: No, it doesn't make any difference, your Honor, except the fact that I didn't want there to be

any misunderstanding that there was a judicial precedent upholding an order of this kind, and I don't think that there has been a judicial precedent. As far as I know, this is the first case of this kind, and insofar as I know, as far as the industry is concerned, this matter is something that the industry, as such, was not aware of, at least not recently.

Now, with respect to the question of Mr. Justice Rehnquist, a statement was made that if it went from Portland to Denver and back to Seattle, that there would be no charge. It is my understanding that is not a correct statement of the fact. I have been informed that there is no way in which you can backhaul a car. It has to move forward from west to east. If you move it backwards, then it becomes an entirely new rate. This is the information I have received, and I respectfully -- I believe my brother is in error when he made that statement.

Now, with respect to Order No. 1134, it is still in existence, and as my brother has stated, it is in full force and effect. It can be activated by the Commission at any time and it's solely in the discretion of the Commission whether it is made effective. So that --

QUESTION: But dependent on the finding of emergency.

MR. COBLENS: Dependent on the finding of emergency.

But as of the moment, it is it not --

QUESTION: Completely stayed, isn't it?

MR. COBLENS: I beg your pardon, no, it is not stayed,

sir.

QUESTION: What did the district court do?

MR. COBLENS: Oh, I beg your pardon. The district court stayed the effectiveness of the order. It declared it null and void, not by reason of emergency, but by reason of the fact that it was an illegal rating.

QUESTION: So it is not in effect.

MR. COBLENS: It's not in effect insofar as becoming effective as far as the rates are concerned. But the district court made no finding with respect to emergency because of certain precedents.

QUESTION: Do you agree that the Commission has gone through the procedure of extending the order --

MR. COBLENS: Yes, sir, this is true. This is true. I have seen the --

QUESTION: And each time asserting an emergency?

MR. COBLENS: Each time, as far as I recall, asserting an emergency.

Now, this Court can affirm the judgment of the court below on one of two grounds: The first is to follow the reasoning of the district court and hold that Service Order No. 1134 did not constitute a car service order as authorized by 49 U.S.C. 115 and was invalid because, as the court stated, it was an illegal rate-fixing order developed through procedures lacking due process.

Now, let me state parenthetically, nobody before this Court argues that the Interstate Commerce Commission does not have the power, assuming that it uses due process, to do what it desires, assuming that it gives due hearing with respect to reconversion. I think my brother admitted that, if it uses section 15, 49 U.S.C. 115, it can issue a new tariff or apply a new tariff. But in that case, of course, we would have to have a hearing, the industry input would have to be there, and you would not have bango! without us knowing anything about it. The industry would have an opportunity to have something to say.

At this point there is no opportunity whatsoever. The order is issued before we even know about it, and sometimes it becomes effective before the industry knows anything about it.

So there is no question about the power of the Interstate Commerce Commission, assuming that it provides ordinary due process, which section 1(15) does not provide. And this is what this case is all about, as I indicated in my brief.

QUESTION: Could you give a hypothesis as to how long that due process might take, the kind of due process you are talking about?

MR. COBLENS: Well, the Court well knows --

QUESTION: Not that we measure due process by time. But when we are confronted with an emergency, that does enter

into it, doesn't it?

MR. COBLENS: But, your Honor, we have had emergencies for 75 years and this business of reconsignment has been in existence for 50 years, and as my brother states, we can expect further emergencies from time to time. So that when you are talking in terms of possibly a year, as against 50 years or 75 years, it seems to me that if this Court, which balances the interests, and this is the balance wheel of the nation, that even assuming it takes a year to give due process, which it might very well, the element of due process, which the Court well knows is so important, is worth it, particularly when we know that for years and years and years, unless something was done, we are going to have some emergency or another. If it's not the Russian grain deal, it will be the Patagonian wheat deal, or it will be some other deal that will come in and -- because the basic fact is that there are just not enough cars, and when you don't have enough cars, the slightest dislocation causes a "emergency" on the basis of the Interstate Commerce Commission.

QUESTION: Mr. Coblens, in that connection, suppose the Commission issued an order just stating that no car could be held more than five days at the reconsignment point. Valid without a hearing?

MR. COBLENS: Yes, sir, they filed it without a hearing under 1(15), if they found an emergency.

QUESTION: So that they could go that far.

MR. COBLENS: That is correct.

QUESTION: ... order, and you would have no objection.

MR. COBLENS: I raise an objection. If we had no -- to the extent possible, I would try to prevent it. My basic plea is, number one, the court below held that this was a rate order and, consequently, they set it aside as a rate order. In addition to that, as I would like to propose, or we argue, the fact that this Court noted probable jurisdiction and did not merely affirm on the basis of the opinion, indicates that the Court is interested in the broader aspects of the case than the points made by the court below. The court below went on a perfectly sound and legal ground, namely, that it was a rate order and section 1(15) did not provide for changes in rates.

But there is underlying the whole case, and something I would like to get across to the Court, a more fundamental question, a question which this Court peculiarly is designed to take care of, and that question is this: Must this Court or any court accept the ipse dixit of the Interstate Commerce Commission in spite of all the evidence to the contrary that the freight car situation on the nation's railroads is a temporary emergency which should be dealt with under the provisions of 49 USC 1(15) rather than a long, continuing

and probably continuing problem? And as the Court well knows, this is what we have.

Section 49 USC 1(14), which is the general rule-making power, provides full due process procedures, and section 49 USC 15, which is the through and joint rate provision of the Interstate Commerce Act, provides an orderly means of dealing with the problem, giving all interested parties full due process rights.

The broader issue before this Court, and it can only be made before this Court, is whether this Court will sanction the abrogation of the doctrine of judicial supremacy which I have been taught and have taught others to believe is one of the principal doctrines of American constitutional law.

QUESTION: As I understand your friend's argument on this matter of a chronic condition related to an emergency is perhaps vaguely analogous to a person who has diabetes which is chronic that goes into diabetic shock, perhaps from time to time, and perhaps he analogizes this immediate situation as a diabetic shock. He calls for something other than ordinary treatment.

MR. COBLENS: Except the fact that I forget now how many diabetic shocks the lumber industry has had in this regard. Orders of various kinds have been issued against the lumber industry by reason of one "emergency" after another. Now, how many emergencies make an emergency? This is what you

are up against. How many emergencies do you have to have before you have a chronic situation? And it's my contention, your Honor, that when you have an emergency that existed for 50 years or thereabouts, it's not an emergency any more; it's something that should be dealt with, giving the input of the industry under either section 1(14) or section 15, which allows due process rights.

QUESTION: This isn't the basis the district court went on.

MR. COBLENS: This is not the basis of the --

QUESTION: The district court said that even if it's an emergency, and they seemed to accept the fact that it was, it isn't a car service order.

MR. COBLENS: The issue of emergency was not raised before the district court, for a perfectly good reason. There were two cases against --

QUESTION: So the question is whether it's a car service order or not.

MR. COBLENS: Well, that's the way the district court -- I believe, however, when it comes up to this Court, this Court can --

QUESTION: Did you assert in the district court -- you attacked the order, didn't you?

MR. COBLENS: I attacked the order.

QUESTION: Did you say it wasn't an emergency?

MR. COBLENS: I did not bring that point before the court because the court had already ruled against me on that question, and I will confess it.

QUESTION: What you are really arguing now is that even if the district court was wrong in calling it a rate order --

MR. COBLENS: That's right.

QUESTION: That it is a car service order, and you say, nevertheless, you are entitled to an affirmance because it is no emergency.

MR. COBLENS: That's correct, sir, and that this Court as --

QUESTION: What do we have before us on which we can judge whether there is or isn't --

MR. COBLENS: The history and the cases that Justice Rehnquist wrote and I cited in my brief.

QUESTION: Are we going to be fact-finders on that?

MR. COBLENS: I don't think it's a fact-finding. I think this Court has already held that there is a chronic car shortage. Justice Rehnquist has held that.

QUESTION: Let me ask you, are you supporting the district court's conclusion?

MR. COBLENS: I am supporting the district court's conclusion.

QUESTION: And for the reason that it used?

MR. COBLENS: That's right.

QUESTION: That it is not a car service order.

MR. COBLENS: That is correct, sir. I say that I have two strings to my bow.

QUESTION: Tell me again why it isn't a car service order, but a rate order.

MR. COBLENS: Because of the fact that it affects the rates, the traditional and historic way in which car service orders have been enforced. And except for the two orders that I didn't know about and the ICC didn't know about, the traditional way is by use of demurrage charges, and as has been stated --

QUESTION: Which increases the costs to the shipper.

MR. COBLENS: It increases the cost to the shipper. Everything increases the cost to the shipper, or to the ultimate buyer in an economic sense.

QUESTION: Unfortunately, yes.

QUESTION: It increases the cost -- this has been pointed out -- only to the extent the purpose of the order is not achieved. The purpose of the order is to free up freight cars, and to the extent it does, to the extent it prevents freight cars being used in this way longer than five days, then it doesn't increase the cost at all.

MR. COBLENS: But the difficulty with that is that this is what the Interstate Commerce Commission has stated. As I point out in my record and in the affidavit before the court below, there are many economic arguments for reconversion

and for the practices of the lumber industry, and the lumber industry or the wholesale lumber industry has never had an opportunity to submit those arguments because never has the Interstate Commerce Commission taken this question up in a full due process hearing.

QUESTION: But if this were just a demurrage, in short, putting a uniform charge, daily charge, or something like that, for holding a car too long, you probably wouldn't be here.

MR. COBLENS: I would not be here --

QUESTION: This puts a very different charge on different shippers.

MR. COBLENS: That is correct.

QUESTION: Depending on what the rate structure -- so the extra charge is dependent upon a rate rather than a demurrage, some uniform charge.

MR. COBLENS: What it does is it splits up the rate from the through and joint rate. My brief and the affidavit shows that in some cases it triples the rate, and it grossly aggravates the situation rather than --

QUESTION: It doesn't triple it if the car moves.

MR. COBLENS: I beg your pardon?

QUESTION: It doesn't triple it if the car moves.

MR. COBLENS: That is true, sir. That is true.

QUESTION: This Court has upheld the demurrage charges against challenge, and I guess what I want, and I think what

Mr. Justice White wants is what's the difference?

MR. COBLENS: The difference is in the structure of the Interstate Commerce Act. The Interstate Commerce Act only gives authority to the Interstate Commerce Commission for emergency action in the case of rules under 1(15). Justice Brandeis in the Pekin case, which I have cited, has stated that 1(15) must be very strictly construed and that it is only traditional and at that time it was traditional only to enforce rules by various -- either by prohibition, criminal prohibition or by in some cases demurrage charges.

Now, if we follow Justice Brandeis' reasoning, that this is in effect a quasi-criminal statute, and since the Interstate Commerce Act in this particular section, because of the very emergency factor involved, and because of the fact that it does away with due process, must be strictly construed. Therefore, the court below held that since it is such an unusual remedy and since section 1(15) does not give that remedy, it does not come under the terms of section 1(15), and that's the difference, because of the fact that in one case due process is granted, and in the other case it is not. The Commission has had authority under section 49 USC 15, to deal with this problem for 50 years.

QUESTION: Can't you say exactly the same thing about demurrage charges, exactly the same thing? And, further, I thought a little while ago you had conceded that if the

Commission put out a plain bar order and said no car may be held more than five days, this would be all right without due process.

MR. COBLENS: If I said so, I misspoke myself, your Honor.

QUESTION: You wouldn't say it was a rate order, would you?

MR. COBLENS: No, sir. I would say that --

QUESTION: It would have the same effect, wouldn't it?

MR. COBLENS: It might have. Yes, it would have the same effect in the sense that it would put criminal penalties presumably on it, some penalties of some kind.

QUESTION: But it wouldn't be a rate -- unless the Commission said that the line haul rates would apply, the individual rates would apply, then the individual rates wouldn't apply just with a bar order? Here they went on and said the individual rates will apply, not the through rates.

MR. COBLENS: That is correct, sir. I don't know exactly -- I can't guess what penalty the Interstate Commerce Commission, in some cases they impose fines, in some cases they have imposed jail sentences, made it a violation of the Interstate Commerce Act --

QUESTION: And in other cases when they say no more than five days, they put a demurrage charge.

MR. COBLENS: They put a demurrage charge on it.

That is true, sir. And my contention here --

QUESTION: I think it is conceivable that a demurrage charge could be the equivalent of the increased rate, couldn't it? In dollars?

MR. COBLENS: Except the fact that --

QUESTION: No, couldn't it be? I mean, suppose it were \$100 a day demurrage charge.

MR. COBLENS: No, it might not be. Oh, if it's \$10,000 a day, I assume so. But you get to a point at which a demurrage charge becomes more than, something different than a demurrage charge.

QUESTION: Here if they hold it one day too long it could cost, in one of these examples, \$1500.

MR. COBLENS: That's correct, sir. That's correct.

QUESTION: For 7500 pounds.

MR. COBLENS: That's correct. So that you come down to a question, I suppose a question of degree in the sense that when -- a demurrage charge usually starts at \$10 a day and it may go to \$20, \$25, \$50 or what have you. That has been the traditional way in which it's done.

If after five days they put a demurrage charge of \$1500 a day, which I suppose is something the Commission --

QUESTION: Well, a demurrage charge has to be uniform. The way this rate thing works, I gather some shippers pay, according to these examples, a thousand dollars more, others

\$300 more, others \$600 more.

MR. COBLENS: That is correct, depending upon where it finally winds up. A demurrage charge would be uniform, but say, it was \$1500 a day, my contention then would be, and I think it would be justified, that this isn't true demurrage, this is in effect a change of quality rather than purely quantity. At some point a change in quantity becomes a change in quality, and my contention is that based upon the way in which this order was designed and is designed, and talking specifically with 1134, it's a rate order, it's designed to affect the rate at which commodities move. Rates at which commodities move on a through and joint rate are governed by section 49 USC 15. Section 49 USC 15 provides due process rights. Section 1(15), which is the one under which 1134, all it requires under its wording is that "The Commission is of the opinion that an emergency is required." And the worst part about that is that several courts of this country have held -- and I've cited them -- the Daugherty case and the two Southern Railway cases -- have held that we as a court cannot go into the question of whether the opinion of the Interstate Commerce Commission is or is not justified. All we can do is to decide whether or not the Interstate Commerce Commission is corrupt or arbitrary or some other thing.

QUESTION: It is because of those cases that you didn't make your lack of emergency argument in the district

court.

MR. COBLENS: That is correct, sir. That is exactly so. And the reason I didn't make it in my case, in my court, is because my court, the U.S. District Court for the District of Oregon, had decided the Daugherty case, and as an advocate, the Court well knows it would be foolish for me to go before a court which had ruled adversely to me and try to make an argument which they had ruled out .. So I took another argument which I think is perfectly valid and I used it.

Now, before this Court, however, I'm in an entirely different situation. I am before a court which has authority for the whole nation. You can look at the thing as a whole. You can look at it. Is this due process? And is this a violation of due process? And are we violating the rule of judicial supremacy that this Court has recently upheld in U.S. v. Nixon. Are we violating that rule? In the Daugherty case and in the two Southern Railway cases, by saying that --

QUESTION: Mr. Coblenz --

MR. COBLENS: Yes, sir.

QUESTION: You refer to due process, as you have quite frequently. You are not speaking in a constitutional sense, are you? You are not urging that there has been a constitutional denial of due process?

MR. COBLENS: No I'm arguing that the whole scheme

of the Interstate Commerce Act, except for section 1(15), provides a hearing, provides all the administrative procedures which allow you to bring before the Commission itself the economic arguments on behalf of the industry. I don't know, your Honor, and I have never really thought the question through whether or not an Interstate Commerce Act, which did not provide for due process in all these other cases, would be struck down by this Court. This Court has never been faced with that problem because the history of the Interstate Commerce Act has been that, if anything, the Interstate Commerce Commission has been overly cautious in all cases except under 1(15), and it's this exception of 49 USC 1(15) that I am here complaining about, particularly as used in this case.

Does that answer the first question?

QUESTION: Yes, in this case you are making a statutory argument.

MR. COBLENS: I am making a statutory argument, but I think that if in all other cases, if the other provisions of the Interstate Commerce Act did not provide due process, I think certainly counsel, other counsel, would have been here long before me arguing the constitutional question, and I would not be here, possibly, arguing the constitutional question.

Now, I feel that before this Court, this question is not an emergency. How long do you have a situation which has existed admittedly for 50 years and which we know is going to

exist for another 50 years unless a complete change is made, how can the Interstate Commerce Commission claim that it's an emergency? An emergency, as I understand it, based upon the dictionary definition, is a sudden, total, and unexpected event.

QUESTION: Well, the Commission here apparently suggests to you that if the district court is reversed on the car service as against rate order, then the Commission is going to -- you are going to have some chance to litigate before the Commission again with respect to an emergency --

MR. COBLENS: We never did have a chance to litigate.

QUESTION: I know, but they still have to decide each time whether there is an emergency.

MR. COBLENS: This is true, but we never get a chance to litigate.

QUESTION: You can litigate it --

MR. COBLENS: No, I cannot, because under the Daugherty case and under the --

QUESTION: You can raise it. You may lose. You will see if you lose.

MR. COBLENS: Well, I can raise it, your Honor, but I can raise it only under such conditions as gives me no chance at all. It's like a Mexican escape, your Honor.

QUESTION: I don't know. If someone renews an order every three or four months for three or four years on

the basis of an emergency, it doesn't sound much like the case you are talking about.

MR. COBLENS: But they don't renew it on the basis of every four years. This is --

QUESTION: I mean every two or three months.

MR. COBLENS: Every two or three months.

QUESTION: Well, that's what I said.

MR. COBLENS: But I do not have any judicial --

QUESTION: Didn't you waive the argument on emergency?

MR. COBLENS: Did I waive it, sir?

QUESTION: You knew about it, and you decided not to raise it. What is the difference between that and a waiver?

MR. COBLENS: A waiver is when a person --

QUESTION: Is when it is intelligently done.

MR. COBLENS: I beg your pardon, sir?

QUESTION: A waiver is when it is intelligently done and certainly this was.

MR. COBLENS: Well, also, it's when you have a choice. I had no choice. A waiver is a situation where a man who has a choice to A and B, intelligently chooses B. I had no choice in this case between A and B.

QUESTION: You had the choice to use A and B.

MR. COBLENS: Not practically, sir.

QUESTION: Are you suggesting judges never change their minds about some things?

MR. COBLENS: Well, when you have the same judge, it's very difficult to get him to change his mind.

QUESTION: We have all tried it, and sometimes succeeded, haven't we, in practice? Even here we change our minds sometimes.

MR. COBLENS: Well, this Court is unique, I must say that.

(Laughter.)

This Court, because of your very -- because of the way in which this Court sits and because of your very unique position -- excuse me, sir.

MR. CHIEF JUSTICE BURGER: Go ahead. You may finish your sentence.

MR. COBLENS: Thank you, sir.

Because of your very unique position in American history, this Court is not a court, it's the highest court of political decisions that there is in the American constitutional system. And consequently, you as conditions change have a right to change your mind. Other courts do not have that right and don't exercise it.

Thank you, sir.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:07 a.m., the argument in the above-entitled matter was concluded.)