In the

Supreme Court of the United States

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants,	)	
v.	)	No. 75-420
THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ET AL., Appellees.	)	

Washington, D.C.
April 26, 1976
and
April 27, 1976

Pages 1 thru 49

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v.	:	No. 75-420
THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ET AL., Appellees.	:	

Washington, D. C.

Monday, April 26, 1976

The above-entitled matter came on for argument at 2:27 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

DANIEL M. FRIEDMAN, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C., 20530, for the Appellants.

DOYLE S. MORRIS, ESQ., 300 Terminal Tower, Cleveland, Ohio 44101, for the Appellees.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in United States and Interstate Commerce Commission against The Chesapeake and Ohio, No. 75-420.

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

ORAL ARGUMENT OF DANIEL M. FRIEDMAN

ON BEHALF OF THE APPELLANTS

MR. FRIEDMAN: Mr. Chief Justice, and may it please the Court: The question in this case, here on direct appeal from the United States District Court for the Eastern District of Virginia, is whether when the railroads tell the Interstate Commerce Commission they need an increase in rates for a particular purpose, the Commission has authority if it grantsthat increase to tell the railroads they have to use the money for the purpose for which they seek it.

More precisely, the issue is whether in this case the railroad's representation that they needed a substantial increase in rates in order to accomplish deferred maintenance and delayed capital improvements justifies the Commission when it gave this rate in telling the railroads they had to use the additional revenues derived from the increase it authorized for that purpose.

QUESTION: Mr. Friedman, do we have just three roads here?

MR. FRIEDMAN: Yes. The three railroads are called colloquially the Chessie system. It's the Baltimore and Ohio, the Chesapeake and Ohio, and the Western Maryland Railway.

QUESTION: Are the others noticeable by their absence or is there a reason for this?

MR. FRIEDMAN: They are, indeed, Mr. Justice. The reason the others are noticeable for their absence is only the Chessie system challenged the action of the Commission in this case. The other railroads accepted the Commission's conditions, as I will come to in a moment.

QUESTION: They didn't have the argument that Chessie says it has either. They don't have any deferred maintenance. I mean, they don't say they do, anyway.

MR. FRIEDMAN: They don't say they do. A number of them are quite prosperous, as well as the Chessie. They don't make that argument, and indeed the thrust of my submission to this Court will be that it was all the railroads, as I will come to, it was all the railroads that came in and said, "We have this need for the deferred maintenance."

QUESTION: Including the Chessie.

MR. FRIEDMAN: Including the Chessie. Yes, Mr. Justice.

Let me come right to that. It began in April of 1974 when virtually all the railroads in this country, with one exception, I believe, all of the railroads filed a

petition with the Commission saying that they needed a 10 percent across-the-board increase in freight rates and among the railroads who submitted this petition was the Chessie. The three Chessie companies were explicitly listed in an appendix to this petition as among those on whose behalf it was filed. And Chessie's counsel, Mr. Rettberg, who appears here on their behalf on the brief, was one of those whose name appeared on the cover of this document, the petition, and at the conclusion of it.

So the Chessie associated itself completely with all of the railroads' submissions with respect to the need for this additional revenue.

Now, what did the railroads tell the Commission with respect to why they needed the revenue? The petition said, and I quote, "Massive additional expenditures are required for maintenance and capital improvements." That's at page 107 of the Appendix. There's a caption in the petition at page 109 which is called, "The Problems of the Industry as Described by Railroad Chief Executives and Operating Officers." This section contained a number of statements by various officials of the country's railroads, not officials of the Chessie, but a number of important officials describing the extent and seriousness to the railroads of the problems of deferred maintenance and delayed capital improvements.

For example, I will just give one or two illustrative

statements, but there are a number of them there. One railroad spoke of the plant deterioration, decline in car fleet, and increase in unserviceable cars that have resulted from inadequate cash flow.

Another spoke of years of inadequate spending on maintenance of facilities and way.

Another about insufficient maintenance expenditures in the past.

And there was attached to this petition excerpts from a report that had been made, the so-called ASTRO report, dealing with the financial problems that the nation's railroads were facing. And it said that the railroads' current difficulty in meeting the needs for service can be traced directly to more than a decade of inadequate earnings which have forced major cutbacks in capital spending and maintenance programs. That's at 177 of the Appendix.

Now, under the Interstate Commerce Act, a tariff such as this that is filed becomes effective within 30 days unless the Commission acts to suspend it, which as this Court is aware, it can do for up to 7 months. In this case the railroads because of their claimed need for emergency revenues as fast as possible asked the Commission to permit these tariffs to become effective on 10 days' notice.

The Commission declined to do this. It instituted an investigation into the legality of the increases and

suspended the tariffs. But it authorized the carriers to themselves cancel the tariff that had been suspended and to file a new substitute tariff at no higher rates than those provided in the original tariff -- and now I quote the exact words of the Commission at pages 45a of the appendix to the jurisdictional statement -- "subject to the following conditions:" I stress the words "subject to the following conditions," because the Chessie's contention here is that the orders the Commission initially issued requiring these conditions were not really a condition at all, they were merely a hortatory suggestion by the Commission that it was exhorting the railroads to do this.

At page 46a of the appendix to the jurisdictional statement, under these conditions listed, paragraph No. 3 states: "Revenues generated by the increases should be expended for capital improvements and deferred maintenance of plant and equipment and the amount needed for increased material and supply cost, other than fuel."

Then over at the top of page 48a of the appendix, the first sentence in the middle of it, the same thought is repeated. "The Commission intends that revenues generated by increases authorized herein, over and above the amount needed for increased material and supply costs, other than fuel, will be used by the respondents exclusively for reducing deferred maintenance of plant and equipment and delayed capital

improvements in order that rail service to the shippers will be improved." Then two sentences down the Commission stated, "The respondents' failure to apply the increased revenues as heretofore specified will result in the cancellation of these authorized increases."

The Commission made one other significant determination earlier in this order, at pages 42a and 43a of the appendix to the jurisdictional statement beginning on the last line of 42a, the Commission said that "the increases proposed would, if permitted to become effective, generate additional revenues sufficient to enable the carriers to prevent further deterioration and improve service." And then it said, "However, if the schedules were permitted to become effective as filed and without conditions designed to promote service improvements, the increases proposed would be unjust and unreasonable and contrary to the dictates of the national transportation policy."

So it was because of these reasons that the Commission imposed this condition to granting of the increase.

The next day after the Commission entered this order, all the railroads filed the new amended tariff containing basically, with one or two minor exceptions, the increases provided for in the earlier tariff, and this new tariff became effective in 15 days.

QUESTION: Does your argument imply some kind of an estoppel argument? The real question is the statutory

authority of the Commission to do what it did, isn't that it?

MR. FRIEDMAN: That is correct, Mr. Justice. We are not suggesting that the railroads are estopped. What we are suggesting is that since if the Chessie in fact did not have any deferred maintenance or delayed capital improvements, at that point it could have refused to accept this increase itself because of these conditions. What we are saying is that the Chessie fully participated with all the other railroads and that the Commission was justified in these circumstances, as I will come to in a moment, in imposing this condition upon all of the railroads.

QUESTION: Well, isn't the only real question here the statutory authority of the Commission to do what it did?

MR. FRIEDMAN: Yes, that is the question.

QUESTION: Whether it was justified as a matter of rough justice ... is not really the question at all.

MR. FRIEDMAN: That's right. The only thing the Court of Appeals -- the district court decided in this case was that the Commission had no authority to do that.

QUESTION: And that's the only issue here.

MR. FRIEDMAN: That's right, and we suggest in our briefs that if the Court agrees with us on that, it will be appropriate to remand the case to the district court to pass on Chessie's attacks on the application of this condition to it. It's in a somewhat different position.

QUESTION: Let me just follow that up for a moment. Would the case be any different if all of the railroads except Chessie said, "We want to spend the money on deferred maintenance," the Chessie from the outset said, "We don't need the money for that purpose, but we think rates ought to be uniform. If you don't give us the increase, there will be a weakening of the rate structure all over the country." You have even made that point in your own brief. Would the case be different if that's the way it had been presented?

MR. FRIEDMAN: I think it would be, Mr. Justice, for a couple of reasons. First, if the Chessie had made that submission, the Commission might not have granted the Chessie the increase; it might have decided that in the particular circumstances of this case, it would be appropriate to treat the Chessie differently. We don't know. They might not have done it. But I think it would be a much more difficult case if the Chessie had said that and the Commission said, "Never mind, we think the rates have to be uniform throughout the country." I think that would be a more difficult case.

Let me state something right at the outset. We make no claim, contrary to what the district court suggested, that the Commission has any general authority, any general authority to tell the railroads how to spend their money. That's not what we think the Commission is doing in this case. In this case what the Commission did was it said that to the extent these

increased rates exceed increases in cost, which the Commission subsequently said came to 3 percent, to the extent the increases here exceeded the additional costs, it would be unjust and unreasonable unless the carriers applied the increases for the purposes for which they said they needed them. That is, to improve service -- to improve service -- by using the funds for correcting their maintenance deficiencies and their defects in capital improvements. That's our basic position.

Now, let me just briefly allude to three other orders the Commission entered in this case which kind of fill out the details of it. In a subsequent order they defined what they meant by deferred maintenance and delayed capital improvements. Then they subsequently, in August of 1974, denied a petition for reconsideration by the Chessie which proposed that the order be amended to provide that if any carrier had no deferred maintenance or delayed improvements, it could use the funds for any valid corporate purposes. And at page 80a of the appendix to the jurisdictional statement, the Commission explained why. It said that it has consistently expressed its full intention that the authorized increases over and above increased costs shall be used by the respondents exclusively for reducing deferred maintenance of plant and equipment and delayed capital improvements in order that rail service to the shippers will be improved.

It pointed out at pages 81 to 82 that the petition and verified statements filed in this case, as it said, are replete with references to the need for revenues to provide funds for great, but unspecified, amounts of deferred maintenance and capital improvements.

It also pointed out at page 81a that its decision how to apply the funds which the Commission had required be segregated, that the decision on how to apply them, to what particular items of deferred maintenance or dalayed capital improvements and to determine the extent to which these were necessary was a decision left to the railroads. The Commission, in other words, is not telling them how to apply it or to what. It just tells them they had to apply it as they said they were going to do.

And, finally, in October, when some of the railroads came in and stated that they really couldn't use these funds for that purpose, the Commission said, well, any railroad that cannot apply all of the increase under this order for deferred maintenance or delayed capital improvements may, with the permission of the Commission, expend it for new and additional capital improvements. Under that provision a number of railroads have been authorized by the Commission to expend the funds generated by this increase to new capital improvements where they convinced the Commission that they had no deferred or delayed maintenance of capital improvements.

I think it's somewhat significant that although the Chessie keeps telling us now that it has no deferred maintenance or delayed capital improvements, it has never sought the permission or authorization of the Commission to expend the funds challenged under this order which is known in railroad jargon as Ex Parte No. 305.

The three-judge district court, in setting aside the Commission's order, said two things before it came to its actual decision. It said, first of all, that it had no doubt that Chessie's facilities require additional maintenance and improvement. That's at page 15a of the appendix to the jurisdictional statement. It pointed out that over a 10-year period, from 1964 to 1973, the number of annual derailments of these carriers had increased 176 percent, from 87 to 240.

The court also described the Commission's action, and I quote again from page 22a, as a well-intentioned effort to cope with the vexatious deterioration of track and equipment that saps the ability of the nation's railroads to serve the public adequately.

However, relying on decisions of this Court, two old decisions, which it saw as establishing the proposition that the Commission has no general power to control the railroads' expenditures, it said that Congress hadn't authorized the Commission to control the carriers' expenditure of funds as a condition to withholding the suspension of rates.

Now, as I have said previously, we think the district court misunderstood the case and approached it incorrectly. The Commission is not attempting here to tell the railroads how they are to expend their funds generally. All it is saying to the railroads is that when they tell the Commission that they need additional funds for a particular purpose in order to provide adequate service, the Commission can say to them, "Yes, if that's what you need the funds for, you may have those funds provided you do with them what you have told us you intend to do with them."

QUESTION: Suppose they had not attached any explicit limitation, Mr. Friedman. In the past has the Commission ever exercised any kind of authority by implication where a request is made for increased rates for a specific purpose?

MR. FRIEDMAN: No, Mr. Chief Justice, not to my knowledge. But let me point out something in this case, that there is some evidence in the record, at page 54a, a dissenting opinion of Commissioner O'Neal at one stage of the proceeding, in which he points out that in the past the Commission had given a large number of increases to the carriers and that although they admonished the carriers to use this money to improve their service, the carriers hadn't done it.

In addition to that, we have in this case protests by shippers in which they said that there had been a lot of

these increases and the railroads were always making these promises, "You should protect the shippers by doing something to make sure that the railroads carry out their commitments." I refer to page 213 of the Appendix where the National Industrial Traffic League, probably the leading organization of shippers in this country, urged the Commission to do that. And also at 215 and 221 where two large shippers made this point.

QUESTION: What were your first page citations?

MR. FRIEDMAN: The first page was 213, Mr. Chief Justice, then 215 and 221.

Now, as I have mentioned, the Commission had stated that if the increased rates in this case were not applied with conditions designed to promote service improvements, it would be contrary to the national transportation policy. The national transportation policy, which is a prelude or preface to the statute itself and was created and enacted in 1940, directs that all provisions of the Act be administered with a view to carry out that policy. And one element of that policy listed is the promotion and preservation of safe, adequate, and efficient service.

Now, it seems to us that an essential and important element of safe, adequate , and efficient service is to ensure that the carriers do provide adequate maintenance of their plant and equipment and to make the necessary capital

investments in order to haul the shippers' goods.

We find this authority of the Commission to impose this condition in the broad contours of section 15a(2) of the Act which directs the Commission in exercising its power to prescribe just and reasonable rates to consider the need of the public interest of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of that service.

QUESTION: Suppose 15a(2) had been amended so that it clearly forbade this power, you wouldn't think this condition would be valid then.

MR. FRIEDMAN: Not if it clearly forbade it, Mr. Justice, because if it clearly forbade it, it seems to us, the Commission --

QUESTION: I know, but this was a prior act of the Commission.

MR. FRIEDMAN: Oh, I'm sorry. I would think that if the statute were amended to change it after this order, I don't think that would invalidate this order.

QUESTION: Are you relying on 15a(2) as it read there at the time?

MR. FRIEDMAN: At the time, yes. We don't think the amendments to the statute have changed the Commission's power in this respect. But this order was entered under the old section.

QUESTION: Why shouldn't the new statute control? Let's suppose 15a(2) had been amended to forbid this. Now, why wouldn't the ordinary rule apply that the law as it now is applies? Why wouldn't it invalidate an existing order? If the law just said that the Interstate Commerce Commission had no power to direct the railroads to use money for maintenance, would you think this order would stand?

MR. FRIEDMAN: That would be a difficult question, Mr. Justice, I think. But that is not, of course, our --

QUESTION: 15a(2) doesn't apply any more in this situation, does it?

MR. FRIEDMAN: There is a substitute provision which applies in the future.

QUESTION: And you think that's even stronger.

MR. FRIEDMAN: I wouldn't say it is necessarily --

QUESTION: That's what your brief says.

MR. FRIEDMAN: Yes. It's certainly no weaker.

I would also suggest something else, Mr. Justice, that I think that when people come before a regulatory agency and said they want the regulatory agency to authorize and give authority to do something for a particular person, when the agency gives them that authority, it has inherent power to condition it and say, "Yes, you can do it, but you have to do it for the purpose which led us to give you the authority." That, it seems to us, is an inherent power of administrative

agencies, that when they are asked to do something, it seems to us they should be able to tell the parties, "Yes, we are going to do what you have asked us to do, and we in turn are going to require you to fulfill your commitment to us that that is the reason you want it."

The whole history which we have traced in our brief, the amendments of the Interstate Commerce Act, beginning with the Transportation Act of 1940 and some of this Court's decisions in the interim, indicate a history on the part of Congress which is attempting to strengthen the hand of the Commission in trying to enable the railroads to provide better service. It started originally as a mere rate-making function, and now it has been developed and developed to the point that there is a duty on the Commission, we think, to try to foster a sound, efficient, and economical transportation system.

QUESTION: Now, is this the first case in which the Commission has attempted to exercise such a power?

MR. FRIEDMAN: Yes, this is.

QUESTION: And, indeed, before this time it had disavowed it, I take it.

MR. FRIEDMAN: No, Mr. Justice, it had disavowed the power, it had disavowed the authority to directly tell the railroads how to spend the money, to tell them -- in one famous case this Court said they couldn't tell the railroads to buy tank cars, in another case it said it had no power to tell

the railroads to build a terminal in Los Angeles. But there has never been a case in which the Commission was asked to give a rate increase for a particular purpose where it had to face up to this. In one sense, this is the first time that the Commission has ever directly attempted to do this. But I suggest this is the first time, really, that the problem has ever been before the Commission, and I think it did in this case because of its experience in a number of other cases that after the railroads had said they needed the additional funds to improve service, it turned out that the service was not improved at all. The deferred maintenance, the delayed capital improvements kept getting worse and worse. And that is why we think the Commission took the step in this case, and we think that within the broad authority of the Commission to support and further efficient and effective transportation, the Commission had the power in this case to tell all the railroads, including Chessie which jointed in this application, that they had to use the money for the purposes for which they said they needed it.

QUESTION: Mr. Friedman, if the maintenance situation got much, much worse and there were a thousand derailments a year, would it ever reach a point where the Commission would have statutory authority, entirely apart from rate increases, to tell the railroads to do something about it?

MR. FRIEDMAN: I don't know. I just couldn't answer

that. I suppose if it got -- at some point they had some safety authority, and perhaps they might be able to require the Commission to do --

QUESTION: There is no authority just because the trains are dirty and slow and poor service, there is no separate statutory authority to --

MR. FRIEDMAN: Not as far as I know. I know the Commission has some authority, I don't know the precise details, to do safety inspections. And I suppose if the rails got to the point that it was dangerous to run the trains over them, I am sure the Commission would have some authority to correct that.

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

Mr. Morris.

ORAL ARGUMENT OF DOYLE S. MORRIS ON

BEHALF OF THE APPELLEES

MR. MORRIS: Mr. Chief Justice, and may it please the Court: We've finally established that, yes, this was the very first time in 80-plus years of history.

And, secondly, I would submit that Mr. Justice White put his finger on the entire case when he asked, "Well, suppose 15a(2) had been changed to make this unlawful." The fact is that 15a(2) has quite recently, in the Rail Revitalization Act of 1976, been made by the Congress of the United States completely inapplicable to the railroads.

Now, the result of that is of crucial importance because it's that very 15a(2) on which the Commission and the Government have relied as a source of their claimed implication of power.

QUESTION: Ordinarily when a carrier comes in and asks for a rate increase, what is the justification for the rate increase tendered in the first instance?

MR. MORRIS: We make every possible justification the merits of the case will sustain.

QUESTION: Usually increased cost, isn't that the primary factor?

MR. MORRIS: That's one.

QUESTION: Would you say it's not primary?

MR. MORRIS: Not exclusively that.

QUESTION: Primary.

MR. MORRIS: It could be a primary case.

QUESTION: What other reasons?

MR. MORRIS: Let me tell you what we advanced in this case. And we freely were parties to this application, proud of it. We dwelled upon the low level of earnings in this industry, terribly depressed. And the result of that, we pointed out, was, yes, that had resulted in the deferral of maintenance; yes, that had resulted in the deferral of improvements.

QUESTION: Increased cost of capital would be one

reason, would it not?

MR. MORRIS: It certainly would. It would indeed. And we also pointed to a number of things in support of the application: increased costs of operation, increased costs of borrowed money, as your Honor has just suggested, the need to expand and grow, and the general burden of inflation -- a broad variety of grounds asserted in support of this application.

Again, in response to Mr. Justice White's question, the cases of this Court teach us the change in the law may be relied upon by an appellant in support of his judgment. We are obviously entitled to rely on the new section 15a(4), the new rule of rate-making which Congress has substituted for the old rule of rate-making as a part of our judgment. And this Court would have to observe the new rule even if we didn't talk about it. It's the law of the land today.

QUESTION: If it said the ICC could expressly do this, you wouldn't be here.

MR. MORRIS: Wouldn't be here. And one of the reasons I am here, and the main reason is because never in the history of the rate-making power from its very inception in 1906 in the Hepburn Act has the rate-making power ever extended to anything beyond the fixing of the rate. It has never before this order of 1974 been attempted to be applied to the control of the use of the revenues after they were collected.

QUESTION: If the carrier doesn't make out its case

for the need, then the rate increase shouldn't be allowed.

MR. MORRIS: The case of need was made, your Honor.

QUESTION: Well, I say, hypothetically "if." You are saying that the only power the Commission has is to grant or not to grant.

MR. MORRIS: It can fix the rate. That's its power, exactly. They cannot tell us what to do with the money when collected.

QUESTION: What if six months after the rate increase is granted, the Commission discovers that all of the testimony about needing it for a particular purpose is wrong. Does it have any remedy?

MR. MORRIS: Yes, it does.

QUESTION: What is it?

MR. MORRIS: The Commission has kept control over this entire proceeding. The Commission could pull the string on this rate increase today, your Honor. It's kept control over it, it has required reports and I --

QUESTION: It could rescind the rate increase, then?

MR. MORRIS: It could control whether it was unjust and unreasonable. Now, I don't suggest for a minute that that would be a proper step, but it has that power in the naked raw sense. It's required reports of carriers as to their investments and how they have used the funds.

QUESTION: What if the Commission decided that every

railroad in the country needs it extremely badly except Chessie and that Chessie really didn't have any deferred maintenance, like it now says. Could it cancel it with respect to the Chessie?

MR. MORRIS: Well, I don't believe, Mr. Justice White, as a practical matter the practical application of the Act that in those terms, I don't believe the Commission would consider doing that for the obvious reasons described in the Government's brief. That would mean dislocations in the rate structure and we would get all the business and the poor railroads would be poorer.

So I want to --

QUESTION: You still didn't answer the question.

MR. MORRIS: Perhaps I didn't get the thrust of it.

QUESTION: About the power.

MR. MORRIS: The Commission would have the power if it felt the Chessie was not entitled to the money and hadn't made a showing --

QUESTION: So at the outset, if the Commission had looked over the papers that were submitted for the rate increase and thought that the Chessie really didn't need it for the purpose that was asserted, it could have allowed the rate for everyone except the Chessie, it would have had the power to.

MR. MORRIS: Yes, sir.

QUESTION: OK.

MR. MORRIS: Now, what does the new rule of rate-making tell the Commission to do? The new rule of rate-making is addressed exclusively to the point that the Commission should establish adequate revenue levels, and for what purposes? Among others, to assure a flow of net income and depreciation to provide the carriers with ability to invest in prudent -- prudent -- capital improvements, not deferred or delayed capital improvements. Moreover, it instructs the Commission, gives the Commission the affirmative duty to be sure that adequate levels of revenue are established so as to cover "total operating expenses." No suggestion that it would be limited to any particular type of operating expenses, such as deferred maintenance.

I think the case can be stated best by giving you an illustration of what's really happening. As counsel for the Government told you, the carriers --

MR. CHIEF JUSTICE BURGER: We will resume there the first thing in the morning.

MR. MORRIS: Thank you.

(Whereupon, at 3 p.m., the argument was recessed, to reconvene at 10 a.m. the next day, Tuesday, April 27, 1976.

IN THE SUPREME COURT OF THE UNITED STATES

ER

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants,	:	No. 75-420
v.	:	
THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ET AL., Appellees.	:	

Washington, D. C.

Tuesday, April 27, 1976

The above-entitled matter came on for further argument at 10:06 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

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DOYLE S. MORRIS, ESQ., 300 Terminal Tower, CLEVELAND, OHIO 44101, for the Appellees.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in No. 75-420.

Mr. Morris, you have about 20 minutes remaining.

ORAL ARGUMENT OF DOYLE S. MORRIS

ON BEHALF OF APPELLEES (Continued)

MR. MORRIS: Mr. Chief Justice, and may it please the Court: When we concluded last evening, it had been established that 15a(2) is gone. Congress has made it no longer applicable to the railroads. You will recall that that was the section that was the source upon which the Government and the Commission relied for their source of implied power. So it appears that the appellants in terms of statutes have nowhere else to go because the new rule of rate-making expressed in new section 15a(4) makes it clearer than ever that the rate-making power cannot be expanded by implication into the power to impose conditions controlling the use of carriers' revenues.

One or two examples will --

QUESTION: Of course the Government doesn't agree with you on that.

MR. MORRIS: I take it they do not, Mr. Justice White.

QUESTION: On the construction of section 15a(4).

MR. MORRIS: I take it they do not, but I respectfully

submit that any reading, just a casual reading of 15a(4) which appears at page 2 of our Supplemental Brief, establishes once and for all that the Congress has imposed upon the Commission an affirmative duty to establish revenue levels for the carriers which will, among other things, cover "total operating expenses." And if I may be permitted to give your Honors a couple of examples that will readily illustrate how this claimed power cannot be implied from this new statute.

At appendix 467 and 473 you will find the cases of the DT&I. The DT&I is at 467. The Utah Railway is at 473. Each of these carriers applied under the Commission's 305 orders for permission to use these revenues for operating expenses. And what happened? They were turned down.

Now, the Milwaukee case tells us even more. The Milwaukee case appears at page 477. The Milwaukee was desperately hard put for cash, and it applied to the Commission under its order for permission to use these funds for operating expenses. After two months of deliberations, the Commission finally grudgingly agreed to give such consent, but upon conditions. So at once we see further new conditions superimposed upon the conditions that are here challenged at bar.

Now, what were these two new superimposed conditions? One, that the Milwaukee's transfer from its account 716, the special reserve fund that the Commission had decreed, to its other pocket and said account 701 cash, that had to be regarded

if you please as a "borrowing,"and such borrowing could endure subject to the Commission's pleasure and had to be repaid upon the Commission's further order.

And the second condition was that while this borrowing was outstanding, the Milwaukee could not be permitted to transfer any assets of any kind to its parent company or any of its affiliates or subsidiaries without the Commission's permission.

Now, in imposing this second condition the Commission was exercising a power that the Congress of the United States has steadfastly refused to grant it over a period of a decade, for more than a decade. The Commission has been up on the Hill trying to sell a bill that would give it jurisdiction over just this very type of inter-company transactions, and the Congress in a full decade hasn't even given them a hearing on that bill.

So this illustrates what can happen. It illustrates that unlawful, unauthorized action breeds upon itself and leads to further unauthorized action.

QUESTION: I suppose if the Congress thought the particular amendment wasn't necessary, that might also explain not having any action.

MR. MORRIS: Yes, certainly. I agree entirely. But the point I should like to make is --

QUESTION: The Commission might respond to that saying

they have the power already and they were just trying to confirm it.

MR. MORRIS: Their representations to the Congress were quite to the contrary. They made extensive representations in which they say they do not have any power whatever, as cited in our brief, to control or prohibit or deny intercorporate transactions or the payment of dividends, transfer of assets, what have you, and they claim that this is a serious problem and they ought to be given jurisdiction to say, "Yes, you may make such a transfer," "No, you may not," "It should be rescinded," et cetera, extensive jurisdiction over such transfers, and Congress has not accorded it.

QUESTION: Did the Commission in these presentations relate that to some of the disasters that have occurred in the carrier field?

MR. MORRIS: They have. They have related it to the well-known disaster of the Penn Central, and it's interesting to find that, among expert bodies who have studied the subject, including the Commission's own staff, there is no conclusive evidence that the fact that the Penn Central had a conglomerate structure as such had any bearing whatever on its going bankrupt. But this is the type of thing that the Commission has been asserting in support of the bill that it has been lobbying for a decade, and the matter hasn't even been given a hearing.

But nonetheless, in this proceeding, they exercise

that power that has been denied them by the Congress of the United States.

It illustrates simply this, your Honor, that under a statute as new 15a(4), which imposes an affirmative duty to establish revenue levels that will cover total operating expenses, one simply cannot imply a power from that kind of a statute that would give the Commission the right to withhold revenues from the coverage of operating expenses. The two propositions go manifestly 180 degrees in the opposite direction.

Thus, we find that the Congress has drawn a bright line of distinction between the rate-making power, the power to establish revenue levels, on the one hand and the power to dictate the use and control the use of revenues on the other. The latter has been, we respectfully submit, denied.

Well, where does the Commission go from there? No statute to rely on. All we hear is the presentation the railroads made "promises," and they are being held to their promises. Yesterday I reviewed the facts that there were no such promises, that in addition to deferred maintenance and delayed capital improvements, the applicants presented a broad array of facts in support of their rate increase case.

The point, I suggest to you gentlemen, is simply this: Even if it were true, assuming arguendo, that the carriers' entire case in support of that Ex Parte 305 request for a rate increase had rested on their claimed need for "deferred

maintenance" and "delayed capital improvements," even if narrowly defined later on by the Commission, still the fact would remain that private parties cannot confer jurisdiction on the Commission which the Congress of the United States denied. We rely on a fundamental maxim that jurisdiction cannot be created by consent. It's for the Congress to state the Commission's powers, not for the carriers to confer any power whatever.

QUESTION: I take it the Chessie went in on the same basis as the other carriers.

MR. MORRIS: We were a party to the application.

QUESTION: Whatever that means, Chessie was a party to it.

MR. MORRIS: We take full responsibility for whatever was in the application, although we ourselves --

QUESTION: Then the answer is yes.

MR. MORRIS: My answer is yes, although we ourselves made it clear in our one little exhibit that we did not intend to spend a penny more on maintenance. We do intend to spend huge amounts on capital improvements. We had a $300 million capital improvement program. We made it quite clear that we had no intent to apply any of the funds to maintenance. As it turned out, of course, we have spent many, many millions on maintenance, but as of that time that was our intent.

So in the final analysis --

QUESTION: You went in on the request on a different basis than the other carriers?

MR. MORRIS: No, sir. We were parties to the application. We accept full responsibility for everything that was said. The overriding point remains --

QUESTION: One of the reasons -- at least one of the reasons that was given for a rate increase was the need to take care of maintenance, deferred maintenance.

MR. MORRIS: That is one of the reasons, exactly.

QUESTION: But you suggest that didn't apply at all to Chessie, or not?

MR. MORRIS: Not to deferred maintenance as later defined by the Commission. We spend millions of dollars on maintenance, and that means we have huge maintenance needs--

QUESTION: Did whatever the application say actually apply to Chessie, or not?

MR. MORRIS: Not everything, not everything. We have no deferred maintenance as such, but we have tremendous maintenance needs.

QUESTION: Did the application say you did or not?

MR. MORRIS: The application did not pinpoint Chessie as such.

QUESTION: But it said everybody did, or not?

MR. MORRIS: No, not as such. It said the railroads as a group had extremely depressed earnings levels, and that

depressed earnings level had led to extensive deferral of maintenance and extensive deferred capital improvements.

QUESTION: So that could have been a true statement even if it only applied to half the carriers.

MR. MORRIS: Yes. Yes, it was among a variety of reasons, which I set forth yesterday, in support of the entire application. The entire industry, of course, had an extremely depressed earnings level. In the Eastern part of the United States in the year 1973 the carriers had their most tremendous volume of business ever. The rate of return on net investment in the Eastern district was just a little over one-half of 1 percent. And with the increase, it has become still less than 3 percent. That was the need.

And the Commission found, if you please, the Commission found that the carriers needed the revenues and without the increase, the carriers would not have sufficient revenues to provide the country with adequate services as required by the statute. But notwithstanding that finding, which was a paraphrase of the then controlling statute, the Commission nonetheless determined to embark upon a revolutionary step to control the use of the revenues.

QUESTION: Of course, deciding to increase the earnings of the railroads, or the rate of return, doesn't necessarily mean to increase the distributable earnings.

MR. MORRIS: I suppose not, your Honor. The basic

statutory finding at that time was, as you know, in terms of carrier need which, as you wrote in SCRAP II, is what the Commission focuses on in the main in its revenue cases, and that need was certainly established here by any standard, any standard whatever.

QUESTION:: But again that doesn't mean any intention to increase the distributable dividend, does it?

MR. MORRIS: None was given, none was asserted in terms of dividends, directly, but we see the handwriting on the wall. That's one of the reasons why we are here. I think the handwriting is clear. In the Milwaukee case they go so far as to reach dividends without Congressional authorization.

So where does that leave us? All the Commission has got left to talk about is the national transportation policy, and the teaching of this Court's decision in Arrow Transportation, 372 U.S., is clear. The policy as such simply does not enlarge the Commission's substantive power. That, of course, would be much too easy. All you would need to do would be to rely on the policy to do anything that came to mind. You could scrap the Act and just assert any priority you might wish under the policy in the name of "adequate economic and efficient service." The Congress has made it clear it didn't intend to add a whit to the rate-making power by adoption of the policy. Here is the Senate's report:

"The policy makes no change in the rate-making rule now contained in section 15a of the Act, except broadening it to apply to all carriers." Senate Report 433, 76th Congress.

So the transportation policy is not available to the Government. What's left? Nothing, except to talk in terms of the power ought to be implied because it's reasonable. The fact remains, gentlemen, Congress has not conferred the power and adjectives simply cannot grant it.

We stand today at a moment of choice in this country between public or private ownership of our national railway system. Congress with the recent enactment of the Rail Reorganization and Revitalization Act of 1976 has spelled out the congressional policy in section 101(a) of that bill to make it abundantly clear that it is the declared policy of the Congress that the railroads shall remain vigorous, under the private sector of the economy. Thus we find with this comprehensive enactment of this new bill that Congress is bending every effort to keep the railroads viable and in the private sector to avoid the huge burden on the taxpayers that would follow with any other course.

We respectfully submit, your Honors, that affirmance of the judgment below would provide monumental support to the rule of Congress that honest, economical, and efficient management be permitted to manage.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Friedman, do you have --

REBUTTAL ARGUMENT OF DANIEL M. FRIEDMAN

ON BEHALF OF APPELLANTS

MR. FRIEDMAN: I just have four brief points. The first one is an interrelational one to the question Mr. Justice Stevens put to me yesterday. I am advised that the supervision of the safety aspect of railroads has been transferred to the Department of Transportation in 1966 and that the authority that the Commission previously had at that time is now used and performed by the Department of Transportation but the same safety regulations factor.

Mr. Morris has said that the Commission for 10 years has been seeking from the Congress the authority which it now purports to exercise. As we pointed out in our reply brief, what the Commission was seeking from Congress was something very different. The Commission was seeking authority to prevent railroads from diverting their railroad assets into non-transportation assets. That's what they were talking about in connection with the Penn Central. The Penn Central allegedly had been using a lot of railroad revenues and railroad properties for nontransportation purposes. That is a very different thing from what the Commission is doing in this case, which is to try to ensure that the railroads used the transportation revenues for the purposes for which

they say it's necessary.

Mr. Morris has said that the new statute denies the Commission this authority. We emphatically and vigorously deny that.

I would like to, apart from the language which we briefly referred to of the statute, which we think, if anything, manifests an even clearer intention that Congress intended the Commission to have the responsibility to ensure that the railroads are operating efficiently, and, of course, ensuring the necessary deferred maintenance is done is one way to ensure that. But they are two very specific things with respect to the statute.

The first is set forth in the Senate Committee report which is quoted in a lengthy footnote at pages 17 to 18 of our brief, Footnote 18, and the first full paragraph in the footnote on page 18, I just quote that, says -- it refers to a study made by the First National City Bank of the railroads' problems -- it says, "The figures as to the amount of deferred maintenance in the nation's rail industry compiled by the Interstate Commerce Commission in its proceeding Ex Parte 305, this very proceeding, substantially comport with the $5.7 billion found by FNCB in its study."

In other words, Congress recognized in enacting this statute that the railroads had a very serious problem in connection with deferred maintenance, and along with that there

is a provision of the new statute, which is section 504, which is contained in Public Law 94, section --

QUESTION: Not in your brief?

MR. FRIEDMAN: It's not in our brief because the statute had just been enacted at the time we filed our reply --

QUESTION: And the citation is?

MR. FRIEDMAN: Yes. It's Public Law 94-210, section 504(a), and it's page 40 of this little printed version of the Act that is around, and that expressly directs the railroads within 18 months after the enactment of this statute to report to the Secretary of Transportation all class I rails total deferred maintenance, and the purpose of that is to enable the Secretary to allocate from the fund that had been created amounts that will help the railroads in cleaning up this deferred maintenance.

Now, it seems to us incredible to believe that at the same time that the Congress is attempting to strengthen the statute to enable the Commission to deal more effectively with the problems of the railroads and it recognized the vast amounts of deferred maintenance and also took steps to ensure that the Secretary of Transportation would be able to channel funds for that purpose, now requiring the railroads to report the amounts of deferred maintenance and at the same time it would cut off the Commission's power when the railroads tell them they needed the money for deferred maintenance, that Congress

would have said, no, you can't do that. That just seems to us impossible to believe that that's what was intended. I stress the whole question here is the question of the Commission's power; whether or not the Chessie did or didn't have deferred maintenance isn't the issue before this Court. As I previously mentioned yesterday, the district court recognized that Chessie needed additional maintenance. The sole question is the question of power, and we submit that the Commission most certainly has the power when the railroads -- all the railroads -- tell us they need this money for deferred maintenance to say to the railroads, "Yes, we are giving it to you, but you have got to use it for the purposes for which you said you needed it."

QUESTION: Didn't you argue yesterday, Mr. Friedman, that we should decide this on 15a(2) without reference to 15a(4)?

MR. FRIEDMAN: Well, I suggested that at the time the Commission acted, at the time the Commission acted, that's all they had before it. But since my opponent has now urged that the new statute denies the Commission this power is just attempting to indicate why we think the new statute, if anything --

QUESTION: But you still think we should decide this on 15a(2).

MR. FRIEDMAN: I think it can be decided on 15a --

QUESTION: How do you think we should decide it --

15a(2) or 15a(4)?

MR. FRIEDMAN: I would say that since this order was entered under 15a(2), it should be decided on 15a(2), but I would suggest that the more recent legislation confirms the power of the Commission.

I also point out that we don't rely wholly on 15a(2). We also, of course, rely on the national transportation policy and what we consider to be the in herent power of an agency to tell people when they ask the agency to do something --

QUESTION: But if we disagree and think it has to be done on 15a(4), you say nevertheless 15a(4) gives the Commission power --

MR. FRIEDMAN: Oh, yes, we don't have any question of that. The whole statutory scheme, it seems to us, indicates that Congress did intend the Commission to have this power.

QUESTION: But which statutory scheme? The one in existence at the time this was done or the one in existence now? As you say, the issue, and the only issue here, and your brother agrees, is the issue of Commission power to do what it did.

MR. FRIEDMAN: Yes.

QUESTION: And it's not a constitutional question, it's purely a matter of did Congress confer upon the Commission the power to do what it did in this case? It's awfully important to know what statutes we are going to look at to

determine that question. It's kind of an odd answer, I think, you say, well, you can take your pick, 15a(2), 15a(4), or anything else you might find. What do you say we should look at?

MR. FRIEDMAN: I think you could first look at 15a(2) and then if you agree with us that 15a(2) does give the power, then the next step I would do is to look and see whether the new statute, 15a(4) and the other provisions change that power.

QUESTION: If it was done under 15a(2) and if you are right, that ought to be the end of it, shouldn't it? We shouldn't look at anything subsequent to that.

MR. FRIEDMAN: If the Court agrees with us. But I think it's not unusual in interpreting a statute to look to see what later legislation has done in terms of --

QUESTION: Suppose we should find that 15a(4) explicitly forbade this kind of condition, repealed the case here today even though it was decided under 15a(2) and we could read it as you suggested 15a(2) can be read, what do you suppose we would have to do?

MR. FRIEDMAN: I would suppose in that case, since the order does work to the future, since the order does work to the future and since it has been stayed in the interim, I would suppose that would tend to wipe out the order if 15a(4) expressly prohibited --

QUESTION: Why isn't it exactly the same, then, if a

new law is passed, which it has been, and it says 15a(2) will no longer apply at all --

QUESTION: Which it does.

QUESTION: -- which it does. So some other provision applies, either some other provision applies or it doesn't. But in any event 15a(2) doesn't apply any longer. How can we look now at 15a(2).

MR. FRIEDMAN: I think, Mr. Justice, you can look to 15a(2) now because what Congress has done in the latest statute, 15a(4), which is intended to strengthen the Commission's hand --

QUESTION: But something does more than that. Something says 15a(2) will no longer apply at all.

MR. FRIEDMAN: In the future, that is correct.

QUESTION: Well, now is the future.

MR. FRIEDMAN: Yes, but this order was entered --

QUESTION: I know, but you are talking about the future now, about today, we are not talking about yesterday, we are talking about today.

MR. FRIEDMAN: We are talking about the Commission's power to do this kind of thing, and it seems to me --

QUESTION: When it did it.

MR. FRIEDMAN: When it did it. And it seems to me that in defining the Commission's --

QUESTION: Yes, but if 15a(4) said whatever the

power was then, they haven't the power now, the order would be out the window, wouldn't it?

MR. FRIEDMAN: If it said that, but it hasn't said that.

QUESTION: Would it be?

MR. FRIEDMAN: The order, it seems to me, at the time it was entered was a valid order without regard to what Congress subsequently said.

QUESTION: The answer then is we can confine our attention to 15a(2) then, if that is correct.

MR. FRIEDMAN: Well, if the order was valid under 15a(2), as we think it is, and assuming that we are only going to look at 15a(2) --

QUESTION: And that is the legislation in existence at the time the order was entered, and shouldn't that be the end of it?

MR. FRIEDMAN: Except this, Mr. Justice, that the order has now been stayed. The order has now been stayed.

QUESTION: That's not a judgment upon the order.

MR. FRIEDMAN: No, Mr. Justice, in terms of the future effectiveness of the order. I would assume that if Congress had passed a statute saying, in effect -- cutting off the order and saying that henceforth the Commission cannot exercise its power --

QUESTION: Henceforth. Then why would you assume

that?

MR. FRIEDMAN: That the Commission would presumably I would think probably reconsider this order, because he always speaks --

QUESTION: It just said henceforth the Commission shall not have any power to tell railroads what they shall do with the revenues from the rate increase. But the "henceforth" is a great big word, isn't it?

MR. FRIEDMAN: It is, Mr. Justice.

QUESTION: And wouldn't that almost imply that up until that statute, the Commission did have power, that Congress is recognizing it.

MR. FRIEDMAN: It would imply that the Congress had power, yes. I would suppose that if the Commission, if the order is valid under 15a(2) when entered, in one sense that should be the end of it.

On the other hand, since the present posture of the case is such that it has to go back to the district court in any event because the district court has not passed upon some of these other aspects and since the order is now stayed, I would think there might be problems if 15a(4) and the other provisions of the statute explicitly provided that the Commission no longer has this power.

QUESTION: I suggest to you, Mr. Friedman, that the only issue before the Court is whether the Commission had the

power to do what it did on the day that it did it under 15a(2) and that the consequence of the stay was merely to preserve the status quo until we could determine whether they had the power on that day.

MR. FRIEDMAN: Yes. I fully agree, Mr. Chief Justice, that the issue is what power the Commission had at the time it entered the order, and all I am really arguing on the subsequent statute is to answer the claim that the subsequent statute somehow shows that Congress didn't intend the Commission to have this power.

QUESTION: This is more than that. This is not a self-executing order. Doesn't it require continuing supervision by the Commission of this whole revenue matter?

MR. FRIEDMAN: Only to the extent that the -- well, the railroads are required to report to the Commission how they got these revenues and what they are doing. That part of the order was upheld. The district court upheld the reporting and accounting provisions. The only thing it struck was this condition that they had to use the revenues --

QUESTION: But isn't it likely that the report might show some use of that revenue that was arguably deferred maintenance and arguably not deferred maintenance and there is going to be some problem about whether that use was correct or not? Inevitably isn't there a continuing supervision by the Commission of the distribution of these funds?

MR. FRIEDMAN: There is, although, of course, the Commission has recognized in one of its orders that the carrier has considerable discretion to make the determination whether it is or isn't deferred maintenance. Of course, there will be continuing supervision to the extent the carriers come in and ask for an exception from the order under the provision I mentioned under which they could use it for purposes other than those permitted in the order.

It seems to me as long as the order is outstanding, as long as the order is within the Commission's power, then it's --

QUESTION: It is within the Commission's power or was within the Commission's power.

MR. FRIEDMAN: Well, it's an outstanding order, it's an outstanding order, and unless and until the order is modified either by the Commission or by the court, it seems to me it's a valid order that carriers are required to follow.

QUESTION: Is it in effect now?

MR. FRIEDMAN: Yes, the order is in effect insofar as it applies to carriers to report and also insofar, I assume, as the carriers are required to use the money for deferred maintenance except with respect to the Chessie, because only the Chessie took the case to court and only the Chessie was the one that got the temporary restraining order. But as far as all the other carriers are concerned, at least the reports we

have in the record indicate that they are complying.

QUESTION: Is the order in effect with respect to Chessie now?

MR. FRIEDMAN: Is the order -- the operation of the order has been stayed by the district court with respect to this condition, but the --

QUESTION: So with respect to the condition it is just with respect to the Chessie or with respect to all railroads?

MR. FRIEDMAN: I think just with respect to the Chessie that has been stayed. Only the Chessie sought the stay.

QUESTION: But the Commission, although it has been stayed with respect to the Chessie is enforcing it with respect to all other railroads?

MR. FRIEDMAN: Well, enforcing it, I'm not sure there has been any need for enforcement. I would say, yes, Mr. Justice, as shown by the fact that there are these 21 or 22 instances in which various carriers came into the Commission and asked for exceptions from the order, and the Commission granted some and rejected others. So I say the order is in effect. It's just that with respect to the Chessie because of the stay the Chessie has not been required to observe the condition.

QUESTION: Those instances have happened since -- or some of them, at least, have happened since the district court

stayed the order.

MR. FRIEDMAN: I believe so. I would have to check the dates on that. The orders are all set out in the -- certainly since the date of the temporary restraining order, because after the temporary restraining order, the Commission issued its last order in October and the Chessie then amended its complaint to include that order, and in that order the Commission gave the instances in which it had granted or denied these exceptions. So the order was stayed, I would say, with respect to the Chessie prior to the time the Commission had finished the case.

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

Thank you, Mr. Morris.

The case is submitted.

(Whereupon, at 10:40 a.m., the arguments in the above-entitled matter were concluded.)