In the

Supreme Court of the United States

SOUTHERN PACIFIC TRANSPORTATION COMPANY	)	
Petitioner,	)	
v.	)	NO. 81-622
COMMERCIAL METALS COMPANY	)	

Washington, D. C.

March 31, 1982

Pages 1 thru 46

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400 Virginia Avenue, S.W., Washington, D. C. 20024

Telephone: (202) 554-2345

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COMPANY, :

Petitioner, :

v. : No. 81-622

COMMERCIAL METALS COMPANY :

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Washington, D. C.

Wednesday, March 31, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:05 o'clock a.m.

APPEARANCES:

JAMES H. PIPKIN, JR. ESQ., Steptoe & Johnson, 1250 Connecticut Ave., N.W., Washington, D.C., 20036; on behalf of the Petitioner.

DAVID M. SUDBURY, ESQ., Commercial Metals Company, P.O. Box 1046, Dallas, Texas, 75221; on behalf of the Respondent

C O N T E N T S

* * *

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Southern Pacific Transportation Company against Commercial Metals. You may proceed whenever you are ready now.

ORAL ARGUMENT OF JAMES H. PIPKIN, JR., ESQ.

ON BEHALF OF THE PETITIONER

MR. PIPKIN: Thank you, Mr. Chief Justice, and may it please the Court:

I represent petitioner, Southern Pacific Transportation Company, a railroad common carrier involved in this action. In essence, the action is an effort by the carrier to recover from the shipper or consignor -- in this case, respondent Commercial Metals Company -- freight charges incurred in transporting three separate carload shipments of steel cobble, which is a form of scrap steel, from Detroit, Michigan to southern California back in 1974. The dollar amount involved in these movements is small; it is less than $14,000 total.

The legal issue presented is of great significance to the nation's railroads and motor carriers. It is whether a carrier's right to recover transportation charges from a consignor can be barred by an implied remedy based on a violation of the ICC's

credit regulations. Or putting it another way, it is whether an equitable defense should be added to the credit regulations as an enforcement mechanism.

The courts below found that the carrier violated the ICC's credit regulations with respect to all three shipments here involved, by delivering the first shipment without checking the credit worthiness of the consignee and by accepting checks which were later returned for insufficient funds, and one of which was for an amount less than that subsequently determined to be due.

Though Southern Pacific contends that the actions with respect to the second and third cars do not violate the credit regulations, we concede a violation with respect to the first. So the question is what consequences arise from that violation. And the courts below found that while Southern Pacific had made a prima facie case of a right to recovery from the consignor, the credit violation gave rise to an affirmative defense which barred collection of the charges.

The argument I would like to make this morning is basically twofold. It is first, that the lower court's decision is inconsitent with the purposes of the credit regulations as well as their language and history and 50 years of case law; and second, that the decision,

if allowed to stand, will have serious adverse consequences to the nation's transportation system.

QUESTION: Before you get into your argument, may I ask you a question about the facts, Mr. Pipkin. Does the record tell us whether the consignor was paid for the goods?

MR. PIPKIN: I am not sure that it is in the record, but it is conceded in respondent's brief on the merits that he was paid.

QUESTION: Oh, it is. I missed it. Thank you.

MR. PIPKIN: One of our reasons for saying that the court below erred is based on the contract between the carrier and the consignor.

QUESTION: Mr. Pipkin, let me interrupt you a little bit. What is the percentage of consignors that sign that annotation?

MR. PIPKIN: There is no information that is available that really would give an overall percentage of that. I understand in the case of Southern Pacific it is something like one-third.

QUESTION: I couldn't hear Justice Stevens's question and I may be repeating, but what is the status -- does the record show the status of the Southern Pacific's suit against Carco?

MR. PIPKIN: The record doesn't show the

status. It shows that the summons and the complaint were unable to be served, both by special processor who were hired by the carrier, and subsequently by the Marshall's office of the court. No service was ever made, and in fact, the record shows that the carrier was unable even to track down the consignee through the Secretary of State's office of the state of California. So all that the record really shows is that service was unable to be obtained, and that the consignee effectively vanished.

QUESTION: Were the goods ever paid for?

MR. PIPKIN: Yes, sir. That was the answer to Mr. Justice Stevens' question.

The consignor is the party that requests the transportation service and selects the consignee. And the consignor fills out a bill of lading, which is the basic contract between the consignor and the carrier. Its terms are described by the Interstate Commerce Commission, and unless the bill of lading explicitly provides to the contrary, the consignor is presumed to be primarily liable for the freight charges.

The consignor has the option, however, of disclaiming liability for the charges by executing the so-called "non-recourse clause" that appears on the face of the bill of lading. If the consignor fails to sign

the non-recourse clause, it becomes primarily liable for the freight charge, and the carrier knows that if he is unable to collect from the consignee, he can then turn to the consignor for payment.

QUESTION: What is the practical effect of the non-recourse clause? What incentive does the consignor have not to sign it?

MR. PIPKIN: Well, that involves the business relationships essentially between the consignor and the consignee. Any consignee would rather receive goods on credit, and most goods do move on credit. Approximately 95% of the goods in interstate freight transportation move on credit.

If the consignor signs the non-recourse clause which says that he is not liable for payment, the carrier is then more likely to deliver that shipment to the consignee on a COD basis, unless he knows the consignee well and has dealt with him in the past. The consignee clearly would rather not have that situation arise, and if he has two prospective sellers of goods, one of which will not sign the non-recourse clause and one which does, he would rather get the goods from the consignor so it will arrive on a credit basis rather than COD. But that is really a business judgment and it involves, to some extent, almost whether it is deemed

insulting to the consignee to receive it on that basis.

But in any event, the continuing liability of the consignor who does not sign the non-recourse clause is clear from the language of the bill of lading and clear under the case law for the last 60 years, and in fact, as this Court has expressly recognized that in the Illinois Steel case cited in our briefs.

The cases also indicate that under the Interstate Commerce Act, the carrier has a duty to collect the freight charge, and if he cannot collect it from the consignee, he must try to collect it from the consignor. Allowing a violation of the credit regulations to be used as a bar against collection from the consignor would be inconsistent with those cases and the essential purposes that they endorse.

Apart from the contract, the principal reason for our position basically is the statute and the regulations are part of a comprehensive regulatory scheme, and they are totally silent on any affirmative defense arising from violation of the credit regulations. And I would like to speak just for a second about the history.

The credit regulations can be traced back to 1918 during the first World War when the Director General of the railroads then issued something called

General Order Number 25, which essentially put interstate freight transportation on a cash basis, with a few exceptions.

The purposes are undisputed for taking that action. They were to increase the working capital of the carriers by reducing the amount of freight charges that would be outstanding, owed by the consignees, and to reduce discrimination. And when in 1920 the Congress enacted what became Section 3(2) of the Interstate Commerce Act, the issue here involved -- that is the basis for the credit regulations.

The continued that same policy. Carriers were told that they could not deliver freight until the charges were paid, except under such rules and regulations as the commission should prescribe. The same purposes were true, though -- to protect the carriers and their working capital, and to prevent discrimination. And the regulations adopted by the commission left a great deal of discretion to the carriers. The main one is one that says that the carrier can extend credit for a specific period upon taking whatever precautions are deemed by it to be adequate to assure payment.

Those regulations are still in effect and have been for 61 years, they are enforced by the Interstate

Commerce Commission primarily through a $5000 civil penalty, but also occasionally by cease and desist orders or injunctive proceedings. And in this whole regulatory scheme there is no hint that a credit violation can be utilized as an affirmative defense, or that Congress intended that to be an enforcement mechanism. And that engrafting such a defense on the regulatory scheme would in no way further the purposes of that scheme, which were to protect the carrier's working capital and to prevent discrimination.

In addition, the ICC has taken a very clear position on this same issue that is before the Court. It has expressly said in the CGF Grain case that we cite in our briefs that a credit regulation -- credit violation, excuse me -- has no effect on a consignor's liability.

QUESTION: We don't have any views of the ICC in this case, do we?

MR. PIPKIN: No, we don't, Your Honor. But we do have that clear expression of their view on the precise issue that is before the Court. And the agency's interpretation, the agency that is responsible for promulgating the regulations and enforcing them is, we submit, entitled to great weight.

And lastly, the decisions shortly after the

credit regulations were issued uniformly rejected arguments that violations of the credit regulations barred recovery of the freigh charges. And we cite decisions particularly in 1924 and 1925 that raised exactly the same issue where state supreme courts rejected the same contention that is made.

The same thing had happened when the motor carrier credit regulations were promulgated at a later time than those that apply to the railroads. The courts considering that uniformly rejected estoppal as a defense. For 50 years after that railroad credit regulation was issued, no court held that a violation could bar recovery of freight charges.

QUESTION: I am sorry, Mr. Pipkin, would you tell me again the name of that case, the ICC --

MR. PIPKIN: The ICC? It is called CGF Grain.

QUESTION: Have you cited it?

MR. PIPKIN: Yes, Your Honor, we have.

QUESTION: Don't bother, I will get it. Thank you.

QUESTION: And they agree with you?

MR. PIPKIN: Yes, Your Honor. It is 351 ICC, 710. And it is referred to in both of our briefs.

QUESTION: And the ICC agrees with you?

MR. PIPKIN: Yes, Your Honor.

Now, we recognize that there are cases cited by Commercial Metals in this case, virtually all of which involve a situation where there is a consignee who has had some misrepresentation made to him by a carrier, and the result is that the consignee has relied on that misrepresentation and taken some detrimental action; and where the court has found that if payment were to be required, the consignee would have effectively paid twice. And the courts in those -- or, a number of the courts addressing those cases have held that there can be an estoppal in that situation.

What I would point out is that whatever the merits of those decisions, those cases do not turn on a violation of the credit regulations but rather on a misrepresentation by the carrier in detrimental reliance. And they involve a consignee, not a consignor, and the kind of situation that is addressed there cannot arise in the consignor context. And there has been payment by someone at least in most cases of the full charge, albeit to the wrong person.

In only one aberrational case, prior to this one, has any court held that a consignor can take advantage of a credit violation. All other cases have been resolved by enforcing payment. And what we say is that in the fact of that history where the credit

regulations have been interpreted consistently from the time of their promulgation through the next 50 years, this Court should not, in the 1980's, engraft a new affirmative defense upon them.

The other reasons that we give for reaching that conclusion have to do with the consequences of the lower court's decision. If the decision is upheld, one result, simple result, is the practical elimination of the non-recourse clause which has been in the bill of lading for 61 years and which obviously has been viewed as having some purpose.

And I say that it will be practically eliminated because the credit regulations require that payment be made within five days. If the shipper doesn't pay it within five days, technically a credit violation will have occurred. And whenever the carrier then turns to the consignor, the consignor will be able to say well, you violated the credit regulations by not forcing payment within that five-day period, so in effect, it will make no difference whether the non-recourse clause is signed or not.

Second and more importantly, more and more consignors and consignees will claim that they do not have to pay because of some credit violation. There are several possible results to this, all of them we submit

bad. First, the carriers, as the amicus brief filed by the ATA and the AER indicate, may be forced to curtail extensions of credit. As I mentioned, 95% of freight now moves on credit, and the amount of credit outstanding on shipments in any year is something like $25 billion.

If a carrier knows that the consignor will no longer be liable for a charge if he is unable to collect from the consignee, the carrier will insist on payment COD in a much higher percentage of the cases. This has a serious effect on the credit relationships; it also will impair efficient rail operations because it will result in cars having to sit there for a longer period of time until cash can be obtained from the consignee.

And in addition, we suggest that the Court should not overlook the increased litigation that inevitably will occur in order to ascertain liability for freight charges. The decision below will be read as saying that every violation of the credit regulations gives rise to an affirmative defense. That would be highly unfair, and even Commercial Metals does not go that far.

When the ICC has reviewed the operation of the credit regulations from time to time, they have found that many violations occur, many violations are

unavoidable, and that the majority of those violations are actually caused by shippers rather than carriers. And that is because of this situation where the ICC's jurisdiction is over the carriers. The regulations are worded that payment must be recieved within five days, if it is properly extended in the first place. Well, the carrier often doesn't have any control over whether that payment can be enforced or not from the consignee. So it clearly would be unfair to say that there is any kind of an estoppal situation in all cases.

So what Commercial Metals has done in this case is take the position that there is a fault standard which should be read into this. They are basically saying that there should be an estoppal only when the violation is the carrier's fault.

But I suggest that that is part of a standard that raises many hard issues. First of all, what is meant by fault. Is negligence enough, or does the carrier have to take some action intentionally in order to violate the regulations or create some discrimination? The regulations say, moreover, that before extending credit, a carrier must take whatever precautions it deems appropriate, so it leaves it essentially up to the carrier what precautions to take.

Well, if fault becomes the test, will there be

some standard read into that. Will the carrier be required to take some minimal precautions so that it is no longer up to him entirely what he should do, and what standards would be applied.

Failure to pay within five days. That is something that would not appear to be the fault of the carrier in most cases. But if a court has to determine whether a failure to collect is a carrier's fault, can it impose some standard on the carrier to do something other than just sit there for those five days?

QUESTION: Mr. Pipkin, does the record in this case disclose whether the carrier made any credit inquiry of any nature in this instance?

MR. PIPKIN: The record indicates that the carrier did not investigate the credit worthiness of the consignee. We know nothing beyond that. We don't know whether the agent who had the car tendered to him felt that he knew enough about the company based on his personal knowledge, or the fact that it had a plant across the street or whatever, that he could make his own determination, or what. We just know there was no investigation of credit worthiness.

So in determining the trick question --

QUESTION: We should judge the case on the basis that the company needn't -- you are suggesting

that there need be no investigation.

MR. PIPKIN: I am not suggesting that, Your Honor. I am saying that that would violate the credit regulations, by --

QUESTION: Yes, but you are suggesting that to come out where you want to come out, there needn't be any investigation.

MR. PIPKIN: I am suggesting that this Court should adopt a blanket rule saying that in the case of consignors who have the opportunity to protect themselves by signing the non-recourse clause, there should be no --

QUESTION: Well, you are suggesting that we construe the statute that way.

MR. PIPKIN: Yes, Your Honor.

QUESTION: And you say that the regulation construes it that way.

MR. PIPKIN: That is the way it has been up until now.

QUESTION: And so it wouldn't make any difference if the agent or the railroad deliberately didn't make an investigation.

MR. PIPKIN: It is our position that there should be a blanket rule, but let me say further on that -- we concede that there is a violation in this case.

We don't concede that there is any connection between that violation and the loss that occurred, which is something we think the courts below slurred over very quickly.

QUESTION: It wouldn't make any difference if there was, would there?

MR. PIPKIN: In our view, it should not. But on that first shipment, there was no credit check. But the carrier in that case could have, as it did in the case of the second and third shipments, required a check. That would not have violated the credit regulations, but the check would have bounced the same way the other two did, and it would have -- the result would have been the same. We would have been unable to collect from the consignee and had to turn to the consignor. So we don't think there is a causal connection between those two events.

So in addition to determining the tricky question of whether a violation has occurred, the courts, if the rule advanced by Commercial Metals were to prevail, would also have to grapple with this vague fault standard, applying it in particular factual situations and along the way, coming up with possibly some kind of substantive standards. And since the dispute would be between two private parties, there

would be no assistance from the agency that is charged with enforcing and promulgating the regulations. And also, since many of the actions would be in state courts that might have their own different standards to apply in equitable estoppal cases, the result clearly will be not only increased litigation, but inconsistent results, and the result would be to take an issue that for the last 60 years has been characterized by certainty and uniformity and transform it into one where confusion and inconsistent results will probably prevail.

QUESTION: Mr. Pipkin, may I ask another question, just looking at the CFG case that you rely heavily on. That appears to be an under-charge case rather than a non-payment case, isn't it? And would that necessarily then have the same rule as one involving -- whether a credit violation excuses payment of the full charge. I am not saying that you are necessarily wrong, but I am just not sure that I understand why that case --

MR. PIPKIN: We don't deny that the statement in that case is essentially a dictive, that it is a statement of the agency's position which is broad and covers this situation.

QUESTION: But then the agency goes on to say it is a question to be determined by the courts and not

by the commission in the collection situation.

MR. PIPKIN: Oh, that is true. They are saying that when that dispute arises it will be the court that decides it. But in the face of a lack of support, as a legal matter, for the proposition advanced by Commercial Metals and in view of the adverse practical consequences that will occur, I think the Court has to ask what is there to commend an affirmative defense in a situation like this.

I would suggest that there are no policy reasons relating to the credit regulations or the credit statute that would be advanced by allowing this defense; in fact, it is contrary to those purposes, and there is no policy justification in terms of the effective operation of the transportation system. And further, there is no need because the consignor already has the ability to protect himself, but wants this Court to create an additional remedy for him. We don't believe that that is necessary or justified.

Thank you. I would like to save the rest of my time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Sudbury?

ORAL ARGUMENT OF DAVID M. SUDBURY, ESQ.

ON BEHALF OF THE RESPONDENT

MR. SUDBURY: Mr. Chief Justice, and may it

please the Court:

The Southern Pacific, having admittedly engaged in illegal, negligent and inequitable conduct today comes before this Court seeking to transfer the very fruit of that action to an innocent consignor. The Interstate Commerce Commission Act, specifically, Section 3.2 entitled Payment of Freight as a Prerequisite to Delivery, prohibits a railroad from delivering any freight shipped by it until all charges have been paid, except under express circumstances promulgated by the rules and regulations of the Interstate Commerce Commission.

The applicable regulations which counsel has conceded have been violated, at least with regard to the first shipment are located in 49 CFR 1320.1, and they provide that a railroady may extend, only for a very limited number of days, credit under certain circumstances, provided that it takes precautions to ensure timely payment of charges.

QUESTION: Mr. Sudbury, can I interrupt with a question on this. How did their discount hurt your client?

MR. SUDBURY: Justice Stevens, the failure of the railroad, in this case, to take any precaution with regard to any credit check whatsoever of the consignee

-- admittely, the consignee was not a credit patron of the railroad, had never applied for credit and had never been given credit. The decision to extend credit to the consignee was a pure act of voluntarism on the part of the railroad.

QUESTION: But supposing they had checked it out and said we find you are a bad credit risk; we are not going to deliver the goods. And they called your client up and said what do you want us to do? What would you have said?

MR. SUDBURY: At that point in time, Your Honor, our worst expectations would have been to have had possession -- or at least, to have control of the material that was in a yard in California, had not been released to the consignee. Once it went to the consignee, the party that had written hot checks here and didn't pay the --

QUESTION: But you would have been liable for the freight charges.

MR. SUDBURY: Under Section 7, that is right, Your Honor, we would --

QUESTION: And you would have had the goods back, but instead of the goods you have got payment for the goods. So how does it -- I don't understand how you are that badly hurt.

MR. SUDBURY: The shipment --

QUESTION: If you weren't paid for the goods, I would understand. But you were paid.

MR. SUDBURY: The sale was made fob Detroit. What we received was the fob purchase price, free onboard the rail carrier in Detroit. We were not paid in this case for the freight charges to California. That is why the bill of lading was, as the railroad has admitted, freight collect.

QUESTION: I understand that, but I still don't quite understand how you are hurt because had you been advised of the situation, you could have gotten the goods back, but you still would have had to pay the freight. I don't know how much these goods are worth, I don't have any idea, but I wonder if you would have been -- if you were put to the elections of either taking money for the goods or saying keep the goods and ship them back, what you would have done.

MR. SUDBURY: Well, the goods were approximately $46,000. The freight charges obviously are $14,000. I think that is in the record in the deposition of Mr. Hillman.

The point is, though, that the control of the goods, once they were let out of the railroad's hand without any credit precautions whatsoever, they gave us

no choice. We never got to that stage. The railroad never contacted us. It was strictly in the railroad's dominion to determine whether they were going to release the goods, and when they did so, in fact, they didn't contact us for two years and seven months later to tell us that it had not been paid for. By that time, the record shows, the railroad's attempts to even locate the consignee were impossible. Had they contacted us, we were in touch with the consignee, we could have perhaps applied some pressure to make sure the goods were paid for.

And I think even more specifically, to answer your question, I want to call the Court's attention to the facts involved in the dates of these shipments. The first shipment left Detroit on April 11, 1974. That shipment arrived and was released, admittedly without any credit check, to the consignee on April 25, 1974. We didn't even ship the last two cars, the rail cars, they didn't leave Detroit until May 2nd, sometime after the consignee had the first car already in his possession.

Specifically to answer your question, we certainly would not have shipped the second two if we knew there was any problem with the first.

QUESTION: And does the record tell us when

you were paid?

MR. SUDBURY: By the consignee?

QUESTION: Yes.

MR. SUDBURY: The payment for the goods was made prior to shipment.

QUESTION: Counsel, the stipulation of facts really don't refer to what an acceptable credit inquiry by the carrier would have disclosed. And it just would seem to me that the record might have indicated whether the information, if disclosed, would have been acceptable by industry standards. There just isn't anything here, is there?

MR. SUDBURY: There is nothing, Your Honor, because, of course, there was no credit inquiry made. The stipulation says that Carco had never even applied for credit.

QUESTION: And the stipulation does not appear to cover the further inquiry of what it would have disclosed had an inquiry been made.

MR. SUDBURY: It does not. The facts are that the consignee never paid for the first shipment, and the fact is that the rail -- the freight charge was some two weeks past due when the second cars arrived, and the fact is that the railroad released the second two cars; one by an extension of further credit when they took a

check for less than the full amount of the freight charge, and both those checks were shortly returned by the consignee's bank marked insufficient funds. From there, the railroad was not able to find the consignee.

QUESTION: What evidence do you have, counsel, that the legislative body, the Congress, was concerned about protection of the consignee, the shipper, in enacting Section 3.2. The evidence that we have examined would indicate that the concern of Congress was with the protection of the carriers, not the shipper.

MR. SUDBURY: The purpose of the Act, as set forth in the preamble, is to promote the orderly and efficient transportation policy throughout the United States. Specifically, it refers to encouraging sound economic conditions in transportation throughout the United States.

Certainly, --

QUESTION: That is just the preamble to the Transportation Act of 1920, isn't it, which had a lot of provisions in it.

MR. SUDBURY: That is correct. The railroad's position that the shipper, or that the consignor in this case, is not protected by any legislative history simply defies the realities of the transportation shipment. The fact is that the railroad released these goods,

extended the credit on its own volition. They improperly and in violation of not only the regulations but the law -- the law says in Section 3.2 that no carrier by railroad and no express company subject to the provisions of this chapter shall deliver or relinquish possession at destination of any freight transported by it until all tariff charges have been paid, except under such conditions as the Interstate Commerce Commission may from time to time prescribe.

QUESTION: That is true, but do you have anything in the legislative history that indicates that that provision was enacted for the benefit of the shipper?

MR. SUDBURY: Under the railroad's argument, Justice O'Connor, the legislative history was directed solely toward increasing the cash flow of the railroad. Certainly, the extension of credit on their part here was an act which they voluntarily undertook that hurt or certainly handicapped that cash flow in this case.

QUESTION: Mr. Sudbury, I take it that in light of this discussion you have just been having with Justice O'Connor, that you agree that this case is to be decided in light of the Act and the regulations; this is not a common law suit.

MR. SUDBURY: No, to the contrary, Your

Honor. The Act specifically states that -- in its savings clause -- that it was not designed or intended to eliminate any remedies that were available at the common law. Specifically, -- in fact, an argument which I will get to in just a minute is that in addition to a violation of the regulations, this was a violation of the express contract between the parties.

QUESTION: Even inspite of the failure to sign the non-recourse clause?

MR. SUDBURY: That is correct, Your Honor. The non-recourse clause is a means by which a consignor can relieve itself absolutely of any liability, as a matter of contract. The failure to sign it does not ipso facto mean that the consignor should not have available to it certain equitable defenses, as the Fifth Circuit recognized in this case. That is really the thrust of the railroad's position.

Our position is that the option to sign the non-recourse part of Section 7 is just that; it is a contract option. It doesn't preclude any other remedies available at common law to a party to the contract.

The simple fact in this case is that had the Southern Pacific observed these relatively simple but mandatory rules, this loss would not have occurred. I referred specifically to Section 3.2 of the Act

previously. Specifically, the Commission, in promulgating regulations under that Act, has said that the carrier, upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit period specified in this part, may relinquish possession of the freight. The fact is in this case, admittedly, they took absolutely no precautions.

By regulation, therefore, the commission has made two requirements for the granting of credit, and these are pertinent to the issues under consideration. First, the railroad must take precautions at least to some degree to assure itself of timely payment of the charges.

QUESTION: Excuse me, Mr. Sudbury, is the non-recourse clause or the opportunity to sign one, is that a matter of voluntary agreement or is that somehow required by law?kj

MR. SUDBURY: No, it is a matter of voluntary agreement, Your Honor.

QUESTION: So some of them -- bills of lading do not include it, then, I take it.

MR. SUDBURY: My understanding is that at least with rail carriers, all bills of lading have that option on it. Whether it is signed or executed or not

is a matter of contract --

QUESTION: Yes, but to have it on it, what, is just a matter of railroad practice or custom or something?

MR. SUDBURY: I believe the form of the bill of lading has it on it in practically every instance I have ever seen, yes.

QUESTION: But you don't say it has in it because some law requires it.

MR. SUDBURY: The commission has promulgated a form of bill of lading for rail carriers; it has not done so, my understanding, is for motor carriers. The rail carriers do have --

QUESTION: And the form promulgated by ICC includes -- ?

MR. SUDBURY: Includes this clause which may be executed, yes.

QUESTION: Well, I just wonder could either a rail carrier or a consignor insist on its deletion before the transaction of shipment is completed?

MR. SUDBURY: Well, the non-recourse part of Section 7 does not come into play unless it is specifically --

QUESTION: Signed.

MR. SUDBURY: -- affirmatively signed by the

consignor. In this case, it would not signed, admittedly. The reasons for it are unknown. But the point is that in not signing it, that was not a violation of any regulation, a violation of any statute. That was a matter of contract option, either through foresight or for whatever the reason, it was not signed. And we have admitted that. And as the Fifth Circuit, that makes us primarily liable, together with the consignee who has accepted the goods, for the freight charges.

However, that does not absolutely mean that we don't have the right to raise whatever defenses that we are entitled to as a matter of law.

QUESTION: Do you think a consignee could depend on the same grounds that you are depending on?

MR. SUDBURY: Well, our -- you mean had it not paid the charges and been sued?

QUESTION: Yes.

MR. SUDBURY: Absolutely not. Our standard, as it has been referred to, our test that it would seem logical to apply is that you must have equity on your side. Certainly a consignee who received the goods who had not paid the charges is not going to be heard to complain that it is not required to pay because the railroad never investigated its credit worthiness.

QUESTION: So it is not enough just to have a bare violation of the statute and regulation.

MR. SUDBURY: That is correct, Your Honor, and we have never suggested that. In fact, as the railroad has pointed out, the large majority of the violations of the regulations are required where the consignee receives freight and does not make payment within a certain period of time.

QUESTION: Of course, in one sense, your client, the consignor, selected the consignee, and your argument imposes this pre-selected consignee on the carrier, doesn't it?

MR. SUDBURY: We selected to do business with this person on an fob Detroit basis, that is correct, Your Honor. We did not instruct the railroad -- in fact, to the contrary, under the law and regulations, we expected that they would either collect the charges at the time of delivery or shortly thereafter, certainly within a matter of days. Again, we were not even notified of this loss for over 31 months.

As I pointed out, the railroad mailed its bill for the first carload on April 25, 1974. This was for the carload that was released without any credit check or payment whatsoever.

QUESTION: Let me go back a bit, Mr. Sudbury.

Suppose the railroad had said to the consignee, cash on the line or no delivery. Then they would have to -- I don't know whether this would have involved a lot of demurrage, but at any rate, they would have had to, in effect, impound the entire shipment, wouldn't they, until paid?

MR. SUDBURY: That is correct, Your Honor.

QUESTION: Now, who then would be liable?

MR. SUDBURY: For the demurrage?

QUESTION: For the demurrage and the freight charges.

MR. SUDBURY: The courts have held that lawful charges include not only the freight charges but also the demurrge, and not signing Section 7, had the consignee just refused the shipment for some reason, gone out of business before it got there, we would have been liable, the consignor would have been liable for the freight, as well as the demurrage charges.

That is a risk or an expectation that we were willing to assume under the circumstances. What we were not willing to assume was the total lack of any credit check on the part of the railroad, and then the unbridled extension of credit on their part, coupled with their action in not coming back against the party to whom they now claim and the Fifth Circuit held has

principal liability for two and a half years after the fact.

QUESTION: In what respects are you worse off as a result of the delivery?

MR. SUDBURY: We have no -- obviously no ability to go back against the consignee, at least based on the record that the railroad has in trying to locate him. We have had no more success. The counsel for the railroad suggested that an agent may have released this because he was down the street. Well, he is down the street from the railroad in Alhambra, California and not at our office in Detroit, Michigan.

QUESTION: Well, you are worse off by the amount of the freight, aren't you?

MR. SUDBURY: We were not paid the freight in the first place.

QUESTION: I know, but what you are objecting to is that there is a claim for freight charges against you.

MR. SUDBURY: That is correct.

QUESTION: And you had -- they already had their money. And if the railroad had investigated and not delivered the goods, you would have had the goods, too.

MR. SUDBURY: That is correct.

QUESTION: And if you would have had to pay the freight charges that the consignee should have paid, you could have taken it out of their money.

MR. SUDBURY: That is correct.

QUESTION: You couldn't keep all their money and the goods, too, I wouldn't think. You would only have to give back the money that -- the balance after you collected the freight charges.

MR. SUDBURY: We were paid for the goods fob Detroit, --

QUESTION: So you had the money already.

MR. SUDBURY: That is correct, Your Honor.

QUESTION: And if you could have gotten the goods back, too, you could easily have paid the freight charges.

MR. SUDBURY: Certainly.

As I was saying, the railroad mailed its bill for the first carloads on April 25, 1974. Giving the railroad the benefit of the most liberal interpretation of the regulations dealing with when it was due, the first bill was already two weeks' past due when the second cars arrived and were released by the railroad. Obviously, the last two cars were released when the bill was blatantly delinquent.

The counsel for the railroad has pointed out

that the railroad accepted two checks for the last two cars, one of which is inexplicably in an amount approximately $900 short of the proper amount. Their brief refers to some transposition of numbers, but still, that amounted to an extension of credit on the part of the railroad.

They have also asked how accepting a check for the last two, or two checkes for the last two cars, somehow is related to the first car. Well, the facts is at that point, they had a credit history with Carco whom they had never dealt with before. They had an account past due for some two weeks which had not been paid. They had nothing in their credit file from a customer who had never even admittedly applied for credit. They took two checks that subsequently were returned to the bank for insufficient funds.

The Fifth Circuit opinion states that Southern Pacific was in direct violation of the Act by extending credit without any precaution whatsoever and for a period of time in excess of the period required in the regulations.

The question was asked earlier about whether we contend this is a violation of the common law. We do. In addition to the violation of the Act, the railroad's conduct breached the contract between the

parties. As the railroad has admitted and the case law is clear, the bill of lading is a common law contract. This contract expressly provides that the service of a carrier is to be performed in accordance with the conditions listed on the back of the contract terms and conditions, on the back of that document, which is unfortunately poorly reproduced in the Joint Appendix, Section 7. It is at pages 37 and 41, although eligible. I would refer you to page 1(a) of the appendix to the brief of the National Industrial Traffic League which has the entire document.

It reads that the owner of the consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property. But except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges on it have been paid.

What we are saying is that this is an express contract between the parties that was violated.

QUESTION: The Fifth Circuit didn't pass on that contention, did it?

MR. SUDBURY: They did not get to -- or address that point. In that regard, Southern Pacific

mistakenly portrays the Interstate Commerce Commission's view of its role in determining the liability of consignors and consignees under bills of lading. Specifically, at footnote 1, page 2 of the Southern Pacific's reply brief on the merits, it implies that the Interstate Commerce Commission has expanded its jurisdiction to include interpretation of the liability of parties to a bill of lading contract.

In fact, the Interstate Commerce Commission in the CGF Grain case, as was mentioned earlier, specifically has reiterated what it classifies as its longstanding position that the question of a contract is to be resolved -- or the question of liability under a contract -- is to be resolved by the courts. The Commission said that the question of complainant's liability does not turn on whether any provision of the Act has been violated, but rather is governed by the bill of lading contract between the parties, and it must be decided by interpreting that contract.

For this reason, it is a question to be determined by the courts and not this Commission. This conclusion is in accordance with numerous past cases in which the Commission has declined to decide questions of liability as between a consignor and a consignee.

In reply to the -- this position, the railroad

has once again in its reply brief looked to a purported historical analysis to attempt to portray the first sentence of Section 7 as actually two clauses somehow combined in history into a single sentence. The fact is that those two clauses do relate to the consignee. When the bill of lading is executed, the consignee is not even a party to the contract; the law is he only becomes a party to it when he accepts the goods upon delivery.

Such a convoluted analysis as called for or requested by the railroad is not required. The contract obligation is clear, and that obligation was breached, in addition to the violation of the Act.

The Fifth Circuit held that the Southern Pacific, although establishing a prima facie case of primary liability on the part of Commercial Metals, nevertheless permitted Commercial Metals to raise an equitable defense based on the facts.

QUESTION: Well, it sounds to me like you are saying well, the railroad's conduct didn't release us from our liability, it just damaged us. But the court of appeals held that this failure just released the consignor from liability, didn't it?

MR. SUDBURY: Right, that it was an equitable defense which could be raised in the suit for the charges.

QUESTION: Whether or not it did you any damage, right?

MR. SUDBURY: The opinion of the Fifth Circuit did not directly address the question of whether or not we were damaged. The trial court's opinion clearly did; it referred to the gross negligence of the railroad which resulted in the loss.

QUESTION: Well, the breach is admitted, the breach is admitted, but you insist that ipso facto, as soon as there is a breach, you are released.

MR. SUDBURY: The railroad --

QUESTION: That is what the holding was.

MR. SUDBURY: Your Honor, the railroad came back against us when they, apparently two and a half years later, discovered that they were not going to be able to find the consignee. The damage --

QUESTION: Well, that may be so. Maybe they breached the contract, but that is a different argument than you are released from liability just by the breach.

MR. SUDBURY: Well, our position is --

QUESTION: Is it a different argument? And it is one that the court of appeals didn't reach.

MR. SUDBURY: It gave rise to our right to assert a defense to the claim which the trial court and the Fifth Circuit recognized.

QUESTION: Well, it may have given you a right to say you have been hurt and you should have a counterclaim. But that is different, isn't it?

MR. SUDBURY: A counterclaim against the carrier?

QUESTION: Yes.

MR. SUDBURY: That was not what the court so held. We have not presumed --

QUESTION: I know the court didn't hold that, but it seems to me that is what you -- that is a different argument than saying that you are released.

MR. SUDBURY: Well, I think the Fifth Circuit held that the remedies available as equity give rise to equitable defenses which would recognize --

QUESTION: I know what it held, but that is just saying that the railroad's conduct just released you.

QUESTION: I think the court, the Fifth Circuit, has followed other courts which have recognized these equitable defenses, Your Honor, specifically in the Admiral case, the case decided in the Seventh Circuit. The court there went on to say that under the facts in that circumstance that the plaintiff, the carrier, had created the risk of loss by its credit practices. It said it contributed to the gravity of the

loss by allowing, in this case, the consignee's unsatisfied debts to accumulate beyond a lawful and reasonable time for credit. Under these circumstances, we find no difficulty in holding the plaintiff estopped to collect payment of the freight charges from the defendant.

QUESTION: Mr. Sudbury, as you correctly pointed out, that is, of course, a consignee case where the consignee would have, in effect, paid double if it was held liable.

Are there any cases like this one where the consignor has been excused from his liability? There are a whole line of them, I know, on the double-payment situation.

MR. SUDBURY: The Atcon case referred to by counsel for the railroad is a case exactly on point, although that case doesn't even -- the facts in that case don't reveal whether or not there was an initial violation of the law and regulations based on the unbridled extension of credit to the consignee in that case. All it says is that the carrier's failure to come back against the consignor within the time period set forth in the regulations is a violation of the credit restrictions, and therefore, a defense can be raised.

QUESTION: Which case was that, again?

MR. SUDBURY: The Atcon versus Brown -- Brown Transportation v. Atcon, cited.

The court in Admiral stated that Congress did not intend to fashion a sword to insure collection in all instance and to shield or insulate the carrier from the legal consequences of its otherwise negligent or inequitable conduct. That is exactly what the railroad seeks here.

The court continued that these same considerations lead us to reject plaintiff's claim that the principles of equitable estoppal have no application in any action for the collection of freight charges. In considering the carrier's plea for equitable relief in the Admiral case, the court said that it would not blind itself to the plaintiff's unlawful conduct in violating the credit regulations as enacted by the Commission.

In that case, the defendant could not be charged as a matter of law with knowledge of the preface. In our case, we certainly could not be charged with the knowledge of extension of credit to a consignee of which we had no knowledge for some two and one-half years.

Permitting recovery in this case would serve only to reward the carrier for its unlawful as well as inequitable conduct. We decline to turn the Motor

Carrier Act's equivalent of Section 3.2 inside out to achieve that result.

Equitable estoppal or equitable defenses have been recognize in other cases the Mason & Dixon Lines and Crossville Rubber Company, the Atcon case, specifically referred to previously, Allied Van Lines, Aero Mayflower, all cases cited in the briefs.

Referring to a previous decision of this Court in a case in which equitable estoppal defense was allowed, the Eighth Circuit in 1972 in the Southern Pacific Transportation Company v. Campbell Soup case specifically stated that we think it is equally plain, however, that this Court in the Fink decision, 1919 case, did not intend to impose a species of absolute viability upon consignees by ruling out the defense estoppal under all circumstances.

We think the critical question in this case is whether judicial recognition of an estoppal defense will contravene the anti-discriminatory purpose of the Act. The Fifth Circuit specifically found that that anti-discriminatory purpose was not contravened. We received -- Commercial Metals received no windfall. We were not paid for any freight that we are holding and refusing to pay someone. Forcing us to pay the carrier in this case would not benefit anyone except the

carrier, and in fact, it would be obviously to our detriment.

The trial court and the Fifth Circuit's opinion do not result in discrimination against any competitor of the shipper, nor did it discriminate against any locale or geographic region. As found in the court below, the party guilting of granting the preference in this case was the Southern Pacific. To turn that illegal preference against CMC is illogical and not required by law.

CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, counsel. You have seven minutes for rebuttal.

(Whereupon, at 12:00 p.m., the oral argument in the above-entitled matter was recessed for lunch, to reconvene at 1:00 p.m. the same day.)

AFTERNOON SESSION

CHIEF JUSTICE BURGER: Mr. Pipkin, you may continue.

ORAL ARGUMENT OF JAMES H. PIPKIN, JR., ESQ.

ON BEHALF OF THE PETITIONER -- Rebuttal

MR. PIPKIN: Mr. Chief Justice, I really have nothing to add unless there are question by the bench.

CHIEF JUSTICE BURGER: Very well. I hear none. Thank you, gentlemen, the case is submitted.

(Whereupon, at 1:01 p.m., the oral argument in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

SOUTHERN PACIFIC TRANSPORTATION COMPANY vs. COMMERCIAL METALS COMPANY

#81-622

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Sharon Ryan Connelly