

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1008
TITLE BURLINGTON NORTHERN, INC., ET AL., Petitioners
v.
UNITED STATES ET AL.
PLACE Washington, D. C.
DATE November 3, 1982
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C-O-N-T-E-N-T-S

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1 Then on petition for administrative review in
2 1979 in San Antonio III, the Commission modified its
3 decision and set a higher rate ceiling of \$17.23.

4 Now, it should be noted that the railroad's
5 obligation to collect and the shipper's obligation to
6 pay the rate derives not from the Commission's order
7 establishing any particular ceiling but from the fact
8 that the rate was filed in a tariff with the Interstate
9 Commerce Commission. If the tariff were less than the
10 ceiling, then the tariff is what the shipper would pay,
11 not the ceiling.

12 Now, following San Antonio III, the railroads
13 sought review in the Court of Appeals in the D.C.
14 Circuit on the ground that the ceiling was arbitrary,
15 capricious, and unlawfully low. And San Antonio also
16 appealed, contending that the decision was arbitrary and
17 that the rate that resulted was too high.

18 The D.C. Circuit in its first decision in June
19 of 1980 concluded that the Commission's San Antonio III
20 rate ceiling was arbitrary, it lacked adequate
21 rationale, and the cost findings were not adequately
22 supported. The entire decision in June of 1980 dealt
23 with the new ceiling and whether it was adequately
24 explained and supported. The Court did not in that
25 decision discuss at all whether the 1978 decision of the

1 Commission to lift the 1976 prescription was proper.
2 The only question was the validity of the new ceiling
3 and whether it was rationally supported.

4 Now, after the Court of Appeals decision and
5 commencing with shipments moving on July 24, 1980, San
6 Antonio quit paying the tariff rate and commenced paying
7 at a level of \$15.83 a ton, which it calculated to be
8 the old 1976 interim prescription increased by general
9 rate increases that had occurred since that time. And
10 from July 24, 1980, to May 7 of 1981, when they resumed
11 paying at the tariff level, the difference between the
12 tariff that was in effect and on file at the Commission
13 and the rates that they actually paid amounted to
14 approximately \$20 million.

15 Now, after they quit paying at the tariff
16 level and after other attempts to compel them to pay at
17 that level failed, the railroads petitioned the D.C.
18 Circuit to clarify that its decision with respect to the
19 ICC orders in San Antonio II and III did not affect the
20 railroads' tariffs that were on file at the Commission.

21 QUESTION: Do you have any regrets in having
22 made that decision to petition for clarification, Mr.
23 Martin?

24 MR. MARTIN: Well, I think not, because we
25 were in a position in the fall in which we were not

1 getting our tariffs paid, and we had to do something to
2 clarify the problem.

3 And we believe that under Wichita, the Court's
4 decision in 1980 had not acted to revive the prior rate
5 prescription; it had not had any effect at all with
6 respect to our tariffs. We thought that the quickest
7 way of getting a resolution of that issue was to go back
8 to the D.C. Circuit; hopefully, they would rule that
9 their order related only to the Commission's orders and
10 not to the railroads' tariffs.

11 QUESTION: Did you give any consideration to
12 going before the Commission?

13 MR. MARTIN: Well, we did go before the
14 Commission virtually simultaneously. We did, in fact,
15 file a tariff again at the San Antonio III level. In
16 other words, we believed, as we told the Court, that our
17 tariff on file had not been invalidated by our revived
18 order, but just in case it had and to be careful, we
19 filed a new tariff at exactly the same level and went to
20 the Commission and said, allow this to become effective
21 if, in fact, it's necessary to do so.

22 QUESTION: Mr. Martin, did the railroads argue
23 below that the CADC should not declare the tariffs
24 unlawful because the San Antonio failed to comply with
25 the filed rate doctrine?

1 MR. MARTIN: Yes, yes, we did. That -- there
2 were about four or five railroad submissions to the D.C.
3 Circuit on clarification. I can't give you a page
4 reference, but it was in there.

5 Now, the effect of the Court's clarification
6 in June of 1981 -- this is the second D.C. Circuit order
7 -- was to construe its earlier 1980 decision as
8 requiring the railroads to roll back their tariff to the
9 San Antonio I-level pending further proceedings before
10 the Commission. And the Court then, rather than the
11 Commission, decided what the railroads' rate should be
12 during the course of the remand proceedings.

13 We believe that that decision, both with
14 respect to the revival of San Antonio I and the
15 "unlawfulness" of the railroads' tariff is in error.
16 Now, first with respect to the scope of authority of a
17 reviewing court, we believe that under this Court's
18 decisions in Arrow, Scrap, Wichita Board, and most
19 recently, Conrail v. NARY, the Commission has the
20 exclusive jurisdiction to decide what the level of the
21 rates or the tariffs should be and whether particular
22 rates or tariffs violate provisions of the Act or prior
23 ICC regulations or rulings.

24 We believe that reviewing courts have no power
25 to determine what the rates should be. The court's

1 function is to review and, where appropriate, set aside
2 Commission orders, which is not the same thing as
3 setting aside or passing on the validity of the
4 carrier's tariffs.

5 Now, *Conrail v. NARY* is the most recent
6 decision of this Court on point. In that case the Court
7 of Appeals for the D.C. Circuit had vacated an ICC order
8 that had established maximum rates on recyclables equal
9 to 180 percent of variable cost. The court had gone
10 beyond invalidating the order and also ordered that
11 carrier rates filed pursuant to 180 percent ceiling must
12 be revoked.

13 And this Court summarily reversed, holding
14 that the Commission's failure to adequately support the
15 180 percent ceiling did not mean that the ceiling or
16 rate set at that ceiling were "rejected outright." As
17 this Court pointed out, rates up to that ceiling might
18 eventually prevail at the Commission. There was thus no
19 basis for that portion of the Court of Appeals order
20 which had gone beyond striking down the order and
21 invalidating the carriers' tariffs.

22 Now, that case is squarely on point in
23 rejecting the proposition that the function of a
24 reviewing court is to restore the status quo ante, which
25 is what the District Court of Appeals in this case did.

1 The function of the reviewing court is not to restore
2 the status quo ante; it is to allow the Commission on
3 remand to decide the validity of the carrier's rates.

4 Now, that is very close to what happened in
5 this case, where the Commission's San Antonio III
6 decision establishing a rate ceiling was set aside
7 because the rationale was not adequate. But the Court
8 of Appeals' first decision in 1980 left open the
9 possibility that rates at that same level might
10 eventually prevail after the Commission's proceeding on
11 remand.

12 The problem is that if the Court's 1981
13 decision, which is here on review, is valid, it would
14 mean that for some interim period of time the old 1976
15 temporary rate would apply and no matter what the
16 Commission might decide on the remand, the carriers
17 could never recover their tariff rate for that interim
18 period.

19 Now, the court below recognizes these
20 consequences of its decision, but it in effect blames
21 them on the revived 1976 order of the Commission.
22 However, there is nothing in Wichita, nothing in Conrail
23 v. NARY which suggests that the holding of those cases
24 depended on whether the Commission had issued one order
25 or two orders or 10 orders. So long as the tariff rate

1 might eventually prevail on remand before the
2 Commission, then the reviewing court has no power to
3 interfere with the tariff. We believe that is the
4 holding of *Conrail v. NARY*.

5 Now, this limitation on a reviewing court's
6 power would apply even if San Antonio I had been
7 revived. In fact, the Commission in 1976 had clearly
8 intended that the order be temporary, to get the traffic
9 moving. This is in the appendix at E-13 and F-2. And
10 by its own terms the '76 order had life only "until the
11 further order of the Commission." And such a further
12 order was, in fact, issued in 1978. Thus by its own
13 terms the original 1976 order ceased to have any effect
14 two years before the period in question here.

15 But even more fundamentally, the Commission
16 did not bring the 1976 order back to life in 1980 or in
17 1981. The Commission has never ruled, never found, that
18 a reasonable maximum rate for 1980-81 would be at the
19 San Antonio I level.

20 In fact, in its April 1981 decision the
21 Commission concluded that the San Antonio I rate was
22 "several years out of date" -- that is at F-4 in the
23 appendix; and "cannot have continued validity because of
24 the new statutory threshold on ICC maximum rate
25 jurisdiction and because of the changed statutory

1 standards since 1976." That is at F-8 in the record.

2 So the question really is where an agency rate
3 order which was temporary in the first place expires,
4 where the agency has not itself brought the order back
5 to life and where the agency in fact believes that the
6 old order is out of date and wrong and would not be
7 revived if it was up to the Commission, can a reviewing
8 court bring it back to life for the period of the remand?

9 QUESTION: In the Commission procedures is
10 there any practice parallel to the one in probate
11 matters of a dependent relative revocation so that when
12 a subsequent order is set aside, it revives the last
13 proceeding?

14 MR. MARTIN: No, Your Honor. And the reason
15 for that is --

16 QUESTION: Have they ever ordered, have they
17 ever done that?

18 MR. MARTIN: No. No, Your Honor, because the
19 reason for that is because of the interrelationship
20 between the tariffs which are on file and the maximum
21 rate orders. The Commission can fully protect everyone,
22 and that's the difference.

23 Where you've got a will and another will, what
24 do you do in the meantime? Well, you don't have that
25 problem in the ICC or in other statutory situations that

1 are built on the Interstate Commerce Act because there's
2 a tariff there, and if the tariff turns out to be have
3 been too high, the Commission can award reparations and
4 protect everybody.

5 In other words, if we had a \$20 tariff on file
6 and the Commission ultimately concluded it wasn't \$15,
7 it was \$17.50, that would have been a fair maximum
8 reasonable rate for that interim period of time. The
9 Commission isn't stuck with the alternative of either
10 the \$20 or the \$15. It can say, \$17.50 was the maximum,
11 pay the reparations back to the \$17.50 to make the
12 shipper whole for the excess of the tariff during that
13 period, and pay them interest. It can do that, and it
14 has done that.

15 Now, what it cannot do is authorize the
16 railroads to go back and once its tariff has been
17 reduced, collect more. In other words, if our tariff
18 was reduced from \$20 to \$15 for an interim period of
19 time and the Commission later concluded that it really
20 ought to have been \$20 or \$22 or \$18 or anything above
21 that, there's no power to authorize the railroads to go
22 back and retroactively collect that higher amount from
23 the shipper.

24 But the reason that the will situation really
25 isn't analogous is because of the Commission's

1 flexibility to determine what between the \$20 and the
2 \$15 is a fair rate and --

3 QUESTION: In other words, under the new
4 tariff that nullified any prior tariff?

5 MR. MARTIN: Well, what would happen is --

6 QUESTION: I am speaking of the Commission
7 now, not the Court.

8 MR. MARTIN: The Commission wouldn't enter a
9 tariff. The carriers go file a tariff, and the tariff
10 becomes the rate that has to be paid by virtue of the
11 fact that it's filed. And what the Commission would do
12 is look at the tariff and say is that too high or
13 unlawful for any reason. Now, if after having looked,
14 it says that that \$20 tariff is too high, we hereby
15 order the railroads to reduce, and then two things
16 happen: For the future, once the tariff is reduced,
17 that reduced tariff becomes the rate that the shipper
18 has to pay, and so for the future we are taken care of.
19 Now, the question is, what do you do about the past?
20 And if the \$20 ought to have been \$17.50, the shipper is
21 protected by the reparations and the interest on the
22 reparations.

23 But the problem we've got is that if when an
24 order is set aside that had approved a higher rate, the
25 effect of that order is automatically to invalidate not

1 only the order but our tariff and make our tariff
2 unlawful for some period in the past and it gives the
3 Commission no opportunity to make a determination of
4 whether it was reasonable or not, then we are stuck
5 because there's nothing we can do for that interim
6 period of time, and here it was nine months and \$20
7 million.

8 Now, the problem here is not simply one of
9 exceeding the Court's jurisdiction to review orders. It
10 interferes directly with the statutory ratemaking scheme
11 because you have a period of rising costs and changing
12 regulatory standards. It is not at all uncommon for the
13 ICC or other regulatory agencies to issue a succession
14 of rate orders that will reflect successively higher
15 maximum rates, which is what happened here.

16 Under this ruling, whenever one such order is
17 set aside on review, the last prior lawful order would
18 bounce back into effect, revived for some period of
19 time. And that would happen no matter how outdated the
20 prior order was. And here it was 1976 to 1980. And it
21 would apply no matter how inconsistent that revived
22 order is with the changed statutory standards. And here
23 we had two new statutes that had come into effect.

24 QUESTION: Do you think that the Court of
25 Appeals, Mr. Martin, was attempting to interpret

1 Commission intent in deciding the effect of its previous
2 order or that its ruling as to the effect of its own
3 decision or order wasn't based on what it conceived to
4 be the intent of the Commission?

5 MR. MARTIN: It said that it was not based on
6 its own intent or subjective determination as to what
7 the rate level should be, and it said that it was the
8 effect of its order. It did not go into the question of
9 what the Commission intent was in 1976 or what the
10 Commission's intent would be in 1980. It simply ruled
11 in a more or less mechanical way, without looking at
12 anybody's intent, on the rates involved.

13 But the problem here is not only that time has
14 passed but that in 1976 the Commission passed a new rule
15 of ratemaking, 10704(b)(2) of the statute. That was not
16 applied in the 1976 first order because that proceeding
17 was in midstream by the time the Act was passed. But it
18 was a brand-new rule of ratemaking.

19 Then again in 1980 the Staggers Rail Act
20 changed the ratemaking standards some more. And the
21 problem is that that San Antonio I rate, which goes back
22 to 1976 and was intended to be temporary and interim in
23 the first place, doesn't begin to reflect those changed
24 regulatory standards.

25 Now, I might -- I might just go to the --

1 well, I see that my light is on. I would like to
2 reserve my time, if I may.

3 QUESTION: Mr. Martin, would you clarify one
4 thing for me before you sit down. And that is, San
5 Antonio apparently applied in October of 1980 with the
6 Tariff Integrity Board challenging the tariffs, in
7 effect. Now, did San Antonio appeal from the order that
8 resulted from that?

9 MR. MARTIN: No, ma'am, they did not. They --
10 their position with the Tariff Integrity Board was that
11 our tariff, which was on file, ought to be rejected
12 because it's inconsistent with the Court of Appeals
13 decision. In the Tariff Integrity Board letter from Mr.
14 Geezenboter, which is in this supplemental brown volume
15 of documents, rejected that and said there has been no
16 order of the Commission directing that the tariff be
17 rejected or reduced.

18 QUESTION: And did San Antonio ever actually
19 file a complaint with the Commission or just something
20 with the Board?

21 MR. MARTIN: No, they did not. They took the
22 position that the Court of Appeals decision had given
23 them the relief they wanted; they didn't have to go to
24 the Commission.

25 QUESTION: Okay. Thank you.

1 CHIEF JUSTICE BURGER: Mr. Schulder.

2 ORAL ARGUMENT BY ELLIOTT SCHULDER, ESQ.,

3 ON BEHALF OF FEDERAL RESPONDENT SUPPORTING PETITIONER

4 MR. SCHULDER: Mr. Chief Justice, and may it
5 please the Court:

6 The United States and the Interstate Commerce
7 Commission agree with petitioners that the Court of
8 Appeals decision in this case violates the rule against
9 judicial ratemaking established in this Court's Wichita
10 and Conrail decisions. The decision below basically
11 interferes with the Commission's exclusive authority to
12 determine proper rates, and it reaches an inequitable
13 result.

14 San Antonio has argued that Wichita and
15 Conrail are distinguishable because they do not involve
16 successive rate orders. But the effect of the Court's
17 holding in earlier ICC order revived in declaring
18 inconsistent tariff rates unlawful is precisely the same
19 as if the Court had directly enjoined the railroads from
20 collecting tariff rates during the period in question.

21 In either situation, the Commission is
22 precluded from making its own determination of the
23 proper rate levels. The Court of Appeals remand
24 decision left open the possibility that the San Antonio
25 rate level would prevail.

1 Now, under the teaching of Wichita and Conrail
2 on the proper role of the Court of Appeals in this
3 situation should have been to preserve the agency's
4 authority to determine what rates are reasonable for the
5 period on remand. However, the Court, rather than
6 preserve the Commission's authority, essentially has
7 usurped the authority of the Commission by declaring the
8 tariff rates unlawful during the period --

9 QUESTION: Well, the Commission didn't think
10 so initially, did they?

11 MR. SCHULDER: Well, the Commission --

12 QUESTION: Or did it think that it was being
13 usurped but that it would just knuckle down to it?

14 MR. SCHULDER: The Commission's initial
15 position was that the legal effect of the Court of
16 Appeals remand decision was to revive the San Antonio I,
17 the earlier Commission order --

18 QUESTION: But its attitude wasn't that that
19 was proper?

20 MR. SCHULDER: Its attitude was that that
21 would create an inequity and that the Court of Appeals
22 should try to correct the inequity.

23 QUESTION: But was its position, however, that
24 the Court had overstepped its authority, or did it take
25 a position on that?

1 MR. SCHULDER: No, I don't believe it took a
2 specific position on that. However, after this Court's
3 decision in Conrail came down, the Commission changed
4 its position and affirmatively told the Court of Appeals
5 that -- the Court of Appeals decision was incorrect.

6 QUESTION: But Conrail wasn't the first case
7 of this genre, was it?

8 MR. SCHULDER: Well, Conrail was -- Conrail
9 was the first case in which a majority of this Court
10 held that a reviewing court has no authority at all with
11 which to set rates or determine rate policy in the
12 context of a remanded proceeding.

13 Now, the argument that the Court of Appeals
14 overstepped its bound under Wichita and Conrail we feel
15 is also supported by the filed rate doctrine. If we
16 look at the record in this case, the only tariff that
17 was on file during the remand period at issue here, the
18 10-month, 9- or 10-month period at issue, was the tariff
19 filed at the San Antonio III level.

20 There was, in fact, no tariff on file
21 governing the movements in question at the level of San
22 Antonio I. Yet during the entire period in question
23 here, San Antonio paid only the rate at the San Antonio
24 I level.

25 The Court's decision, by declaring tariff

1 rates -- tariff rates here unlawful has rewarded San
2 Antonio's resort to self-help and, in effect, sanctioned
3 San Antonio's violation of the filed rate doctrine.

4 The filed rate doctrine has its origins in the
5 Interstate Commerce Act, which requires shippers to pay
6 and carriers to collect only filed tariff rates. If a
7 shipper believes that a filed tariff rate is unlawful
8 either because it's inconsistent with the Commission
9 rate order or for any other reason, the proper remedy is
10 to challenge the filed rate before the Commission. And
11 if the Commission at that point finds the rate unlawful,
12 it may award the shipper reparations for any overcharge
13 and any interest. Thus, the shipper is fully protected
14 by the statutory scheme.

15 San Antonio, however, has argued that it is
16 excused from paying the tariff rate for this period
17 because the Act prohibits carriers from publishing or
18 collecting rates in excess of those prescribed by the
19 Commission. But the question here is what rate the
20 shipper must pay when there is an ongoing dispute over
21 whether the tariff rate is in violation of the
22 Commission's order. It is not up to a shipper like San
23 Antonio or even to the Court of Appeals to decide in the
24 first instance whether a tariff rate is or is not
25 unlawful.

1 The Commission is not arguing here that filed
2 rates are automatically the lawful rates that govern a
3 particular movement in question, but that the
4 determination of lawful rates is for the Commission to
5 make. The only way to preserve the Commission's
6 authority to make a determination, we submit, is to
7 adhere to the filed rates with the remedy, of course, of
8 reparations in the event the shipper wishes to file a
9 complaint in testing the validity of a tariff rate.

10 Thus, the purpose of the filed rate doctrine
11 essentially is to provide a rigid rule; that is, the
12 shipper must pay the filed rate until the dispute over
13 the proper rate is resolved by the Commission. The
14 filed rate doctrine, therefore, like the rule in Wichita
15 and Conrail, preserves the Commission's jurisdiction
16 over rates.

17 The Court of Appeals decision in this case,
18 however, violates both the Wichita and Conrail and the
19 filed rate doctrines. Accordingly, for the reasons I
20 have stated and those we have stated in our briefs, the
21 Commission and the United States respectfully request
22 the judgment of the Court of Appeals be reversed.

23 QUESTION: Would you comment just to refresh
24 my recollection on the appealability question, the
25 jurisdictional question as to whether it's timely?

1 MR. SCHULDER: San Antonio has raised the
2 point that the petition in this case was not timely
3 filed because it was filed in excess of 90 days from the
4 Court of Appeals initial remand decision. However, we
5 agree with petitioners that the remand decision did not
6 resolve the question that is at issue here and that the
7 Court dealt with in its June 1981 decision which is
8 before the Court now, the decision on the petition for
9 clarification of mandate.

10 The earlier remand decision said nothing about
11 whether or not its order remanding the case to the
12 Commission for further proceedings and explanations
13 would act to revive the earlier Commission order.
14 Accordingly, we agree that there is no question of
15 jurisdiction over this case.

16 QUESTION: Was any order entered or any
17 mandate handed down by the Court of Appeals with respect
18 to Judge Wilkie's opinion, or does his opinion stand
19 simply alone on that?

20 MR. SCHULDER: Do you mean on the petition for
21 clarification of mandate?

22 QUESTION: Yes.

23 MR. SCHULDER: I am not sure.

24 QUESTION: Well, not the petition, but Judge
25 Wilkie's opinion is here, of course. The question is

1 whether or not an order was entered. It probably is in
2 these papers somewhere, but I just haven't seen it.

3 MR. SCHULDER: I am not aware one way or the
4 other.

5 QUESTION: Is there any mandate from which an
6 appeal is taken; I guess that's my question.

7 MR. SCHULDER: I am not aware one way or the
8 other whether there was a subsequent mandate issued at
9 that point.

10 Thank you.

11 CHIEF JUSTICE BURGER: Mr. Slover.

12 ORAL ARGUMENT BY WILLIAM L. SLOVER, ESQ.,

13 ON BEHALF OF RESPONDENT

14 MR. SLOVER: Mr. Chief Justice, may it please
15 the Court:

16 I represent the City of San Antonio, one of
17 the respondents in this case. In their arguments on
18 brief and in their presentations to the Court this
19 morning the petitioners and the federal respondents
20 raised three separate and distinct allegations of error
21 in connection with the decision of the Court of Appeals
22 below.

23 First, they contend that the decision violates
24 the principles which this Court has enunciated in the
25 line of decisions beginning with Arrow and culminating

1 recently with Conrail. They contend the decision
2 violates those principles whether or not the San Antonio
3 I rate order was restored or not.

4 Secondly, they assert that the court erred in
5 finding that the San Antonio I rate order had continued
6 in effect.

7 Finally, they charged that the court below
8 erred in its decision in that it violated the filed rate
9 doctrine.

10 Nowk, in the time allotted to me, and
11 hopefully, in quite a bit less, I am going to try to
12 respond to each of those three arguments. But before I
13 do, I would like to emphasize one aspect by way of
14 factual background; and that is, the significance of the
15 San Antonio I rate order. It has a very practical
16 significance to my client because it has been the only
17 constraining force against runaway rail prices during
18 the nation's energy crisis.

19 And secondly, it is extremely critical to this
20 litigation because all of this voluminous record -- and
21 indeed, we submit, this very action before the Court
22 today -- is one of a series of unceasing efforts by the
23 railroads to extricate themselves from the constraint of
24 the order.

25 So as we go through each of these arguments, we

1 submit that the very distinguishing feature is the San
2 Antonio I order itself. And in that connection, this
3 case is a very unique case in the sense that very, very
4 little railroad transportation takes place under
5 prescribed rates. A statistically immeasurable amount
6 of transportation has taken place with rate restrictions
7 in virtually very little experience in successive
8 orders. So you have here a very unusual situation.

9 Now, as I say, the basic allegation of error
10 is that the court below violated this Court's rules in
11 Wichita and Conrail. And those rules, very generally
12 speaking, divide the functions between the judiciary and
13 in this case the Interstate Commerce Commission. They
14 draw a line of demarcation where this Court has
15 suggested that the -- that the laws and the policy of
16 the Congress have ousted the federal judiciary from
17 taking injunctive action. And their basic allegation
18 asserts that the court below crossed over this forbidden
19 line into this forbidden territory in its decision.

20 Now, I think I have fairly stated what they're
21 saying. But how the court did it is not nearly as
22 clear. And what they have done or what they are seeking
23 in this Court to do is to stretch and expand the
24 principles and boundaries that exist today in the Arrow
25 line of decisions. And basically, they're very easily

1 stated. In Arrow and Scrap the Court concluded that the
2 federal courts should not take injunctive action prior
3 to the time that the Interstate Commerce Commission has
4 acted finally. And in Wichita and Conrail they
5 concluded that the Court should not take intrusive
6 injunctive action where the ICC has acted finally but
7 the Court reverses or remands that action.

8 So we have a body of law that ousts the
9 federal judiciary from taking preclusive or injunctive
10 action in these ratemaking areas. Now, of course, here
11 there isn't any injunction. So what my opponents' case
12 comes down to is this word "affects." They are asking
13 you here today to buy the affects test. They are saying
14 when a reviewing court reaches an action which affects
15 rates, then that should be discouraged in the same way
16 that overt injunctive action is.

17 QUESTION: Isn't the Court of Appeals action,
18 however, equivalent to something like an injunction?

19 MR. SLOVER: Well, I think we would all agree,
20 as the Court said, that the effect of its action was the
21 same. But the distinction, as we see it, is that unlike
22 the Wichita case, here the court was doing something
23 that it was eminently qualified to do: It was
24 construing an order. And the considerations which
25 caused this Court to oust the judiciary in Wichita and

1 Conrail are in no way applicable to the construction of
2 orders.

3 QUESTION: Let' assume that ultimately it is
4 found that their action was correct. Why wasn't the
5 proper approach to it to let these rates remain in
6 effect, adjust whatever equities might be found by
7 reparations?

8 MR. SLOVER: Well, of course, Your Honor, we
9 submit that this Court's decision and the Arizona
10 Grocery case is dispositive on that point, that neither
11 the Commission -- in other words, for example, the
12 Commission itself could not have at the end of the
13 proceeding said, we have examined this initial rate and
14 we find that at some point in the past it became
15 unsatisfactory, so we are going to set a rate for the
16 future and also adjust for the past.

17 That process could not have taken place with
18 or without the district -- the Circuit Court action. So
19 the rate prescription order can never be retroactively
20 adjusted under the rulings of this Court and Arizona
21 Grocery.

22 QUESTION: Either way?

23 MR. SLOVER: That's correct. The Arizona
24 Grocery --

25 QUESTION: Either way --

1 MR. SLOVER: -- it was the other situation.

2 QUESTION: -- if the rate proves too low, the
3 railroads can never go back.

4 MR. SLOVER: That is exactly what that case
5 says.

6 QUESTION: Yes.

7 MR. SLOVER: So the difficulty that we have
8 with the so-called affects test that they're striving to
9 extend Conrail beyond injunctions is that none of the
10 considerations which bothered the court in Conrail -- in
11 other words, when a court enters an injunction, it has
12 to decide, one, who is going to win on the merits or the
13 probability of success; and secondly, irreparable injury.

14 Now, in Conrail the court said that the
15 federal courts should not be engaging in these type of
16 considerations, which in the first instance should
17 initially be considered by the Commission. They felt
18 that the injunctive process was intrusive upon the
19 Commission's area of expertise.

20 But there's no expertise in this case. The
21 court simply construed a rate order, an order which this
22 Court has held has the force of a statute. None of the
23 considerations behind Conrail apply to a judge's or a
24 Circuit Court's construction of a rate order. So we
25 submit --

1 QUESTION: Do you think that the Court of
2 Appeals here did try to determine what the Commission
3 had intended by its various San Antonio orders?

4 MR. SLOVER: I -- I do not know the answer to
5 that. I know that they had the order before it. This
6 Court has said that rate orders are unique, they have
7 the force of statute, they speak for themselves. And
8 indeed, at that particular time, there was not the
9 controversy which has been generated after the fact.

10 So we submit that this court was eminently
11 qualified to construe a rate order, and that is, in
12 fact, what it did.

13 QUESTION: When you say it construed the rate
14 order, I take it then you mean it construed the effect
15 it thought the Commission would want the rate order to
16 have?

17 MR. SLOVER: I simply don't know that I would
18 -- that I would go that far. I -- I think that they had
19 the rate order in their hand, and it said, this order
20 shall remain effective, et cetera, until modified. They
21 had vacated the modification.

22 And again, I feel that the court was not
23 taking injunctive action or any of this type of activity
24 that this Court has precluded, but rather was simply
25 engaging in the -- in the uniquely judicial process of

1 interpreting and construing an official document.

2 QUESTION: What do you do about the filed rate
3 point?

4 MR. SLOVER: Well, in --

5 QUESTION: Because I guess there was a tariff
6 outstanding.

7 MR. SLOVER: Well, let me say about the filed
8 rate. First of all, I would disagree with my colleague
9 in connection with his response to Justice O'Connor,
10 that this -- this theory was ever really broached to the
11 court below. But as to the filed rate doctrine, so to
12 speak, I think that's really a bad rap against the court
13 below. The more that I thought about this argument, the
14 more I began to think that the -- that the court below
15 and Judge Wilkie never got into whether we were paying
16 too much or too little or who had to pay whom.

17 The filed rate doctrine deals with the
18 railroads collecting charges in tariffs and possibly our
19 paying charges, et cetera. Wilkie never talked about
20 that. Wilkie talked about --

21 QUESTION: Well, now --

22 MR. SLOVER: -- the priority --

23 QUESTION: -- he may not have. He may not
24 have, but is it -- it may not have ever been posed
25 there, but it's posed here.

1 MR. SLOVER: Well, it --

2 QUESTION: And do you think that it's properly
3 posed here and --

4 MR. SLOVER: I absolutely do not.

5 QUESTION: Well, assume we disagree with you.
6 How do you respond to the filed rate --

7 MR. SLOVER: Well, I think that the -- the
8 Interstate Commerce Act is very clear because the
9 provision section 107601 that requires the carriers to
10 file the rates is subject to the exception that where
11 there are outstanding rate orders, they have to -- they
12 are forbidden from publishing, charging, or collecting
13 any other rate but the rate in the order.

14 So we simply say that the -- that the
15 statutory source of the -- of the rate filing in this
16 statutory scheme is preempted by another part of the
17 statute. And indeed, that is exactly how we read
18 Arizona Grocery. Arizona Grocery says, when you have
19 the rate order, you have to obey it; you can't throw
20 tariffs in the front door that has some other rate and
21 then have a lawsuit as to whether that was right or
22 wrong.

23 QUESTION: But the tariff was filed pursuant
24 to another rate order.

25 MR. SLOVER: Which the Court of Appeals

1 vacated.

2 QUESTION: Yes, but the tariff was still there.

3 MR. SLOVER: Well, we -- the liability --

4 QUESTION: The tariff was still --

5 MR. SLOVER: -- of the tariff --

6 QUESTION: -- there, wasn't it?

7 MR. SLOVER: Well, it was. And again, Justice

8 O'Connor mentioned whether we had filed a complaint, and

9 indeed we did file a complaint about -- about that. And

10 it continues to languish at the Commission today. It

11 was never acted upon. But we took every action.

12 We do not control this pricing. They control

13 these -- these --

14 QUESTION: What's the railroad supposed to do

15 when the -- after the -- is it supposed to withdraw that

16 tariff or file a new one or what?

17 MR. SLOVER: That's what we would submit. We

18 would submit that the -- because the order continued in

19 full force and effect, the railroads who control this

20 pricing -- in other words, they control the --

21 QUESTION: Are you saying that the net effect

22 then of the Court of Appeals order was that it required

23 the railroads to file a new tariff?

24 MR. SLOVER: Absolutely.

25 QUESTION: And you say that's not contrary to

1 the filed rate doctrine?

2 MR. SLOVER: Yes, we would submit that, or an
3 exception. And while we are on the filed rate doctrine
4 --

5 QUESTION: May I interrupt with a question
6 there?

7 MR. SLOVER: Yes, sir.

8 QUESTION: Under your view, could they, the
9 railroads, have immediately refiled the existing tariffs?

10 MR. SLOVER: They could not have. The other
11 thing about the filed --

12 QUESTION: Could they have filed any tariff
13 above the San Antonio I rate?

14 MR. SLOVER: Yes. We submit that the -- that
15 the -- that the tariffs become secondary under the
16 statutory scheme to the rate order. The rate order,
17 under this Court's decision and Arizona Grocery, is the
18 equivalent of a statute; it is a much higher --

19 QUESTION: Well, then they could not have
20 exceeded the San Antonio I rate, under your view?

21 MR. SLOVER: Yes. We -- we submit that they
22 could not have filed tariffs in excess of the San
23 Antonio I rate.

24 QUESTION: So there just is no room for a
25 filed tariff; it wouldn't have done any good to file

1 another tariff?

2 MR. SLOVER: They could have filed one after
3 San Antonio, but we take --

4 QUESTION: No; why would they do that?

5 MR. SLOVER: -- that the -- that the order is
6 in effect; you either file at the order or the order
7 supplants the tariff.

8 QUESTION: Well, but they have to file
9 tariffs. And your point is they should have filed the
10 tariff and had to file a tariff at the San Antonio level.

11 MR. SLOVER: They have to conform their tariff
12 to that order, which at that point was the only viable
13 order. The additional point I want to make on this
14 filed rate doctrine, which I persist is a sort of an
15 add-on to this case, is that all of these cases deal
16 ultimately with who has to pay what at the end of the
17 litigation.

18 I am not certain that any of them or there is
19 any particular body of law that -- that says that we
20 have to pay up first and argue later. They have a case
21 pending in the United States District Court in Texas to
22 get the filed rate. And really, I think what their
23 proposition comes down to here is that somehow we have
24 to pay first and argue later. And I am not so certain
25 that even if you came and found that -- that the rates

1 they file are the filed rates and they have to charge
2 them, that we have to pay them pending the litigation.
3 So --

4 QUESTION: But that's really what the filed
5 rate doctrine is all about, isn't it?

6 MR. SLOVER: I -- I do not see it as that, no.

7 QUESTION: Well, do you think you could pay
8 some other rate than the filed rate?

9 MR. SLOVER: We believe that if you have -- in
10 other words, there are cases that if you have loss and
11 damage, if your goods are set off, that you can set off
12 --

13 QUESTION: Yes, but supposing it's just a
14 disagreement about the reasonableness of a filed rate.

15 MR. SLOVER: Then we submit that we could --
16 we could withhold payment pending litigation. Yes, that
17 would be our position, that if the rate is --

18 QUESTION: Is there some case in this Court
19 that supports that?

20 MR. SLOVER: Well, in many of the cases that
21 have been cited in the brief, that is what in fact took
22 place. I -- we have cases where, not in this Court,
23 Your Honor -- but there are cases where the issue of
24 what has to be paid pending the litigation is discussed,
25 and they appear not to require that we pay and then

1 argue.

2 QUESTION: But the Court of Appeals left open
3 the possibility that the San Antonio II and III -- is
4 that what you call them?

5 MR. SLOVER: Yes.

6 QUESTION: San Antonio II and III rates, or
7 the San Antonio III rates, could be reestablished by the
8 Commission?

9 MR. SLOVER: Yes, Your Honor, but not
10 retroactively.

11 QUESTION: Well, I don't know. The
12 possibility was that those rates would be reestablished
13 and that the Commission would have said, that's what
14 they always should have been.

15 MR. SLOVER: But, Your Honor, that's a
16 critical distinction in this case. They cannot go
17 backwards on the rate order.

18 QUESTION: I understand.

19 MR. SLOVER: And so while it's true --

20 QUESTION: I understand that. But they can
21 leave in effect -- the Commission could leave in effect
22 that tariff. Now, when a railroad files a new tariff,
23 the Commission can suspend it if it wants to.

24 MR. SLOVER: That's correct.

25 QUESTION: And I suppose on the remand, if the

1 Commission wanted to, it could have suspended that
2 tariff.

3 MR. SLOVER: Well, of course, at the time this
4 litigation came up, as you mentioned in the direct
5 arguments, the Commission was taking our position.

6 QUESTION: Yes, I know.

7 MR. SLOVER: They had attempted to file
8 tariffs, and they did take the position that we espouse;
9 namely, that tariffs in conflict with the rate order
10 could not be filed. Now --

11 QUESTION: Well, it's already filed.

12 MR. SLOVER: Well, they were filed, but we
13 consider them to be null and void --

14 QUESTION: The Commission never ordered them
15 suspended or revoked or withdrawn.

16 MR. SLOVER: But they -- we concluded that
17 they were null and void because they were in conflict
18 with the outstanding rate order.

19 Now, as I say, the real heart of the position
20 of the petitioners in the final analysis, as we read it,
21 comes down to a series of efforts to, in essence, make
22 the San Antonio I rate order go away. But if you make
23 the San Antonio I rate order go away, then you don't
24 have to extend Conrail, you have Conrail. Without the
25 San Antonio I rate order, there isn't any question that

1 the court below would have taken the prohibitive-type
2 interference.

3 QUESTION: Assume hypothetically that this
4 Court reverses the Court of Appeals. What is the
5 posture of the carrier with respect to the San Antonio I
6 rates that are being charged?

7 MR. SLOVER: Well, as we see it, if you
8 reverse the Court of Appeals, you would have to also
9 reverse yourself in Arizona Grocery. That's --

10 QUESTION: Well, let's lay that aside for the
11 moment. We will decide that later. But what is the
12 posture of the carrier if we reverse? What do they do
13 about having only the \$11 rates all this time?

14 MR. SLOVER: Well, as you understand, this --
15 this -- this proceeding is going on in various
16 continuing facets, and I presume that if you were to
17 reverse, this disputed period would become part of that
18 ongoing proceeding. But I am speculating.

19 The -- as I was saying, the --

20 QUESTION: May I ask you, I know you rely
21 heavily on Arrizona Grocery, but isn't that a case in
22 which the court held that reparations could not be
23 granted when the rate had previously been determined to
24 be lawful by the Commission and the Commission later
25 changed its mind?

1 MR. SLOVER: Well, as Mr. Justice White
2 mentioned, I think that's -- the Arizona Grocery
3 situation is something of the reverse of this situation
4 where the Commission prescribed a higher rate --

5 QUESTION: Yes.

6 MR. SLOVER: -- and then they prescribed a
7 lower rate.

8 QUESTION: After the shipments had already
9 taken place, pursuant --

10 MR. SLOVER: Right.

11 QUESTION: -- to the first rate which had been
12 approved before the shipment took place.

13 MR. SLOVER: And they -- they tried to get the
14 carrier to ante up the difference --

15 QUESTION: No, I think the --

16 MR. SLOVER: -- to lower --

17 QUESTION: Oh, I see.

18 MR. SLOVER: -- down the difference of the
19 second shipment.

20 QUESTION: The shipper sued for reparations.

21 MR. SLOVER: Right.

22 QUESTION: And their claim was disallowed.

23 MR. SLOVER: Correct.

24 QUESTION: Now, why is that inconsistent with
25 your position here -- I mean with the position of your

1 opponents here?

2 MR. SLOVER: Well, in both cases this -- well,
3 in the Arizona case and, as we submit, the fact, the
4 situation in this case, the rate order cannot be
5 retroactively adjusted. And so in Arizona --

6 QUESTION: Well, after it has been finally
7 approved by the Commission then. But here we're not
8 doing that, are we? I mean we are not being asked to do
9 that.

10 MR. SLOVER: Well, we -- we claim that the San
11 Antonio I rate order is the only legitimate valid rate
12 order that's stood the test of -- of administrative
13 procedure and was sanctioned by a reviewing court. I
14 recognize that the record and the briefs are laced with
15 these opinions about its interim nature and its temporal
16 nature. But the Interstate Commerce Act doesn't provide
17 for temporal orders or short-term orders; it just -- it
18 just requires orders.

19 QUESTION: Well, I understand your argument.
20 I am just not quite clear on why the Arizona rate case
21 provides you as much support as you think it does.

22 MR. SLOVER: Well, we take our actions in many
23 ways were guided by this Court's discussion in Arizona
24 Grocery where it said, where the Commission prescribes a
25 rate, it speaks in its legislative capacity, and it says

1 \$10, and that \$10 must govern. The carriers cannot take
2 their pricing freedom and try \$15, throw it in the front
3 door, file a tariff as you will, make us pay, make us
4 litigate and take their chances. They say that the \$10
5 prescription governs.

6 And that is fundamentally what our position
7 boils down to before this Court this morning, that at
8 the completion of the activities of the Circuit Court,
9 the San Antonio I rate order stood in full force and
10 effect, continued as Judge Wilkie found. And that order
11 set a specific rate, and under this Court's ruling in
12 Arizona, that is the only legal lawful rate, and they
13 cannot vary it by filing tariffs or by any other means.

14 Their relief was not to engage in this
15 withering array of lawsuits and legal actions and
16 maneuverings, but to go back to the Commission and seek
17 to act upon the circuit's mandate just as they did when
18 they were dissatisfied with the Eighth Circuit. They
19 went back, and they made their case to try to modify the
20 prescription. And that would have been their best
21 course of relief following the action of the D.C.
22 Circuit.

23 QUESTION: Let me try again.

24 MR. SLOVER: Yes.

25 QUESTION: If we were to reverse the Court of

1 Appeals and vacate its judgment, then is San Antonio III
2 rate structure the prevailing rate for this whole period?

3 MR. SLOVER: Yes. In other words, as -- as --
4 thinking about that here, in other words, if you reverse
5 -- if you reverse Wilkie -- or, to state it differently,
6 what we contend happens at the end of the Circuit
7 Court's activities is that the price constraint
8 continues. These people are continued under the
9 regulatory rate ceiling, and they seek a result that at
10 the end of the Circuit Court's action the ceiling is
11 gone, they are back to voluntary pricing.

12 So taken on balance, if you were to reverse
13 the D.C. Circuit, you would, in essence, be restoring
14 pricing freedom to these railroads over our traffic
15 because there wouldn't be any constraining rate orders
16 at all.

17 QUESTION: And if we affirm the Court of
18 Appeals, then San Antonio I rates are applicable and
19 it's open to them to try to get --

20 MR. SLOVER: Correct. And indeed, the day
21 after the Circuit Court was open to them, the Circuit
22 Court never interfered with anything that the ICC could
23 have done --

24 QUESTION: But that still leaves a couple of
25 years of rates at the San Antonio I level long after the

1 San Antonio I tariff was filed, doesn't it?

2 MR. SLOVER: No, it leaves, I think, the time
3 period is -- is about six or seven months or eight
4 months. It is --

5 QUESTION: How much money would be involved?

6 MR. SLOVER: I believe the figure has been
7 computed at approximately \$19 million. I never figured
8 out, I don't contest it. As you perhaps appreciate, the
9 numbers in these coal rate cases are -- are very, very
10 enormous. So if you were to affirm the court below, the
11 effect of your holding would be that the San Antonio I
12 rate order continued until the Commission finally
13 vacated it back in April of 1981.

14 The last point that I shall make very briefly
15 is that the most understandable part of the presentation
16 of my opponents is this facade of how they get the San
17 Antonio I rate order to self-destruct or to have been
18 lifted or vacated. And I simply want to say that the
19 record in this case before the Commission shows that the
20 railroads were intensely trying to vacate the order, to
21 lift it, to get out from under this pricing constraint.
22 And we were resisting it steadfastly throughout the
23 course of the proceedings.

24 And so to come before this Court now and say
25 that the existence of this order, which is of such

1 critical significance to this litigation and to my
2 clients is metaphysical or semantical really belies the
3 fact. Everybody, including the Circuit Court and the
4 Commission, were acutely aware of the distinction
5 between vacating or lifting an order and modifying it.
6 And we submit that no case can be made on the facts of
7 this record that the San Antonio I order somehow had
8 gone out of existence before it got to the D.C. Circuit.

9 QUESTION: May I ask one other question about
10 the consequences of an affirmance? You don't take the
11 position that the May 7th order of the Commission where
12 they allowed, pursuant to which you have been paying the
13 higher rate, that that was invalid?

14 MR. SLOVER: Well, we had some doubts about
15 it, but those doubts did not --

16 QUESTION: In other words, what I am really
17 asking is if you were -- are you entitled to --

18 MR. SLOVER: No.

19 QUESTION: -- recover the excess --

20 MR. SLOVER: We're really --

21 QUESTION: -- of over the San Antonio I rate
22 for the period subsequent to May 7, '81?

23 MR. SLOVER: Well, that issue is pending at
24 the Interstate Commerce Commission as to what the --

25 QUESTION: It seems to me one possible --

1 MR. SLOVER: They are now --

2 QUESTION: -- consequence of your view would
3 be that the revival of the San Antonio I rates required
4 that that be the ceiling until --

5 MR. SLOVER: It was vacated.

6 QUESTION: -- today.

7 MR. SLOVER: And -- no, it -- we -- we take
8 the position that that be the ceiling until it was
9 properly vacated. And the Commission vacated it last
10 May.

11 QUESTION: And that was consistent, in your
12 view, with -- they were permitted to do that under the
13 Court of Appeals mandate?

14 MR. SLOVER: They were permitted to get to
15 work on that the afternoon of Judge Wilkie's decision.
16 Nothing that the Circuit Court did in any way interfered
17 with that. Our difficulty was that we felt that the
18 process that led to the vacation might have been a
19 little summary. But fortunately, that's not --

20 QUESTION: But for purposes of our analyzing
21 your argument here, we can assume that you accept the
22 validity of the May 7th action of the --

23 MR. SLOVER: That is correct.

24 QUESTION: -- May 7, '81, action of the
25 Commission?

1 MR. SLOVER: Yes, Your Honor.

2 QUESTION: Well, could, that afternoon without
3 a hearing or anything else, could the Commission have
4 amended its San Antonio I order to the extent that it
5 just permitted the -- well could it just have withdrawn
6 it that afternoon?

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1 MR. SLOVER: We would have argued that they
2 could not have. We would have suggested and contended,
3 as we did before the Fifth Circuit, that something in
4 the nature of the defective hearing, that Wilkie found
5 difficulties with, should have been reheard.

6 QUESTION: You don't think they could have
7 done something to the order that would have permitted
8 the railroads to file new tariffs immediately?

9 MR. SLOVER: Well, I guess the question there
10 is one of how much they could have done. They in fact
11 did do something very summarily, and that has clearly
12 been accepted by the courts.

13 So my answer to your question, with the
14 benefit of hindsight, is that, yes, they could have
15 acted expeditiously. And indeed, Your Honor, the
16 railroads could have asked the D.C. Circuit not to
17 vacate the order. As we point out, many of the
18 litigants in these rate cases come before the Circuit
19 Court and say, it's a lousy order, but don't vacate it;
20 we need it for the duration.

21 QUESTION: I take it the Commission's position
22 now is that the railroad tariffs that were filed based
23 on San Antonio III are still in effect?

24 MR. SLOVER: Well, as has been pointed out,
25 the Commission's position is a little like a chameleon

1 here. At one time their position was as ours is and at
2 another time they took the position that they had --

3 QUESTION: Well, at some point in this
4 proceeding the Commission took the position that the
5 railroad tariffs that were on file were the governing
6 rates.

7 MR. SLOVER: Right.

8 QUESTION: And that is in effect saying the
9 railroad should be permitted to file a new tariff at the
10 San Antonio III level.

11 MR. SLOVER: That's correct.

12 Thank you.

13 CHIEF JUSTICE BURGER: Do you have anything
14 further, Mr. Martin?

15 REBUTTAL ARGUMENT OF ROBERT EDEN MARTIN, ESQ.

16 ON BEHALF OF PETITIONERS

17 MR. MARTIN: I'd just like to address a couple
18 of the questions that have been raised. First, with
19 respect to where the filed rate doctrine was raised in
20 our papers before the D.C. Circuit, in the first
21 argument section of the petition for clarification that
22 we filed in November, pages 11 through 12. This is in
23 response to Justice O'Connor's question.

24 I'd like to address the Chief Justice's
25 question with respect to what happens if we reverse or

1 if we don't reverse. If there is a reversal, our
2 argument would be that everybody is protected because
3 the entire matter of what happens to a rate from 1978,
4 when San Antonio II came down, to the present and
5 through tomorrow will be before the Commission. The
6 Commission will rule on what would have been a
7 reasonable maximum rate throughout that entire period
8 and can protect everybody, including San Antonio.

9 The problem is, what happens if you don't.
10 And here we have from 1978 --

11 QUESTION: Wait a minute, now. What can the
12 Commission do, you say? What rates have been charged up
13 'til now?

14 MR. MARTIN: From 1978 to '79, the San Antonio
15 II level was charged. From '79 until '80, the San
16 Antonio III level was charged.

17 QUESTION: May '80.

18 MR. MARTIN: Yes. July '80.

19 QUESTION: Now, the Commission cannot get the
20 railroads to give up any of those collected rates?

21 MR. MARTIN: Yes, sir.

22 QUESTION: On what basis?

23 MR. MARTIN: Because the issue of the validity
24 of the maximum rate that the railroads charged from '78
25 to '80 was the question that was before the Commission

1 in San Antonio III. It went before the D.C. Circuit.
2 The D.C. Circuit remanded it and it's still on remand.

3 So I think this is very important. Before the
4 Commission right now there is a proceeding in which --
5 it is ongoing. The Commission will some day decide what
6 would have been a maximum reasonable rate for this
7 entire period. If it finds that the rate --

8 QUESTION: I take it your colleague on the
9 other side doesn't agree with that. I understood him to
10 say that if we reversed there was no way that a
11 reasonable rate could be set for this interim period.

12 MR. MARTIN: No, if that's what he said he's
13 wrong, because the problem is with respect to the hole
14 in the middle. The whole 1978 to the present and the
15 issue of the maximum rate is before the Commission right
16 now.

17 But if San Antonio is right, then there is a
18 chunk of that period from July of 1980 to May of 1981 in
19 which the Commission would not have jurisdiction to
20 decide what's a maximum reasonable rate. So the
21 Commission could, according to his theory, find that the
22 San Antonio II level was okay from '78 to '79, the San
23 Antonio III level was okay from '79 to '80. But there's
24 a dip for nine months in which the Commission has no
25 power to do anything because of the D.C. Circuit's

1 decision. And then from May of '81 on, again
2 jurisdiction would revert to the Commission to find
3 what's a maximum reasonable rate.

4 Our theory is that there's no hole, that the
5 Commission has jurisdiction over the entire period.

6 QUESTION: If the Court of Appeals is
7 reversed, the status quo ante is restored, I take it?

8 MR. MARTIN: The carrier's tariff is on file
9 today, Your Honor. Back in May of 1981 the Commission,
10 in the decision that is in the brown book at 5, restored
11 pricing freedom to the carriers.

12 QUESTION: Can they recover from San Antonio
13 the shortfall in the interim?

14 MR. MARTIN: If you reverse, we will be able
15 to go back and collect from them for that interim period
16 of nine months our tariff. And then if the Commission
17 decides that the tariff was too high for that period or
18 any other portion of this four-year period, it can
19 require us, yes, sir, to pay reparations and to pay
20 interest.

21 Now, I would like to address the point that
22 was made about San Antonio I being the only constraining
23 force on the railroads and you have to somehow affirm
24 the Court of Appeals because it's the only constraining
25 force. That just isn't right, because from 1978 to '80

1 it didn't exist and it doesn't exist today.

2 I would like to call the Court's attention to
3 the Appendix F-11, which is where the May 7, 1981, order
4 appears. And as of that date and that order, San
5 Antonio I on everybody's theory is gone, everybody's.
6 And Judge Wilkie acknowledged it in his decision at
7 A-6. So that is gone, and the Commission has
8 jurisdiction over the entire period to implement the
9 standards of the Act, and the only question is whether
10 there's a nine-month chunk in the middle of that period
11 over which it has no jurisdiction and over which it has
12 no alternative except to restore a rate which it
13 believes is out of date by years, is inconsistent with
14 the statutory standards.

15 Again, a brief reference, at F-7 and F-8 of
16 the record. We don't have to speculate about what the
17 Commission's intent is, at least today, because we
18 know. In May of 1981 it got out this decision, in which
19 it said that the San Antonio rate is supported neither
20 by current cost data or current legal standards, or at
21 least that there's no reason to believe it is, and that
22 not even San Antonio contends that its evidence would
23 ultimately justify reimposition of the San Antonio
24 prescription.

25 This is the Commission in May of '81. It says

1 that the San Antonio I rate, if restored, would be way
2 below even the threshold for Commission maximum rate
3 jurisdiction, and a rate of that kind "cannot have
4 continued validity." This is at F-8 of the record.

5 So we know what the Commission's view is in
6 the wake of the remand. We know what the Commission's
7 view is in 1980-81. We don't have to speculate about
8 it.

9 CHIEF JUSTICE BURGER: Thank you, gentlemen.
10 The case is submitted.

11 (Whereupon, at 11:56 a.m., the case in the
12 above-entitled matter was submitted.)

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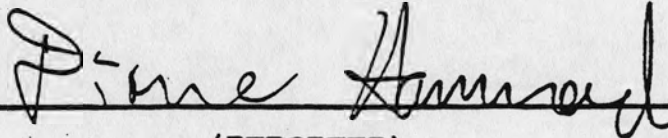
CERTIFICATION

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:

Burlington Northern, Inc., Et Al., Petitioners V. United States
Et Al. No. 81-1008

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

BY

A handwritten signature in cursive script, appearing to read "P. H. Anderson", written over a horizontal line.

(REPORTER)