

ORIGINAL

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 82-1643

**TITLE** INTERSTATE COMMERCE COMMISSION, ET AL., Petitioners  
v. AMERICAN TRUCKING ASSOCIATIONS, INC., et al.

**PLACE** Washington, D. C.

**DATE** January 10, 1984

**PAGES** 1 thru 37



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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   INTERSTATE COMMERCE COMMISSION,           :

4    ET AL.,                                       :

5   Petitioners           :

6                                       v.                               :   No. 82-1643

7   AMERICAN TRUCKING ASSOCIATIONS,           :

8    INC., ET AL.                               :

9   Washington, D.C.

10    Tuesday, January 10, 1984

11                   The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 2:23 p.m.

14 APPEARANCES:

15 CARTER G. PHILLIPS, ESQ., Off. of the Sol. Gen., Dept.  
16 of Justice, Washington, D.C.; on behalf of the  
17 Petitioners.

18 PATRICK MC ELIGOT, ESQ., Washington, D.C.; on behalf of  
19 the Respondents.

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1                                   P R O C E E D I N G S

2                   CHIEF JUSTICE BURGER: Mr. Phillips, I think  
3 you may proceed whenever you are ready.

4                   ORAL ARGUMENT OF CARTER G. PHILLIPS, ESQ.,  
5                   ON BEHALF OF PETITIONERS

6                   MR. PHILLIPS: Mr. Chief Justice, and may it  
7 please the Court:

8                   At issue in this case is the validity of a  
9 rule adopted by the Interstate Commerce Commission in  
10 1980 that provides the Commission with authority to  
11 reject at any time tariffs filed by a motor carrier if  
12 those tariffs were adopted or published under procedures  
13 that are found to be in significant violation of a rate  
14 bureau agreement. The importance of the rate bureau  
15 agreement is that it serves as the basis for the motor  
16 carriers' immunity from antitrust liability for jointly  
17 setting and publishing their rates.

18                   This suit is an attack on the rule as adopted  
19 and not as applied, and accordingly the facts are rather  
20 sparse. The rule was adopted in the aftermath of the  
21 enactment of Congress in 1980 of the Motor Carrier Act.

22                   The primary purpose of that Act was to  
23 increase competition among motor carriers, and one of  
24 the significant means for achieving that particular  
25 purpose was Congress' attempt to restructure the



1 operations of rate bureaus. Rate bureaus had been  
2 created after 1948 when Congress adopted the  
3 Reed-Bulwinkle Act which conferred the initial antitrust  
4 immunity on rate carriers so that they could avoid the  
5 destructive competition that Congress had found to have  
6 existed in the past so that they could set their rates  
7 jointly in a way that would otherwise violate section 1  
8 of the Sherman Act because the immunity was perfectly  
9 permissible.

10 During the 32 years that the Reed-Bulwinkle  
11 Act had been in effect both the Commission and Congress  
12 had become concerned about possible abuses in the rate  
13 bureau process, and some members of both Congress and  
14 the Commission began to doubt whether any antitrust  
15 immunity was appropriate at all. In 1980 Congress  
16 comprised on the issue and retained a certain amount of  
17 antitrust immunity for rate carriers but did so only in  
18 return on the condition that the rate bureaus themselves  
19 operate under very strict requirements so that they  
20 would be more open to the public and provide greater  
21 opportunity for competition among the motor carriers.

22 For instance, Congress required that bureau  
23 meetings be open, that the name of the proponent of any  
24 rate increase be disclosable, and that members of the  
25 bureau not discuss various aspects with published

1 rates. With regard to enforcement under the Interstate  
2 Commerce Commission Act, however, Congress did not  
3 modify the Commission's preexisting powers.

4 In its notice of proposed rule making the  
5 Commission explained that most of the requirements of  
6 the Act were self-fulfilling, but nonetheless adopted  
7 several substantive provisions designed to provide very  
8 clear guidance to the motor carriers with regard to  
9 precisely how they should operate in order to assure the  
10 continuance of their antitrust immunity.

11 The only one of those rules that is at issue  
12 in this case is the Commission's decision to adopt  
13 rejection, as it is called, of the carrier's tariff  
14 filing as a potential sanction in cases where the  
15 Commission finds after a hearing and the possibility  
16 ultimately of judicial review that the tariff is the  
17 product of a significant violation of a rate bureau  
18 agreement. The Commission thereby asserted its  
19 authority in appropriate cases to declare the filed  
20 tariff to be invalid ab initio and thereby to subject  
21 the carrier to overcharged liability under section  
22 11705(b)(1).

23 QUESTION: Under that, Mr. Phillips, was the  
24 usual remedy retroactive, cancel it out all the way?

25 MR. PHILLIPS: The usual remedy in what

1 context?

2 QUESTION: You just said that they exercise  
3 their discretion under that rule?

4 MR. PHILLIPS: Yes.

5 QUESTION: Cancel the filed tariff.

6 MR. PHILLIPS: In cases of significant rate  
7 bureau violations.

8 QUESTION: But that was the only thing the  
9 Commission would do?

10 MR. PHILLIPS: No. The Commission retained  
11 the option of exercising any of its other enforcement  
12 powers.

13 QUESTION: Such as?

14 MR. PHILLIPS: It could bring a civil  
15 proceeding for a penalty, could decide to declare the  
16 rate invalid and prescribe a rate for the future, the  
17 traditional remedies it had always used.

18 QUESTION: And require adjustments.

19 MR. PHILLIPS: Could require adjustments.

20 QUESTION: Well, could it cancel it out only  
21 for the future?

22 MR. PHILLIPS: Yes, Your Honor.

23 QUESTION: Could it also revoke approval of  
24 the rate bureau agreement itself?

25 MR. PHILLIPS: Yes, Justice Stevens, it could

1    revoke approval of the rate bureau agreement.

2                    QUESTION:   May I ask if the issue in the  
3    Aberdeen case involving the symbolization rule, does  
4    that pertain to rate bureau or is that entirely  
5    separate?

6                    MR. PHILLIPS:   Well, rate bureaus are the ones  
7    ordinarily who file tariffs, and as a consequence they  
8    are the ones who would be placing the symbols on the  
9    tariffs, but the symbolization requirement applies to  
10   anyone who files a tariff.  So if an individual motor  
11   carrier were to do so he would be obliged to comply with  
12   that rule.

13                   QUESTION:   Is the failure to put the right  
14   symbol on the tariff a violation of a rate bureau  
15   agreement?

16                   MR. PHILLIPS:   No, Your Honor.  It's an  
17   independent violation of the regulation.

18                   QUESTION:   Would it be possible to decide this  
19   case one way and the other case the other way?

20                   MR. PHILLIPS:   I think it would be possible.

21                   QUESTION:   And not a necessary conflict.

22                   MR. PHILLIPS:   Not a necessary conflict, no,  
23   Your Honor.  I don't believe so.

24                   QUESTION:   Mr. Phillips, could you give  
25   examples of significant violations that would be subject



1 to the retroactive rule?

2 MR. PHILLIPS: Sure. Presumably one of the  
3 purposes of the rate bureau review process was to make  
4 sure that the shippers have an opportunity to have some  
5 involvement in the negotiations for setting the rates so  
6 that if the meetings for the rate bureaus were closed to  
7 the shippers or if the shippers were in some other way  
8 excluded from that process so that rates were set higher  
9 than they might otherwise have been as the shipper had  
10 had an opportunity to participate and the Commission  
11 were to find in its own view that if the rate bureau  
12 open process had been allowed to function as it should  
13 have, that the higher rate would not have been set, then  
14 it might well be the Commission's judgment that that  
15 higher rate should not be permitted.

16 QUESTION: Well, the Commission would have an  
17 opportunity when the rate is first filed to disallow it,  
18 would it not?

19 MR. PHILLIPS: Yes. It has the right to  
20 suspend it within the 30-day period, but it may or may  
21 not --

22 QUESTION: Well, is this rule really a product  
23 of the Commission's lack of funding or staffing to get  
24 around these things earlier?

25 MR. PHILLIPS: Well, not nearly so much as the

1 symbolization rule, Justice O'Connor. Frankly the  
2 problem inherent in the rate bureau process is one of  
3 general secrecy. I mean the whole reason Congress  
4 modified the rate bureau process was to make it less  
5 secret so that it could well be that violations of the  
6 requirements for rate bureaus would simply make them  
7 more secret and, therefore, make it more difficult to  
8 determine whether there have been violations.

9           So I think there was an inherent difficulty in  
10 complying with the 30-day problem even before the  
11 Commission's budgetary problems, but certainly having  
12 less resources makes it much more difficult frankly to  
13 be able to investigate rate bureau violations within the  
14 30-days.

15           Rationale for the adoption of the rejection  
16 remedy by the Commission was that it simply lacked an  
17 effective remedy for significant violations of rate  
18 bureau agreements under the preexisting law and that the  
19 adoption of rejection was a direct and efficient  
20 administrative response to the peculiar problems that  
21 have been created by the operation of the rate bureaus.

22           QUESTION: Mr. Phillips, rejection is a  
23 creature of statute in a sense. The statute talks about  
24 rejection, does it not?

25           MR. PHILLIPS: Yes, Your Honor. In 10762(e)

1 it makes specific reference to rejection.

2 QUESTION: So presumably the Commission is  
3 bound to follow whatever constraints may be contained in  
4 the statutory creation of rejection.

5 MR. PHILLIPS: Certainly the Commission is  
6 bound by the statute with regard to that; however,  
7 10762(e) does not, by its terms, make any reference to  
8 rejection. Moreover, the Commission --

9 QUESTION: Does the terminology of rejection,  
10 though, indicate that it is something that has not yet  
11 gone into effect?

12 MR. PHILLIPS: Well, that was the position of  
13 the Court of Appeals --

14 QUESTION: Is there a suggestion there that  
15 that is the meaning?

16 MR. PHILLIPS: Well, that is what the Court of  
17 Appeals believed that you can only properly define  
18 rejection that way. However, a proper definition of  
19 rejection is to cast out or to eject which presumably  
20 would have something to do with something that was  
21 already effective.

22 Moreover, I do not think it is appropriate to  
23 tell an agency precisely how it should operate by  
24 reference to dictionary definitions. There is nothing  
25 inherent in that particular phrase that evinces a clear

1 intention by Congress to restrict how the Commission  
2 operates, and our submission is that that kind of a  
3 showing is what this Court's prior decisions have  
4 found.

5 QUESTION: But does the whole structure set up  
6 by Congress suggest that when there is an interval in  
7 which the Commission can accept it or not and then it  
8 goes into effect and thereafter there are other  
9 procedures whereby the Commission could initiate an  
10 examination for the future? Does that whole structure  
11 suggest something contrary to your position?

12 MR. PHILLIPS: I don't believe that that's the  
13 inference to be drawn from this particular statutory  
14 scheme. The remedies that are available all sort of  
15 miss the basic point of what the Commission's trying to  
16 achieve through the use of the specialized rejection  
17 power.

18 There are alternative remedies available, no  
19 question about that, but this Court has held in the  
20 American Trucking Association case before that you don't  
21 look down the list of provisions to see whether the  
22 specific one the Commission has sought to apply exist,  
23 but rather you determine whether given the mission of  
24 the Commission the particular enforcement device that it  
25 has in fact adopted is consistent with that mission, not



1 with any specific provision.

2 I don't believe, frankly, that you can go  
3 through and find that -- It might well be appropriate to  
4 say the Commission cannot follow this course of action  
5 if its efforts were to make superfluous some preexisting  
6 arrangement that Congress has set out, but that is not  
7 the case here. So in the absence of that it would seem  
8 to me that the structure of the Act does not in any way  
9 cavern the Commission's discretion to choose an  
10 enforcement technique that is appropriate.

11 QUESTION: What about the fact that subsection  
12 (e) is part of that one section which generally deals  
13 with processing of new rates? Do you take the view that  
14 rejection can occur at any time, even ten years later?

15 MR. PHILLIPS: Well, there is a three year  
16 statute of limitations for an overcharge liability so  
17 that --

18 QUESTION: But you could reject ten years  
19 later.

20 MR. PHILLIPS: Sure. You could reject, but  
21 you could not impose overcharge liability for the total  
22 period. I think it is important to realize that  
23 Commission's position here is that we believe that the  
24 rejection authority made specifically a matter of  
25 statutory provision in 10762(e) is helpful but that the

1 Commission also relies on its inherent authority, the  
2 broader sort of notion of rejection similar to what the  
3 Court held in the United Gas Pipeline v. Mobil Gas  
4 case. So we do have two alternative theories involved  
5 here.

6 QUESTION: Mr. Phillips, what if Congress said  
7 with respect to rates the Commission may do the  
8 following: it may reject; it may suspend; it may hold a  
9 hearing and find unreasonable. It didn't say anything  
10 more. Do you think the Commission given those three  
11 weapons to deal with rates filed could say, well, in  
12 addition we are going to have three or four other kinds  
13 of procedures that are a little bit different than  
14 anything like the three that Congress has set forth?

15 MR. PHILLIPS: In absence of some indication,  
16 I submit, in the legislative history that says that when  
17 Congress set out those three that those were the only  
18 ones that had in mind and meant for the Commission not  
19 to go beyond those three. Our position would be  
20 consistent with the earlier American Trucking  
21 Association case that Congress doesn't sit down and  
22 figure out every aspect of how the Interstate Commerce  
23 Commission is going to perform its job and that the  
24 specific reference to certain enforcement mechanisms in  
25 now way necessarily restricts the Commission from using

1 additional mechanisms so long as those satisfy the aim  
2 of the statute which is in this case the enforcement of  
3 the rate bureau agreements.

4 So I do not believe that that setting out  
5 would necessarily preclude what the Commission has done  
6 here.

7 Respondents filed this suit in the United  
8 States Court of Appeals for the Eleventh Circuit  
9 challenging many of the rate bureau regulations adopted  
10 by the Commission, and the court upheld most of the  
11 substantive regulations but rejected the rejection rule  
12 in this case. In holding that the Commission had no  
13 power to reject the rate that had gone into effect after  
14 30 days, the court did reject additional contentions  
15 that had been made by the Respondents.

16 First, the court held that the rejection  
17 authority mentioned in 10762(e) is not restricted simply -  
18 to rejecting problems in rate filing procedural defects  
19 but is also available for substantive unlawfulness.  
20 Second, it held that the Commission's authority over  
21 rate bureau agreements was not limited to declaring them  
22 unlawful, but rather the Commission could also adopt  
23 sanctions in addition to declaring the agreement  
24 unlawful.

25 The court held, however, that free or

1 post-effective rejection was inappropriate on three  
2 grounds: first, the dictionary definition of rejection,  
3 which I have already discussed; second, the court held  
4 that it would violate a statutory policy favoring  
5 stability of rates; and third, the court reasoned that  
6 prior decisions of this Court precluded rejection of  
7 effective rates.

8           This Court has held that the determination of  
9 how best to enforce the national transportation policy  
10 as embodied in the Interstate Commerce Commission Act is  
11 a matter firmly committed to the discretion of the  
12 Interstate Commerce Commission, and the Commission's  
13 authority in this regard does not depend upon the  
14 express provision of a specific power. There is a  
15 legitimate, reasonable and direct relationship between  
16 the asserted enforcement authority and a mandate of the  
17 statute, and the Commission's rule must be upheld.

18           I've already discussed the dictionary  
19 definition problem of the Court of Appeals' analysis.  
20 Equally unavailing is the Court of Appeals' reliance on  
21 the stability of rates as a statutory policy.

22           It is clear that the 1980 Act was designed to  
23 increase flexibility in rates, not to guarantee their  
24 stability at all costs, and that the Commission's  
25 rejection rule in this context furthers the competition



1 element of the Act and does not great --

2 QUESTION: Let me just ask you one more thing,  
3 Mr. Phillips, and that is could the Commission reject a  
4 proposed rate within the time provided in the statute  
5 simply because it lacks enough information on the  
6 proceedings to let it make a sound decision?

7 MR. PHILLIPS: The Commission does have the  
8 power to reject for lack of information although the  
9 tariff filing --

10 QUESTION: So why does it need this rather  
11 unusual power to go back on an issue?

12 MR. PHILLIPS: Justice O'Connor, in order to  
13 use the power you are talking about there would have to  
14 be something in the tariff filing itself that would make  
15 clear whether or not there has been a rate bureau  
16 operation problem, and tariff filings are just a set of  
17 numbers which do not in any way give you any insights  
18 into whether there may have been a tariff rate filing  
19 problem. So the Commission would be obliged to do one  
20 of two things, either disregard the rate bureau  
21 operation problems or have to suspend every rate  
22 increase in order to investigate whether or not the rate  
23 bureau operation has been complied with. Neither of  
24 those seem particularly appropriate, and this much more  
25 tailored remedy seems much, much more suitable at least

1 in the view of the Commission.

2 QUESTION: Is there not another consideration  
3 here? As I understand it, if the filing violates the  
4 rate bureau agreement it does not have the immunity of  
5 the Reed-Bulwinkle Act. Am I correct in that?

6 MR. PHILLIPS: Yes, Your Honor.

7 QUESTION: If that is true and then there is  
8 an incorrect tariff filed that violates the agreement,  
9 the people who file it run a very substantial risk of  
10 treble damage liability, do they not?

11 MR. PHILLIPS: Well, there is no question that  
12 there is some deterrent value to having antitrust  
13 liability --

14 QUESTION: I would think that would be a  
15 greater deterrence than the fear of rejection.

16 MR. PHILLIPS: Well, the Commission recognized  
17 that but nonetheless believed that -- The antitrust  
18 liability notion is cumbersome. It is in the hands of  
19 the shippers exclusively who may or may not have a  
20 direct interest in bringing the suits and who may not  
21 want to risk it whereas this is in the hands of the  
22 Commission --

23 QUESTION: If they talk to a venturesome  
24 lawyer they would not have much trouble getting  
25 representation I would not think in a case like this

1 because it is a clear violation if there is no  
2 immunity.

3 MR. PHILLIPS: Well, I do not doubt that the  
4 attorney may be willing to undertake the expense. I do  
5 not know that the shipper would necessarily want to  
6 pursue the matter particularly. It may just not be in  
7 their interest.

8 I do not dispute that there is some deterrent  
9 force, no question about that, but in the Commission's  
10 view it was simply not sufficient, and it was not in the  
11 Commission's hands which was the real problem in the  
12 preexisting rate bureau regulatory scheme. They lacked  
13 the power to take action.

14 Moreover, perhaps in some respects treble  
15 damages is an overkill remedy for the particular problem  
16 that the Commission retains greater discretion to tailor  
17 this particular relief more effectively than a treble  
18 damage award might.

19 QUESTION: Do we have any feel for how often  
20 these violations occur? I take it it only applies  
21 to --

22 MR. PHILLIPS: Significant violations?

23 QUESTION: The significant ones that this rule  
24 contemplates.

25 MR. PHILLIPS: Well, the rule has been in

1 effect since the end of 1980, and we do not have any --

2 QUESTION: No, but the Reed-Bulwinkle Act has  
3 been in effect for a lot longer than that. So there  
4 have been rate bureau agreements for a long time.

5 MR. PHILLIPS: The problem with the 1948 to  
6 1980 period was that the thrust of the Commission's  
7 regulatory efforts was made in approving rate bureau  
8 agreements and reviewing what agreements furthered the  
9 national transportation policy. There was virtually no  
10 attention paid to -- once you had an agreement in  
11 effect -- how it was to be operated.

12 The Commission believed that the 1980 Motor  
13 Carrier Act in that Act Congress expected for the  
14 Commission to review more carefully how the rate bureaus  
15 themselves operate and worry less about the agreements  
16 since Congress had provided the express requirements for  
17 those agreements.

18 QUESTION: I had a little feeling in reading  
19 the briefs that maybe this was kind of a theoretical  
20 problem. May I am just unsophisticated.

21 MR. PHILLIPS: Well, there is certainly a  
22 theoretical element to it any time a litigant challenges  
23 a rule on its fact rather than wait for it to be  
24 applied. That is going to be an inherent problem.  
25 Certainly in our view in dealing with it as a



1 thecretical matter we think it inappropriate to deal  
2 with extreme hypothetical applications but rather the  
3 more central purposes for which the Commission adopted  
4 this particular rule.

5           The Court of Appeals believed that this  
6 Court's decisions in Portland Seed and Berwind-White  
7 required rejection of the Commission's rule. As we  
8 suggested in our brief, our position is that those  
9 decisions indicate that a shipper cannot seek a judicial  
10 order requiring rejection of an effective tariff, but  
11 they say nothing about the power of the Commission to  
12 modify the sanctions that will best enforce this  
13 particular legislation.

14           On that issue, it seems, that this Court's  
15 decisions in American Trucking, Chesapeake & Ohio and  
16 the Trans-Alaska Pipeline Rate Cases make plain that  
17 this is a matter clearly within the Commission's  
18 discretion.

19           Finally, I just suggest why we believe that  
20 this particular rule is reasonable under the  
21 circumstances since that's the standard to be applied.  
22 In the first place, it serves a very powerful deterrent  
23 function. In the second place, it deprives the motor  
24 carrier of the benefit of a clearly unlawful tariff  
25 which is a just consequence and one that the overcharged

1 liability is designed to further.

2           Moreover, providing the overcharge relief to  
3 the shipper will encourage them to help the Commission  
4 to police these particular provisions in a way that  
5 should encourage enforcement of these operations that  
6 Congress believed were so important. Finally, this  
7 particular remedy is one that the Commission itself can  
8 exercise, which is important in being able to tailor the  
9 relief to the particular circumstances where it is  
10 appropriate.

11           Accordingly, it seems clearly reasonable and  
12 under this Court's prior decisions the rule should be  
13 upheld.

14           QUESTION: Has this always been the  
15 Commission's view?

16           MR. PHILLIPS: Has what always been the  
17 Commission's view? That we have the power to reject?

18           QUESTION: The position that you are  
19 furthering.

20           MR. PHILLIPS: Well, the Commission adopted  
21 the rule in 1980. It has always taken the view that it  
22 can reject for various reasons unlawful rates and  
23 require overcharges.

24           QUESTION: Retroactive?

25           MR. PHILLIPS: Retroactively. It has not

1 often found need to undertake that, frankly, but the  
2 Commission, I think, reasonably concluded that Congress  
3 in 1980 placed a special burden on the Commission in  
4 enforcing rate bureau operations. That's why this  
5 particular device was used in this particular context.

6 If there are no questions I reserve the  
7 balance of my time.

8 CHIEF JUSTICE BURGER: Mr. McEligot.

9 ORAL ARGUMENT OF PATRICK MC ELIGOT, ESQ.,

10 ON BEHALF OF RESPONDENTS

11 MR. MC ELIGOT: Mr. Chief Justice, and may it  
12 please the Court:

13 I would first like to address some questions  
14 that were asked of counsel where we have a difference of  
15 opinion. First, Justice Stevens, asked whether there  
16 was a direct conflict between this case and the Aberdeen  
17 case.

18 We submit that there is, Your Honor. The  
19 holding here is the Commission cannot retroactively  
20 validate tariffs. The holding in Aberdeen is that it  
21 can. There is a direct conflict, and I think you have  
22 to decide both of these cases together.

23 Justice O'Connor asked if this rule was the  
24 result of the problem that the Commission is complaining  
25 about about not having enough funds to check tariffs

1 before they become effective. This case does not  
2 involve that, Your Honor, because the type of violations  
3 we are dealing with here would not be discovered by the  
4 tariff examiners who look at the tariffs and determine  
5 whether they are tariff informality violations. They do  
6 not look at substantive violations at all.

7 This is not involved. The Aberdeen case does  
8 involve that question.

9 You also asked, Justice O'Connor, whether the  
10 Commission could reject a tariff when it lacks  
11 sufficient information. No, it would not reject the  
12 tariff. It would suspend the tariff pending an  
13 investigation. These are separate powers.

14 The tariff rejection power is simply to deal  
15 with tariff filing informalities, procedural matters.  
16 If the tariff is not filed in accordance with the  
17 Commission's tariff circular rules, it would reject it.  
18 If there is a substantive violation of the Act such as a  
19 violation of the rate bureau agreements, it would  
20 suspend the tariff.

21 Finally, Justice Stevens asked about the  
22 threat of antitrust liability, and you mentioned treble  
23 damage liability. I would just like to mention that  
24 very recently the Justice Department brought a case, a  
25 criminal case, against some of the clients that I



1 represent, a rate bureau, alleging just these  
2 violations, violations of rate bureau procedures. That  
3 case was dismissed and was turned into a civil  
4 proceeding, but the threat is even more serious than you  
5 suggest.

6 I would like to begin by pointing out three  
7 misconceptions that are likely to arise from a reading  
8 of the ICC's decision and counsel's briefs: first, that  
9 the rule at issue interprets and implements the Motor  
10 Carrier Act of 1980; second, that the tariff rejection  
11 procedures satisfy the full hearing requirements of the  
12 Interstate Commerce Commission Act; and third, that the  
13 ICC will be in a position to exercise discretion in the  
14 matter of refunds to shippers.

15 None of these statements are correct as I will  
16 show. While the ICC's decision states that it is  
17 intended to interpret and implement provisions of the  
18 Motor Carrier Act of 1980, there is nothing in that Act  
19 even addressing this subject. The Commission admitted  
20 in its decision that it was concerned that in the Motor  
21 Carrier Act of 1980 Congress did not go far enough in  
22 providing remedies for violations of rate bureau.

23 It, therefore, took it upon itself to provide  
24 this additional remedy, which is the subject of this  
25 case. Now, this is important because of what the

1 Congress said in the Motor Carrier Act of 1980.

2 I would like to quote. Congress said, "The  
3 ICC should be given explicit direction for the motor  
4 carrier industry and well defined parameters within  
5 which it may act. It should not attempt to go beyond  
6 the powers vested in it by statute."

7 Now I'll admit that an agency ordinary should  
8 have some leeway in fashioning remedies for the statute  
9 that it is administering, but I think that this is not  
10 the case here. Since Congress, I think we showed in our  
11 brief -- We have a different reading of the legislative  
12 history than counsel.

13 Our reading of the legislative history and  
14 what we showed in our brief is that Congress was  
15 tempting to reign in the agency, and that they were  
16 being as explicit as they knew how to be in that Act.  
17 So in those circumstances we feel that the Commission  
18 went far beyond the power vested in it by adopting this  
19 rule.

20 As to the question of the procedural rights, I  
21 would like to point out that this rule provides that the  
22 complaints will be filed with what is called the Tariff  
23 Integrity Board. Now this is a creature of the ICC.  
24 There is no provision for it in the statute.

25 This is an employee board that will act on

1 these complaints that a rate bureau violation occurred.  
2 The Tariff Integrity Board's procedures, which were  
3 adopted by the Commission, provide that the proceedings  
4 will be informal, that no transcript will be made, that  
5 subpoenas will not be issued, and that oaths will not be  
6 administered.

7 Now, the Tariff Integrity Board does not  
8 itself act on the complaint. It forwards its  
9 recommendation to the Commission. But the rules do not  
10 say what happens next.

11 Two things are possible. The Commission can  
12 act directly on a Tariff Integrity Board recommendation,  
13 strike the tariff retroactively, in which case the  
14 carriers will have been denied these procedural rights  
15 that I just mentioned, or it can start all over again  
16 and file its own complaint using the Tariff Integrity  
17 Board's recommendation as a basis for its complaint.  
18 But if it does that it merely delays the proceedings and  
19 increases the liability of the carriers.

20 As we pointed out, while the complaint has to  
21 be filed within 60 days after the tariff became  
22 effective, there is no time limit on when the Commission  
23 has to decide the issue. The tariff stays in effect and  
24 the Commission can drag on the proceeding as long as  
25 they want. All increases that were placed into effect

1 during this time would have to be refunded.

2           So what the Commission is doing with this  
3 duplicative procedure is merely trying -- if that is the  
4 way it proceeds -- is merely dragging out the  
5 proceedings. There is no reason for this at all except  
6 that the Commission wants to bring this proceeding  
7 within its Tariff Integrity Board rule which is the only  
8 place where it is stated that it has this authority to  
9 retroactively reject tariffs. So it just kind of made  
10 up this system so that it can bring it in within that  
11 rule.

12           The third misconception I mentioned was the  
13 ICC's refusal to acknowledge that it will be unable to  
14 exercise discretion in the matter of refunds. I think  
15 the best example of this is in the tariff  
16 missymbolization rule in the Aberdeen case.

17           That rule flatly provides that changes  
18 resulting in increases which are not identified by  
19 proper symbols shall be considered unlawfully published  
20 and filed and therefore invalid and not collectible. In  
21 such cases the lawful provisions will be those  
22 purportedly superseded.

23           Now it is not difficult to imagine what will  
24 happen if there is a violation of that rule. First of  
25 all, as we pointed out in our briefs the ICC has no



1 jurisdiction to entertain shippers' complaints for  
2 overcharges.

3 A shipper has to go directly to court. It can  
4 either go to a state court or to a federal court, but in  
5 either case there would be no reason for the court to  
6 refer the matter to the ICC since it is a pretty easy  
7 matter to determine whether a tariff had been properly  
8 symbolized or not. There will not even be any need for  
9 a hearing or anything. If it is not symbolized, it is  
10 not symbolized.

11 The court then will be faced with the rule  
12 which flatly declares the tariff invalid and not  
13 collectible, and the provisions of the overcharge  
14 statute which provides that all such charges are to be  
15 refunded. The court will have no discretion whatsoever  
16 in the matter. So the ICC saying that it has discretion  
17 means nothing in that case.

18 In the case at issue here and the rule at  
19 issue here for violations of the rate bureau agreements,  
20 the ICC will have some discretion in this respect. It  
21 can decide whether or not the violation has been  
22 significant as they put it in its order.

23 Now, there is no standard to determine what  
24 significant is, but even more important the ICC has  
25 boxed itself in. If it determines that a violation of a

1 rate bureau agreement is significant, then the tariff is  
2 stricken, overcharges are due and owing, and a court  
3 will have to award them. The court cannot consider  
4 actual harm to the shipper, cannot consider the  
5 seriousness of the offense.

6           The Commission has said it is going to do this  
7 in motor carrier cases. Yet, in the cases of the  
8 railroads where it has authority to deal in the railroad  
9 section of the Act, the ICC can award overcharges or  
10 damages.

11           It has said in those cases that it is going to  
12 consider violations of railroad rate bureau agreements  
13 under the damage sections of the Act so that it will  
14 require the shippers to show or not show harm, but not  
15 so in the case of motor carriers. There is no reason  
16 for this distinction. Neither counsel nor the ICC has  
17 ever given us any reason why the railroads should be  
18 treated any differently than the motor carriers.

19           Under the normal procedures before the  
20 Commission adopted this rule, if a shipper brought a  
21 complaint in court and said that there had been a  
22 violation of some provision of the Act, the court would  
23 have been free to decide whether damages were due at  
24 all, in the first place, and secondly, whether the  
25 shipper had been actually harmed. We submit that that

1 is the only fair way to handle this, and that is the way  
2 that your decisions in Davis v. Portland Seed require.

3 I would like to now turn to the authority of  
4 the ICC to retroactively invalidate effective tariffs.  
5 I think counsel for the government put their finger on  
6 the issue here in their reply brief. They said what the  
7 Commission is trying to do is create a basis for  
8 overcharged liability.

9 We submit that the statute says what is an  
10 overcharge and what is not, and that the Commission  
11 cannot create overcharge liability. The overcharge  
12 provision of the Act states at paragraph 4 in the  
13 petition at the very last page of the petition if you  
14 would like to follow it, "The common carrier providing  
15 transportation or service subject to the jurisdiction of  
16 the Commission under the Act is liable to a person for  
17 amounts charged that exceed the applicable rate for  
18 transportation or service contained in a tariff filed  
19 under the Act."

20 Now to me this means simply that if a tariff  
21 is on file with the Commission and a carrier charges  
22 more than is called for in that tariff that carrier is  
23 subject to an overcharge claim and must refund the  
24 excess. It does not involve this problem at all,  
25 violations of the Act.

1           In the very next sentence the Act states -- it  
2 provides for damages sustained by a person as a result  
3 of an act or omission of the carrier in violation of the  
4 Act. Now, this is what we are talking about in the case  
5 of both misymbolization and violations of rate bureau  
6 agreements. We're talking about violations of the Act.

7           What the Commission has done is taking this  
8 whole Alcuette case, which reached a strained  
9 interpretation of the Act and is trying to ride on it in  
10 this case by creating overcharge liability when there is  
11 none. I think we pointed out in our briefs that every  
12 other court that has considered that Alouette decision  
13 except the one that is on appeal here, the Aberdeen  
14 case, has rejected it and has said that there is no  
15 basis whatsoever. It has been rejected by the First  
16 Circuit, by the D.C. Circuit and by the Eleventh  
17 Circuit.

18           QUESTION: Mr. McEligot, Mr. Phillips stressed  
19 reliance on American Trucking for the position that he  
20 took. Do you plan to mention that?

21           MR. MC ELIGOT: Well, there are two points  
22 there. The first, Your Honor, I think we discussed it  
23 in our brief.

24           There is a recent case called the Central  
25 Forwarding case that discusses that at some length, and



1 the point there is that the American Trucking case was  
2 decided before the Motor Carrier Act of 1980. The Motor  
3 Carrier Act of 1980 set new limits on the Commission,  
4 and really -- I think the Court said it is still good  
5 law, but it has to be read in light of what Commission  
6 said later. Congress said the Commission cannot go  
7 beyond the strict, statutory limits.

8 So, as I said, an agency ordinarily would have  
9 some leeway in this, but it cannot have that leeway here  
10 where Congress said otherwise. Congress could not have  
11 made itself more clear.

12 I would next like to discuss the specific  
13 language of the Act, which the Commission says gives it  
14 authority to retroactively invalidate tariffs. It  
15 relies solely on this rejection power in the Act.

16 The rejection authority provides that the ICC  
17 may reject a tariff submitted to it by a common carrier --  
18 under the tariff filing section of the Act if that  
19 tariff violates that section or requirements of the  
20 Commission carrying out that section. That provision is  
21 just in there for that one purpose so that the  
22 Commission can reject tariffs at the outset that do not  
23 meet the tariff filing requirements either of the  
24 statute or of its own tariff circular rules.

25 It is not meant to deal with retroactive

1 invalidation of tariffs. It is not meant to deal with  
2 substantive violations of the Act.

3 At least two courts have held -- The Delta  
4 case cited in my decision held that. But it is simply  
5 to deal with tariff filing informality violations --  
6 formality violations. It is not to deal with  
7 substantive issues.

8 The rate bureau agreement violations obviously  
9 do not violate either the tariff filing provisions of  
10 the Act or of the Commission. So in the first place we  
11 are saying that the Commission cannot even use it in  
12 this case. However, they could in the Aberdeen case if  
13 that were the only issue.

14 I think Justice O'Connor put her finger on  
15 this. If you read the statutory scheme it is clear what  
16 the rejection authority is meant to do. It is meant  
17 merely to get at problems right at the outset.

18 There are no procedural steps to be taken. If  
19 the Commission rejects it, that is it. Later on the  
20 Commission in other sections of the Act can suspend  
21 and/or investigate for substantive violations, and it  
22 can after a full hearing order tariffs canceled  
23 prospectively.

24 Now, counsel said that their reading of the  
25 rejection authority would not make those other

1 provisions superfluous, but we cannot see why the  
2 Commission would need them if they could do all this  
3 that they are saying they could do under the rejection  
4 authority. If the Commission can come along three years  
5 or five years later and reject authority and render it  
6 invalid retroactively, it certainly has no need to  
7 suspend proposed tariffs or to cancel effective tariffs  
8 after a full hearing.

9 I think the Court was correct, too, in saying  
10 that the plain meaning of rejection contradicts this  
11 interpretation. The plain meaning according to court  
12 was to refuse to accept or to decline to receive.

13 I think it is pretty clear that if that is the  
14 plain meaning -- and I agree that it is -- that Congress  
15 could not have intended the Commission to reject a  
16 tariff after it already accepted it. Congress would  
17 have used the word "strike", I believe, if it were  
18 talking about the type of authority that counsel has  
19 indicated that the Commission needs because to strike a  
20 tariff it could do that after it was already effective,  
21 strike it from its record.

22 But, of course, if it had meant that, too, it  
23 would also have provided procedural remedies, and it  
24 would not have needed to provide for the suspension and  
25 investigation authority.

1 I think that is all I have.

2 CHIEF JUSTICE BURGER: Do you have anything  
3 further, Mr. Phillips?

4 ORAL ARGUMENT OF CARTER G. PHILLIPS, ESQ.,  
5 ON BEHALF OF PETITIONERS -- REBUTTAL

6 MR. PHILLIPS: Mr. Chief Justice, and may it  
7 please the Court:

8 Justice Stevens, I may have been a little  
9 short in my answer to your question on whether there was  
10 a square conflict between this decision and the Aberdeen  
11 case. In our view there is a conflict over the  
12 interpretation of the rejection language. In order to  
13 avoid a conflict one would have to find that the  
14 missymbolization rule is itself an abuse of discretion  
15 or not consistent with the statutory authority.

16 So there is a conflict. It is not one that  
17 could not be avoided, but certainly an ample  
18 justification for having granted the writ of certiorari  
19 in this case.

20 With regard to the scope of these various  
21 powers that are available, one point that I probably  
22 could have made earlier with regard to the difference  
23 between the suspension and the rejection authority that  
24 the Commission exercises here is that the power to  
25 suspend is expressly limited to the proposed tariffs



1    whereas rejection is in no way limited to any kinds of  
2    times limits --

3               QUESTION: Can I ask just one question? Does  
4    it require any kind of a hearing under the proposed  
5    rule?

6               MR. PHILLIPS: The proposed rules themselves  
7    do not discuss what hearing would be provided for. The  
8    Tariff Integrity Board is made mention of, and the  
9    Commission at that time did expect that the Tariff  
10   Integrity Board would be the body that would proceed on  
11   these matters.

12              However, the Eleventh Circuit declared the  
13   process followed by the Tariff Integrity Board to be  
14   unlawful, and the Tariff Integrity Board is for all  
15   intents and purposes defunct. It is the Commission's  
16   intention to follow a complaint and full hearing  
17   procedure just as it would on any other investigation.

18              QUESTION: Before the rejection or after?

19              MR. PHILLIPS: After rejection.

20              QUESTION: After --

21              MR. PHILLIPS: After the effective date you  
22   mean?

23              QUESTION: No, the tariff is filed and goes  
24   into effect and then they think they found a violation.

25              MR. PHILLIPS: Right.

1           QUESTION: Do they have to have some kind of  
2 hearing to determine there was a violation before they  
3 reject, or they just go ahead and reject?

4           MR. PHILLIPS: No, they file a complaint  
5 suggesting rejection and then go ahead and proceed with  
6 the entire -- the same process they use for any other  
7 post-effective action on a particular rate that exists.

8           Finally, with regard to the American Trucking  
9 Association case, there is no indication in the 1980 Act  
10 that Congress in any way meant to modify that. It did  
11 restrict the Commission's authority substantively to  
12 deal with rate bureaus.

13           It in no way intended to modify the  
14 Commission's ability to enforce the Act, and indeed  
15 expressly stated that it retained the same authority to  
16 deal with overcharges that it had always had so that  
17 American Trucking is still good authority and justifies  
18 rejection of the Court of Appeals' decision in this  
19 case.

20           If there are no further questions.

21           CHIEF JUSTICE BURGER: Thank you, gentlemen.

22           The case is submitted.

23           (Whereupon, at 3:05 p.m., the case in the  
24 above-entitled matter was submitted.)

25

# CERTIFICATION

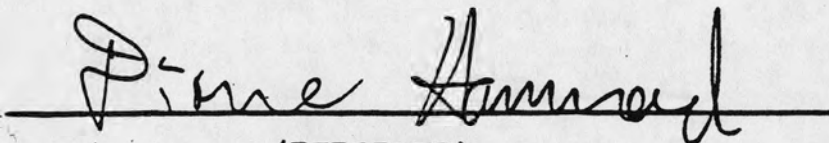
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AMERICAN TRUCKING ASSOCIATIONS, INC., et al.

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 "Pione Hammond", is written over a horizontal line.

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