OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-21

TITLE SQUARE D COMPANY AND BID D BUILDING SUPPLY CORP., Petitioners V. NIAGARA FRONTIER TARIFF BUREAU, INC., ET AL.

PLACE Washington, D. C.

DATE March 3, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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SQUARE D COMPANY AND BIG D :

BUILDING SUPPLY CORP., :

Petitioners, :

V. : No. 85-21

NIAGARA FRONTIER TARIFF BUREAU, :

INC., ET AL. :

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Washington, D.C.

Monday, March 3, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 o'clock p.m.

APPEARANCES:

DOUGLAS V. RIGLER, ESQ., Washington, D.C.; on behalf of the petitioners.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States as amicus curiae in support of the petitioners.

DONALD L. FLEXNER, ESQ., Washington, D.C.; on behalf of the respondents.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Square D Company against Niagara Frontier Tariff Bureau.

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

ORAL ARGUMENT OF DOUGLAS V. RIGLER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. RIGLER: Mr. Chief Justice, and may it please the Court, the issue presented in this proceeding is whether motor carriers who conspire in violation of the antitrust laws, who violate their filed rate bureau agreement, and who violate provisions of the Interstate Commerce Act are immune from damage suits brought under the antitrust laws by the victims of their illegal conspiracy.

The petitioners here today are two shippers who brought suit in a class representative capacity with respect to the transport of commodities by motor freight between points in the eastern and central United States and the province of Ontario, Canada.

The respondents are the Niagara Frontier Tariff Bureau, a regulated rate bureau, and five member trucking company carriers of that bureau. The action closely parallels the United States Government action

not brought under the antitrust laws which was settled by consent decree.

At the District Court level the defendant's carriers moved to dismiss the case, and the District Court granted that motion, holding that maintenance of an action for damages under the antitrust laws was barred by application of this Court's 1922 decision in Keogh versus Chicago and Northwest Railroad.

The Second Circuit Court of Appeals reluctantly upheld the District Court, holding that the task of overruling Keogh if it is to be overruled is for this Court, but the Second Circuit expressed substantial doubt that any of the basic rationale which necessitated the Court's Keogh ruling in 1922 is valid today.

QUESTION: Are you asking that Keogh be overruled?

MR. RIGLER: Yes, I am, Your Honor.

QUESTION: Specifically?

MR. RIGLER: Yes. Keogh should be overruled because the passage of the Reed-Bullwinkle Act and subsequent decisions of this Court have rendered it inapplicable under the clear repugnancy doctrine which necessitated it in the original instance.

QUESTION: Do you lose if we don't overrule?

MR. RIGLER: Do I lose?

QUESTION: If we don't overrule Keogh.

MR. RIGLER: We are not able to pursue our damage claims. We still have an action pending for injunction, and the Second Circuit did give leave to amend in the event there were claims outside of the Keogh doctrine, but basically the answer is, yes, we do, Mr. Justice Brennan.

The allegations of the complaint are to be accepted as correct for purposes of this proceeding. Those allegations are that notwithstanding the fact that they had a Bureau agreement on file at the ICC which would have given these carriers antitrust exemption, they organized a secret committee of principles or top management executives, and that these principles met to fix prices, to engage in anticompetitive acts, and to coerce other carriers into withdrawing or withholding independent rate filings which were lower and would have had the effect of lowering the overall tariff structures.

Now, the act of coercing other carriers into withholding or withdrawing their independent rate filings is explicitly and specifically forbidden by the Interstate Commerce Act. Thus the conduct at issue here violates the antitrust laws and the Interstate Commerce Act.

QUESTION: May I ask this question? If there had been no violation of the filed rate schedules, would you be making the same argument?

MR. RIGLER: I am not sure I entirely understand the question, Justice Powell, because the part of the damage claim relating to coercion would still be valid. In other words, they prevented rates from being filed, and yes, we would be asserting an antitrust clause of action based on the coercion which precluded other carriers from exercising their statutory right to file lower rates.

QUESTION: I am not sure I understand the case either, but if the filed rates had been specifically approved by the Interstate Commerce Commission, would you be here?

MR. RIGLER: Yes, sir, I would.

QUESTION: Assuming no violation.

MR. RIGLER: We are not attacking the ratemaking process. We are not attacking the antitrust immunity which flows from compliance with a regulatory agency's rate authority granted by Congress. In other words --

QUESTION: I understand the ICC has not approved this particular rate schedule. It rarely approves them as a matter of practice, but does the mere

filing of -- if the rates have been filed and not violated -- that was my original question -- I take it you would still be here.

MR. RIGLER: If the rates were filed and became effective after 30 days?

QUESTION: Yes.

MR. RIGLER: Yes, we would, and the reason --

QUESTION: You would still be here.

MR. RIGLER: We would still be here.

QUESTION: So the allegations of ignoring their own rate schedule are not essential to your claims.

MR. RIGLER: Well, what they ignored was the method of fixing rates which was approved by the Commission, and that is what they had statutory authority to do. The evil is that instead of following an exemption given to them by Congress in express antitrust immunity, instead, they chose to go around that and to subvert the regulatory statute.

Now, when they did that and filed rates in which shippers were denied participation, and in which shippers didn't realize that there were other carriers out there willing to offer even lower rates, that constituted a violation which is actionable under the antitrust laws, and it is no longer safeguarded by the

express immunity which Congress granted in Reed-Bullwinkle.

Neither is there any necessity for the implied immunity which the Court granted so long ago in Keogh, because now the basic tension between the Interstate Commerce Act, which in 1922 permitted the ICC to approve jointly proposed rates and the prohibition in the Sherman Act which said companies should not get together and fix rates and fix prices, that basic original tension was resolved in 1948 when Congress eliminated the dilemma, and this Court repeatedly has held that only a clear repugnancy between the antitrust laws and a regulatory statute will permit even implied immunity, and that implied immunity is to be narrowly construed so as to make the regulatory plan work.

Once the carriers had an opportunity to do that and went outside, then their rates should be subject to the ordinary application of the antitrust laws, and notwithstanding that they were filed with the Commission, and notwithstanding that they became effective 30 days after approval, without any action by the Commission because the Commission simply no longer has the resources to review these -- but even assuming that they had done it, it wouldn't have been a fair review.

In their briefs, the respondents contend that when we paid the filed rates with the ICC, we got to use their words, exactly what we were entitled to. Well, we didn't get what we were entitled to because the ratemaking process didn't work the way it was supposed to because these very respondents subverted it.

QUESTION: Well, would you have any remedy at all before the ICC?

MR. RIGLER: As a practical matter, the answer is no. Let me answer that question in two ways. As a policy matter, we are here under the antitrust laws because we are entitled to those damages --

QUESTION: I understand that, but --

MR. RIGLER: Yes.

QUESTION: -- why couldn't you get relief before the ICC?

MR. RIGLER: We cannot get relief before the ICC for probably four reasons. Number One, the lack of resources, which means they can only examine a handful of the thousands and thousands of new tariff filings each year means that their appetite for reviewing hundreds of old tariff filings simply isn't going to be there.

Secondly, there is a two-year statute of limitations with respect to reparations, and in this

case we have a 15-year conspiracy which arose from the concealment of the activities. We had no idea that these people were coercing --

QUESTION: The statute probably wasn't running, then, was it?

MR. RIGLER: That would be a case of first impression. You are asking whether the --

QUESTION: Well, go ahead.

MR. RIGLER: -- concealment would apply? That has not been decided. We don't know the answer to that.

QUESTION: Why else --

MR. RIGLER: The third question is, another case of first impression, whether the ICC retains the authority to cancel expired tariffs. Remember that this has been going on for a long time, and it appears that the ICC may lack any authority, let alone, of course, the inclination to go back and review --

QUESTION: What would be your measure of damages?

MR. RIGLER: What would be the measure of damages? The sole measure of damages at the ICC would be reparations.

QUESTION: I know, but in this antitrust case what would you measure your damages by?

MR. RIGLER: The measure of damages would be

the difference between the rates which the shipppers paid and the rate levels which would have prevailed absent the antitrust --

QUESTION: How would you know that?

MR. RIGLER: I am sorry, sir?

QUESTION: How would you decide that?

MR. RIGLER: By expert testimony just the same as in any other antitrust case. There is nothing peculiar about shipping goods by trucks. And as a matter of fact that method of computation or damages has been used.

QUESTION: You wouldn't have to resort to the ICC at all to establish what a reasonable rate would have been?

MR. RIGLER: No, we would not. I think that the way things would operate in the District Court is that our expert, we would -- obviously, the plaintiffs would bear the burden of showing what lower rates would have been. There are various ways to compute that. They would suggest that. The respondents would have a chance to attack, and the jury would make up its mind, but that would be no different than the burden borne by any other antitrust plaintiff.

If the rates were below the zone of reasonableness, I suppose the burden then might shift to

the respondents to try to justify that, but let me say that the ICC doesn't set the rates in any event. They only determine whether rates submitted to them are within a zone of reasonableness.

QUESTION: Right.

QUESTION: Well, isn't it possible under your theory that a court or jury could afford damages on the basis of a hypothetical rate that would have been unlawful under the Interstate Commerce Act?

MR. RIGLER: Highly unlikely.

QUESTION: It is certainly possible, though, and it could subject carriers to very conflicting standards with respect to filed rates, it seems to me.

MR. RIGLER: I don't believe so. First of all, the zone of reasonableness is extremely broad. It is highly unlikely that we would propose rates which would run that risk. Secondly, if there is a contention on the respondent's parts that the rates we propose are below that zone of reasonableness, then and only then, I suppose, the matter might be referred to the ICC, but I believe that would be a very highly unusual situation.

I mean, when you have a number of other carriers already proposing lower rates, legitimate carriers who are out to make a profit, and if we use that as our measure of damages, then there would be, it

seems to me, a very strong suggestion that that was within the zone of reasonableness.

In Carnation, in the 1966 Carnation case, which was, I think, really on all fours with this case in many respects, there was the possibility of reference back to the FMC, to the Maritime Commission, but the --

QUESTION: Did the Maritime Commission have ratemaking authority?

Did the Maritime Commission have ratemaking authority?

MR. RIGLER: The Maritime Commission had rate approval authority. The ICC may have ratemaking authority, but it doesn't exercise it, I don't believe, very often, Justice Stevens. In other words, the fact patterns are the same because what you have is the carriers proposing their rates and the agency saying, yes, these are acceptable rates. But in neither case do you have the agency saying you shall charge such and such a rate, so that in that sense the facts are very much the same.

As a matter of fact -- I think this is an important point -- when Congress passed the Reed-Bullwinkle Act, it alluded to the Shipping Act of 1966 as a model, as a precedent for the type of express immunity it was granted, so that if the carrier -- if

the carriers must pay or stand vulnerable to antitrust damages or illegal activities or unauthorized activities under the Maritime Act, presumptively the same would apply in this situation.

It is true there are slightly different statutory schemes, but the fact that Congress referred to it in 1948, I think, is determinative. With the Court's consent at this point I will reserve. If there are more questions, I will take them now. Otherwise, Mr. Wallace will speak for the United States, and I will save the remainder of my time for rebuttal.

CHIEF JUSTICE BURGER: Very well.

Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE UNITED STATES

AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

MR. WALLACE: Mr. Chief Justice, and may it please the Court, the complaints in this case were dismissed to seek recovery for damages under the Sherman Act, alledging that the respondents had engaged in conduct that was not approved and could not be approved by the ICC.

The charged concerted price fixing activity is outside the scope of collaboration that is authorized and immunized from the antitrust laws by the

Reed-Bullwinkle Act, and it is well established that the conduct charged is subject to the proscriptions of the antitrust laws. That has been true since the trans-Missouri and Joint Traffic Association cases, and was recognized again in Georgia against Pennsylvania Railroad, and indeed, the government brought a suit to enjoin much of the conduct that is at issue in these complaints, and a consent decree was entered against that conduct, so the question in the case is not whether the alleged conduct is immunized from the antitrust laws, it is whether there is adequate reason for a more limited implied immunity only from damage suits by shippers injured by the alleged violation of the anti-trust laws.

In other words, whether there is adequate reason why carriers who have violated both the Interstate Commerce Act and the Sherman Act must be allowed to retain the fruits of their violation, and the Sherman Act violation is a crime, I will remind the Courts. They must be allowed to retain those fruits as against injured persons who are within the class that Congress sought to protect in both of those statutes.

QUESTION: If they violated the Interstate Commerce Act, isn't there some sort of relief before the Interstate Commerce Commission?

MR. WALLACE: The Commerce Commission can revoke tariffs that have been secured in violation of the kind of collaboration that is authorized by Reed-Bullwinkle. And if there is an overcharge as against the charge that the tariff authorizes, an order can be entered to give reparations for the overcharge, and that would be enforceable in Court, and there is a court action for reparations against unreasonable rates under the Act in a statute that Congress passed to overrule this Court's decision in T.I.M.E., but if the tariff has not been violated and the rate charged is within the zone of reasonableness, the ICC does not have a remedy to recompense shippers, even -- it can revoke the tariff, but even though the shippers might be able to prove that had the antitrust violation not occured, a lower rate within the zone of reasonableness would have been available to them. That is what is at issue in this case.

QUESTION: There is no possibility of reparations then from the ICC?

MR. WALLACE: Reparations are only if an unreasonable rate has been charged that is beyond the zone of reasonableness or if the tariff hasn't been complied with.

QUESTION: Mr. Wallace, is the Solicitor

General's office asking that Keogh be overruled specifically?

MR. WALLACE: Keogh as it was interpreted and applied by the Court in Georgia against Pennsylvania Railroad, the broad rationale underlying Keogh, it would be possible to read the Keogh decision itself quite narrowly and say that it has been superseded by Reed-Bullwinkle in effect, but Keogh has generally been applied in accordance with its rationale, which would apply to any filed rate, whether approved by the Commission or not.

Of course, the statutory scheme has changed considerably since Keogh.

QUESTION: What is the answer to the question? Are you asking Keogh be overruled or not?

MR. WALLACE: As it has been interpreted and applied in Georgia against Pennsylvania Railroad, yes. Or one could say we are asking that that aspect of the Georgia case be overruled. The Georgia case did not reexamine that rationale, but applied it in the scope that it was stated by the Court in Keogh.

Now, we have detailed in our brief, as Judge Friendly did for the Court of Appeals, the reason why the rationale of Keogh has become obsolete in its particulars, and I won't repeat that here. The main

point is that the rule of Keogh is incompatible with this Court's modern jurisprudence strongly disfavoring implied antitrust immunities, limiting them to plain repugnancy between the two schemes and authorizing them not only to the minimum extent necessary to make the other federal statutory scheme work, and our position is here not only is the immunity unnecessary, but compliance with the Interstate Commerce Act as amended by Reed-Bullwinkle would be fostered by the availability of an antitrust damage remedy as a deterrent to violations of the procedure specified by Reed-Bullwinkle for collaboration that includes shipper participation in the Rate Bureau activities and a lack of coercion of members of the Rate Bureau from filing independent rates.

Nor is there any inconsistency between the established presumption against implied antitrust immunity and what has come to be known as the filed rate doctrine, which prevents use of the courts to bypass agency authority under the statutes that agencies are charged to administer. The claim here is not a claim under the Interstate Commerce Act, and the ICC does not administer the Sherman Act, nor is this a case like ARCLA, the Court's most recent filed rate case, in which someone was trying to circumvent a tariff that he

himself had filed, and if there is anything that this Court's Carnation decision stands for, it is that the ordinary rule against implied antitrust immunities is compatible with the filed rate doctrine.

So, are submission is that there is no need to allow persons to retain the benefits of their antitrust violation.

QUESTION: Mr. Wallace, could you refresh my recollection on the Carnation case? I thought that was just a challenge to the procedure, the ratemaking agreements, which would have been exempt if they follow it. I didn't think there was any problem of rates having been approved or filed in that case. Were the rates filed with the Maritime Commission?

MR. WALLACE: My understanding is that they were, but I would have to look back to be sure about it. But the case was very comparable, because the challenge here is that the prescribed procedures under Reed-Bullwinkle were not followed in filing the rates with the ICC.

QUESTION: I understand, but of course that was an immunity case, and here the question is whether the Keogh takes away a remedy.

MR. WALLACE: But that is a more limited implied immunity. There is no -- Keogh did not construe

any words in a statute. It just granted a more limited implied immunity from one of the remedies and said those damaged by the violations can't get recompense.

QUESTION: But the conduct itself remained unlawful, as the --

MR. WALLACE: That is correct, which to me cuts in favor of our position, because the respondents knew right along that their conduct was unlawful, and the question is whether they should retain the fruits of that violation or those injured should be recompensed, and it has been pointed out that very few of these rates are actually investigated and approved by the ICC. They are submitted and filed much like putting a book on a library shelf, and should that make a difference in who should have the fruits of the violation? We don't think so.

QUESTION: Your position would be the same in this case if the ICC had instituted an investigation of some of these rates and specifically approved them, found them to be within the zone of reasonableness.

MR. WALLACE: That would decide certain facts and that decision, if sustainable in the courts as a review of any administrative decision, would be controlling in the antitrust suit, but it wouldn't necessarily have decided all of the issues in the

antitrust case.

QUESTION: Well, but you would still say that a suit for damages would lie.

MR. WALLACE: If there has been a violation of the antitrust laws that damage someone, we would take that position. That is correct.

QUESTION: And you would say even though the ICC had approved the rate, the rates might have been lower except for the conspiracy.

MR. WALLACE: If that can be proved, and if there is a contention that the lower rate would not have been within the zone of reasonableness, or would have been discriminatory, those questions could be referred to the ICC for an answer if the ICC had not answered them in its --

QUESTION: You think the measure of damages in that situation would be the difference between what the rate might have been and the rate that was charged?

MR. WALLACE: What it would have been, as one could reasonably show -- in many antitrust cases it is not easy to prove the damages with precision. If someone is excluded from business, he is damaged, but there is necessarily an element of --

QUESTION: Of course, if the rates had been lower, if there hadn't been a conspiracy, and the rate

had been lower, all the competitors would have been paying a lower rate, too, so how would there have been damage to the business and property?

MR. WALLACE: Well, the damage might not have been in losing business to competitors. It might just have been in lower profit margins. It is a little hard to say what damages someone can prove until he has a chance to prove them.

QUESTION: Mr. Wallace, just one quick question. Does your argument apply equally to railroad carriers? This is a motor carrier case.

MR. WALLACE: It does apply equally. We have taken a very comparable position in the Wheat Rail case. The differences are only technical differences in accommodating the two schemes.

CHIEF JUSTICE BURGER: Mr. Flexner?

ORAL ARGUMENT OF DONALD L. FLEXNER, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. FLEXNER: Mr. Chief Justice, and may it please the Court, this Court has never allowed plaintiffs to end run the Interstate Commerce Act by taking their rate complaints to the courts intead of to the Commission. The court has always read the Interstate Commerce Act to mean that a shipper who thinks he is paid too much money must take that

complaint to the expert agency, and antitrust cases have been no exception to the rule, and you can easily see why.

If a plaintiff could easily have chosen to go after treble damages and attorneys' fees and to argue technical rate issues to a lay jury instead of to the expert agency that Congress created to regulate rates, there would have been little incentive to go to the Commission, but Congress wanted the Interstate Commerce Act and the Interstate Commerce Commission, not the antitrust laws and not the courts to regulate and govern the legality of rates, and if shippers could have gone to courts, that Congressional policy would have been defeated, and that is why Keogh was decided the way it was, and that is why it should be reaffirmed and not only ruled.

Now, we have three specific reasons which I can briefly summarize why the judgment below should be affirmed.

QUESTION: Are you telling us that if the flaws and deficiencies in Keogh are correct, Congress should change that, not this Court. Is that it?

MR. FLEXNER: That is precisely right, Your Honor. If the Court's interpretation of the Interstate Commerce Act and Keogh in Georgia was wrong, and no one

here contends that it was wrong, Congress has had those cases in front of it for over 60 years, and is in a position to correct the law, and this has been an area of intense Congressional activity.

In fact, the government has now proposed that all motor carrier legislation be repealed, and Congress is considering that legislation as well as --

QUESTION: I did not read Judge Friendly's position as suggesting Keogh was wrong when it was decided. Do you read his opinion that way?

MR. FLEXNER: I do not, Your Honor. I think --

QUESTION: And then it is changed conditions, is it not?

MR. FLEXNER: That is the government's argument, but I think that is insufficient except as a policy rationale addressed to the Congress to justify overturning 60 years of established precedent, and we think, Your Honor, that this case simply can't be distinguished from Keogh and Georgia, as hard as petitioners have tried, Number One.

Number Two, Congress has never overruled this Court's interpretation in those cases, and Number Three, the policy arguments that the government makes about competition being the order of the day and such ought to be addressed to Congress, which has the issue before it

now.

I would like to take those points in order, if I may. Very briefly, it is flatly incorrect to say that the rates at issue in Keogh and Georgia were the product or were made in compliance with the regulatory plan. Those rates were the result of per se illegal naked price fixing conspiracy and collusion that was not approved by the Commission, that was beyond the power of the Commission to approve and immunize.

The complaint in the Georgia case called those wilfull violations, said they flouted ICC procedures, they were outside of the express immunity contained in certificate 44, which was the wartime immunity, and the Court recognized that government prosecutions would be adequate to deal with those kinds of illegal forms of agreements because it would not interfere with the heart of the Commission's discretion over rates.

But treble damages would have the opposite effect. Treble damages as administered by the courts would involve the courts in a forbidden pursuit, namely deciding what rates other than the file rate would be lawful, and that was a decision that Congress wanted the Commission to make, and set up specific statutory standards and procedures and remedies that were just plain different from the standards and remedies and

procedures under the antitrust laws.

So, it is wrong to say that our position is not based on the plain language of the statute. The statute defines specifically what rate it is that a shipper is entitled to, and it is a just and reasonable and nondiscriminatory rate. It is not the competitive just and reasonable and nondiscriminatory rate. It is not the lowest reasonable and nondiscriminatory rate. It is just what it says, and there is no necessary relationship between a violation of a Rate Bureau procedure and whether that rate is just and reasonable.

That is an issue for the Commission to decide, and in fact in the Wheat Rail case the Commission found that even though there was a Rate Bureau violation, there had not been injury caused to the shipper, and the Commission refused to retroactively nullify or abrogate that rate, and that decision by the Commission was cited with approval by this Court in the ATA decision when it upheld a new administrative remedy for shippers to redress Rate Bureau violations and to receive what this Court thought was potentially ruinous.

QUESTION: Mr. Flexner, the Solicitor General suggests that the question of what the rate should have been absent the alleged collusion or antitrust activity could be referred by the Court to the Interstate

Commerce Commission, so that would satisfy your concern.

MR. FLEXNER: Well, Justice O'Connor, there is no statutory provision that authorizes that procedure. This Court has three times, if I remember correctly, considered the question of a referral of complicated rate issues in a situation where a plaintiff is trying to create a cause of action in court that Congress had not itself authorized, and on those occasions, in Keogh itself, in 1951, in Montana-Dakota, and in 1959 in this Court's decision in the T.I.M.E. case, the Court found that the issue is one of legislative intent, not -- and refused to allow a procedure to be gerryrigged in order to create a cause of action that Congress had decided it wanted to rest exclusively with the agency.

And, Your Honor, I must say that this case shows what a mess --

QUESTION: But there is nothing inherently existing in the statutory framework, is there, to prevent a court from referring the question to the ICC?

MR. FLEXNER: Justice O'Connor, I think there is an issue as to whether or not it is congruent with what Congress wanted the Commission to do. Congress said there is a two-year period within which you can consider it, whether rates are lawful or unlawful under

the standards of the Act, which is the point of the referral.

This case involves 16 years. There are other cases out there, Justice O'Connor, that involve 25 or 30 years. So I think we are talking about a procedure which would be such a mess for the courts and would leave so many unanswered questions in terms of where our appeal rights were, were they from the Commission decision, was the Commission's decision advisory, do we submit it to the jury, do we argue contrary facts to the jury, do we appeal from the jury verdict?

None of those questions have been addressed by this Court, and certainly they have not been addressed by the Congress, and we think that in a statute which is supposed to provide certain continuity, and where Congress has clearly laid out a map or a guidepost for remedies, and where this Court has refused to authorize this kind of a detailed referral procedure on rates, this would be a bad case to do that.

QUESTION: Mr. Flexner, you said a moment ago that in Keogh the rates proposed by the defendants there could not have been approved by the Commission. Why is that?

MR. FLEXNER: I meant to say, Justice Rehnquist, that while the rates themselves could be

approved, the agreement from which the rates arose was beyond the authority of the Commission to approve or disapprove, so they were the -- not rates made in compliance with the regulatory plan, but they were the product of a conspiracy which the Court at that time said was settled as illegal under the antitrust law.

QUESTION: But nevertheless the rates were reasonable rates and were approved?

MR. FLEXNER: They were, Your Honor, but of course in the Georgia case the rates had neither been approved, and indeed, as here, were labeled coercive --

QUESTION: Keogh itself said or assumed or stated that the government could get after the conspirators.

MR. FLEXNER: That is exactly right, Your Honor, and, of course, the defendants in this case have been sued by the government and are subject to very stringent injunctive provisions. The point that is raised about retaining the illegal fruits of the conspiracy is just wrong, and it really is just a rehash of the argument that was made in Keogh itself.

In Keogh, the plaintiff said, we are not limited to the rights that we have under the Interstate Commerce Act. We are entitled to the competitive rate that the antitrust laws allow us, and the report in the

broadest possible language said, no, your entitlements are defined comprehensively and in a self-contained way by the Interstate Commerce Act.

Now, you take this case. We say that the shippers had remedies and advantages that have no counterpart in the antitrust laws. They could -- each time a rate went into effect throughout the year of this alleged conspiracy have complained to the Commission. They could have asked that the Commission suspend the rates. They could have asked for an investigation. They could have raised every argument that they thought was reasonable to raise.

And assuming that there was a procedural argument that they couldn't think to make, which is what they allege here, in June of 1983, when they brought this antitrust case, what Congress said they should have done was go to the Commission, and what they should have argued is what they are arguing here, and the Commission's remedies would have been whatever they were.

They could have disapproved the rate. They could have cancelled the rate and put a new rate in prospectively.

QUESTION: Mr. Flexner, I understand your basic position, but I don't see how -- there would be

some situations in which a revocation of the existing rate would provide no remedy at all. For example, supposing economic conditions were such that normally rates would be declining, and the conspiracy resulted in preserving the rate by using -- just declining to file a change when you normally would. You get no remedy by revoking the --

MR. FLEXNER: Our position, Justice Stevens, is that Congress set about to comprehensively define all the remedies that shippers would have.

QUESTION: Well, I understand your point. That is what Congress said. It is quite clear, however, that if you lose in this case, you are subjected to a great deal of exposure that you don't have now.

MR. FLEXNER: That is exactly --

QUESTION: Your treble damages and whatever changes.

MR. FLEXNER: That is exactly right, and I must say --

QUESTION: I mean, I don't think you can argue that there are existing remedies that take care of the problem. It may be the remedies Congress intended. But that is quite different from saying that they have got adequate remedies.

MR. FLEXNER: I would certainly concede that

the Commission doesn't have treble damages and attorneys' fees.

QUESTION: Sure, and there is nothing they can do if you preserve a rate against an otherwise -- a decline that would otherwise normally follow.

MR. FLEXNER: But the point of their argument is that somehow this is because the remedy is different from before the Commission than it is what they would like under the antitrust laws, that that is "unfair."

QUESTION: Well, is there any -- what could the Commission -- what could the Commission do about rates that are no longer in effect? I suppose the rates have been changed over the years, and a lot of the rates that they are complaining about are no longer in effect. What could the Commission do about that?

MR. FLEXNER: Your Honor, I think the answer is that under the new Act, the Motor Carrier Act, under nullification authority, perhaps they could nullify tariffs that were in effect in taking the rate back to the preexisting level, but the point is that Congress set up a scheme in which shipppers on a day-to-day basis had rights that had no counterpart in the antitrust laws. In other words, you or a shipper --

QUESTION: So you say if these people claim they were hurt by a rate that was set ten years ago and

was in effect for two years, that is just tough, they should have gotten after it then.

MR. FLEXNER: That is exactly right, Your Honor.

QUESTION: So they are just barred.

MR. FLEXNER: They are barred.

QUESTION: So they have no remedy.

MR. FLEXNER: They had the remedy.

QUESTION: They have no remedy before the Commission except with respect to a rate that is now in effect.

MR. FLEXNER: That is correct, Your Honor, because that -- because we are talking about a two-year statute of limitations --

QUESTION: What makes you think the Commission wouldn't apply some tolling doctrine if there is an allegation of conspiracy and concealment?

MR. FLEXNER: I don't know, Your Honor. All I know is --

QUESTION: Why shouldn't they? I mean, consistent with normal statute of limitations laws, if there has been a concealment, why wouldn't you expect that statute to be told for the Commission itself and allow the retroactive setting aside of filed rates?

MR. FLEXNER: Well, I think, Your Honor, there

may be an argument that the Commission can decide that that is available to them. In the Wheat Rail case, they considered under a different statute whether or not a Rate Bureau violation which the plaintiffs contended resulted in an unlawful rate justified retroactively nullifying the tariff, and they concluded that in the circumstances of that case, there was no injury, and it was not justified, and therefore the rate should be only cancelled prospectively.

So, the Commission has wide discretion, and I think the point to be made, Justice White and Justice Stevens, is that the Commission created a set of unique rights in shippers that the antitrust laws just don't give to anyone. They give shippers the right to know what rate is in effect at all times. They give them a 30-day lead time before it goes into effect, and the point is that what is fair or not fair as decided by Congress and this Court in the T.I.M.E. case concluded that it wasn't going to substitute its judgment for Congress's on the delicate balance of shipper interests and carrier interests, and recognize that even though in that case the shipper, which happened to be the United States, might be without a remedy, that the fact that it was without a remedy was a deliberate choice by Congress, and it would therefore not be a justification

for substituting a court action which would only interfere with the Commission's jurisdiction, and so we don't think you can distinguish your way out from under Keogh and Georgia. We think that the facts of those cases and their rationale clearly apply here, and the proposition that is presented is that the Reed-Bullwinkle Act overruled those decisions.

Here we say that the enforcement agencies, the Department of Justice and the Department of Transportation and the Interstate Commerce Commission, which after all is bound to interpret and imply that statute, have said in their briefs that Reed-Bullwinkle did not overrule Keogh.

The lower courts that have looked at this issue agree with that position. And we think that the legislative history, as Judge Friendly analyzed it, shows that Congress did not intend to overrule Keogh, but rather to augment it, but the problem is government prosecution and the lack of agency authority to regulate rate bureaus, and it was not Keogh, because Keogh after all was intended to protect the rate authority of the Commission and those special powers as the process by which rates got set, and there was no reason therefore for Congress to want to overrule a statutory interpretation that only served to carry out its intent,

and there is a remarkably clear statement in the legislative history, I think, which underscores that point.

The Congress says, look, we understand that the antitrust laws are not necessary to regulate rates, and the reason they are not necessary to regulate rates is that we have cloaked a government authority with the power to decide that question. And so the antitrust laws don't apply in that area, and we think that is a particularly powerful statement in light of the history that -- the history that Judge Friendly reviewed.

Now, they don't make the petitioners any more of the Motor Carrier Act of 1980, and the reason they don't make anything of that Act is that that Act is forward looking, and their case seeks to reach back over a 16-year period and apply treble damages and attorneys' fees with respect to rates that are ancient history, that were made and carried out under the old rule that I should say were always subject to and contained in filed tariffs that were required to be paid and were the exclusive means by which carrier and shipper relationships were carried out in the market.

And they don't rely on the Motor Carrier Act for a second reason, and that is that Congress made a deliberate decision in that Act to retain the full

ratemaking powers of the Commission which this Court interpreted in Keogh and Georgia as requiring shippers to use those powers and not the antitrust laws to resolve disputes over rates.

QUESTION: I take it if the Commission as far as money is concerned could only give reparations.

MR. FLEXNER: Reparations, Your Honor, and after the 1980 Act they can -- and this Court's decision in ATA, there is now an additional remedy for shippers, which is the remedy to nullify the existing tariff --

QUESTION: That may be so, but as far as money is concerned, there would be reparations then, but reparations would only be given if the rate was unreasonable.

MR. FLEXNER: That is exactly right, because --

QUESTION: So you would say that if these conspiratorial -- if these rates which were set by a conspiracy turned out to be reasonable, there wouldn't be any relief before the Commission.

MR. FLEXNER: Well, I would say that would be for the Commission to decide.

QUESTION: I know, but they would decide -- they would say, well, certainly these carriers didn't abide by the right procedures to make joint rates, but nevertheless the rates they came up with were within the

zone of reasonableness. No reparations. Isn't that right?

MR. FLEXNER: If the Commission made that decision, Your Honor --

QUESTION: No reparation.

MR. FLEXNER: -- there would be no reparations, and it would be because the plain language of the statute defined what rate is legal and what the shipper is entitled to, and the Commission and the courts are bound by that plain language, and in fact when the petitioners get up and they say we would like to put an expert on the stand who is going to testify that there was a competitive rate out here that would have been charged but for this alleged procedural violation, and we are entitled to a presumption that it falls within this broad band of -- reasonableness, to do that, this Court would have to overrule Keogh, Montana-Dakota, and Arklin, all of which stand for the proposition that a court may not assume anything about how a commission would apply a zone to a particular rate. That is an adjudicatory function assigned by the Congress to an expert agency.

QUESTION: I wonder, Mr. Flexner, if your argument would apply assuming there was a rate increase and the Commission took a look at it and then revoked it

under the ATA case, so you wouldn't have a filed rate. Then why couldn't they get treble damages then?

MR. FLEXNER: That, Your Honor, I can say I know that is not this case, and it may be some future case. If you proceed --

QUESTION: Maybe they will never do that.

MR. FLEXNER: And if you proceeded on that basis given the Court's decision in ATA, you proceed at your own risk, but this is a case in which there is no dispute but that the rates were --

QUESTION: Did the District Court have power to stay the proceeding until it found out whether the ICC might revoke the rates?

MR. FLEXNER: I think under this Court's opinions, Your Honor, on the stay and deferral procedure, it would not. So we say, Your Honor, that where we are now is that there has been a settled interpretation of the Interstate Commerce Act that has been an integral part of the law for 60 years. No one has said that the Court was wrong in its initial interpetation of the Act. There is no confusion in the law. The lower courts have clearly understood where shippers must go to resolve their rate disputes, and here, the petitioners are asking for a fundamental change in an area of rate regulation despite the fact

that this is an area where Congress has moved very carefully, step by step, balancing the relationship between the ports and the agency, and as important, between shippers and between carriers, and if this delicate balance is to be changed, we think that Congress is the proper body to do it.

QUESTION: What did the Bullwinkle Act do about antitrust immunity?

MR. FLEXNER: It defined the circumstances, Your Honor, in which the government could prosecute.

QUESTION: But nobody else? It gave express antitrust immunity.

MR. FLEXNER: It created an express immunity because when you read the legislative history, it is clear that the need for the legislation was to create certainty where government prosecutions had been creating --

QUESTION: But there is no argument in this case that that express immunity would apply.

MR. FLEXNER: Oh, we would contend it does apply, Your Honor, and I must say --

QUESTION: Do you insist that you complied with the procedures?

MR. FLEXNER: We do, Your Honor. I mean, we have answered the complaint.

QUESTION: Let's assume that it were proved that you did not comply, that your clients did not comply with those procedures, there would be no express immunity.

MR. FLEXNER: That is correct, Your Honor.

QUESTION: Do you think that immunity that they were talking about was just immunity from government suit?

MR. FLEXNER: I believe so, Your Honor, and the reason I do is the legislative history makes it clear that with respect to rate levels and whether particular rates that arise out of what we have been calling a procedural violation violate the Act because they are unreasonable or discriminatory, that is a matter that can only be decided by the Commission according to those special standards, and there is no necessary relationship between the procedural violation and whether that legal entitlement has been undermined, and that, it seems to us, is the key. That is why Keogh made sense in the breadth in which it was decided.

If there are no further questions, thank you very much.

QUESTION: Very well.

Mr. Rigler.

ORAL ARGUMENT BY DOUGLAS V. RIGLER, ESQ.,

ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. RIGLER: The Court just heard Mr. Flexner tell it, that if wrongdoers can violate the antitrust laws and the Interstate Commerce Act and get away with it by concealing a conspiracy for a long period of time, they get to pocket the money, they should be unjustly enriched, and the people who were victimized should lose that money, and he tells you that that is what Congress had in mind when it passed the Reed-Bullwinkle Act which gave them an express antitrust immunity. That flies in the face of the implied immunity doctrine.

The implied immunity doctrine is a narrow doctrine. It is a limited exception to a broad national policy of open price competition, and where Congress grants express immunity, the implied immunity doctrine no longer applies.

QUESTION: Do you think that the considerations expressed by Judge Friendly and to some extent reiterated in the government's brief now have escaped the attention of Congress over the years?

MR. RIGLER: I think that Congress believed that it had handled that problem in the Reed-Bullwinkle Act. Let me say that Keogh didn't have to be expressly or explicitly by words overruled by Congress because the only reason Keogh ever came into existence was the

Court, not Congress, the Court had to grapple with the problem of the Interstate Commerce Act allows you to jointly submit rates for approval, and the antitrust laws forbid joint price fixing, and you have said in Gordon versus Stock Exchange, the Silver case, the Philadelphia National Bank case, the Carnation case, the Borden case, the Court could not have been more unanimous and more clear over the years that that implied immunity disappears when Congress takes express action.

QUESTION: You left out in that list of cases the Southern Motor Carrier case. Do you think that is consistent with that --

MR. RIGLER: The Southern Motor Carrier -- that is a case, I believe, of justifiable reliance in terms -- I think that that case was only sited.

QUESTION: Do you think the Reed-Bullwinkle Act was a response to Keogh or a response to the Georgia case.

MR. RIGLER: I think that the Reed-Bullwinkle Act was a comprehensive attempt to deal with it, and I think we can follow through on that analysis by asking what happens if Keogh is overruled. Motor carriers who comply with the law still get an antitrust exemption not only from government prosecution, but from complaints by

shippers as well.

Mr. Flexner was dead wrong when he said that we are arguing about approved activities, or activities which could have been approved by the ICC. This comes up on motion to dismiss and the allegations in that complaint are, they were --

QUESTION: He was saying what his position would be at trial, I think. We understand. We assume your facts for the purposes --

MR. RIGLER: That is right, and those coercive activities never could have been approved. Sending us back to the ICC for a number of reasons denies us all relief, and going back to a question Justice O'Connor asked, carriers today don't have to justify where they file within that broad band of reasonable rates. They can file at any level, and it is going to go through. So we should have the same ability when they are outside of their ICC immunity to say, wait a minute, there is some defect. The rate should have been this or that. You don't really need the references to the ICC, and if we are thrown back there we will never get it done.

QUESTION: You say Reed-Bullwinkle was a Congressional effort to --

MR. RIGLER: To comprehensively --

QUESTION: -- comprehensively deal with this. You would think that you would find more evidence that they intended to overrule Keogh.

MR. RIGLER: I don't think that they -- I think that what they thought they were doing was setting a game plan showing how you could obtain regulatory immunity.

QUESTION: After all, Keogh was a case of statutory construction.

MR. RIGLER: No, I think I would disagree with you, respectfully, Justice White.

QUESTION: It certainly wasn't a constitutional law case, was it?

MR. RIGLER: They had two statutes that couldn't be read --

QUESTION: Well, so --

MR. RIGLER: I think that Congress dropped the ball and the Court had to come up with something.

QUESTION: The statutory construction had been on the books a long time, and here comes Reed-Bullwinkle. You would think Congress would have dealt specifically with private antitrust actions if it was dealing with the cold question of antitrust immunity.

MR. RIGLER: If you look at the express words

of the statute, they say you may have immunity from the antitrust laws, but there is a quid pro quo. You must comply with the regulatory plan. I would agree with you. It is not a model of clarity. I think the overall legislative history reads that Congress did intend to overrule Keogh, although that brings me back to a point which Justice Blackmun had raised.

We are not saying that there is never any necessity for implied immunity. If you have two inconsistent statutes, you may be in that situation, so going back to your question, do we want it overruled, we want it overruled in the case of an express violation, one that results in unjust enrichment, one that is a knowing violation. We say that all you have to do is reaffirm what you say in Carnation, that conduct outside of express immunity which is granted should permit the victim of that conspiracy to use the applicable law of the land to recover his damages.

That is the result that the Court should reach.

CHIEF JUSTICE BURGER: Very well. Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:03 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

lderson Reporting Company, Inc., hereby certifies that the ttached pages represents an accurate transcription of lectronic sound recording of the cral argument before the upreme Court of The United States in the Matter of:

#85-21 - SQUARE D COMPANY AND BID D BUILDING SUPPLY CORP., Petitioners

V. NIAGARA FRONTIER TARIFF BUREAU, INC., ET AL

nd that these attached pages constitutes the original ranscript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)