10-1974

Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Procedures (SCRAP)

Lewis F. Powell Jr.

Sally — Write "Out" letter for me in these two companion cases. - done 9-6-74 of

OUT

OUT

Possible Recusal.
Seaboard Coast Line and Southern RR's are both appellants in No. 73-1966 (see attached memo). Both are Hunton Williams clients. You have recused yourself in the two previous SCRAP cases. Should you decide not to recuse, I would recommend that this case be noted, the question of jurisdiction postponed to the merits.

No. 73-1971 + 1966

UNITED STATES AND I.C.C.

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), ET AL.

Appeal from D.D.C. three-judge court (Wright, C.J., Richey; Flannery, dissenting)

Federal/civil

Timely

See Preliminary Memorandum for No. 73-1966.

Carr

8/29/74

DK

PRELIMINARY MEMORANDUM

Summer List 15, Sheet 1

No. 73-1966 ABERDEEN AND ROCKFISH RR. CO., ET AL. v. STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), ET AL.	Appeal from D.D.C. three-judge court (Wright, C.J., Richey; Flannery, dissenting) Federal/civil	Timely
No. 73-1971 UNITED STATES AND I.C.C. v. STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), ET AL.	Appeal from D.D.C. three-judge court (Wright, C.J., Richey; Flannery, dissenting) Federal/civil	Timely

1. SUMMARY: This is the most recent installment in a protracted and complex litigation concerning the application of the National Environmental Policy Act's procedural requirements to I.C.C. general revenue proceedings. Finding that the I.C.C.'s efforts to meet NEPA's requirements were "substantially deficient," the D.D.C. three-judge court (Wright; Flannery, dissenting) vacated the Commission's order authorizing railroad rate

increases on recyclable commodities and remanded to the Commission for fulfillment of NEPA obligations and reconsideration. The court, however, declined to enjoin the railroads from putting the rate increases into effect.

The United States and I. C. C. appeal, contending that the I. C. C. had complied with NEPA and that the court's order interferes without warrant in the I. C. C.'s discretion to determine the procedures and scope of general revenue proceedings. In No. 73-1966, the nation's railroads, defendant-intervenors below, appeal, contending that the district court lacked jurisdiction to review the Commission's general revenue order. The appellees, environmental organizations, and associations of dealers in recyclable commodities, plaintiff-intervenors below, move to dismiss on the ground that, since the district court denied an injunction, no appeal lies to this Court. In the alternative, appellees move to affirm.

2. FACTS AND OPINION BELOW: Under the Interstate Commerce Act, railroads initiate rate increases by giving the I. C. C. notice of proposed increases at least thirty days prior to their effective date. The Commission may then suspend the proposed rates for up to seven months, pending a determination of their lawfulness. At the end of the seven months, the railroads may put the increases into effect unless the Commission has, within the seven-month period, determined that the increases are unreasonable. This case involves a particular kind of rate increase -- a percentage increase in most existing rates designed to meet railroads' revenue requirements. I. C. C. authorization of general revenue increases (i. e., its failure to find them unreasonable) means only that they are generally necessary to meet current revenue needs. Shippers or other

injured parties may subsequently challenge the reasonableness of the increase as applied by a particular railroad to a particular commodity. In such proceedings, the challenging party has the burden of proof.

This case began when, in December, 1971, the nation's railroads collectively filed a temporary 2.5 percent surcharge on nearly all freight rates, intended as an interim measure to ease the railroads' financial plight pending the filing of permanent percentage increases. The Commission, finding that the railroads had critical need for increased revenues, allowed the surcharge to take effect without suspension. Thereafter, the railroads filed proposed permanent increases averaging 4.1 percent. These the Commission suspended for seven months, pending a determination of their lawfulness.

Plaintiff environmental organizations, appellees here, then filed suit. Concerned that the across-the-board percentage increases would aggravate the existing absolute disparity between rates on recyclables and those on virgin commodities, thus further discouraging recyclable use, plaintiffs claimed that NEPA requires the I. C. C. to issue a detailed environmental impact statement before either the temporary surcharge or the proposed permanent increases could be allowed to take effect. The three-judge court held that, since the permanent increases had been suspended and since I. C. C. promised to file an impact statement before they were authorized, plaintiffs' request for relief as to the permanent increases was premature. The court did, however, find that I. C. C. had violated NEPA by allowing the temporary surcharge to take effect without filing an impact statement. The court enjoined the railroads from collecting

the surcharge, in effect requiring suspension until I. C. C. complied with NEPA. This Court reversed, holding that the Commission has exclusive power to decide whether to suspend rates pending a decision on their lawfulness, and that NEPA does not authorize courts to interfere in this exclusive jurisdiction. U.S. v. S. C. R. A. P., 412 U.S. 669.

Meanwhile, after a hearing and submission of briefs, I. C. C. issued an order and report authorizing the proposed permanent increases. The report considered the environmental consequences of the increases, particularly those applied to recyclables. Finding that the increases would have no adverse environmental impact of significance, the Commission concluded that, under NEPA, no formal impact statement was necessary. This conclusion met with strong criticism both from plaintiffs and from government agencies (C. E. Q. and E. P. A.). The I. C. C. then reopened the proceedings to reconsider the rates' environmental effects, and suspended the rates on recyclable commodities for another seven months. The Commission issued a draft impact statement on March 5, 1973. Both plaintiffs and government agencies responded with comments highly critical of the draft's analysis. The I. C. C. denied plaintiffs' request to hold hearings on the draft and on the recyclable rates. It then issued a final impact statement, again concluding that the increases would not adversely affect the environment. Therefore, finding it unnecessary to reconsider its original general revenue order, I. C. C. terminated the proceeding.

The plaintiffs again moved in the district court for relief, claiming that I. C. C.'s actions were not in compliance with NEPA. The district court granted a preliminary injunction restraining the railroads from collecting

the permanent increases. The Chief Justice stayed the injunction, and this Court refused to vacate the stay, instead remanding for reconsideration in light of Atchison, Topeka, and Santa Fe R. Co. v. Wichita Board of Trade, 412 U.S. 800. U.S. v. S.C.R.A.P., 414 U.S. 1035.

Finally, the district court issued the decision that is the subject of this appeal. First, the court (Wright) held that it had jurisdiction to review the I.C.C.'s general revenue orders for NEPA compliance. The court recognized that decisions of this Court have held that such orders are generally not subject to review. These cases, however, concerned challenges by shippers and, since shippers could subsequently bring actions challenging particular applications of the general increases, general revenue orders are not ripe for review. Plaintiffs here, in contrast, challenge present non-compliance with NEPA. The court thought it extremely doubtful that they would be allowed to raise their claim in subsequent, particularized rate proceedings, since their claim concerns only the necessity that an impact statement accompany the general rate order. Moreover, since timeliness, under NEPA, is of the essence, unless the general rate order was reviewed now, it would never be reviewed at all. */

Turning to the NEPA issues, the court held that I.C.C.'s efforts at compliance had been inadequate in two respects. First, since I.C.C.

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*/ The court also noted that this Court's previous cases finding no jurisdiction to review general rate orders are of "doubtful precedential value" since, in two recent cases, application of the doctrine has been affirmed only by an evenly divided vote. Alabama Power Co. v. U.S., and Atlantic City Electric Co. v. U.S., 400 U.S. 73.

had not issued its impact statement until long after its general rate decision had been made, it had failed to abide NEPA's requirement that the statement be available at all comprehensive stages of the decision-making process. Thus, the statement was little more than a post hoc environmental rationalization of a decision already made. And this being so, the Commission's remedial efforts were inadequate, since it had refused to duplicate the original proceedings by holding hearings on the draft statement and the recyclable rates.

Second, the court found the impact statement itself deficient. Its tone was "combative," and it failed to respond to powerful criticisms made of the draft. These failures were products of the statement's "fundamental deficiency": the statement analyzed only the marginal impact of the general percentage increases, ignoring existing disparities in the underlying rate structure and their environmental impact. Absent such analysis, the I. C. C. could not evaluate the cumulative impact of general percentage increases.

The court therefore vacated the Commission's orders insofar as they concerned recyclable rates. It directed the Commission to reopen the proceedings and (a) to prepare a new draft statement, giving detailed instructions as to its contents; (b) this done, to duplicate fully the original rate proceedings, including, "presumably," oral hearings before the Commission, since such hearings had been held before the increases were first approved; and (c) to issue a final revised order manifesting full reconsideration of the rate increase, accompanied by a final impact statement.

Finally, because of its uncertainty about the meaning of this Court's Wichita Board of Trade decision, supra, the court declined to enjoin the

railroads from charging increased rates on recyclables pending the I. C. C.'s reconsideration.

Judge Flannery dissented, concluding that NEPA in no way affects the rule that general rate authorizations are unreviewable, and finding that the I. C. C.'s impact statement and remedial efforts had placed it in substantial compliance with NEPA.

3. THIS COURT'S JURISDICTION: Appellants claim this Court's jurisdiction under 28 U.S.C. § 1253, which provides direct appeals from orders of three-judge courts "granting or denying . . . an interlocutory or permanent injunction." Appellees move to dismiss for lack of jurisdiction. The court below denied an injunction at the instance of appellants and "the successful party below has no standing to appeal from a decree denying the injunction." Public Service Comm'n v. Brashear Freight Lines, Inc., 306 U.S. 204. Moreover, the order below can in no way be characterized as injunctive. Its only effect on the railroads will be that shippers will not have the burden of proof should they subsequently challenge particular rate increases.

This problem is not discussed in the jurisdictional statement of either the SG or the railroads.

4. CONTENTIONS: The SG contends that, in light of the emergency nature of general revenue proceedings and the limited time in which the Commission has to act, the Commission has complied with NEPA, as required, "to the fullest extent possible." General revenue proceedings are designed to deal as quickly as possible with a problem of limited scope: railroads' immediate revenue needs. The district court's decision forces

the I. C. C. to expand these limited purpose proceedings into an inquiry concerning the underlying rate structure. NEPA does not warrant this intrusion into the I. C. C.'s discretion and into the "delicate balance" established by Congress in railroad rate regulation. The SG also contends that, since oral hearings are not required in I. C. C. rate-making proceedings (see U.S. v. Allegheny-Ludlum Steel Corp., 406 U.S. 742), such hearings being in the I. C. C.'s discretion, the Commission's remedial efforts did duplicate "existing agency review processes" and gave full consideration to environmental impact.

In No. 73-1966, the railroads substantially repeat the SG's contentions. In addition, they contend that the district court lacked jurisdiction to review the general rate order. Relying on this Court's first opinion in S. C. R. A. P., the railroads argue that NEPA cannot be taken to alter the rule that general revenue orders are unreviewable.

Appellees respond that the issues are insubstantial, relying on the opinion below.

5. DISCUSSION: Appellees' assertion that this Court lacks jurisdiction is, I think, correct under existing law. The problem has not, so far as I know, arisen before in this context, because, prior to this case, I. C. C. general revenue rulings have been considered unreviewable. If, however, appellees' jurisdictional argument is correct, it means that the district court can vacate and remand an I. C. C. order on NEPA grounds and immunize its action from review -- at least by way of direct appeal -- by denying an injunction.

The district court's conclusion that it had jurisdiction to review the general revenue order is not contrary to this Court's first S.C.R.A.P. decision, which explicitly did not decide this jurisdictional problem. The district court's decision that the NEPA claim is ripe for review (in distinction to shipper challenges to reasonableness) seems quite convincing, however doubtful the court's views of the NEPA issues may be.

On the merits, the court's decision seems doubtful indeed. Post-decision remedial action has often been deemed sufficient to meet NEPA's requirements (e.g., Jicarilla Tribe v. Morton, CA 9, 471 F.2d 1273), and this would seem particularly true where, as here, hearings are within the agency's discretion. Moreover, the district court's objections to the contents of the impact statement do seem to ignore the special scope and emergency nature of general revenue proceedings.

There are motions to affirm and dismiss.

Carr

D.D.C. opn in SG's juris. statement.

8/29/74

DK

June 4, 1975

No. 73-1966 Aberdeen and Rockfish v. SCRAP
No. 73-1971 United States v. SCRAP

Dear Byron:

Please note at the end of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

Mr. Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 5, 1975

No. 73-1966 - Aberdeen & Rockfish R. Co.
No. 73-1971 - Students Challenging Regulatory Agency Procedures

Dear Byron,

In our Conference discussion after the argument I expressed the view that the District Court had no jurisdiction in these cases under the Algoma rule. Your opinion for the Court convinces me that I was wrong. On the merits, I agree with your opinion, and join it with many thanks for your massive efforts in wrestling with a real Jonah.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 6, 1975

Re: No. 73-1966, Aberdeen and Rockfish v. SCRAP
No. 73-1971, United States v. SCRAP

Dear Byron:

In due course I will circulate a dissent in this case.

Sincerely,

T.M.

T. M.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 10, 1975

Re: (73-1966 - Aberdeen & Rockfish RR Co. v. SCRAP
(73-1971 - U. S. v. SCRAP

Dear Byron:

Please join me in your circulation of June 4.

Regards,

WEB

Mr. Justice White

Copies to the Conference

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
				3/31/75				
join BRW 6/10/75	Dissent in Part 6-11-75	join BRW 6-18-75	join BRW 6-5-75	1st draft 6-4-75 3rd draft 6-12-75	await dissent 6/6/75 join BRW 6-18-75	join BRW 6-9-75	out letter 6/4/75	join BRW 6/6/75
				4th draft 6-18-75				
					73-1966 Aberdeen & Rockfish v. Scrap 73-1971 U.S. v. SCRAP			