



10-1971

United States. v. Allegheny-Ludlum Steel Corp.

Lewis F. Powell Jr.

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BENCH MEMO

No. 71-227 OT 1971

UNITED STATES v. ALLEGHENY-LUDLUM STEEL CORP.

On Appeal from the USDC for WD Pennsylvania (3-Judge Court) (Aldisert, USCJ, Marsh, USDJ and Miller, USDJ).

This case involves one of a series of orders of the Interstate Commerce Commission directed toward the problem of railroad freight car supply and distribution on the nation's railroads. The order under consideration was generally opposed by both shippers and the railroad industry, represented in the USDC by such organizations as the Association of American Railroads, the American Iron and Steel Institute, the National Industrial Traffic League, and the National Association of Shippers

Advisory Boards. The USDC permanently enjoined enforcement of the ICC order. Less than three months later, a three-judge USDC sitting in the ^{Middle} ~~North~~ District of Florida specifically rejected the conclusions of the USDC for WD Pennsylvania, and held the order to be a reasonable exercise of ICC power, based upon substantial and sufficient evidence in the record before the ICC.

FACTS

In 1963 the ICC undertook a study to ascertain the adequacy of the nation's supply of railroad freight cars. In 1964 the ICC determined that there existed "a substantial inadequacy" of freight car ownership among America's railroads. A notice of proposed rulemaking was issued, broadening the inquiry to include all phases of car ownership, utilization, and distribution, with a view toward alleviating the car shortage. A seven year study ensued, after which the trial examiner concluded that there not competent evidence upon which to base a conclusion as to the adequacy of freight car ownership, and that the proposed car service rules (the subject of the order under review) had not been shown to be justified. Eighteen months later, in August, 1969, the ICC reached contrary conclusions, finding that the railroads lacked an adequate supply of freight cars, and that the mandatory car service rules under consideration were justified.

The railroad industry has had a ¹⁶ Code of Car Service Rules since 1916. Prior to the promulgation ^{of the} ICC order under review, compliance with the rules was voluntary. The rules were established to govern relations of carriers among themselves, particularly, to secure the prompt and expeditious use of freight cars. The ICC order made compliance with Car Service Rules 1 and 2 mandatory. Car Service Rule 1 provides generally that cars in possession of a non-owner railroad at a junction with the owner railroad must be delivered empty to the owner, or loaded at that point to or via the owner's line. Car Service Rule 2 deals with cars in possession of a non-owner railroad at a point other than a junction with the owner railroad. Such cars generally must be either returned empty to the owner railroad, or returned empty to the railroad from which the car was received under load, or loaded to or via the owner's line. The purpose of these rules is to assure that empty freight cars in possession of a non-owner railroad will be returned, with or without a load, in the direction of the owning line.

Prior to the ICC order under review, it seems that these rules were honored only when convenient for the non-owner railroad in possession. Between 1956 and 1965, total freight car ownership, as well as aggregate carrying capacity, of American railroads actually declined. During the same period, demand for freight cars increased. These two factors, as well as others, produced general non-compliance with the Car Service Rules.

The result was that an owner railroad had the use of its own cars on an average of less than once each month.

THE ICC DECISION

After its extensive investigation into all phases of freight car ownership and the rules and practices governing their utilization and distribution, and the finding that there was "a substantial inadequacy of ownership in more than one category of freight cars . . . throughout the United States among all" Class I railroads, the ICC promulgated the mandatory car service rules as a part of a comprehensive set of rules designed to alleviate the freight car shortage. Since its findings regarding the voluntary observance of the car service rules indicated that a car owner received the use of its own cars on an average of less than once each month, the ICC concluded that the operation of the car service rules offered little incentive for railroads to purchase larger fleets of general service freight cars, or to maintain the cars in good repair, since the principal beneficiaries of such actions would frequently be other railroads. The ICC noted that under the existing system a railroad that owned a sufficient number of cars to satisfy its own shippers could suffer more serious car shortages than railroads with deficient ownership of cars. The ICC found that making observance of the car service rules mandatory would in the long run reduce

empty car miles, and would place the improved utilization of cars within the control of their owners, who could then provide for the ^{needs} ~~rules~~ of the shippers for whom the cars were acquired. Recognizing that the need for exceptions to the rules might arise, the ICC authorized the railroads to resolve inequities by negotiation, and authorized ICC officials to provide exceptions in order to alleviate inequities and hardships.

THE USDC DECISION

The USDC found the order deficient in three respects:

(1) The mandatory car service rules would clearly benefit the owner lines at the expense of the non-owner lines (who had theretofore enjoyed the use of cars owned by the owner lines as well as their own cars), and the ICC had failed to find a specific freight car shortage, or more acute freight car shortage, in the owner lines. "Owner lines" are railroads that own a sufficient number of cars to satisfy ^{their} ~~the~~ own shippers. "Non-owner lines" are railroads that are deficient in car ownership. Since there was no specific finding of shortage, or more acute shortage, in the owner lines, the USDC reasoned that it was impossible to determine whether the public interest in return of cars to the owner lines outweighed the public interest in the prompt movement of freight waiting shipment at the initial unloading point of the car. It is undisputed that mandatory observance of

the car service rules would ^{require} ~~acquire~~ extra switching and delays at unloading points, since empty cars under the mandatory rules have to be returned in the direction of the owner line, rather than merely shipped out in random directions in order of availability.

(2) While the thrust of the mandatory car service rules, as well as the other new rules, will be to require the railroad industry to increase its fleet of freight cars, the ICC had made no findings regarding the capacity of the industry to absorb new freight car capital expenditures. Thus, the USDC reasoned that it was impossible to gauge the effect of the new rules on the industry, and, because of increased shipping costs which might result from increased capital expenditures, on the shipping public.

(3) Noting that the ICC had conceded that as a practical matter there could not be complete observance of the mandatory rules (20% non-compliance being considered good performance), and considering the foregoing two points, the USDC concluded that the mandatory rules could not be considered "reasonable" within the requirement of the statute.

49 U. S. C. § 1(4)(a).

DISCUSSION

As the opinion of the 3-judge USDC for MD Florida demonstrates, the reasoning of the USDC is not persuasive.

First, faulting the ICC for not making a specific finding of shortage, or more acute shortage, on the owner lines was not sound, for the ICC had found that the freight car shortage was all pervasive throughout the United States. Given the shortage on all lines, the ICC was simply establishing a policy that during a period of shortage the owner lines would have maximum use of the cars in which they had invested. This policy is equitable, for the shortage would then bear most heavily on the railroads which had failed to purchase an adequate car supply. The issue was ~~not~~ whether the owner lines suffered a more acute shortage, but rather which lines should have first call on cars in times of shortage.

Second, failure to consider the financial effects on the non-owner lines and the shipping public is not fatal, for the ICC was justified in designing rules to maximize use of freight cars by their owners during the period of pervasive shortage. To deny owners the maximum use of their cars would in effect penalize the owners, and benefit the non-owners, who had not adequately provided for their needs. The rules are designed to serve as an incentive for the non-owner lines, who under the rules will have to bear the brunt of their failure to maintain adequate car supplies. Non-owner lines will not be compelled to purchase additional freight cars; they will simply have to suffer the consequences of their failure to maintain adequate car supplies.

The ICC did consider the financial effect of the new rules upon shippers, and concluded that any burden on shippers, in terms of "extra switching and short delays" was overbalanced by the "overall benefit to be derived when originating lines obtain quick return of their system cars." Although the ICC apparently did not consider the matter of additional shipping costs that might result from increased capital expenditures for additional freight cars, this seems of little consequence in light of the goal of an adequate rail freight system.

Third, the admission that full compliance with the rules is not practicable does not render the rules unreasonable. Adequate provision exists in the ICC order for flexibility and necessary exceptions to the rules. ← Criminal sanctions, the SG says, cannot follow absent proof of criminal intent.

A brief review of the record reveals that the ICC has no effective way of measuring and evaluating the freight car shortage problem. Under the existing system, a shipper faced with a shortage of two cars on April 1 files a shortage report with the ICC indicating a shortage of two cars. If those two cars are not supplied for one week, the shipper will have filed 7 shortage reports indicating a total shortage of 14 cars, when in fact two additional cars would have relieved the shortage. Compounding the reporting problem is the fact that railroads operate by and large with the

use of cars owned by other railroads, and therefore have no incentive to remedy their own shortage problems.

Appellees attack the order primarily on the grounds (1) that it is unreasonable, and therefore does not meet the statutory requirement of reasonableness, 49 USC § 1(14)(a), and (2) that it is not supported by adequate findings, as contemplated by the Administrative Procedure Act. Appellees arguments have considerable merit. Taking cars away from non-owner railroads and making them available first to owner railroads in times of shortage will undoubtedly burden (1) shippers who use the non-owner railroads and have no other choice because of their physical location on the lines of non-owner railroads, ^{and (2) non-owner railroads,} who will have to bear the brunt of their own failure to maintain adequate car supplies. But whether these burdens are "reasonable" and consistent with the public interest can only be determined against the backdrop of the dimensions of the problem, which is one of massive proportions. It seems to me that the ICC has made a reasonable choice among a range of unhappy alternatives. At least the instant choice will help put the general shortage problem in clearer perspective. It also seems clear that detailed findings regarding the impact of mandatory car service rules on shippers and non-owner railroads could not reasonably be made, and that the ICC's general findings in this area are sufficient to justify its order in light of the broad provisions

for exceptions. The ICC has the expertise concerning, and responsibility for, broad policy decisions of this character. While the remedy may in some respects be drastic, so is the problem.

REVERSE.

CEP

Huntington (S.G.)

I.C.C. ^{Car Service} Rules 1 & 2 require that

12% decline in no of cars

Steel industries opposed New Rules

— saying they would be impracticable

I.C.C. found:

There is shortage

Owners have limited use of own cars

Sec 1-14a of ICA Act — in statutory authority

High ownership ^{R.R.} ~~cars~~ are those which come close to providing their share of cars. I.C.C. did not find ^{expressly} that these R.R. ~~to~~ are suffering from a shortage

Order provides incentive to purchase new equipment

? } The I.C.C. order ~~is~~ designed to enforce the R.R. own rules.

Impossible to write any car rules which can be enforced 100%

Huntington (cont.)Truitt (On behalf of Shippers)

There is a shortage - but not a chronic.

But Rule - being mandatory - and unreasonable. Will cause hardship & cannot be enforced.

Rule 1 & 2: When a car is unloaded, it must be returned to owner. This obligation takes precedence over needs of shippers. It gives the shippers of the owner less a preference.

Grocery, chemical, gypsum, & steel & other industries oppose this Rule.

There was no finding of ~~of~~ setting benefits to shippers.

~~Present~~ Old Rule expressed "promises" as to movement of cars, but these were not mandatory.. Altho. these ^{old} Rules - adopted by RRs - appear to be explicit, the history of their application shows they have been "precatory" rather than binding.

Trutt (for shippers)

No findings as to effect of Rules on shippers.

Failure to find that any RR is financially able to purchase cars.

Measures (for lessiv of Am RR)

The record does not show what RRs own adequate no. of cars or what constitutes an adequate no.

The order seems to be based on assumption that there are "have" & "have-not" RRs - but these are not identified.

All railroads "have" & "have not" ~~oppose~~ oppose these mandatory rules

Record contains no standards as to what is "adequate"

ICC did not find a car shortage by any particular RR - nor any facts as to the "nationwide" shortage.

Shippers oppose order - regardless of whether they are on "have" or "have not" lines

Moloney (Cont.)

RR's stand united - except for U. Haven & few others - against this order.

Shippers, Recivers & RR all oppose this order. National Transportation Policy incompatible with this order.

→ Comm. finds a car shortage
→ but ICC's order is inconsistent with max. utilization of the cars that are available.

Huntington (Rebuttal)

B & O / C & O - Great Northern & Pa. supported the Ruler

Purpose of order is not to increase utilization but in due time to alleviate the shortage.

ICC could not make specific findings as to shortage of particular RR - as no data is available, but will be available in future.

No. 70-227 U.S. v. ALLEGHNEY-LUDLUM STEEL, et al
Argued 3/27/72

Tentative Impressions*

This case involves the validity of an order of the ICC promulgating mandatory rules with respect to the routing of freight cars.

A hearing examiner listened to testimony for 50 days, took 6,000 pages of testimony, filed a 63-page report and concluded:

"The record does not contain competent evidence upon which to base a conclusion as to the adequacy of freight car ownership; and that the adoption of the proposed car ownership formula, regulations and car service rules has not been shown to be justified. "

The Commission, 18 months later, refused to accept the findings of the hearing examiner and ordered the service rules to be observed for the purpose of increasing - in time - the number of cars. The essential thrust of the rules is to expedite the return of cars to the "owning line", which is supposed to have the effect of making other lines - which may not own all the cars required for their traffic - to purchase such cars.

*These impressions are dictated on the afternoon following argument to record my initial and tentative impressions. I will have read, in preparation for the arguments, the principal briefs, some of the cases and the bench memo. I hope to do further study before the Conference. My views are subject to change and to the discussion at the Conference.

A three-judge court, after recognizing the presumed validity of an order of the Commission, found that such order did not meet the special statutory requirement of "reasonableness".

A provision of the applicable Interstate Commerce Act specifies:

"The Commission may, after hearing . . . establish reasonable rules, regulations and practices with respect to car service" 49 U. S. C. § 1(14)(a)

The three-judge court concluded that the rules were not reasonable. It pointed out several deficiencies in the Commission's report:

1. The Commission's report declares that the rules "are not designed to improve the utilization of freight cars" - but to induce deficiency owner line to acquire additional cars. Thus, the public will not be benefitted except perhaps in the long run.

2. There is no factual showing that the rules will cause the "non-owner lines" to acquire cars or additional cars.

3. The Court found that "the record is devoid of evidence which reflects the capacity of the railroad industry to absorb new freight car capital ~~expenditures~~ expenditures".

4. ~~The Court was impressed by~~ ^{indicated} Evidence from shippers that the rules "would seriously obstruct and undermine railroad car utilization, and that the necessary consequences would be delay,

wasteful railroad operations, and disruption of shippers' production and distribution program." See jurisdiction statement 23.

5. The Commission failed "to find a specific freight car shortage in the owner-lines."

6. The Commission conceded that "there cannot be more than 80% enforcement of regulations" although a violation "carries criminal penalties".

My Tentative Views:

Although an order of the Commission is presumptively valid, this presumption is not as strong where the Commission overrules its own examiner's report. It seems to me that the railroads and shippers have the better argument, and I am inclined to affirm the decision below.

Opinion in 71-227 U. S. v. Allegheny-Ludlam has been assigned to Bill Rehnquist. When this opinion is circulated I will probably write a brief dissent. Want to see the opinion first.

DOUGLAS, J. Reverse,
Difficult case.
Technical field & would
rely on ICC

MARSHALL, J. Reverse

BRENNAN, J. Reverse (tentative)
Would go with a majority
of court but is inclined
tentatively to Reverse.

BLACKMUN, J. Reverse
H.A. Court has a
stronger opinion.

STEWART, J. Reverse (tentative)
Quite uncertain

POWELL, J. Affirm (tentative)

WHITE, J. Reverse

REHNQUIST, J. Reverse

~~Major~~ Chief Justice

Affirm (tentative)
Has serious reservation as
to ICC's Rule

May 30, 1972

Re: No. 71-227 U. S. v. Allegheny Ludlum
Steel Corp.

Dear Chief:

At the Conference on the above case you and I both voted tentatively to affirm. All other Justices voted to reverse, although Justices Brennan and Stewart were marked on my record as "tentative".

I have now reviewed Bill Rehnquist's opinion and am inclined to join it. Apart from the problem at this late date of writing a meaningful dissent, Bill makes a fairly strong case for reversing the district court and affirming the decision of the ICC.

Unless you expect to write a dissent, I will advise Bill Rehnquist of my concurrence.

Sincerely,

The Chief Justice

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May 30, 1972

Dear Bill:

In No. 71-227 - U. S. v. Allegheny-
Ludlum Steel Corporation, please join
me in your opinion.

W. O. D.

Mr. Justice Rehnquist

cc: Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL


May 30, 1972

Re: No. 71-227 - United States v. Allegheny-
Ludlum Steel Corp.

Dear Bill:

Please join me.

Sincerely,



T.M.

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May 30, 1972

Dear Bill:

In No. 71-227 - U. S. v. Allegheny-
Ludlum Steel Corporation, please join
me in your opinion.

W. O. D.

Mr. Justice Rehnquist

cc: Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

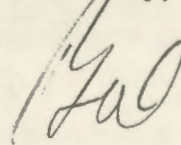
May 30, 1972

RE: No. 71-227 - United States v. Allegheny-
Ludlum Steel Corporation

Dear Bill:

I am happy to join your opinion in the
above.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

MEMORANDUM TO MR. JUSTICE POWELL

Re: No. 71-227, United States v. Allegheny-Ludlum Steel Corp.

This is the ICC case involving the promulgation of mandatory railroad car service rules. Justice Rehnquist has circulated an opinion for the Court upholding the ICC rules and reversing the USDC. Douglas, Brennan, and Marshall joined immediately.

The vote at Conference was 7 to 2 to reverse. You and the Chief voted to affirm. You have indicated that you will probably write a brief dissent.

Attached is the Rehnquist draft, the bench memo that I wrote in the case, and your tentative impressions, dictated after Conference. The Rehnquist opinion reaches the same conclusions that I reached in the bench memo, reasoning along the same lines.

CEP

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

2nd DRAFT

From: Rehnquist, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 5/30/72

No. 71-227

Recirculated: _____

United States et al., Appellants, v. Allegheny-Ludlum Steel Corporation et al.	}	On Appeal from the United States District Court for the Western District of Penn- sylvania.
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[May —, 1972]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In 1969 the Interstate Commerce Commission promulgated two "car service rules" which would have the general effect of requiring that freight cars, after being unloaded, be returned in the direction of the lines of the road owning the car. Several railroads and shippers instituted two separate suits under 28 U. S. C. §§ 2321-2325 to enjoin enforcement of these rules. In *Florida East Coast Railway Company v. United States*, 327 F. Supp. 1076 (MD Fla. 1971), the action of the Commission was sustained by a three-judge court, but in the case now before us a similar court for the Western District of Pennsylvania held the Commission's order invalid. 325 F. Supp. 352 (WD Pa. 1971). We noted probable jurisdiction, 404 U. S. 937, and for the reasons hereinafter stated we conclude that the Commission's action here challenged was within the scope of the authority conferred upon it by Congress and conformed to procedural requirements.

The country's railroads long ago abandoned the custom of shifting freight between the cars of connecting roads, and adopted the practice of shipping the

Reviewed
5/30/72
LFP

Write
note
to Chief

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same loaded car over connecting lines to its ultimate destination. The freight cars of the Nation thus became in essence a single common pool, used by all roads. This practice necessarily required some arrangements for eventual return of a freight car to the lines of the road which owned it, and in 1902 the railroads through their trade association dealt with this and related problems in a code of car service rules with which the roads agreed among themselves to comply. The effect of the Commission's order now under review is to promulgate two of these rules¹ as the Commission's own, with the result that sanctions attach to their violation by the railroads.

Because of critical freight car shortages experienced during World War I, Congress enacted the Esch Car Service Act of 1917, which empowered the Commission to establish reasonable rules and practices with respect

¹ "Rule 1. Foreign cars, empty at a junction with the home road, must be:

"(a) Loaded at that junction to or via home rails, or,

"(b) Delivered empty at that junction to home road, except in instances where Rule 6 has been invoked, or unless otherwise agreed by roads involved.

"Rule 2. Foreign empty cars other than those covered in Rule 1 shall be:

"(a) Loaded to or via owner's rails.

"(b) Loaded to a destination closer to owner's rails than is the loading station or delivered empty to a short line or switch loading road for such loading. (Car Selection Chart is designed to aid in so selecting cars for loading.)

"(c) Delivered empty to the home road at any junction subject to Rule 6.

"(d) Delivered empty to the road from which originally received under load, at the junction where received, *Except* that when handled in road haul service, cars of direct connection ownership may not be delivered empty to a road which does not have a direct connection with the car owner.

"(e) Returned empty to the delivering road when handled only in switching service." Jurisdictional Statement 64.

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to car service by railroads. 49 U. S. C. § 1 (14)(a). The pertinent language of that Act provides:

"The Commission may . . . establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part . . ."

No party to this proceeding has questioned that the rules promulgated by the Commission are "rules, regulations, and practices with respect to car service," and therefore the issue before us is whether these rules are "reasonable" as that term is used in the Esch Act. The court below concluded, and the appellees here contend, that for a number of reasons the rules in question do not meet the statutory requirement of reasonableness. Appellees also contend that the findings of the Commission are insufficient under the Administrative Procedure Act, 5 U. S. C. § 551, *et seq.*

The record of proceedings before the Commission establishes that the Commission has been increasingly concerned with recurring shortages of freight cars available to serve the Nation's shippers. It found that shortages of varying duration and severity occur both as an annual phenomenon at peak loading periods and also during times of national emergency. The result of these shortages has been that roads were unable to promptly supply freight cars to shippers who had need of them.

Underlying these chronic shortages of available freight cars, the Commission found, was an inadequate supply of freight cars owned by the Nation's railroads. The Commission concluded that one of the principal factors causing this inadequate supply of freight cars was the operation of the national car pool system. In practice this system resulted in freight cars being on lines other than those of the owning road for long periods

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of time, since the rules providing for the return of unloaded freight cars in the direction of the lines of the owning road were observed more often than not in the breach. Since the owning road was deprived of the use of its own freight cars for extended periods of time, the Commission found, there was very little incentive for it to acquire new freight cars. In addition, since a road which owned a supply of freight cars inadequate to serve its own on-line shippers could generally, by hook or by crook, arrange to utilize cars owned by other roads, the national car pool system significantly reduced the normal incentive for a railroad to acquire sufficient equipment to serve its customers. The rules promulgated by the Commission are intended to make those railroads whose undersupply of freight cars contributes to the national shortage more directly feel the pinch resulting from the shortage which they have helped to cause. By thus requiring each road to face up to any inadequacies in its ownership of freight cars, the rules are intended in the long run to correct the nationwide short supply of freight cars which the Commission has found to exist.

Central to the justification for the Commission's promulgation of these rules is its finding that there was a nationwide shortage of freight car ownership. The court below assumed the correctness of that finding, and we conclude that it was supported by substantial evidence.

Shortly after the Second World War, the Commission conducted an investigation into the adequacy of freight car supply and utilization by the Nation's railroads. The Commission in that proceeding concluded that there was "an inadequacy in freight car ownership by rail carriers as a group." Recognizing that this inadequacy was caused at least in part by the inability of the rail-

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roads to acquire new equipment, first during an era of wartime demand and then during an era of post-war boom, the Commission at that time imposed no obligation on the railroads except to require them to file with it their rules and regulations with respect to car service.

In 1963 the Commission began this investigation into the adequacy of car ownership, distribution, and utilization. At the conclusion of the investigatory phase of the proceeding in 1964, the Commission determined that there was a shortage of freight cars in general service. 323 I. C. C. 48 (1964). Formal notification of proposed rulemaking was then issued, and a questionnaire was submitted to the various railroads for the purpose of compiling data on car ownership and use. After this data was gathered, railroads, shippers, and other interested parties were permitted to file verified statements providing further factual material and to adduce legal arguments. The Commission, through its Bureau of Operations, presented to the Hearing Examiner tabular collations of the freight car ownership and use data, and suggested a formula by which a railroad might compute the sufficiency of its freight car ownership. The Bureau also proposed that the entire Code of Car Service Rules adopted by the Association of American Railroads be promulgated by the Commission for mandatory observance.

Many railroads and shippers opposed mandatory enforcement of the rules. Some roads and shippers appeared in favor of at least some mandatory enforcement of the rules, arguing that unless some compulsion were used in enforcing them, cars purchased by a railroad for use by its shippers would continue to be detained for inordinately long periods of time by other roads.

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After 50 days of hearings, the Trial Examiner issued his report, recommending against mandatory enforcement of the car service rules. Although the Commission, prior to referring the matter to him, had previously made a definitive finding that a shortage of freight cars existed, the Examiner's report stated that there was no competent evidence in the record developed before him upon which such a determination could be made. The Examiner assigned several reasons for recommending against mandatory enforcement of the rules.

The Commission issued a comprehensive opinion disagreeing with the trial examiner in many respects, and ordering that two of the car service rules be promulgated as rules of the Commission with sanctions attaching to noncompliance. Finding that "the continuing relocation of cars on owner's lines is of major importance to the maintenance of an adequate car supply,"² the Commission concluded that the inconvenience in switching and delays feared by the shippers was outweighed by the long term benefit which would accrue from the mandatory enforcement of the two car service rules.

After its first order adopting the two rules was issued, the Commission considered claims that there was need for some procedure for exceptions to the mandatory enforcement of the rules. A supplemental order then established another rule which permitted the railroads to seek exception from the Commission's Bureau of Operations, in order to alleviate inequities and hardships.³

² 335 I. C. C. 264 (1969).

³ "Rule 19—Exceptions

"Exceptions to the rules (prescribed by the Interstate Commerce Commission for mandatory observance) for the purpose of further improving car supply and utilization, increasing availability of cars to their owners, improving the efficiency of railroad operations,

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The court below held that the rules were not "reasonable," as that term is used in the Esch Act, for three reasons. First, although there was a general finding of a nationwide freight car shortage, the court said that a specific shortage on owner lines should have been found in order to justify the promulgation of these rules. Second, it said there should have been a finding as to the financial effects upon the railroads and shippers who would be affected by the rules. Finally, it supported its conclusion that the rules were not "reasonable" by the fact that even though violation of the rules could be enforced by monetary penalties, the Commission nonetheless conceded that the obtaining of complete compliance with them would be impossible.

The standard of judicial review for actions of the Interstate Commerce Commission in general, *Western Chemical Company v. United States*, 271 U. S. 268 (1926), and for actions taken by the Commission under the authority of the Esch Act in particular, *Assigned Car Cases*, 274 U. S. 564 (1927), is well established by prior decisions of this Court. We do not weigh the evidence introduced before the Commission; we do not inquire into the wisdom of the regulations which the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported. In judicially reviewing these particular rules promulgated by the Commission, we must be alert to the differing standard governing review of the Commission's exercise of its rulemaking authority,

or alleviating inequities or hardships, may be authorized by the director or assistant director of the Bureau of Operations, Interstate Commerce Commission, Washington, D. C."

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on the one hand, and that governing its adjudicatory function, on the other:

"In the cases cited, the Commission was determining the relative rights of the several carriers in a joint rate. It was making a partition; and it performed a function quasi-judicial in its nature. In the case at bar, the function exercised by the Commission is wholly legislative. Its authority to legislate is limited to establishing a reasonable rule. But in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission, like other legislators, may reason from the particular to the general." *Assigned Car Cases*, 274 U. S. 564, 583 (1927).

The findings of the Commission as to a nationwide shortage of freight cars was based primarily on data submitted by the railroads themselves covering the years 1955 through 1964. Over this 10-year period total freight car ownership of Class I railroads dropped 12.4%, and aggregate carrying capacity of those railroads dropped 5%. Over the same period revenue tons originated dropped 2.9%. The decline in ownership of plain box cars, as opposed to more sophisticated types of cars, was even more dramatic; ownership of cars over the 10-year period in question dropped 22.1%, while aggregate carrying capacity of such cars dropped 18.9%. Testimony of witnesses for the National Industrial Traffic League, the Western Wood Products Association, the American Plywood Association, and the Vulcan Materials Association also supported the finding of a car shortage. These statistics, taken together with the Commission's post-war determination of a car shortage, portray a gradually worsening ratio of carrying capacity to revenue tons originated.

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The Commission further found that freight car shortages, in the sense that a particular road was unable to promptly supply freight cars to particular shippers who needed them, have occurred chronically, both during peak loading seasons each year and during times of national emergency. It is quite true, as appellees suggest, that inability of the roads to supply cars to shippers at particular times is not conclusive evidence that there is a national shortage of freight car ownership. Conceivably, freight car ownership could be adequate, yet poor utilization of the supply results in shortages. Nonetheless, the Commission may fairly rely on these chronic shortages in availability of freight cars as one factor upon which to base its conclusion that there was an overall shortage of ownership of freight cars.

The Commission also found that a surprisingly low percentage of freight cars was actually on the tracks of the roads owning the cars at any given time, and that this percentage had been decreasing during the period in question. In March, 1966, less than 30% of the railroads' plain box cars were on the line of their owner, and during the preceding year that percentage remained mostly in the low thirties. The Commission summarized the factual situation it found in these words:

"From the evidence adduced and the data collected, it is obvious that an adequate freight car supply is as much a problem today as it was during the period considered in our last proceeding in 1947. Car service which involves a shortage of approximately one out of every ten cars ordered or even one out of every fifteen cars ordered demands that every available means be marshalled to eliminate such deficiencies."

One of the means marshalled by the Commission to eliminate such deficiencies was the promulgation of the two rules under attack here. The thrust of these rules

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is to require that freight cars after unloading be dispatched in the direction of the lines of the owning road.

Thus the Commission concluded after investigation that the railroads were frequently unable to supply shippers with freight cars. It reasoned from this fact, and from statistics showing a significantly more rapid decline in aggregate carrying capacity than in revenue tons originated, that an underlying and important cause of the unavailability of box cars to shippers was that the Nation's railroads simply did not jointly own a sufficient number of freight cars to adequately serve shippers of goods over their lines. Because of the existence of the national pool of freight cars, whereby roads may service on-line shippers with foreign cars, it was difficult, if not impossible, to relate inadequate ownership statistically to any particular road or roads. The Commission therefore chose to make mandatory two of the car service rules which would have the effect of aligning more closely than at present the ownership of freight cars on the part of the road with the availability of those freight cars to the owning road for use of its on-line shippers. The result of these rules, over the long term, the Commission reasoned, would be to bring home to those roads who themselves had an inadequate supply of cars to serve their on-line shippers that fact, and also without doubt to supply incentive to such roads to augment their supply of freight cars in order to adequately serve their on-line shippers. The national supply of freight cars would thereby be augmented, and the railroads as a result would be better able to supply the needs of shippers.

Appellees' fundamental substantive contention is that the short term consequences of the enforcement of these rules will so seriously disrupt established industry practices as to outweigh any possible long term benefits in

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service which might accrue from them, and that therefore the rules are not "reasonable" as that term is used in the Esch Act.⁴ While of course conceding that the railroads themselves originally promulgated the rules for voluntary compliance, appellees argue that because the rules have been observed largely in the breach, usages and practices have grown up which permit far more efficient utilization of the existing fleet of freight cars than would be permitted if the two rules in question were enforced by the Commission. Appellees state that in reliance on the existence of a national pool of freight cars, and on the consequent availability to shippers of cars not owned by the line originating the shipment, manufacturing plants have been located and enlarged. They claim that enforcement of the rules now would seriously hamper the movement of freight traffic from these and other shipping points.

It may be conceded that the immediate effect of the Commission's order will be to disrupt some established practices with respect to the handling and routing of freight cars, and on occasion to cause serious inconvenience to shippers and railroads alike. If the Commission were thrusting these regulations upon an admittedly smoothly functioning transportation industry, well supplied with necessary rolling stock and adequately serving all shippers, the rationality of its action might well be open to question.

But such is not the case. The Commission's finding that there are recurring periods of significant length

⁴ Three separate briefs have been filed here in support of appellees, each of which understandably presents the case for affirmance in slightly differing form, and no one of which completely adopts the reasoning of the District Court. We have not found it necessary in deciding the case to deal with each separate argument in support of affirmance, since we believe all of them to be generally subsumed under those claims with which we deal.

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when there is not an adequate freight car supply to service shippers is supported by substantial evidence. While the flexible system of routing freight cars presently in existence may well have short term advantages both for some shippers and some roads, the Commission could quite reasonably conclude that it has long term drawbacks as well. The otherwise adverse effect on a road's ability to serve shippers which would result from its owning too few cars is cushioned; the beneficial effect on a road's ability to serve shippers which would result from its owning a sufficient supply of cars is dissipated. The Commission undoubtedly felt that rules designed only to most efficiently utilize the existing inadequate fleet of freight cars would have little or no effect on the nationwide shortage of such cars. Indeed, the appellees stress the concession by the Commission that these rules "are not designed to improve the utilization of freight cars, except insofar as return loading is compatible with the primary objective of increasing availability of cars to the owner."

But only if we were to hold that Congress, in enacting the Esch Car Service Act, intended that the only criterion which the Commission might consider in establishing "reasonable rules, regulations, and practices with respect to car service" was the optimum utilization of an existing fleet of freight cars, however numerically inadequate that fleet might be, could this argument be sustained. Neither the language which Congress used nor the legislative history of the Act supports such a narrow reading of its grant of authority to the Commission. On the record before it, the Commission was justified in deciding that the railroads and the shippers were afflicted with an economic illness which might have to get worse before it got better. Existing practices respecting car service tended to destroy any incentive on the part of railroads to acquire new cars, and

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the resulting failure to acquire new equipment contributed to an overall nationwide shortage of freight cars which prevented the railroad industry from adequately serving shippers. Cars service rules which would tend to restore incentive to the various roads to augment their supply of freight cars, even at the temporary expense of optimum utilization of the existing fleet of freight cars, conform under these circumstances to the statutory requirement of reasonableness.

Appellees support their claim that the Commission's promulgation of these rules is not "reasonable" under the Esch Act on two grounds not directly related to the rules' claimed adverse effect on the ability of the roads to serve shippers. They attack the absence of a Commission finding as to the financial ability of roads inadequately supplied with freight cars to purchase new ones, and they cite the conceded impossibility of obtaining complete compliance with the rules as additional evidence of their unreasonableness.

The Commission's order does not require any road to purchase any freight cars. It abridges to some extent the existing practice among railroads of treating the freight cars which they own as a pool, and for that reason may ultimately cause roads which do not have an adequate supply of freight cars to serve on-line shippers to be less able to serve such shippers than they are now. If, as a result of this fact, such roads are placed under economic and competitive pressure to acquire additional freight cars, there is certainly no principle of law we know of which would require the Commission to permit them to avoid this economic pressure by continuing to borrow freight cars acquired and owned by other lines.

The Commission, acceding to the arguments of shippers and railroads on rehearing, agreed that mandatory total compliance with the rules promulgated would be impossible in view of the tremendous number of units

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involved, and accordingly a procedure by which exceptions might be applied for was established. How the provision for exceptions will be administered in practice is a matter about which we could only speculate at present. It is well established that an agency's authority to proceed in a complex area such as car service regulation by means of rules of general application entails a concomitant authority to provide exemption procedures in order to allow for special circumstances. *Permian Basin Area Rate Cases*, 390 U. S. 747, 784-786 (1968). What bearing any of these factors might have on an action under the provisions of 49 U. S. C. § 1 (17) for the collection of penalties for a violation of the rules in question is a question best decided in such a proceeding. The fact that violation of a rule promulgated under the Esch Car Service Act may be the basis for a proceeding to collect a penalty does not either expand or contract the statutory definition of "reasonable" found in that Act.

What we have said thus far is enough to indicate our view that there is sufficient relationship between the Commission's conclusions and the factual bases in the record upon which it relied to substantively support this exercise of its authority under the Esch Act. Appellees press on us an additional claim that the Commission failed to comply with the provisions of the Administrative Procedure Act, 5 U. S. C. § 551, *et seq.*, citing *Burlington Truck Lines v. United States*, 371 U. S. 156 (1962) and *Secretary of Agriculture v. United States*, 347 U. S. 645 (1954). *Burlington Truck Lines* is clearly inapposite, however, since in that case the Court was dealing with adjudication, not rulemaking. In criticizing the Commission's action there, the Court said that "the Administrative Procedure Act will not permit us to accept such adjudicatory practice," 371 U. S. 156, 167. In *Secretary of Agriculture v. United States*, *supra*, the

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Court reviewed the Commission's action, not under the Administrative Procedure Act, but on the basis of its prior cases establishing the standard for judicial review of agency action. Commenting that "in dealing with technical and complex matters like these, the Commission must necessarily have wide discretion in formulating appropriate solutions," the Court went on to conclude that the Commission "has not adequately explained its departure from prior norms and has not sufficiently spelled out the legal basis of its decision." 347 U. S., at 652-653. For the reasons previously stated, we find no such infirmities here.

This Court has held that the Administrative Procedure Act applies to proceedings before the Interstate Commerce Commission. *Minneapolis & St. Louis R. Co. v. United States*, 361 U. S. 173, 192 (1959). Appellees claim that the Commission's procedure here departed from the provisions of 5 U. S. C. §§ 556 and 557 of the Act. Those sections, however, govern a rule-making proceeding only when 5 U. S. C. § 553 so requires. The latter section, dealing generally with rulemaking, makes applicable the provisions of §§ 556 and 557 only "when rules are required by statute to be made on the record after opportunity for an agency hearing" The Esch Act, authorizing the Commission "after hearing, on complaint or upon its own initiative without complaint, [to] establish reasonable rules, regulations, and practices with respect to car service" 49 U. S. C. § 1 (14)(a), does not require that such rules "be made on the record." 5 U. S. C. § 553. That distinction is determinative for this case. "A good deal of significance lies in the fact that some statutes do expressly require determinations on the record." 2 K. Davis, *Administrative Law Treatise*, § 13.08 p. 225 (1958). Sections 556 and 557 need be applied "only where the agency statute, in addition to providing a

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hearing, prescribes explicitly that it be 'on the record.'"⁵ *Siegel v. Atomic Energy Commission*, 400 F. 2d 778, 785 (CADC 1968); *Joseph E. Seagram & Sons Inc. v. Dillon*, 344 F. 2d 497, 500 n. 9 (CADC 1965). Cf. *First National Bank v. First Federal Savings and Loan Assn.*, 225 F. 2d 33 (CADC 1955). Because the proceedings under review were an exercise of legislative rulemaking power rather than adjudicatory hearings as in *Wong Yang Sung v. McGrath*, 339 U. S. 33 (1950), and *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U. S. 292 (1937); and because 49 U. S. C. § 1 (14)(a) does not require a determination "on the record" the provisions of 5 U. S. C. §§ 556, 557, were inapplicable.

This proceeding therefore, was governed by the provisions of 5 U. S. C. § 553 of the Administrative Procedure Act, requiring basically that notice of proposed rulemaking shall be published in the Federal Register, that after notice the agency give interested persons an opportunity to participate in the rulemaking through appropriate submissions, and that after consideration of the record so made the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.⁶ The "Findings" and "Conclusions" embodied in the Commission's report fully comply with these requirements, and nothing more was required by the Administrative Procedure Act.

We conclude that the Commission's action in promulgating these rules was substantively authorized by the Esch Act and procedurally acceptable under the Administrative Procedure Act. The judgment of the District Court must therefore be

Reversed.

⁵ 49 U. S. C. § 1 (14)(a) likewise requires the Commission to conduct a hearing before promulgating rules.

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

March 31, 1972

Dear Chief:

As I may be out of the city when you make
this week's assignments, may I suggest that No.
71-227 - United States v. Allegheny Ludlam Steel
Corp. be assigned to Bill Rehnquist.

W.O.D.

The Chief Justice

* if the vote is
albin is final

May 31, 1972

Re: No. 71-227 United States v. Allegheny-
Ludlum Steel Corp.

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

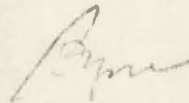
May 31, 1972

Re: No. 71-227 - United States v. Allegheny-
Ludlum Steel Corp.

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Rehnquist

Copies to Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 31, 1972

No. 71-227 - U.S. v. Allegheny-Ludlum Steel

Dear Bill,

I am glad to join, with thanks, your
opinion for the Court in this case.

Sincerely yours,

PS
1.31

Mr. Justice Rehnquist

Copies to the Conference

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

May 31, 1972

CHAMBERS OF
THE CHIEF JUSTICE

No. 71-227 -- U.S. v. Allegheny Ludlum Steel Corp.

Dear Bill:

I voted to affirm in this case but your opinion
persuades me to go along.

Please join me.

Regards,

W E B

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 1, 1972

Re: No. 71-227 - U.S. v. Allegheny-Ludlam
Steel Corporation

Dear Bill:

Please join me.

Sincerely,

H.A.B.
—

Mr. Justice Rehnquist

cc: The Conference

[illegible]