

Supreme Court of the United States

October
██████████ TERM, 1969

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In the Matter of:

-----X
CITY OF CHICAGO, ET AL.,
Appellants,
vs.
UNITED STATES, ET AL.,
Appellees.

Docket No. 101

-----X
CITY OF CHICAGO, ET AL.,
Appellants,
vs.
UNITED STATES, ET AL.,
Appellees.

Docket No. 102

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C O N T E N T S

1	<u>ORAL ARGUMENT OF:</u>	<u>P A G E</u>
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4	Howard E. Shapiro, Esq. on behalf of U. S. and I.C.C., in support of	
5	Appellants	10
6	James W. Hoeland, Esq. on behalf of Appellees other than the	
7	United States and I.C.C.	21
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IN THE SUPREME COURT OF THE UNITED STATES

October

TERM 1969

CITY OF CHICAGO, ET AL.,)

Appellants)

vs)

No. 101

UNITED STATES, ET AL.,)

Appellees)

CITY OF CHICAGO, ET AL.,)

Appellants)

vs)

No. 102

UNITED STATES, ET AL.,)

Appellees)

Washington, D. C.
November 20, 1969

The above-entitled matter came on for argument at
1:45 o'clock p.m.

BEFORE:

- WARREN E. BURGER, Chief Justice
- HUGO L. BLACK, Associate Justice
- WILLIAM O. DOUGLAS, Associate Justice
- JOHN M. HARLAN, Associate Justice
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice

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

2 MR. CHIEF JUSTICE BURGER: Number 101, City of
3 Chicago against the United States and Number 102, the same
4 parties.

5 Mr. MacDougall, you may proceed whenever you are
6 ready.

7 ORAL ARGUMENT BY GORDON P. MAC DOUGALL, ESQ.

8 ON BEHALF OF APPELLANTS

9 MR. MAC DOUGALL: MR. Chief Justice and may it please
10 the Court, I appear for the Appellants and my argument time is
11 being shared by Counsel for the United States and the Interstate
12 Commerce Commission, because the Government has aligned itself
13 in this case on the Appellant's side.

14 These are two direct appeals from two cases heard
15 together by a Three-Judge District Court for the Northern
16 District of Illinois. These two cases were suits to review the
17 action of the Interstate Commerce Commission in allowing to be
18 discontinued a portion of one passenger and all of another
19 passenger train.

20 The press of this continuance involved the Chicago to
21 Evansville segments of the Georgian Train which operates from
22 Chicago to Atlanta; and a complete discontinuance with the
23 Hummingbird Train which operates from Cincinnati to New Orleans.
24 The interconnection is at Nashville.

25 Appellants had a substantial interest in this service

1 since these are the only trains -- the only daily trains from
2 Chicago to Terre Haute, Vincennes, Evansville, Chattanooga,
3 Mobile and now the only daily service from Chicago to Nashville
4 and Montgomery, Alabama.

5 The Court Below dismissed both of the actions for
6 lack of jurisdiction and the Court said that Congress intended
7 to deny judicial review to the public because when the carrier
8 prevails at the ICC the order is one discontinued investigation.

9 On the other hand, if the railroad loses at the I.C.C.
10 the order is one requiring a continued train operation and the
11 railroad can go to court.

12 And we think this is unfair and the reason to think
13 it's legally unfair is that Congress never intended the unfair
14 result and there is nothing in the legislative history to
15 suggest that the public can't go to court, but the railroads
16 can go to court.

17 Q What you mean is that you think it's illegal

18 A Well, the question --

19 Q And we get into this same question about
20 unfairness --

21 A I just thought I'd mention the word "unfair-
22 ness" since it's come up today. Two of the Lower Court deci-
23 sions which we rely on did use the word "unfair," and said that
24 Congress could not be presumed to have intended such an unfair
25 result.

1 Q Well, that's quite a different argument.

2 A The Appellants here today are seven regula-
3 tory commissions: One state; nine communities; three labor
4 organizations; and one railroad passenger association.

5 We are supported in an amicus brief by the National
6 Associate of REGULATORY Commissioners, Utility Commissioners,
7 representing all of the State Commissions for the 50 States,
8 the Virgin Islands, Puerto Rico and the District of Columbia.

9 The Appellees are the Chicago and East Illinois
10 Railroad and the Louisville and Nashville Railroad.

11 The sole issue before the Court, in our judgment,
12 is whether Congress did intend to deny judicial review to the
13 public, while granting such judicial review to the railroads.
14 There is no question of standing involved. Eight District
15 Courts have expressly passed upon the issue. Two earlier
16 decisions in 1965 held there was no judicial review for the
17 public. And all of the decisions since then have held to the
18 opposite, that there is judicial review.

19 And one of these other decisions was rendered by a
20 Three-Judge Court for the same Northern District of Illinois
21 after the judgments below were entered.

22 Now, the statute we have here is Section 13-A(1) of
23 the Interstate Commerce Act, which became law in 1958. And
24 contrary to the opinion below, there is nothing in the language
25 or the legislative history of 13-A(1) to suggest that Congress

1 intended to deny judicial review.

2 The general framework of the Interstate Commerce
3 Act is that decisions of the Commission are subject to judicial
4 review. There is nothing unusual about an order discontinuing
5 an investigation at the Commission. This is what they do in
6 virtually all of their rate cases and those decisions have been
7 subject to review; reviewed by this Court ever since the
8 Rochester decision in 1939 and the Administrative Procedure
9 Act in 1946.

10 The Commission institutes an investigation of a
11 freight rate and finds it lawful, the order is one discontinued
12 investigation. Exactly the one which Appellants were denied
13 judicial review for here.

14 Now, the lower court based -- primarily based its
15 opinion on the wording of the statute. And they said that
16 where the railroad files a notice and elects to supercede state
17 jurisdiction the I.C.C. has authority in that 30-day notice
18 period to either institute investigation or not. If it doesn't
19 institute an investigation the Lower Court held that the train-
20 off becomes effective pursuant to the statute.

21 Q And is that -- do you concede that; that if
22 no investigation is initiated by the Commission within the
23 period then do you concede that that's the end of it?

24 A No, I don't think so. In fact, the --

25 Q I thought we had decided in the New Jersey

1 case in 358 U.S.

2 A Well, right. In the New Jersey case that was
3 a pro curiam affirmance.

4 Q Yes; but nonetheless, it was a decision on
5 the merits.

6 A Well, we don't concede it and the Government,
7 in its brief, does not concede it --

8 Q They don't?

9 A No; I think they use the words "patent
10 abuse" -- absent patent abuse. There could be situations, I
11 think, where the discretion of the Commission is subject to
12 abuse and we can go to court.

13 The author of the opinion in New Jersey below, did
14 recognize such a situation later.

15 Q You mean in that case?

16 A In that case --

17 Q That was --

18 A Yes, that's right; it was --

19 In that case -- in the next case to come along is 200 Fed.
20 sub, where you had another suit -- another type situation. He
21 did -- because there the question was whether the I.C.C. had
22 jurisdiction at all.

23 And that case did come here. You reversed on other
24 grounds.

25 The New Jersey case was a ferry case and before

1 Section 13a(1) -- a ferry across the harbor there and the
2 Commission had initially before 13a(1) was passed, had held
3 that the ferry was unwarranted. And that was upset in court
4 on the grounds that it was not an entire abandonment of line,
5 but that they were just going to have scows across the harbor.

6 So, Congress passed 13a(1). The carrier then
7 invoked 13a(1) and the Commission declined to institute an
8 investigation and in its notice, said one of the reasons was
9 the prior report. We have already investigated this.

10 And that's the State of New Jersey case and I don't
11 think that the courts are precluded from judicial review in this
12 30-day period. It depends on the use of discretion. If you
13 could have a bad-enough case, corruption at the Commission,
14 something like that, possibly you would get judicial review.

15 Q But your argument there, or am I mistaken in
16 thinking that your argument in no way depends upon that issue?

17 A That's right. This was given great weight
18 by the Court Below. They used this nonreviewability concept
19 based on the State of New Jersey, and said, well, since that
20 -- since a train would come off at the end of 30 days without --

21 Q That's the Appellant's argument, but your
22 argument in no way depends -- you could concede, as I understand
23 your argument at least, that the authority of the Commission to
24 hold a hearing and then discontinuance of the service is non-
25 reviewable and still may be basic to the argument you are now

1 making.

2 Yes, because --

3 Q Which is the mutuality argument.

4 A Well, I point out that Section 1336(a) of
5 Title 28 says that you can go to court with any order of the
6 Interstate Commerce Commission. The question is whether an
7 order discontinuing an investigation is such an order.

8 Now, where the Commission doesn't investigate the
9 case there is no order; it's a notice. There is no such thing
10 as an order issued.

11 And that really is our case in a nutshell. The
12 second reason given by the Court Below is that if you allow
13 judicial review why, you will have delays and it was a Cong-
14 ressional purpose to stop the delays that were occurring at
15 the State Commission level. And Congress set up a dual system.

16 Most train-~~66fs~~ today are before the State Commis-
17 sions, not the I.C.C. Section 13a(1) is not self-executing
18 statute; not self-- a carrier has to file notice and that act
19 supercedes the state jurisdiction.

20 WE have a situation where this statute has been set
21 up and Congress answered the delay problem by imposing a 12-
22 month limitation upon the Interstate Commerce Commission. That's
23 where they answer to the delay -- you have judicial review in
24 State Commissions and there is no reason why you can't have
25 judicial review in I.C.C. decisions.

1 The Louisville and Nashville in our brief, suggests
2 that if you have judicial review you are going to have injunc-
3 tions.

4 Our answer to that is that's all right, but that
5 issue is not before this Court, because the Louisville-Nashville
6 stopped the train at Birmingham and the application for a stay
7 was denied, so the question of injunctions or stays pendente
8 lite are not before the Court now.

9 The sole issue is whether there is ultimate judicial
10 review and this is an important case to Chicago and to the
11 Southern States involved and to all regulatory commissions.
12 And we ask that the judges below be reversed.

13 MR. CHIEF JUSTICE BURGER: Mr. Shapiro.

14 ORAL ARGUMENT BY HOWARD E. SHAPIRO, ESQ.

15 ON BEHALF OF U. S. AND I.C.C.

16 IN SUPPORT OF APPELLANTS

17 MR. SHAPIRO: Mr. Chief Justice and may it please
18 the Court: The United States and the Interstate Commerce
19 Commission, although defendants below, support the right of the
20 Appellant's/^{to}obtained judicial review of the Commission's decision
21 permitting discontinuance of the trains involved in this case.

22 We do so for two legal reasons: First, that under
23 the criteria applicable to review of the administration action,
24 as incorporated in the Administrative Procedure Act, the Commis-
25 sion's decisions in these cases represent agency action which is

1 reviewable.

2 And second, nothing in the history of the statute
3 or in its text indicate that the Congressional intent to
4 foreclose judicial review that would otherwise be available.

5 Now, the Commission's decision in these two cases --

6 Q Well, can't you argue Congress intended to
7 put it within the discretion of the agency and hence, except
8 it from review?

9 A No, Your Honor, I don't think that Congress
10 did intend to put this --

11 Q What about the decision to investigate at
12 all?

13 A The decision to investigate at all rests on
14 a slightly different basis.

15 Q Well, that is in the discussion of the agency.

16 A That is within the

17 Q And nonreviewable?

18 A And is nonreviewable.

19 Q So you agree with the New Jersey case?

20 A We agree with the New Jersey case.

21 Q But once you start to undertake an investiga-
22 tion --

23 A Once an investigation is undertaken --

24 Q You can't, even though you discontinue it;
25 even though you don't follow through, but just as you did here,

1 as I understand it; didn't you? Entered an order discontinuing
2 the --

3 A Now, let me turn to that order because I
4 think that's really the heart of our problem here.

5 Q There wouldn't be any need for an order; they
6 could just quite all of a sudden.

7 A That's right. If Your Honors will look in the
8 record at Page 41 and at Page 67, you will see the two basic
9 orders that the Commission entered here. Now, those orders
10 were entered after a full hearing --

11 Q What's the second page?

12 A 67, Your Honor.

13 Q Thank you.

14 A Those orders were entered after a full hear-
15 ing on the merits.

16 Incidentally, that is the only kind of investigation
17 the Commission can give in this copy under 13a(1) if it is
18 going to have power to order the railroad to continue the train.
19 It cannot order the railroad to continue the train without
20 conducting a hearing, so once it opens an investigation there
21 has to be a full hearing.

22 Now, what it does --

23 Q Oh, you have to go right through it?

24 Q Can't you stop it in the middle and --

25 A It is conceivable that the railroad --

1 Q And if you did, then the railroad could
2 simply discontinue the train --

3 A The Commission -- it is conceivable that the
4 Commission might find that it opened its investigation impro-
5 vidently. But in this situation and in most situations it
6 goes all the way through with a full administrative hearing,
7 in which it applies the substantive standard of Section 13a(1).

8 Q Do you think maybe there may be some other
9 situations besides the decision to open the hearing where a
10 review wouldn't be had; but that if they go this far anyway,
11 there should be a review?

12 A Yes, Your Honor. What they do as the orders
13 reflect in Pages 47 to 67, is make findings of fact and con-
14 clusions which are incorporated into the Commission's order.

15 Q What would be the judicial remedy to con-
16 tinue the investigation?

17 A The judicial remedy for --

18 Q Suppose the Court thought that the Commission
19 was wrong, assuming that it is reviewable; what would be the
20 judicial remedy?

21 A To set aside the Commission's order and
22 remand the case to the Commission --

23 Q To continue the investigation?

24 A -- and in effect, the -- discontinuing the --

25 Q The Commission hasn't ordered any

1 discontinuance; they just stopped an investigation.

2 A The Commission would have to reopen the
3 matter and make a redetermination, looking toward a direction
4 for the railroads --

5 Q Start -- renew the investigation.

6 A Renew the investigation --

7 Q Well, I'm a little confused. I gather, for
8 example in this instance, what happened was -- on the formal
9 order is that discontinuance of the investigation. That, I
10 take it means that the railroad then is free to go ahead with
11 its discontinuance of the trains.

12 A But the discontinuance, if I can get back to
13 these two orders. Discontinuance is based upon the Commission's
14 findings of fact --

15 Q I understand this.

16 A -- and those findings of fact apply to the
17 substantive standards of the Act.

18 Q I understand that, but what I'm trying to
19 get is on judicial review of this order, as I understand it,
20 if the Court disagrees with the Commission's discontinuance in
21 the investigation, what is there left except that when it
22 comes back to the Commission the Commission order the railroad
23 to continue the service?

24 A That is exactly what would happen.

25 Q That's all that would happen; there would be

1 no more hearings or anything; would there?

2 It would depend on the nature of the remand, pre-
3 sumably. Presumably, if the Commission found that there was no
4 substantial evidence to support the decision or apply the wrong
5 legal standards then the Commission would have to direct the
6 railroad to continue with the train in effect for another year.
7 That is what the statute would provide.

8 So that what we've got is an order here which does
9 more than just discontinue the investigation; it makes a sub-
10 stantive determination and that substantive determination has a
11 substantial impact on the communities affected and because of
12 that impact it amounts to a reviewable order.

13 Q I take it that you think, then, that as soon as
14 they start an investigation the standards of the Act take over
15 and that it has to be consistent with the public interest for
16 the Commission to permit the trains to be discontinued.

17 A That is correct. What the Commission has to
18 decide --

19 Q Although the Act really puts the standard
20 only in the event that they want to order the trains to be
21 continued.

22 A Well, in determining whether there should be
23 an investigation, of course, they have to consider the stand-
24 ards of the Act. But there's more to it.

25 When an agency is going to decide whether or not

1 to investigate something, not only is it considering the sub-
2 stantive standards involved, but also it has to take into
3 account other considerations: resources, the situation -- the
4 importance of the termination to the area affected and so on.

5 Q Well, tell me this, Mr. Shapiro: I gather
6 that Congress enacted this law, as I recall it, out of some
7 impatience with the delays and -- in getting trains discontinued,
8 didn't they?

9 A That is correct.

10 Q Where properly railroads should be allowed to
11 discontinue service was all tied up with the state and the
12 commission hearings and everything else and sometimes years
13 went on before they succeeded; is that it?

14 A That is the purpose of the statute --

15 Q And certainly that's action contemplated some
16 kind of summary procedure; didn't it?

17 A It contemplated an expedited procedure; not
18 necessarily a summary procedure. That's why they --

19 Q Well, isn't it summary to the extent that the
20 Commission decides not to investigate, as I understand it, what
21 washheld in the New Jersey case, is silent; namely: that is
22 not judicial review. Well, that ends the whole business and
23 the railroad discontinues its service.

24 A And the reason it does, Your Honor, is
25 because under the criteria governing judicial review, in the

1 Administrative Procedure Act, the decision of whether to open
2 an investigation or not is committed to the agency's discretion
3 and hence is not reviewable.

4 Once it has taken agency action it has a substantial
5 impact on people who are protesting that action and were
6 affected by it.

7 Q And then, of course, the other thing is that
8 you have got only four months to act when you do investigate;
9 don't you?

10 A The Commission can take more than four months
11 but its suspension of the railroad's discontinuance is only
12 four months. And the Commission endeavors to wind these pro-
13 ceedings up rapidly.

14 Q In other words, another one of those things
15 that isn't fair; is that it?

16 A It boils down in a sense, to a fairness
17 question.

18 I'd say only that on the law, what you've got here
19 is a declaratory order, in effect, of the kind that was used in
20 the Frozen Food Express case. And there the Court held that an
21 order that simply had the effect of declaring what certain
22 rights -- Commission order declaring certain rights under the
23 Agricultural Exemption to the law, was said to be reviewable.

24 Now, that order, I might say, in the Frozen Food
25 Express case, contained the same language that we have in this

1 case.

2 It makes --the order -- the Commission makes certain
3 findings and incorporates those findings into its order by
4 reference and it said "The investigation is to be discontinued."
5 There is nothing magic in that formula; that's just something
6 the Commission says all the time. It says it in rate pro-
7 ceedings, as Mr. MacDougall pointed out.

8 What we've got here, it seems to the Government, is
9 just a disregard of this Court's decision in Rochester Tele-
10 phone Corporation against the United States. Here we have
11 people who go into the Commission and protest the discontin-
12 uance of a train. They are asking the Commission to order
13 something; order the continuance of that train. They are
14 denied that order.

15 When they are denied an order they have a reviewable
16 situation and in Rochester Telephone this Court said: "An
17 order of the Commission dismissing the complaint on the merits
18 and maintaining the status quo, is an exercise of an administra-
19 tive function; not more nor less than an order directing some
20 change in status. And the Court held that kind of an order to
21 be reviewable in Rochester. And that's all it is here.

22 Now, the Lower Courts have relied, particularly on
23 the United States against the Los Angeles Railway Company, the
24 granddaddy of this line of cases that says that these things
25 aren't reviewable is the State of Minnesota against the United

1 States, a Minnesota Court decision, which picked up the Los
2 Angeles case.

3 The Los Angeles case involved an evaluation order
4 and Mr. Justice Brandeis of this Court said that this order that
5 simply declares what the value of the property is is not a
6 reviewable order, because nothing happens as a result of it.
7 Nobody's ordered to do anything; nobody's affected by it, any-
8 way.

9 Well, this Court held only in that case that the
10 evaluation, since it didn't affect anything, was not ripe for
11 review. The impact of that evaluation order would be felt when
12 and if the Commission did something on the basis of it.

13 So, the Los Angeles case is only a right in this case
14 and is certainly not a basis for denying a review in this kind
15 of situation where I don't think there's any doubt that there's
16 a direct impact which makes the case ripe for review.

17 Now, we have mentioned briefly the legislative his-
18 tory and the desire to expedite the discontinuance of trains
19 to avoid the delays that may occur in the state proceedings.

20 Now, the desire for speed; the desire for expedition
21 is not inconsistent with judicial review. And juridical review
22 doesn't mean that in every case a train whose discontinuance is
23 permitted by the Commission will be kept in operation by the
24 court.

25 Out of some 147 discontinuances after investigation

1 since the Commission -- since this statute was adopted, I
2 think there would have been only nine cases in which temporary
3 relief has been granted pending judicial review.

4 Now, of course, whether temporary relief is going
5 to be granted at all in any of these cases and that's really
6 what the people at the railroads are afraid of, is a matter of
7 the kind of showing made by the Plaintiff in the case. You
8 don't get preliminary injunctions as a matter of course from
9 Three-Judge Courts.

10 The Urgent Deficiencies Act contemplates that the
11 courts are going to act with expedition. And the real issue is
12 expedition in the review process, not denying review altogether.

13 Now, the only other two grounds that I rely upon
14 to deny a review are first, that there is some difference in
15 the substantive standard, between 13a(1) which governs inter-
16 state trains, and 13a(2) which governs intrastate trains.
17 The railroad seem to concede that under 12a(2) there is judicial
18 review.

19 But the answer to that is that this Court has said
20 in Southern Railway Company against North Carolina that the sub-
21 stantive standards are the same. And infact, if we look at
22 them, although there are some slight wording differences, it
23 amounts to the same thing. Publ

24 Does the public convenience and necessary require
25 the continuance of the train; will it unduly burden interstate

1 commerce?

2 Now, we have discussed at some length, the other
3 reason, this a fortiorari argument that if you open an in-
4 vestigation or if you don't open an investigation and it has
5 the same effect as if you did open an investigation. But they
6 are different because the standards for review are different.

7 I think the best analogy one can give is the
8 situation in which the General Counsel of the NLRB issues a
9 complaint. Now, his decision to issue a complaint or not issue
10 a complaint is a matter of his discretion; it's not reviewable.

11 But if he issues a complaint and the NLRB acts on
12 that complaint, that is judicially reviewable.

13 For these reasons and the unfairness of the standard
14 the railroads are arguing which says that commuters and com-
15 munities are not entitled to judicial review, while the rail-
16 roads are, we think the decision of the Court Below is wrong.

17 MR. CHIEF JUSTICE BURGER: Mr. Hoeland.

18 ORAL ARGUMENT BY JAMES W. HOELAND, ESQ.

19 ON BEHALF OF APPELLEES OTHER

20 THAN THE UNITED STATES AND I.C.C.

21 MR. HOELAND: Mr. Chief Justice and may it please
22 the Court: Section 13a(1) of the Interstate Commerce Act is
23 unique among the various provisions of the Act in that the
24 authority to discontinue interstate passenger trains comes
25 directly from the statute and not from any action of the

1 Interstate Commerce Commissioner.

2 It was passed by Congress to meet a pressing problem
3 to enable the railroads to promptly and effectively remove
4 unneeded and not used passenger trains from their system.

5 And we submit, respectfully, that the concept of
6 judicial review will frustrate the very intent under which
7 Congress enacted Section 13a(1).

8 Section 13a(1) is self-implementing and it grants
9 to the carrier upon posting of a 30-day notice, the right to
10 discontinue the train. The Interstate Commerce Commission need
11 do nothing. The statute applies and in 30 days the trains go
12 off.

13 Now, if the Commission orders an investigation they
14 must notify the carrier at least 10 days before the train is to
15 stop; if they don't do that the train goes off at the end of
16 30 days.

17 Then the effect of the 30-day -- of the investiga-
18 tion is to postpone for an additional four-month period the
19 time within which the railroads are authorized by statute to
20 discontinue the trains.

21 Q Now, what happens, Mr. Hoeland, if the hear-
22 ing proceeds and the decision is not to stop; not to stop. Is
23 that subject to judicial review?

24 A It is, indeed, Your Honor, because the Inter-
25 state Commerce Commission can prevent the discontinuance of an

1 interstate train only on the finding by the Commission that a
2 public need exists for the train and that it is not an undue
3 burden on interstate or foreign commerce for the train to be
4 discontinued.

5 Now, this is the only order that can be issued in an
6 investigation proceeding. The discontinuance, although they
7 label it an order, the Commission labels it an order, it is
8 not, in fact, an order because the railroads are simply taking
9 advantage of what the statute grants them: their right to dis-
10 continue.

11 The notice or order as the Commission calls it, is
12 simply a means of notifying the people who participated in the
13 proceeding as to what the Commission has done with the case.
14 If they can't make a specific statutory findings in both of
15 them, then there is no basis under which the railroad can be
16 required to keep the trains for a maximum period of one year.

17 In that regard there is a big difference between the
18 provisions of Section 13a(1) and Section 13a(2) of the Inter-
19 state Commerce Act. A railroad which wants to take off an
20 intrastate passenger train must first proceed before the state
21 regulatory body. If that state does nothing within 120 days
22 or acts unfavorably within that period they then have the right
23 to petition the Interstate Commerce Commission and seek authority
24 from the Commission.

25 This isn't a matter of authority coming from the

1 statute; this authority comes from the Commission. And the
2 railroad has the burden of meeting both of the statutory
3 standards, in order to discontinue an intrastate train.

4 By contrast, the parties other than the Commission
5 -- the Commission must find, rather that both public need
6 requires the continued operation of an intrastate train, and
7 two: that an undue burden would not be placed upon the rail-
8 roads by that continued operation.

9 In other words the Commission has to meet both
10 statutory standards in order for an interstate train to be
11 taken off, whereas the corollary has to be proven by the
12 carriers. The carriers have nothing to prove in a 13a(1)
13 proceeding. They can take off an interstate train for any
14 reason they choose, so long as they publish the required notice.

15 I think it is abundantly clear to everyone that
16 Section 3a is an altogether different section in the Interstate
17 Commerce Act than any other section. The District Court in the
18 New Jersey case, which this Court affirmed in the County of
19 Bergen, made this statement:

20 "Section 13a(1) embodies a new and distinct exer-
21 cise of the Congressional power; its language is clear and
22 unambiguous and therefore it neither admits nor requires any
23 construction by comparison with any other section or subsection
24 of the Interstate Commerce Act, as amended."

25 The statute itself is self-implementing and the other

1 provisions of the Interstate Commerce Act are not. For
2 example, if a railroad seeks to abandon a line of railroad it
3 must do so by applying to the Commission and seeking the
4 Commission's authority. And the only basis under which that
5 authority can be granted is by the Commission issuing a cer-
6 tificate that present or future public convenience and necessity
7 permits. It's the Commission's decision; the Commission's
8 authority. That is totally different from what is involved in
9 Section 13a(1).

10 I might say that the Commission itself has con-
11 sistently recognized that it is not given the authority to
12 approve to disapprove any interstate train from discontinuance
13 under Section 13a(1).

14 In the Great Northern case 307 ICC 59, Case 76, they
15 specifically held that we have no discretion to approve or
16 disapprove of a proposed discontinuance. Our duty is, in
17 appropriate cases, to investigate the facts and only if such
18 investigation warrants the findings specified in the statute
19 may require a railroad to continue or restore the service
20 which is the subject of the investigation.

21 Q How do you distinguish that from, when you
22 say it's not an approval or disapproval?

23 A I distinguish that, Your Honor, with respect
24 to perhaps a Section 13a(2) proceeding before the Interstate
25 Commerce Commission. They are there called upon to approve or

1 disapprove the proposal of the railroad to discontinue the
2 trains.

3 The statute does not give -- 13a(1) does not give
4 to the Commission the power to disapprove or approve. The
5 statute gives the Commission only one bit of limited veto
6 power, limited jurisdiction to require the railroad to continue
7 to operate the trains for an additional year if the Commission
8 finds after investigation: (1) That there is a public need
9 for the trains and (2) that continued operation would not con-
10 stitute an undue burden.

11 Unless the Commission can make both of those findings
12 the railroad discontinues the train by operation of statute and
13 not by any Commission order or lack of order and this is why
14 you get to the question of fairness or lack of fairness you
15 do not have -- you only have an order issued by the Commission
16 in those instances and when the Commission orders a railroad
17 to continue the operation for a year.

18 As this Court has held in the Atlantic Coastline
19 case -- I.C.C. versus Atlantic Coastline, that a Commission order
20 is reviewable if it determines rights or obligations from which
21 legal consequences may flow.

22 I respectfully submit that there are no legal rights
23 in the interest of the Appellants in this case to which they
24 are entitled to judicial review and I think that this Court has
25 answered that question in the New Jersey case because if the

1 Appellants have a right in an Section 13a proceeding, that right
2 should certainly survive the decision of the Interstate
3 Commerce Commission, whether it would or would not investigate
4 a train-off case.

5 In those instances where the Commission refuses to
6 investigate, the interested communities: the State of New
7 Jersey and its Public Service Commission and the County of
8 Bergen and all others, certainly was as great as it is when the
9 Commission sets a case down for hearing.

10 But this Court has held that there is no judicial
11 review where the Commission does not investigate. Now,
12 certainly there is nothing in the manner in which Congress
13 drafted 13a(1) that suggests any fragmentizing of the question
14 of judicial review depending on whether the ICC decides to
15 investigate or whether it doesn't.

16 And a corollary to that point, I believe, is the
17 fact that the argument of the Government in this case is that
18 the ICC decides whether judicial review is available. Now,
19 certainly Congress never intended that when they enacted
20 Section 13a(1). But the Government says: "If the Commission
21 does not investigate then it is not subject to judicial re-
22 view. However, if the Commission does investigate it is sub-
23 ject to judicial review."

24 Now, the question of whether an investigation was
25 held or not, was dependent, according to the Government, solely

1 on the question of whether a substantial question exists and so
2 by the simple expedient of the Commission deciding whether or
3 not a substantial question exists, judicial review is or is not
4 had.

5 But it is not, certainly in the statute nor in the
6 intention of Congress when it enacted Section 13a(1) that any
7 such distinction could ever be drawn.

8 I might say, Your Honors, that another point which
9 bears very directly on this issue, and that is on the question
10 of judicial review, are the circumstances underlying enactment
11 of Section 13a(1).

12 In 1958 the railroads were in dire financial condi-
13 tion; they were losing at the rate of about \$700 million a year
14 on their passenger train operations alone. Theretofore, the
15 railroads were relegated to the piecemeal approach of going to
16 each of the various states through which the interstate train
17 operates and to seek their authority to discontinue a train.
18 And frequently that authority was denied, or in many cases,
19 unduly delayed and as a consequence, Congress was highly con-
20 cerned that the extensive delays that were being experienced,
21 and the costly delays in burdens on the railroads to operate
22 unneeded and costly passenger trains.

23 This was the very purpose that Congress entered the
24 field and when it did, it gave the carriers the right to
25 completely bypass any state regulatory proceeding by the

1 expedient of filing a notice of 30 days, that would enable them
2 to discontinue the train and thus postpone for another four
3 months by the institution of an investigation.

4 The Government and the Appellants would have this
5 Court believe that the concept of judicial review is not in-
6 compatible with the intent of Congress to dispose of these
7 cases as promptly as possible.

8 Congress has set a maximum period of five months
9 under which a train has to be operated. Unless the Commission
10 issues an order, based on the two statutory standards previously
11 mentioned, requiring continued operation for one more year.

12 But the point, I think is established by the circum-
13 stances in Number 102, the L&N Trains that are involved. The
14 so-called Hummingbird trains between Cincinnati and New Orleans.

15 The day before the discontinuance was to take effect
16 the Appellants filed suit in the Federal Court in Chicago and
17 received a temporary restraining order, which restraining order
18 remained in effect for a period of nine months after the date
19 that the L&N filed its notice to discontinue the trains.

20 Congress set the period at five months as a maximum
21 and yet here the L&N was operating a train that was losing
22 money at the rate of a million dollars a year for an additional
23 period of time without any protection bond and I daresay that
24 if this Court had granted a stay of the District Court's order
25 then it would still be operating. We would be losing at the

1 rate of a million and half dollars -- we would have lost at
2 least a million and a half dollars by now and in continuing to
3 operate until further order of the Court.

4 I certainly don't think that there is any consistency
5 between the intention of Congress in enacting and putting on
6 a maximum five months statutory suspension period and the
7 concept of judicial review where railroads have frequently faced
8 with temporary restraining orders, and where bonds are not
9 given for the adequate protection of any damages that might be
10 given.

11 I might want to say one more thing, Your Honors,
12 with respect to the Los Angeles case. As this Court held in that
13 proceedings that there are so-called orders of the Interstate
14 Commerce Commission which are not subject to judicial review.

15 With respect to the discontinuance of a proceeding
16 under 13a(1) the Commission does characterize its discontinuance
17 as an order. There is nothing in the statute that says they
18 should characterize it as an order and in fact, it is nothing
19 more than a notice to the parties and if anything, a house-
20 keeping order. It is not an order ordering anybody to do
21 anything in this case.

22 And under those circumstances, we respectfully sub-
23 mit that the decision of Los Angeles is, in effect, after this
24 point. And what the Commission has simply done in issuing its
25 so-called order of notice of discontinuance is merely the

1 statement of the results of its investigation.

2 Thank you, Your Honors.

3 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Hoeland.
4 I think your time is entirely exhausted, if I am not correct.
5 Is there any time remaining for the argument?

6 MR. MAC DOUGALL: I'd like to just mention one or
7 two things: the first is that where the Commission does enter
8 upon an investigation during the 30-days notice period, and
9 where it does issue an order requiring continued operation of
10 the train, after that point the discontinuance of the trains
11 does not become operative pursuant to the statute. It becomes
12 operative pursuant to the expiration of the Commission order;
13 an order in which the Commission determines it will not renew
14 it.

15 So, if there is a Commission approval or disapproval,
16 of the train-off case, once they enter upon an investigation.

17 Now, it's true that in the 30-day notice period if
18 they decide not to investigate the discontinuance would take
19 place pursuant to the statute.

20 The case is not before us today. We are not re-
21 arguing the State of New Jersey or finding out what modifica-
22 tion of it should be made. The case we have here today is that
23 the Commission did institute an investigation and moreover,
24 they held hearings and the statute requires a hearing. Section
25 13a(1) ; requires evidence and requires

1 findings under Section 14(1) of the Interstate Commerce Act
2 once the Commission enters an investigation it has to make
3 findings and a report.

4 And the last thing I'd like to say is that in order
5 simply discontinuing an investigation is common at the Commis-
6 sion; common. It hasn't come to this Court, in such a precise
7 distinguishing between what do they do on remand if they set
8 aside the Court that is an order of discontinuation of investi-
9 gation, but this is -- does happen behind the scenes in all of
10 the freight rate cases.

11 Q Wouldn't you have to have that finding before
12 an order of discontinuance?

13 A Your Honor, the statute requires -- putting
14 it the other way: It says if the Commission finds that continued
15 operation is required it can issue an order requiring con-
16 tinued operation; but the Commission has always held that the
17 opposite applies; that once they enter an investigation; once
18 they hold hearings, that they have to make findings; findings
19 as to whether or not the trains are required by public commuters
20 necessity; or whether they are not.

21 And that decision is the Great Northern decision
22 recorded at 307 ICC.

23 And also the -- as I said, Section 14(a) requires
24 findings and a report and I think that the Administrative
25 Procedure Act requires it in any investigation.

1 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen,
2 for your submissions. The case is submitted.

3 (Whereupon, at 2:30 o'clock p.m. the argument in
4 the above-entitled matter was concluded)

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