AP

Supreme Court of the United States

In the Matter of:

AMERICAN FARM LINES, Appellant, vs. BLACK BALL FREIGHT SERVICE, et al. Appellees	**Docket No.**	369
INTERSTATE COMMERCE COMMISSION, Appellant, vs. BLACK BALL FREIGHT SERVICE, et al. Appellees.		382

Place Washington, D. C.

Date February 25, 1970

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ENHAM

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

AMERICAN FARM LINES, Appellant vs BLACK BALL FREIGHT SERVICE, ET AL, Appellees	No. 369
INTERSTATE COMMERCE COMMISSION, Appellant vs BLACK BALL FREIGHT SERVICE, ET AL., Appellees	No. 382

The above-entitled matter came on for hearing at 12:50 o'clock p.m., on Wednesday, February 25, 1970.

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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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 369, American Farm Lines against Black Ball Freight Service and Interstate Commerce Commission against Black Ball.

Mr. Califano for American Farm Lines, you may proceed whenever you are ready.

ORAL ARGUMENT BY JOSEPH A. CALIFANO, JR., ESQ.

ON BEHALF OF APPELLANT AMERICAN FARM LINES

MR. CALIFANO: Mr. Chief Justice and may it please the Court: These consolidated appeals are taken from a decision of the United States District Court for the Western District ofWashington.

That decision no authority grant of temporary motor carrier authority for my client, American Farm Lines. The appeals present two questions concerning Interstate Commerce Commission's award of temporary motor carrier authority. One relates to the adequacy of the evidence with the grant under the Interstate Commerce Act and I.C.C. Rules. The other relates to the jurisdiction of the I.C.C. to reopen the proceeding pending before it at a time when some of the parties have obtained preliminary judicial rulings against the Commission and others have asked the Commission to reconsider its opinion.

The counsel have divided the allotted time for argument. I will state the facts and deal with the first

issue. Mr. Cerra, on behalf of the United States Government, will discuss the second issue. We would like to reserve a few minutes for rebuttal.

The conflict before this Court arises because of the determination of the Defense Department to reduce the time during whihh defense materiel is in transit, and thus achieve substantial savings, increased efficiency and with respect to explosives and other dangerous cargo, increased safety.

Until 1966, virtually all defense motor carrier shipments were on a joint-line basis by regulated carriers, with routing specified in detail in their certificates of operating authority. The routings were generally secured. They required several carriers to transport the same load of defense materiel.

In 1966 the Department began to use exempt farm cooperatives, including American Farm Lines to provide a fast, direct, point-to-point service. The Department used farm cooperatives because a legislative exemption freed them from a certificate restriction of regulated carriers, thus enabling them to provide the direct single-line service.

Under thisexemption American Farm Lines has had substantial amounts of defense materiel. This operation promptly demonstrated hthree advantages to the Department of direct service: the direct savings from lower direct transportation costs, the indirect savings from lower inventories, and

hence, fewer pipeline costs and increased safety in the movement of explosives and dangerous materials because of the shorter period of population explosion.

In 1968, after two years -- rougly two years of operation by American Farm Lines, two actions sharply restricted its ability to provide this service. The first was an injunction obtained by the Munitions Carrier's Conference; and the second was a change in the legislative exemption for farm cooperatives.

As a result of the imminent curtailment of American Farm Lines service, American Farm Lines, supported by the Defense Department, applied to the I.C.C. for temporary authority to continue its direct single-line service as a regulated carrier. Protests were filed by 125 opposing carriers.

The application of American Farm Lines was made under Section 210a of the Interstate Commerce Act. That section authorizes the Commission in its discretion, and without hearings or other proceedings, to grant such authority, and I quote: "To enable the provision of service for which there is an immediate and urgent need to a point or points within a territory having no service capable of meeting the need.

Q What's the duration of that authority?

A The duration of the authority was 180 days. It has been extended. The permanent authority proceedings, with

the Defense Department support, the hearings have been completed and the case is now being briefed before the I.C.C.

I.C.C. regulation --

Q Once having granted temporary authority, does the Commission have unlimited power to keep granting extensions?

A Under decisions of this Court, until the permanent authority case --

Q Was it granted or --

A It was granted.

The I.C.C., as I indicated, granted American Farm Lines the authority it requested. Sixty protestants at that point filed petitions for reconsideration. Some of them moved that the I.C.C. stay its grant of temporary authority, pending resolution of the petition for reconsideration. The I.C.C. denied that motion and several of the protestants then went to the Western District Court and asked for a temporary restraining order. That temporary restraining order was granted. No further action was taken by the court.

The I.C.C. then reopened its proceedings to receive additional evidence from the Defense Department, American Farm Lines and the protestants. The I.C.C. promptly notified the court of its action and moved for a stay of the court's full review of the proceedings. The Western District Court took no action on the Commission's motion.

In the reopened proceeding, the Defense Department filed a 22-page detailed statement supporting American Farm Lines. The statement was filed by the Director of TRansportation Policy for the Defense Department, the highest ranking transportation official in the Department.

The protestants filed hundreds of pages of detailed replies to the Defense Statement and upon reviewing all additional evidence, the I.C.C. again granted temporary authority to American Farm Lines.

The Commission concluded that the Defense Department had an immediate and urgent need for American Farm Lines services to discharge its responsibilities for national defense.

Specifically, the I.C.C. found, among other things, that the Defense Department "imperatively requires service over the most direct routes in a minimum transit time". The Department knows of no carriers in a position to meet its needs and, "There is nothing inthis record to establish that the protesting carriers provide a service to meet its needs."

The protestants returned to the District Court and obtained a stay of the I.C.C. order. On final review, the three-judge court vacated the grant of temporary authority by the I.C.C. It based its decision on two grounds, essentially: that the Department of Defense statement did not meet two requirements of an I.C.C. rule with respect to supporting shipper statements and secondly, that the I.C.C. was without

jurisdiction to reopen its proceedings and accept additional evidence.

Q Decision on what, the fact that the case was in court?

A The fact that the Appellees here had gone to the court to obtain what we consider to be essentially, interlocutory relief.

On August 21 of 1969 Mr. Justice Douglas granted a stay of the three-judge court decision to avoid irreparable injury to American Farm Lines, pending a resolution of this case before this court.

The first issue is whether the evidence adduced by the Defense Department, as the supporting shipper, reasonably complied with procedural rules of the I.C.C. The I.C.C. rules call upon shippers to provide eleven categories of information. The court below raised no question about nine categories of the information provided by the Defense Department. It questioned the Department's response to two of these categories. One was, and I quote: "whether efforts had been made to obtain the service from existing motor rail or water carriers and the dates and results of such efforts"and the other is: "Names and addresses of existing carriers who have either failed or refused to provide the service and the reasons given for any such failure or refusal.

Without considering the record as a whole -- without

considering whether the record as a whole contained evidence to support the I.C.C.'s grant of temporary authority, the District Court nullified the Commission's order on the ground that the Defense Department did not comply literally with the requirements of these two categories.

Q What if their answer had been negative on the first; if they hadn't made an inquiry and facts negative on the second. I'm not sure I have the question in mind, but, indicating that no one had refused to furnish service?

A If, under a case that we believe to be almost directly in point: Estes v. the United States, this Court decided recently. If the answer had been "no" to the first question there would have been no requirement; no efforts were made. There wouldhave been no requirement to fulfill any of the other requirements. That is also, in effect, I think I can fairly say, "conceded" in Appellee's brief.

In the Estes case, the Railway Express Agency applied for temporary authority after a railroad had announced that it was cancelling service between Washington and Richmond. The Railway Express Agency indicated that it had not tried to get that service from anyone else, because it was simply not available.

When the protesting shippers came in, none of them held themselves out publicly as capable of providing a direct service from Richmond to Washington of the kind Railway Express

wanted, and the lower court and this court -- the lower court held that Railway Express was entitled to a temporary authority and this court affirmed that decision pro curiam.

We believe that a careful reading of the Defense statement against the categories I've mentioned, shows that the direct, single-line service of American Farm Lines was unique, that the protesting certificated carriers were incapable of legally furnishing this service and that the Defense Department, aware of this, was not required to make efforts in a conventional sense to obtain single-line service from protesting carriers who had no authority to furnish it.

Both of those categories, you will note, are concerned only with one of the statutory standards: whether the existing carriers are capable of providing the service involved. The other standard, the immediacy andurgency of the shipper's need for that service is not involved in these two categories.

Moreover, it's important to note that the I.C.C. Rules in a temporary authority proceeding require only one thing from the protesting carrier, that he give a specific statement"as to the service which such protestant can and will offer."

In evaluating the shippers' response to these categories, the first question is what the service was. The service in this case was direct, single-line service, covering a

14-state area. In its verified statement the Defense Department concluded that this service was substantially faster than joint-line regular route service; in many cases, three times as fast. The Department believed that this service was materially different from joint-line, regular route service, because of the direct savings in transportation costs and because of the enormous impact and indirect savings on its inventory pipeline.

The next question in terms of these categories is whether the certificated carriers were capable of providing this service over the territories covered by American Farm Lines and there is ample evidence in the record on this point.

First, the Defense Department's verified statement, which among other things, specified some 65 point-to-point routings and says that there is no known carrier who can provide direct service for those routings.

I think in this connection it's important to realize that the Defense Department is probably the most experienced shipper in the Western World, moving 64 billion pounds of freight every year.

Secondly, from American Farm Lines own analysis, and uncontested analysis of the authorities of the seven largest carriers operating in this area. Of some 2,030 routes involved in those authorities, those carriers were capable of providing direct point-to-point service over only 93 of those

routes; less than five percent.

Third, the evidence provided by protestants: the protesting carriers introduced their certificates in this proceeding and those certificates show on their face that these carriers have no authority to provide direct single-line service.

Moreover, as we point out in the reply brief, these very protestants are standing now before the I.C.C. with applications for precisely the same kind of authority, supported by the Defense Department that American Farm Lines was granted on a temporary basis by the I.C.C.

Q What will be the consequence if that's granted? Economic consequences?

A The consequence would be, I think, substantial, Mr. Chief Justice, economically and in direct savings costs if comparable reductions result, as the record indicates, American Farm Lines, in effect, reduced direct costs by about 10 percent. The Defense Department spends 500 -- last year it spent $599 million for transportation. That alone would be a $59 million saving. There would be savings in the indirect cost, because you would have to carry less inventory in your pipeline, if your transit times are shorter.

And third, there would be increased safety because explosives and dangerous materials would be on the road for shorter periods of time.

Q Is that expenditure figure you mentioned the surface transportation within the continental limits of the United States, or all other transportation?

A No; that's transportation by the Defense Department, excluding contract carrier transportation and contract air transportation. So, virtually ground transportation within the United States, although there is some air transportation in there.

Q But that's by railroad all over the country and all over the world?

A Most of the -- most of the figure, you might discount it by 5 or 10 percent to take out transportation outside the United States. It does not include contract transportation. A good portion, if not all of the defense transporters abroad are operating on a contract basis and --

Q But this includes air transporation, rail transportation and truck transportation?

A No, sir; it does not include contract air services.

Q I know, but it has to be air transportation.

A Some air transportation is in there.

Q Commercial?

A Yes, sir.

Q But rail is in there?

A Yes, sir, railroads are in there and railroads

are protesting in this case.

The array of brief before this Court present a wide spectrum of views on the question of whether "efforts have been made to obtain" the single-line service from motor carriers.

Some Appellees, including those represented by my colleague, Mr. Dempsey, say that the Defense Department made such efforts, but did not disclose the dates and results.

The Court below and other Appellees say that the Defense Department made no such efforts. One Appellee attempts to argue that the Government brief claims that the Defense Departmentmade such efforts, and that our brief for American Farm Lines indicates that the Department made no such efforts.

I think that the -- all of these papers fail to recognize the unique status of the Defense Department as a unique shipper. It is the most experienced shipper in the Western World, as I indicated; thoroughly familiar with the legal restrictions on the operating authorities of the shippers it has been using for years.

If the point is that when faced with imminent curtailment of American Farm Line service someone in the Defense Department did not pick up a telephone and ask the protestants whether they could provide service under certificates that did not give them legal authority to do so, obviously no such phone

calls were made. They would, we submit, have been a futile act and not required by the law.

If the question is whether the Department reviewed its existing authorities, the existing authorities of existing carriers which were serving it on a joint-line basis over irregular routes, I think the answer is equally obvious. There are scores of transportation officials in the Department, thoroughly familiar with the service these carriers were capable of providing.

Q What is the purpose -- what is your hypothesis asto the purpose of that question in the I.C.C. form?

A I think, Mr. Chief Justice, for the ordinary shipper the question -- the I.C.C. does not grant new authority just because there is a preference for it. The concept is whether or not there is an immediate and urgent need and whether other carriers can provide the same service.

The idea of having to make efforts, I think, was to help the I.C.C., as the I.C.C. itself has said in a statement explaining the regulations, make quick adjudications in cases like this. "Did you try and check other carriers to see if they could do the same thing?"

Q It gets down to the necessity; doesn't it? Isn't that one of the factors?

A I think, Mr. Chief Justice, that it goes more to the question of whether or not carriers are capable of

providing service. And that, of course, does relate to necessity.

I would make one further point in terms of Appellees' arguments, that they were prejudiced because they were not fairly informed of the charges against them. Appellees, like every other party in this case, knew exactly that the issue here is whether single-line -- whether the Defense Department could obtain direct, single-line service which it viewed as materially different from circuitous joint-line services.

Every Defense statement presented in this case is abundantly clear on that point. When the American Trucking Association tried to get the Defense Department to withdraw its support of American Farm Lines, the Assistant Secretary of Defense for Installations and Logistics, wrote to the president of the organization, expressing precisely the point that the Department was trying to get direct single-line service.

The protesting carriers, we submit, fully understood this and thus were not in any way prejudiced in preparing any of their responses.

To the extent, I might note, that they were -- could show that they could provide this service is peculiarly also within their own ability. They were the best people to show that, because they had their own certificates of authority.

I would make one point in closing, with respect to this case, Mr. Chief Justice. This is a summary proceeding

before the I.C.C. under which the standard of review is whether there is any evidence in the record to support the Commission's position. The Commission handles 5,000 temporary authority cases a year and we think there was ample evidence in this one of them to support its position.

MR. CHIEF JUSTICE BURGER: Mr. Cerra.

ORAL ARGUMENT BY ARTHUR J. CERRA, ESQ.

ON BEHALF OF APPELLANT I. C. C.

MR. CERRA: Mr. Justice, and if it please the Court: In the remaining time allotted to Appellants, except for the few minutes we hope to save for rebuttal, my argument would be addressed to the second question presented by these consolidated appeals.

The question concerns the Commission's jurisdiction to reopen its administrative proceedings, after protesting carriers have sought judicial review before a three-judge court and a single judge of that court has issued a restraining order.

Now, the pertinent facts concerning this question are not in dispute, but I think they are important and we ought to highlight them to bring focus on the issue.

After the Commission issued its first order, many protesting carriers filed petitions for reconsideration and some sought that the Commission stay the effect of this grant until the petitions could be determined. The Commission denied

this stay and the grant went into effect immediately.

Shortly thereafter, some of the protesting carriers went to court and they obtained from the judge, a single-district judge, a temporary restraining order against the operation of the Commission's grant of authority. Upon issuance of the restraining order, the Commission acceded to it and itself, postponed the operation of its initial order.

Now, in reply to the petitions that are already pending before the Commission, the Department of Defense and AFL make specific requests that these petitions should be looked at, because: number one, the Department of Defense had added in its reply to the petitioner, some additional reasons supporting a grant.

AFL, meanwhile, had also asked that the petition be reopened in order to receive this evidence. Now, the Commission, of course, had a problem. If additional evidence had not been a part of the original record, nor had the existing carriers been offered and extended an opportunity to reply to that evidence.

So, on the 5th of November it decided to reopen the matter. They reopened it for the purpose of receiving the additional evidence submitted -- to be submitted by the Department of Defense, as well as any evidence in reply by the existing carriers.

We immediately notified -- the Government immediately

notified the court of this reopening and we moved for a stay, pending final completion of the administrative process. We specifically stated in the motion thatit was out intent that upon completion of this administrative process, the parties have the opportunity -- the plaintiffs, that is, the protesting carriers, have theopportunity, if they so desire, to renew their request for relief from the court.

Unfortunately, the motion replies never came on for hearing under local rules of the court, but after receiving the additional evidence, the Commission considered the record anew, both as previously made and as supplemented by additional evidence. And they granted the temporary authority for the second time.

The protesting carriers immediately filed a complaint in court, a supplemental complaint, attacking the second grant and they obtained from the same District Judge, a temporary restraining order against that grant's operation.

On final review after briefs and oral argument, the three-judge court held that without prior leave of court, the Interstate Commerce Commission lacked jurisdiction to reopen this administrative proceedings after the court had assumed jurisdiction and issued the first temporary restraining relief.

In this connection the court also held that there was nothing validly pending before the Commission. They said that the Commission -- the protesting carriers petitioned for

reconsideration, were not authorized by temporary authority Rule 6 or by General Rule of Practice 101(a)(2).

With this holding the court concluded that there was nothing properly before the Interstate Commerce Commission when it reopened the proceeding leading to its second order.

Taking these holdings in reverse order, we submit first that the court simply misconstrued the Commission's Rules of Practice and indeed, and more importantly, they overlooked the controlling rule, which is Rule 101(g). Now, generally speaking the Commission's General Rules of Practice prescribe limitations on the rights of parites to petition for reconsideration.

For example: Rule 101(a)(2)and (3)specify that all orders of the division of the Commission shall be considered administratively final, except in two instances; one not pertinent here. But, in the instance that is pertinent here, except where in a division reverses changes or modifies a prior decision of the hearing officer.

The court below had held that temporary authority of the board was not a hearing officer. Yet, the very rules provide that the term "officer," is defined as including a board of employees. So, properly construed, we would submit that Rule 101(a)(2) of the Commission's General Rules of Practice, authorized petitions for reconsideration in the circumstances of this case, where an Appellate Division had

reversed the temporary authorities board.

Q Where is this printed? I don't find it in your brief.

A 101(a)(2) is printed at page -- I'm sorry, Your Honor, it is not in our brief. It is in the -- I regret, Your Honor, I don't know where it is printed. We're relying on Rule 101(g) which appears at page 33 of our brief.

Now, I was getting to that point. Even considering -- with the Court's indulgence, I do have a copy of the General Rules of Practice where it is printed, if Your Honor would like to look at it, Mr. Justice. I will be glad to submit it to the Court to hand up to you.

(Whereupon the document referred to was delivered by page to the Court)

The railroads do have it in their brief at Footnote 13, page 18, but here's the text of the entire rule in our General Rules of Practice.

As I was saying, we need not rely on Rule 101(a)(2), however, because the construction that we would give from the definition of the term "hearing examiner," isn't necessary. Rule 101(g) specifically authorizes the filing of petitions for reconsideration where the Appellate Division reverses, changes or modifies a previous decision by a board of employees.

Faced with the plain language of this rule 101(g), three of the four briefs of the Appellees don't even mention

it. In the remain[illegible] brief filed by Consolidated Freightways, et al, they contend only that Temporary Authority Rule 6 is later in time and therefore, supercedes or restricts the vested right to petition for reconsideration which was granted by General Rule 101(g). But, we submit that no such intent is expressed in the Rule 6, nor can one be so implied.

Indeed, the language of Temporary Authority Rule 6 which basically says that "petitions for reconsideration of a determination of the board or an initial determination by the division without a prior determination by a board are subject to reconsideration, is merely a repetition of the general rules of practice." Rule 6 itself does not grant the right to petition for reconsideration; rather, it specifies that such right exists, and I quote: "Pursuant to and in accordance with the Commission's General Rules of Practice, the rules of practice of the governing matter.

It would seem to us that the court's construction of the Commission's temporary rules and general rules, is just simply inaccurate and incorrect. There were validly pending before the Commission petitions for reconsideration of the Rule 101(g) and the administrative proceeding had not been completed. This would lead me to the discussion of the remainder of the court's ruling. That is that simply because judicial review had been commenced, the I.C.C. lacked jurisdiction to reopen for hearing additional evidence.

I want to point out first, that contrary to the decision below, the Government didnot concede that the Commission's initial grant of authority was administratively final. Rather, we urge first that the Commission proceeding was not administratively final, because the petitions for reconsideration were pending.

Secondly, we urge that this lack of administrative finality, however, didnot deprive the court of jurisdiction to issue temporary injunctive relief to prevent irreparable injury, pending final agency action, where, as in this case, the order had already become effective and the Commission had declined to stay its operation.

Now, we cited those cases in our brief. They include, among others, Oklahoma Natural Gas, Pacific Inland Tariff Bureau and Cantlay & Tanzola. They are on pages 24 and 45 -- 44 and 45 respectively, of both Appellants' briefs.

We want to point out here that Appellees' briefs neither acknowledge, refer to, or attempt to explain away this particular rule.

Now, we know that the basic tenet is that nobody is entitled to judicial review until all the agency's administrative remedies have been exhausted, and the agency's action is final.

The one that we attempted to use here was an exception which was stated in these cases we cite. Plaintiffs

don't -- excuse me. I refer to them as Plaintiffs, because of my experience below. The Appellees here don't even attempt to explain them away. Rather, they urge this, three things: that once a court asserts jurisdiction, the Commission is simply without any more authority, simply does not possess any more authority to proceed further. The court's jurisdiction is exclusive.

Then they urge that there's no statute that authorizes the Commission to act concurrently withthe reviewing board. And finally, the third matter they urge is that permitting an agency to reopen after court review has been commenced, disrupts the initial procedures and creates the danger that the agency may not be acting as an impartial adjudicatory tribunal, but rather as a litigant, merely trying to paper over defects in an attempt to win a lawsuit.

Now, we would submit that these arguments have no foundation in fact or in law. Simply because a court may have jurisdiction to preserve a status quo. pending completion of agency action, does not mean that the Commission loses all of the jurisdiction to complete the administrative process. In such circumstances, we would submit, the proper procedure is for the reviewing court to hold the judicial action in abeyance pending completion of the administrativeprocess.

The Commission has had experience over the past 18 years, as we pointed out to the court below and in our

jurisdictional statement here, with this very situation. Most of the cases did not involve where a temporary restraining order had been initially issued by the judge, but someof them did. And no court has ever taken issue with us on this procedure, except in the cases such as Atchison-Topeka, which is cited by Appellees.

The statutory found that we believe ability for the Commission to reopen while a judicial review proceeding is pending is Section 17(7) of the Act. This grants the Commission continuing jurisdiction over its orders and empowers it to rehear, reconsider, rescind, change and modify them at any time for the purpose of correcting errors; any error or any injustice, that is. That statute has been in existence since 1906 and it hasn't been changed and where Congress has sought to impose a limitation on the right to review for other agencies, it has specifically done so. It has said that once the reviewing action is filed, the only time an agency can reopen is up untilthe point where the administrative record is filed. Once that record is filed the Court of Appeals, in the citations we give in our brief; the Court of Appeals' jurisdiction becomes exclusive.

Now, Congress was aware of the Interstate Commerce Commission's practice under 17(7), but it expressly limited the reopening powers of other agencies, such as the Federal Trade Commission.

So, we simply say that where Congress was aware of this situation, it was careful to provide some limitation against reopening where it considered it appropriate. But the review provisions of the Interstate Commerce Act and the Urgency Deficiency Act which applies here -- both of which apply here, I submit there is no such limitation and the absence of such provisions is therefore, meaningful.

But more importantly, we need not even rely on Section 17(7) as we have shown the case was validly before the Commission, because the petitions for reconsideration were pending.

And we would submit that there is simply no inconsistency between the Commission's reopening and issuing a second order on new evidence on the one hand, and on the other hand,the court's action in supplying temporary relief from the operation of the initial grant, pending completionof the administrative process.

WE informed the District Court of the reopening. There was no attempted evasion or any evasion at all to the courts stay in the first order. The District Court had an opportunity to stay operation of the second order and in fact, it did so. We fail to see how the Appellees could have been prejudiced in that situation. Certainly they had ample opportunity before the Commission to present all the evidence that they needed to present to rebut what the Department of Defense had submitted.

They did so.

They also had ample opportunity to go back before the reviewing court and seek relief and they did so, and they obtained it.

Q Could I just ask you, do the Commission's Rules prescribe a standard, a substantive standard for when temporary authority is to be granted. More specifically, do the rules say whether or not the absence of single-line service, as compared with joint-interline service is the basis for temporary authority?

A Yes, Your Honor; they do.

Q What do they say?

A Generally --

Q They say generally that single -- a desire for single-line service isn't enough?

A No; no. They say this: "The desire of a shipper for single-line service in lieu of existing interchange or connecting carrier service will not warrant a grant of temporary authority.

Q Well, now, did the Defense Department say what need it had over and beyond single-line service?

A The Defense Department's need over and above single-line service is --

Q Was that adequate?

A They had expressed so in their --

In Mr. Caputo's affidavit he said that this single-line service was needed to complement, rather than to replace the existing joint lines.

Q I know, but the single-line service isn't the reason for getting temporary authority under your rules.

A It is here, Your Honor, because this rule furtherprovides that a grant of temporary authority to effect single-line service be authorized only when it is clearly established, and there are two tests: "that the carriers providing multiple line service are not capable of or have failed in meeting the immediate and reasonable transportation needs of shippers."

Q I know, but the -- I gather the Defense Department, one of its big reasons for wanting this single-line service was just because of the single-line service.

A That is not correct, Your Honor. They wanted a single-line service for the various savings that could be experienced in both time-wise and money-wise.

Q I know, but that wouldn't be enough under the rules to warrant temporary authority; would it?

A It would warrant -- it would be enough under the rules --

Q You mean under that rule if I say, "Well, the only reason I want this temporary authority is to provide single-line service and the only reason I want single-line

service, it saves time and money."

A Your Honor, we would say that you would have to show what the deficiencies were.

Q Well, the only deficiency is that the other carriers are interline; they haven't got single-line service.

A The question of not only interlining is that we're talking about here, Your Honor, vast geographical areas and commodities and for the -- for an applicant to come before the Commission and say he simply desired single-line service would not be sufficient. To show that there was an immediate and urgent need for it and that there were no carrier services capable of meeting those immediate and urgent needs, then the Commission would be authorized under the rules, balancing the equities of the situation and the evidence --

Q You mean under this rule the need for these -- the desire for single-line service is sometimes a perfectly adequate basis for granting a --

A It could be very much so, as in this case, Your Honor.

Q In spite of this rule?

A It is not in spite of the rule, but it is because of the rule, Your Honor.

I think that the basic reason I am talking here about the jurisdiction of the Commission to reopen while this court case is pending is that it's a basic tenet of administrative

law that no party has the vested right to have an agency's error preserved, pending review. If the agency is to correct that error without the necessity of a reviewing court, remanding the matter to the Commission for this purpose. And, as here, where there would be an effective judicial review of the corrective action.

Now, they have talked -- Appellees have talked about the point of perhaps this would not be an impartial quasi-judicial body in rendering a decision, but rather that the Commission would be attempting to win a case as a litigant. We submit that there is absolutely no fact to that suggestion. The Commission's primary and never-ending rule is to administer transportation policy. Even if a reviewing court had remanded to the Commission an order which it put out, it still would be responsible, as this Court has said on many occasions to administering the transportation policy by either reopening the matter to reconsider it on the existing record, reopening to receive new evidence, or otherwise disposing of it.

The Court has clearly spelled that out in the Idaho Power case in 344 U.S.

There is another reason, though, we think that this procedure should be sustained here. In avoiding delays inherent in court reversals and remands, the Commission's action is consistent with the broad purpose of the temporary authority provisions of the Act themselves. That is, the question of

immediacy. It's also consistent with the mandate of Section 17(3) which instructs the Commission to conduct its proceedings in such manner as best will be conducive to the ends of justice and the proper dispatch of business.

Absent any statutory prohibition against reopening, prejudice to the parties or an attempted evasion of a court order, the Commission was free to do so.

And finally, we submit that such procedure would be in both the best interests of judicial economy and agency responsibility.

We would like very much to save our remaining time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Cerra.

Mr. Dempsey.

ORAL ARGUMENT BY WILLIAM H. DEMPSEY, JR., ESQ.

ON BEHALF OF APPELLEES CONSOLIDATED FREIGHTWAYS, CORP., ET AL.

MR. DEMPSEY: Mr. Chief Justice, and may it please the Court: In responding to the arguments advanced by Mr. Califano and Mr. Cerra, I should like to begin with the issue reflecting the Commission's regulations and then move on to a discussion of the second issue regarding the reopening of the record by the Commission.

Now, as to the first question I would like to, at the outset, spend a few moments discussing the statutory framework

in which these issues arise.

This has nothing to do, I may note, with the tension between the exempt provisions of the Act, relating to co-operatives and the other provisions of the Act, because, as Mr. Califano has noted, the Congress settled that problem with the enactment of legislation in 1968, so that no question respecting thatlegislation is before the Court.

The relationship that seems to us to be significant, is a relationship between the temporary authority statute and those provisions of the statute and regulations that bear upon the issuance of permanent operating authority.

As this Court, of course, is well aware, this industry of interstate transportation since the time the Congress first, in any important way, moved into its regulation in 1887 has not been characterized by unlimited competition.

The Congress, from the beginning of its legislative program, for a variety of reasons having to do with the protection of shippers and maintenance of economic stability and a key industry that does have common carrier obligations, has decided that the public interest would be best served, by and large, by the application of the principle of regulated competition. And it has carried forward that judgment each time that it brought a new mode of transportation within the jurisdiction of the Commission.

So that today we have regulation in rates and in

service and most pertinently here, in terms of entry into the market.

So that in the case of any application for permanent operating authority of any consequence, there are extended and extensive proceedings: evidence, cross-examination of witnesses, before a hearing examiner, the report of the hearing examiner breeds some appeal within the Commission; perhaps to the full Commission and often litigation. All of this with an eye toward insuring that if an application for permanent authority is granted it will be upon the basis of a careful consideration and evaluation of all facts that bear upon the need for the service, the competitive impact of the grant and the ability and willingness of the existing carriers to perform that service.

Q How is this transportation being held, carried on now?

A Government transportation, Mr. Justice?

Q Yes.

A By motor carriers and rail and, as the Department said, to a small extent by air; by certificated carriers. For the most part by cooperatives to the extent that under the new legislation --

Q Temporary exhibited that it has spent its course at the moment?

A Temporary authority? Oh, no, Your Honor; no.

Under this Court's decision in Pan-Atlantic Steamship Company, as I believe Mr. Califano indicated, a grant of temporary authority, despite the apparent 180-day limitation of the statute is continued now until the termination of the permanent authority proceedings.

Now, in its jurisdictional statement, AFL estimated that -- and I think that was filed in July of last year -- AFL estimated that it would take another three years for completion of the permanent authority proceedings, and I would consider that to be a pretty good guess. So, that we face a long period of time with the life of this temporary authority.

Q Well, you prevailed below.

A Yes, Your Honor, but --

Q Is there a stay?

A There is a stay; there is a stay.

Now, the Temporary Authority Statute which was enacted in 1938 at the behest of the Interstate Commerce Commission, shortly after passage of the 1935 Motor Carrier Act, of course, cuts sharply across the grain of this general statutory scheme, because it permits the Commission without hearings, at its discretion, to permit this kind of authority to be exercised.

What the Commission said to the Congress, quite sensibly, it seems to me, was that there might very well be occasions in which a shipper's need was so imperative, so

immediate that its satisfaction should not await the conclusions that have often prolonged permanent application proceedings.

Now, what the Congress had in mind when it enacted the statute was that it would be limited to emergencies. This is what the Senate Report said, since temporary grants would be limited to situations in which there wasan emergency. And that, accorded with the kinds of things the Commission was talking about to the Congress, because it was speaking in terms of new oil wells coming in, and the havoc that's wrought by floods and what it referred to in short, as "calamitous visitations."

And the Commission did represent to the Congress that it recognized need -- care would have to be emphasized to protect the interests of visiting carriers. And the language that the Congress chose was well-suited to limit the application of this statute. The Congress spoke, as the Court is aware, in terms of an immediate, urgent need for service that no existing carrier could provide.

Now, it was that statutory framework against which the Commission was called upon to evaluate AFL's application for authority. It may be that in the annals of the Commission there are applications that have been granted that are as sweeping in scope as this one, but if there we do not know of them and the Commission does not refer to them.

This application sought authority and authority was granted to transport for all branches of the United States Government, all commodities from all points of origin to all points of destination in a 14-State geographical area, without restriction as to routes.

Q Without restrictions to routes and would it require it would all be continuous single-line service?

A Well, it would be single-line service, because it would be performed by AFL. I believe --

Q I suppose it could interline with other carriers?

A I believe, Mr. Justice, that there is a provision in the regulations that would prohibit interlining, but I'm not absolutely certain of this. Certainly what was contemplated was single-line AFL service.

The application was supported --

Q Was that on direct appeal?

A I'm sorry, Mr. Justice.

Q Was there any?

A Any interlining; I don't believe so, but I'm -- it isn't in the record and I'm not absolutely confident about it, but my impression would be that there isn't.

The application was supported, as the Court has been advised, by a statement by a single branch of the Government, the Defense Department. In that statement the Department did not state that in the absence of AFL service the existing

service would be inadequate, and that is not surprising, because in two letters that were written by the Defense Department, one to AFL and one to another motor carrier within two weeks of the filing of this support statement.

The Department said this, and I quote: "That the Department is not in a position to state that there would be insufficient or inadequate service without American Farm Lines." And then shortly after the filing of its statement in another letter that it sent to the American Trucking Associations, it said that its support of AFL was "an expression of a desire of the Department to have available the type and quality of service which AFL has provided, regardless of the carriers which might provide the same."

So that in our view it is not particularly astonishing when the Temporary Authorities Board of the Commission denied its application. But, as the Court has been advised, Division 1 of the Commission on appeal, reversed that determination and the authority was granted; the protesting carriers went to court and secured a temporary restraining order. The Commission, thereupon, on its own motion reopened the record and finally the last DOD statement, the so-called Caputo statement was put into the record.

Q What do we have in the way of an I.C.C. statement about this. Is it only their order that is in the record?

A Only their orders.

Q We don't have the findings or anything of that kind in this case?

A Well, it's just that the --

Q It's just the order of Division 1?

A Order 43(a), December 20, 1968, on page 367 of the record.

Q That's it.

A That's it. It's all the application that is referred to. I think there is a finding of sorts there --

Q No opinion or anything else?

A No.

Now, that brings me to the question which is involved in this first branch of the case, and that is whether the Caputo statement measured up to the requirements of the regulations, so I turn now to the regulations, which are set forth in, I think it is Appendix B to the brief of Certain Motor Carrier Appellees, beginning on Page 32 of that brief.

Now, what the regulations say at the outset is that they are designed to implement the Temporary Authority Statute. And I think the first thing, perhaps to note is that they divide temporary authority into two categories: one is called "emergency temporary authority," and the other for want of a better word, I'll call it "ordinary temporary authority."

Emergency temporary authority, according to the regulations is to be granted only where there isn't enough time to

provide notice to interested parties, and then it's restricted. It's restricted to 30 days and then it can be continued only until ordinary temporary authority can be either granted or denied.

Now, this case, of course, is one of ordinary temporary authority and the regulations that begin on page 37, I think clearly make this an adversary proceeding before the Commission, because they require the basic elements of an adversary proceeding. They require that notice be given to interested persons in the Federal Register and they provide that interested persons who are willing and able, or say they are, to provide the service, have a right to reply. They have a right to file a notice.

Q Page 37?

A Page 37, Mr. Justice, of the Brief of Certain Motor Carrier Appellees.

Q Thank you.

A Now, it's a truncated proceeding, to be sure. There is no cross-examination of witnesses. The timetable is telescoped and it is nonetheless, an adversary proceeding.

Now, what the protestants are able to put in their rebuttals, of course, depends in large measure on what the applicant is required to put in his application, and associated papers, and that brings me to the regulation that is most directly involved, and that begins on page 34, subparagraph c,

"Supporting Statements." That regulation refers to the supporting statements of shippers and it says this: "Each application for temporary authority must be accompanied by a supporting statement or statements, designed to establish an immediate and urgent need for service which cannot be met by existing carriers, the statutory standards."

And then it goes on to say that "Any such supporting statement must contain at least the following information;" and it sets forth 11 categories as Mr. Califano has indicated. And of those we're concerned here basically with subparagraphs 7 and 8.

And the basic question is whether the Caputo statement complied with the requirements of 7 and 8 and if it didn't, what the consequences ought to be.

Seven and eight go to what a shipper is supposed to say as to whether or not he has made any effort to get this service from existing carriers. If he has made those efforts, he is then supposed to give the names and dates of the allegedly defaulting carriers and the reasons that they assigned for not being able to perform, and that sort of thing.

Now, analysis at this point is impaired somewhat by the fact that we believe that the Appellants have taken rather markedly divergent views of what the Department of Defense said in response to the threshold question of subparagraph 8. Now, that uquestion is: whether any efforts have been made to

obtain the service from existing carriers.

American Farm Lines says clearly in its brief and I did not understand Mr. Califano to retreat from it, that DOD's response to that question was negative, that it did not make any such efforts. The argument is spelled forth at some length on pages 20, I think -- 20 to 23 of their opening brief, and their conclusion is this, on page 22: "In short, the Department's response to the requirements of subparagraphs 8 and 9 was that it had not requested the proposed service from other carriers." And then it goes on to explain why, in its view that shouldn't be fatal, and I'll take that up in a moment. But, let me turn to --

Well, and then its analysis proceeds this way, it says that "as DOD said it had not made these efforts, then, of course, the other requirements of 8 and 9 never came into play, because the Department couldn't be required to supply details as to efforts that it had never made.

Now, the Solicitor General, on the other hand, I understand not to advance that argument, but rather the argument that, indeed, DOD said -- now this isn't a question I should make clear as to what DOD actually did. This is a question as to what DOD said in its statement. No one knows, really, what DOD actually did. We can only go on the basis of what it said.

The Solicitor General, as I read his brief, and of

course, theGovernment does not argue this aspect of the case, so we have to rely on that brief, I think. As I understand their brief, they say that the Solicitor General did make these efforts and that he did -- I mean DOD did, and that DOD did provide most of theinformation required, and really all that ought to be required. This is what he says on pages 16 and 17 of his brief.

In fact, the statement that DOD, that is, did provide much of the information there specified, thus DOD did state whether it had made efforts to obtain the service from existing carriers and graphically describes the results of its efforts, as subsection 8 dictates. And it explained in detail the reasons why existing carriers were unable to provide the service needed, as subsection 9 contemplates. We acknowledge that the statement did not give the dates of DOD's efforts to secure service, as 8 furtherasks, or the names and addresses of the carriers who do not provide service as 9 specifies. "But these are the only deficiencies," and then he goes on to explain why he doesn't consider those fatal and I'll move on to that.in due course.

Now, a good deal in terms of how one approaches this case, depends upon which of these views of the DOD statement is correct. In our view, the Government's is the only one that is open. And that is because the Commission, Mr. Justice, does have what I consider the, a finding of sorts here in this

order and it bears directly on this problem.

Q What page is it?

A Page 368(a) of the appendix. And I am referring particularly to subparagraph 3, but I'll incorporate when I read it, the further appearing language at the top of the page.

The Commission says this in its order: "It further appearing that by its verified statement filed November 20, 1968, the Department of Defense has established that it has attempted, but has been unable to obtain the required and necessary type of service." Not that it has not attempted, as AFL indicated in the quotation that I read from its brief.

So that under well-established doctrine emerging from decisions of this court, such as the Adams and Chenery case(?) and the Burlington Truck Lines case, we suggest that the order of the Commission has to be defended upon the grounds that it put it on and that therefore, that this argument that AFL advances here, newly-devised, advanced here, I think, for the first time in this litigation, is simply not open.

I would like to say that there are additional infirmities in it, and I'd like to touch on those for a moment. Because, of course, normally if a shipper says that he hasn't made any efforts to get the service thathe wants from existing carriers, that would be fatal; not because of noncompliance of the regulations, but because of noncompliance with the statute. He simply would not have made a sufficient showing.

Now, AFL says that that shouldn't be the case here, because, as Mr. Califano said, what DOD wanted was single-line direct service and knew that wasn't available from existing carriers between many of thepoints, and therefore it would have been bootless for them to ask for it. And they add, that single-line direct route service is obviously superior to joint-line service.

Well, I think they summarized their position quite succinctly in their reply brief, back on page 13. This is what AFL says:""The Department made clear that it's support for AFL was premised, not on service failures, but upon the Department's desire to upgrade the quality and reduce the cost of the motor transportation service available to it through the certification of direct, single-line service.

Now, had that been the argument made by DOD explicitly to the Commission, we suggest that the Commission surely should have concluded, at least, that for the reasons I have already indicated. The Temporary Authority Statute was simply not designed to permit the short-circuiting of all of the other procedures of the Act, simply in order to upgrade the quality and reduce the cost of the service available.

Q Was that because it's not urgent, or what?

A That's because it's not urgent and immediate; that is correct, Mr. Justice.

Now, as far as cost is concerned, the Commission--

Q You don't think that cost savings and -- we're not dealing with pennies in this case, these enormous savings would not be an emergency?

A No, I don't, Mr. Justice. Certainly in the order the Commission never suggested that it was considering cost savings for the Government, and indeed, I can provide the court citations in which the Commission has said that even in permanent authority cases a rate question is not a relevant factor. Now, of course, when we are talking about these enormous savings, we are not talking about this particular case, either; the American Farm Lines having single-line direct rate authority is not going to save the Government this monumental sum of money, and if every carrier, if the entire certification scheme under the Act, is to be abandoned now, and every carrier West of the Mississippi is to have direct single-line authority, well, I don't doubt that there would be very considerable savings; I don't doubt that a lot of carriers would go out of business; I don't doubt that the Commission would regard this all as a very complicated and difficult question --

Q Well, what about the pipeline and safety factors?

A Excuse me?

Q Pipeline and safety --

A You mean shortening the pipeline?

Q Do you consider those part of the expense argument?

A Well, I dontt know. Perhaps I could respond this way: if the Defense Department had said that what we are talking about here are munitions destined for Vietnam and here are the points of origin and here are the points of destination, or aircraft pots or something of that sort. And to be sure we're only talking in terms of saving a day or saving 12 hours from east to west or something of that sort, but perhaps they are important, because fighting men are depending on this materiel.

WEll, I mean I would never suggest that that wouldn't be a relevant consideration and a highly persuasive consideration under the Temporary Authoritv Act.

Q Then the I.C.C. or noone else has ever suggested before that it was illegal or somehow improper to interline explosives?

A No, sir, Mr. Justice, and I refer here to the regulations. The regulation that you discussed with Mr. Cerra, I believe it was, is a regulation that we have set forth and quoted in full at pages 50 and 51 of our opening brief. Now, it has never been mentioned by the Appellants until your colloquy with Mr. Cerra. It seems to us that that regulation says pretty clearly that whatever theoretical advantages may be thought to be associated with --

Q Or practical.

A -- or practical, if you will, will not be enough in a temporary authority proceeding. One must show some sort of unusual and significan actual default on the part of the existing joint-line carriers.

Q Mr. Dempsey, while you are stopped as you are -- am I interrupting you?

A Not at all.

Q I'm trying to reconcile the findings at 368(a) of the appendix; three and four thatI think you referred to sometime ago in relation to the question I put to Mr.Califano about the failure to answer questions 8 and 9. Is there anywhere in this record that indicates or sheds some light on the gap that failure to answer those questions in the original application for temporary authority, and ultimately, a finding by the Commission that is right on target on those two points?

A There is nothing in the record to shed light on it. I think that what there is in the record only makes it more surprising, if I may say, because the Caputo statement, after all, was not written in the dark. It was submitted to the Commission some -- roughly a month after Judge Bolt in the hearing on the temporary restraining order, identified non-compliance with subparagraphs 8 and 9 as a serious problem in his mind.

So that what one would reasonably expect would be

that the Defense Department, in putting in another statement, would have been particularly careful to comply with subparagraphs 8 and 9.

I can only -- well, I shouldn't assume anything. I should simply answer the question and the only answer to the question, I think, is that there is nothing in the record to indicate it.

Q What's the time lapse? I see that this findings 3 and 4 on 368(a) are based on verified statments in November, 1968. What is the date of the --

A That is the date of the Caputo statement; the final DOD statement. The hearing on the temporary restraining order, I believe, was October.

Q Well, what's the date of the document that was filed, the application or petition in which they failed to answer questions 8 and 9?

A November 20. This statement that's being referred to here is the only DOD statement that is being spoken of in any respect now.

Q Well, now I'm even more confused. Maybe you can clear that up or someone can. I thought they had failed to answer on these two points, 8 and 9. The finding says that by the verified statement the following things had been established and two of the following items found on 3 and 4 are precisely the answers to questions 8 and 9. Where did the

Commission get the data?

A Well, as to subparagraph 3, I assume that the Commission thought that a fair inference from what the Defense Department's statement said and I am not prepared to say it was not a fair inference. Our complaint, of course, is that having said that they attempt to get the service they wanted they were then required to comply with the other parts of subparagraphs 8 and 9 and provide the details.

Q Well, then I take it you are concerned about the lack of underlying, factual bases for those two findings in a very important way?

A Yes, sir; that's right. Now, let me move directly to that. I just, on this single-line authority problem I would just like to make sure I made one final point on it and then let move directly into that.

I think that really conclusive evidence that the Commission did not issue this authority on the premise advanced now by AFL. That is, the desirability of single-line services, the fact that they did not limit it to those points between which there exists no single-line direct service. It's simply a broad, 14-state geographical ramp.

So far as the extra record material that's cited in AFL's reply brief is concerned, with respect to the statements made by some Appellee about the desirability of single-line service, those statements were made in the context of the

applications for permanent authority and for reasons that I have already indicated, that is much different than an application for temporary authority.

But, I would cite to the Court since we didn't have any opportunity to reply, two I.C.C. Examiner's decisions in this chain of litigation going on before the Commission.

Ashworth Transfer, Inc., MC-1872, Sub No. 71 and was served January 7, 1970, and Garrett Freight Lines, Inc. MC 263 Sub No. 185, November 20, 1969. In both of these cases the Examiner in permanent authority cases, denied single-line authority, direct routes sought by the Defense Department on substantially the same grounds as the sought this authority, criticizing the Defense Department for not establishing sufficiently the asserted deficiences in multiple-line service.

Now, I don't say that this is terribly important, but I do say that it is indicative of the kind of evidence that has to be introduced when one relies on the single-line authority concept, even in a permanent authority case.

Now, Mr. Chief Justice, let me go to this question of what it is that we complain about in terms of the Government's argument, which I understand to be that there were defaults. The Solicitor General says the Caputo statement did not give names, dates, particulars about the service deficiencies about which it was complaining. But, he says that shouldn't matter and so I guess really the basic question is whether it should

matter or not. There isn't any question, I think, that he's right in making the concessions that he does. In this entire DOD statement not a single existing, allegedly-defaulting carrier is named. No dates, no names and no particulars.

We suggest that the standard to be used in measuring whether or not this is -- if I may, for lack of a better word, say prejudicial error ought to be the traditional one. It ought to be whether had the error not been committed might the outcome have been changed.

The Government says that it would not have been. They say in their brief that the provision of these details could not have affected the outcome and I understand them to say that on the notion that the evidence of record was compelling.

Now, that's kind of a harmless error doctrine, it seems to us has no place unless the evidence that's being relied upon as compelling is independent of the error. That is to say that correction of the error would not have affected that evidence.

Now, if you've got 20 eyewitnesses to a crime and they all identify the defendant in a trial and the trial judge improperly circumscribes cross-examination going to the eyesight of one of them, well maybe that's harmless error. But that situation doesn't resemble the one at bar at all, because the provision of the details by DOD might radically have

have undercut the force of its submission.

Now, I don't have the time and oral argument for the kind of detailed textural analysis of this statement that we do have in the briefs, but let me illustrate to the Court what kind of thing I have in mind.

The most important parts of the statement are generalities. They are always qualified in what we regard as a suggested way. For example: page 368 of the Caputo statement -- no, that's not the statement; that's the order. The statement begins on 194, I think; yes. Page 198 contains what is sort of the topic sentence of the statement. There Mr. Caputo says, "This need for speed has not been met in many, many instances by the current certified motor carriers." Now, noplace in this statement does he indicate anything about those many, many instances. I suppose arithmetically that could be 50 or 100 or 150 or almost any figure, but surely it would make a difference if it were only 50 in this broad geographical area among these dozens of carriers, and I don't really see how it reasonably could be suggested otherwise.

Inthe next sentence he says, and let me just string some of these together, because they are all really the same. In the next paragraph he says, "We must, in some cases, allow no less than 24 hours for each 300 miles of joint-line service." "Some cases."

Inthe next sentence he says: "Prescribed routes are

circuitous." And the next paragraph he says, "some regular route carriers utilize single drivers instead of two-man driving teams, and this sometimes results in delay."

On the next page he says: "Some shipments of explosives between McAllister and Bangor are in transit for lengthy periods of time.

And it's that way throughout. "In many instances it is necessary to coordinate the arrival of inbound shipments with production schedules." He gives one example. How many are many, in addition to one?

On the next page he says, "DOD has experienced situations where shipments routed via currently certificated carriers failed to arrive at destination in time for transshipments"and he gives one example there. How many more times beyond one did DOD actually experience these situations?

Now, he does provide in his statement, some, what he calls "examples." We've analyzed them one-by-one in our brief and I won't detain the Court with the flaws that we see in the examples, other than to note that again, that they did not comply with the regulations. The allegedly defaulting carriers were not identified; they did not have the opportunity of rebuttal.

But, beyond that, I suggest that the fact that DOD did provide some examples, cuts in our favor and not against us, because in the first place it shows they can provide

examples and in the second place: one cannot put aside the possibility, Mr. Chief Justice, that this is about all they could come up with, because as I said before, they drafted this statement in the face of the temporary restraining order, which pointed to noncompliance with subparagraphs 8 and 9 as a problem. They went back and they drafted it and I think it is at least reasonable -- it is reasonably possible to assume that this was about as good as they could do. But, if that's a possibility, then surely compliance with the regulations, compelling the Department to comply with the regulations might entirely change the outcome of this case, because if this handful of examples is all that the Department could come up with, I would find it very difficult to believe that the Commission would have granted this temporary authority.

And I have not spoken of the possibility of rebuttal, but that possibility cannot be put aside, either, as this record demonstrates. The Department is not always infallible in what it says. I would refer the Court to the statement of the Munitions Carriers Conference which is here someplace.

Let me just summarize what it says -- here it is. It's on page 308 or 309. Whatit says, basically, is that DOD in one of its statements gave, before this Caputo statement, gave three examples of what it asserted were deficiencies and two of them could be verified in terms of the carriers that were involved and thosecarriers put in rebuttal. One of them,

indeed, as the statement says, submitted photostatic copies of documents which established that the charge was false. And DOD didn't repeat any of those in the Caputo statement.

So that the opportunity to rebut specific data when that specific data is given by DOD is important to the Appellees.

And I should mention Estes briefly, but I think Mr. Califano really has given me my basis for distinguishing Estes. It's the one that I rely on; there are several, but the shippers in Estes, as Mr. Califano said, stated very explicitly that they had not made any efforts to get the service that they were interested in from other carriers, so --

Q Do you think that if all shippers who support a temporary application come forward and say that "we are not in a position to say that there is insufficient or inadequate service without this temporary authority." If all of the shippers say, "We don't think there is anything wrong with the present -- that the present service is inadequate, but we just want better service." Would you think that the temporary authority would ever be justified?

A No; I think it would never be justified under those circumstances.

Q Apparently the -- do you think the I.C.C. thinks it would be?

A I don't suppose the Department of Defense ever

repudiated the statements that it filed; certainly the Assistant Secretary when he wrote, didn't repudiate that statement. He said, "just to be satisfied, however, with present-day capabilities is not to say we shouldn't have better service."

A Yes, I found that an interesting passage in his letter and Mr. Justice, I think you will not find in the Caputo statement a repudiation of the three letters that DOD wrote and --

Q But the Commission seems to have found that there had been shown an urgent and immediate need.

A Yes.

Q Well, they apparently construe the desire for better service as an urgent and immediate need. That's certainly not -- it's not illogical, I don't suppose.

A But they -- well, it was not illogical?

Q No; it isn't. I mean --

A It's not --

Q They just say you have an urgent need for better service.

A Well, you might, as a matter of fact; it's possible, but all that I can say is that I think you can visualize that a company in extreme plight, or something like that, they might really need better service, but it's hard for me to believe that the Commission, having set forth in its

single-line service regulations, pretty clearly an indication that this isn't the case. And the Commission, after all, does know what the statute said and whatthe history of the statute was.

I think that what the Commission must have done here was to accept the general statements made by DOD in the Caputo statement in terms of what it said were its actual service failures. That is that in many, many instances they hadn't gotten goods on time for transshipment and that sort of thing. And based their decision, based their order on that, not upon a mere statement by DOD of a preference for better service.

Now, if in this order -- I certainly don't suggest that this order is a model of clarity, far from it, but if in this order the Commission had said what you just suggested, Mr. Justice, then the litigation, it seems to me, would have taken an entirely different path.

What we would have been arguing in the lower court was that the order did not comply with the statute. If you would have that kind of a finding by the Commission, we would have tested this on a different basis.

Let me spend what remaining time I have on the second issue in the case: the question respecting the Commission's reopening of the record. I regret that I do not have more time for this, because it is an important issue, bearing as it does upon the Commission's relation to the Federal judiciary.

but we have set forth our arguments in our briefs in detail and, of course, we rely upon them.

Let me try simply to touch upon the highlights of the central factors of this issue.

Q Before you go into that, let me go to that number 4 again which, of the 3 and 4 that troubles me on 368.

A Yes.

Q Four is the finding that there is nothing in this record to establish that any of the protesting carriers provide a service to meet its needs. What are the regulations where the cases hold where the burden lies in establishing that? Who had the burden there?

A Oh, well, I think clearly the Applicant has the burden under the regulations, and particularly if they are talking about single-line service, because that requires, in terms of the regulations, a clear showing that the existing carriers have defaulted. I don't think really that the Commission Counsel would disagree, but the burden here is on the Applicant, especially in terms of the concern of the Congress expressed in the Committee Reports that this temporary authority statute be utilized only in emergencies, as it is an exception to the general statutory scheme.

Q I suppose you would agree that it might be very sensible to have Government carriers exempt from these provisions, but Congress hasn't done that; has it?

A Exempt from the -- from which provision?

Q Eight and nine, the question requirements from making the showing.

A No; if I understand your question --

Q You wouldn't think that that would be the sensible thing to do?

A I don't --

Q But many of them --

A Well, they certainly haven't done it. They have, except that theGovernment on the rate discrimination provisions of the legislation, so that there can, in effect, be rate discriminations in favor of the Government. They've done that, but they haven't done anything with respect to the routings that are to be used, or anything of that sort.

But, I should say that the importance of Government traffic to the regulated motor carrier industry, and particularly some elements of it, is very, very great. And the Commission will, one way or another, in the many, many proceedings that are pending before it now, seeking modification of routes and this sort of thing, will have to decide how this problem can be worked out so as to provide the best service to the department without working undue damage on the existing motor and rail carrier. I think that is a complex problem and I would much prefer to see that worked out in permanent authority applications with full hearings than by way of this kind of

summary proceedings.

Now, I would gather from Mr. Cerra's argument that, perhaps erroneously, but let me just state what I seem to feel about it, and that is that if these petitions for reconsideration had not been pending at the time that the Commission reopened the record, there would not be a very strenuous argument from the other side that the Commission was free to do what it did. But, if I incorrectly surmised that, in any event, I think that's what the Appellants ought to be conceding, because Inland Steel, in this Court, in establishing that the Commission cannot act in a way inconsistent with the Commission's jurisdiction, taken together with the other cases that we have cited, which in other contexts, indicate what that sort of thing means, it would seem to me to lead to the conclusion that where the Commission, in effect, wipes out the race of the litigation, they are acting inconsistently with the court's jurisdiction. This is what the Commission did here. In effect, it wiped out the order that was under review. It reopened the record; in effect, had a new trial, and in effect, a new judgment which was then subject to further appeal so that it seems to me that the turning question here is the effect of the pending petitions for reconsideration.

Now, our first position on that is that those petitions for reconsideration could not have extended the authority of the Commission, because they were not authorized

The regulation respecting the petitions for reconsideration in temporary authority proceedings as set forth on page 47 of the brief of Certain Motor Carrier Appellees. Now, it identified two kinds of orders from which such petitions can be taken and this case does not involve either one of them. That, I think, is conceded.

But, what Mr. Cerra says is that the general rules of practice of the Commission do authorize a petition for reconsideration in these circumstances and that that rule should be read into the temporary authority rule, because the temporary authority rule starts out: "pursuant to, and in accordance with the Commission's general and special rules of practice."

Now, we think that a more normal reading of that phrase, "pursuant to and in accordance with," would be to refer to procedural questions, such as the number of copies and that sort of thing.

But, more important than that, if the general rules and the special rules are read into this rule, then this rule is robbed of any independent significance, because the petitions for reconsideration that are authorized by this rule are also authorized by the general and special rules, so that to give it any meaning, one must read it restrictively. One must conclude that this rule establishes the only circumstances under which petitions for reconsideration are to be permitted in temporary authority proceedings.

If I may add that there is no support here to the Court, or no help to the Court by way of the construction of these regulations by the Commission. The Commission in no order construed these regulations to permit these petitions for reconsideration. It reopened the proceeding on its own motion.

There is a reference in a footnote in AFL's brief to the effect that that is not so and that the Commission indicated that it believed that the petitions were authorized, but I refer the Court to the record citation. It is to a brief by Commission counsel in the court below.

But, beyond that, we say that even if the petitions were not authorized, that the results should be the same. And we say that fundamentally, because we think if the result is different then an important policy consideration underlying the principle restricting agency freedom in the context of judicial review, should be undercut.

And thatpolicy, we think, arises from the dual role of the agency. It is, of course, first and foremost, a neutral arbiter, but then when its orders are attacked it becomes a litigant. Now, so long as the litigation is simply conducted by the General Counsel's office, there is no possibility of conflict of interest, but where the Commission reopens the review procedures after the judicial/has commenced, and particularly where the court has identified what it sees as a possible

difficulty in the Commission's position, then we suggest that there is a risk that the agency will act more as a litigator than as an arbiter.

Now, the counsel for the Commission says, but -- well, he doesn't say yes to that. He says, in connection with his point, that one must allow the Commission the right to correct errors, and certainly that's true; that's an important policy consideration. But, first of all the rule that we're arguing for doesn't deny the agency the right to do that; it simply requires that the agency get the authority of the court to do whatever it wishes to do.

And in the second place, the facts of this case, while certainly not conclusive one way or the other, do not fit very neatly, we suggest, into the notion that what the Commission was doing here was correcting an error and that alone.

The Government in its footnote to its brief, indicates that the Commission had in mind when it reopened the record, this problem respecting subparagraphs 8 and 9 of the regulations. But if that is so, it didn't do anything about that problem, at least directly. It did not suggest to the Department that they comply with subparagraphs 8 and 9. It did not direct the attention of the Department to subparagraphs 8 and 9. What it did was to reopen the record and take additional evidence from the Department and then its counsel returned to court below, as they do here, and concede that there were

defaults with respect to the compliance with these regulations, as Judge Bolt indicated in that very first hearing, but argue that the additional evidence that was taken was so compelling as to outweigh these problems with respect to the regulations.

As I say, I don't suggest that these facts are conclusive, with respect to this risk that I am talking about, but they are not inconsistent, at least, with the theory that I advance.

And, so what we argue for, and I may say that it seems to me that what's needed here is a rule. There ought to be a clearcut rule. I don't suggest that this is policy considerations either way here are so strong as to establish that we are right or we are wrong. But what I do say is that we think the burden on the Commission is complying with the rule that we are talking about would be very, very slight, indeed, whereas the risk of danger on the other side is reasonably significant.

And so what we urge is a rule that would require the Commission, when judicial review has commenced, or at least after the court has taken a significant step in the case, and that here was the grant of the temporary restraining order after a full hearing. But at that point the Commission then would be required to go to the court and seek authorization if it wishes to reopen the record and enter a new order. We think that, as I say, that's a slight burden on the Commission. It

prevents any hazards with respect to the legitimate interests of the parties before the Commission.

That, I think, summarizes our case, if it please the Court.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Dempsey.

Mr. Califano.

REBUTTAL ARGUMENT BY JOSEPH A. CALIFANO, JR., ESQ.

ON BEHALF OF APPELLANT AMERICAN FARM LINES

MR. CALIFANO: Mr. Chief Justice, if I may just make a couple of points. One with respect to the regulation Mr. Justice White on the granting of temporary authority where single-line service is involved. That regulation does go on to provide that a grant of temporary authority to effectuate single-line service will be authorized only when it is clearly established that the carriers providing multiple-line service are not capable or fail to meet needs.

The same regulation, subsection 2 of it, specifically lists as one of the occasions on which an immediate and urgent need exists, an occasion where there is, "a discontinuance of existing service," and I do think it's important to note that the Department of Defense had the service of American Farm Lines for some two-and-a-half years --

Q On an exempt basis?

A On an exempt basis and that service was being discontinued.

Secondly, Mr. Chief Justice, with respect to the burden of proof, I just would like to point out, quoting from the regulation that's in the brief filed by Mr. Adams and the American Trucking Association that with respect to the filing of protests, it says: "Such protest must be specific as to the service which protestant can and will offer and must consist of a signed original," et cetera, et cetera.

I think at best it's fuzzy as to where the burden of proof lies when you read this regulation which follows immediately upon a regulation listing the 11 points.

Q Well, it says a default in the first place. Failure to answer questions like 8 and 9, doesn't that, perhaps alter the situation somewhat?

A I think, Mr. Chief Justice as I have indicated and as many of the Appellees have conceded, if you say no efforts have been made that's an answer, too. That's an answer to 8 and 9. If you say efforts have been made, then the question is: "What kinds of efforts were made and what came out of it?"

This is a procedural rule of the I.C.C. designed to help them, I believe, and I think the problem is that we have just a unique shipper, not like any other shipper in the country and the question is whether or not his statement measures up under either of those alternatives and we believe that what he was asking for was clear here and they clearly

couldn't provide it.

Finally, on the point of need, I would indicate as I think Mr. Justice Brennan asked, that if in this day and age there is not a need for sharply-reducing defense costs, as this would do, and for safety in moving dangerous materiels, it's hard to think of what moreurgent needs we could have than that.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Califano. Thank you, Mr. Dempsey. The case is submitted.

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