

The Burger Court Opinion Writing Database

United States v. Florida East Coast Railway Co.
410 U.S. 224 (1973)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University



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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June fifth
1972

Dear Chief:

I talked with Bill Rehnquist and he has not had sufficient time to study No. 70-279 - U. S. v. Florida East Coast, so I suggest it be put on the next Conference List so that it can be explored by the Conference and determined whether it should be put down for oral argument or disposed of summarily.

The new sentence that Bill Rehnquist put into his Allegheny opinion (71-227) eliminates any possibility of a conflict with Florida East Coast.


William O. Douglas

The Chief Justice

CC: The Conference

To: The
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT From: Douglas, J.

SUPREME COURT OF THE UNITED STATES ~~10/17/71~~
No. 70-279 ~~Recirculated~~

United States of America and
Interstate Commerce Commission, v. Florida East Coast Railway Co. and Seaboard Coast Line Railroad Co. On Appeal from the United States District Court for the Middle District of Florida.

[October —, 1971]

PER CURIAM.

The question is whether the Interstate Commerce Commission procedures used in this rate case "for the submission of . . . evidence in written form" avoided prejudice to the appellees so as to comport with the requirements of § 7 of the Administrative Procedure Act.¹ The Government appeals from the District Court's order remanding this case to the Commission for further proceedings on the incentive *per diem* rates to be paid by the appellee railroads for the standard boxcars they use. We affirm.

In 1966, Congress amended § 1 (14)(a) of the Interstate Commerce Act to require that the Commission investigate the use of methods of incentive compensation to alleviate any shortage of freight cars "and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense."

¹ In its relevant part, § 7 provides: "In rule making . . . an agency may, *when a party will not be prejudiced thereby*, adopt procedures for the submission of all or part of the evidence in written form." 5 U. S. C. § 556 (d) (emphasis added).

pp 2-4

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: [Redacted]

3rd DRAFT

Circulated:

Recirculated:

10-7

SUPREME COURT OF THE UNITED STATES

No. 70-279

United States of America and

Interstate Commerce
Commission,

v.

Florida East Coast Railway Co.
and Seaboard Coast Line
Railroad Co.

On Appeal from the
United States Dis-
trict Court for the
Middle District of
Florida.

[October —, 1971]

PER CURIAM.

The question is whether the Interstate Commerce Commission procedures used in this rate case “for the submission of . . . evidence in written form” avoided prejudice to the appellees so as to comport with the requirements of § 7 of the Administrative Procedure Act.¹ The Government appeals from the District Court’s order remanding this case to the Commission for further proceedings on the incentive *per diem* rates to be paid by the appellee railroads for the standard boxcars they use. We affirm.

In 1966, Congress amended § 1 (14)(a) of the Interstate Commerce Act to require that the Commission investigate the use of methods of incentive compensation to alleviate any shortage of freight cars “and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense.”

¹ In its relevant part, § 7 provides: “In rule making . . . an agency may, *when a party will not be prejudiced thereby*, adopt procedures for the submission of all or part of the evidence in written form.” 5 U. S. C. § 556 (d) (emphasis added).

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

5th DRAFT

From: Douglas, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 6-5

UNITED STATES OF AMERICA AND INTERCIRCULATED:
STATE COMMERCE COMMISSION v. FLORIDA
EAST COAST RAILWAY CO. AND SEABOARD
COAST LINE RAILROAD CO.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA

No. 70-279. Decided November —, 1971

PER CURIAM.

The question is whether the Interstate Commerce Commission procedures used in this rate case "for the submission of . . . evidence in written form" avoided prejudice to the appellees so as to comport with the requirements of § 7 of the Administrative Procedure Act.¹ The Government appeals from the District Court's order remanding this case to the Commission for further proceedings on the incentive *per diem* rates to be paid by

¹ In its relevant part, § 7 provides: "In rule making . . . an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form." 5 U. S. C. § 556 (d) (emphasis added).

Our decision in *United States v. Allegheny-Ludlum Steel Corp.*, *ante*, p. —, holding that § 7 of the Administrative Procedure Act was inapplicable to certain rulemaking procedures under § 1 (14) (a) of the Interstate Commerce Act, 49 U. S. C. § 1 (14) (a), does not apply to the facts of this case. In *Allegheny-Ludlum*, we dealt with the Commission's general rulemaking powers under the first sentence of § 1 (14) (a). We held that such rulemaking was not required to be "on the record" under § 5 (c) of the Administrative Procedure Act, 5 U. S. C. § 553 (c), and that § 7, therefore, was inapplicable. In the present case, by contrast, we deal with Commission incentive *per diem* rulemaking under the 1966 amendments to the Interstate Commerce Act where Congress has conditioned Commission action upon extensive factual inquiries and preconditions. In such cases, we conclude that Commission rulemaking was to be "on the record" and that § 7 applies.

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 15, 1972

MEMORANDUM TO THE CONFERENCE:

I am in agreement with presenting to the
parties the question set forth in Mr. Justice
Rehnquist's Memorandum of June 14 in No. 70-279 -
U.S. v. Florida East Coast Rly. Co.

W. O. D.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 6, 1971

RE: No. 70-279 - United States & I.C.C.
v. Florida East Coast Railway Co, et al.

Dear Bill:

I agree.

Sincerely,



Mr. Justice Douglas

cc: The conference

cc to mail

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 5, 1972

RE: No. 70-279 - U.S. & I.C.C. v. Florida
East Coast Railway & Seaboard RR. Co.

Dear Bill:

I agree with the Per Curiam you have
prepared in the above case.

Sincerely,



Mr. Justice Douglas

cc: The Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 16, 1972

RE: No. 70-279 - United States v. Florida
East Coast Railway Co.

Dear Bill:

I agree with your suggestions in the
above case.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

October 7, 1971

No. 70-279, U.S. v. Florida East Coast R. Co.

Dear Bill,

I am glad to join your Per Curiam, as
re-circulated today.

Sincerely yours,



Mr. Justice Douglas

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 20, 1972

70-279 - U.S. v. Florida E.C.Ry Co.

Dear Bill,

I agree that counsel in this case
should be asked to address themselves
to the question you have framed.

Sincerely yours,

PS

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

October 21, 1971

Re: No. 70-279 - U.S. and ICC v. Florida
East Coast Railway Co. and Seaboard
Coast Line Railroad Co.

Dear Bill:

Please join me in your per curiam.

Sincerely,


T.M.

Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 6, 1972

Re: No. 70-279 - U.S. and I.C.C. v. Florida

Dear Bill:

Please join me in your per curiam.

Sincerely,


T.M.

Mr. Justice Douglas

cc: Conference

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-279

Circulated: 10/18/71

Recirculated: _____

United States of America and
Interstate Commerce Commission
v.
Florida East Coast Railway Co.
and Seaboard Coast Line Railroad Co.

On Appeal from the
United States District Court for the
Middle District of Florida.

[October —, 1971]

MR. JUSTICE BLACKMUN, concurring.

I concur, but I do so with some discomfort.

This is occasioned in part because I am not entirely persuaded that the two appellee railroads have demonstrated a need for detailed cross-examination and live testimony before the Commission's *per diem* order becomes effective. But the District Court and this Court have resolved that doubt in favor of the appellees and I must be content.

My discomfort, however, further centers in the facts that more than five years already have elapsed since the Congress observed, "Something must be done . . . ,"^{*} and amended the Interstate Commerce Act to require the Commission to consider an incentive element in its consideration of *per diem* compensation directed toward the alleviation of the critical freight car shortage; that, as the Court's opinion points out, Congress desired that the shortage be remedied expeditiously and evinced irritation with delay; that it took three years for the agency action that is now challenged; and that, by the Court's decision on this appeal today, still further deferral of

^{*}H. Rep. No. 1183, 89th Cong., 1st Sess., p. 21.

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

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Blackmun, J.

No. 70-279

Circulated:

Recirculated: 6/8/7.

United States of America and
Interstate Commerce Commission
v.
Florida East Coast Railway Co.
and Seaboard Coast Line Railroad Co.

On Appeal from the
United States District Court for the
Middle District of Florida.

[June —, 1972]

MR. JUSTICE BLACKMUN, concurring.

I concur, but I do so with some discomfort.

This is occasioned in part because I am not entirely persuaded that the two appellee railroads have demonstrated a need for detailed cross-examination and live testimony before the Commission's *per diem* order becomes effective. But the District Court and this Court have resolved that doubt in favor of the appellees and I must be content.

My discomfort, however, further centers in the facts that more than six years already have elapsed since the House Committee on Interstate and Foreign Commerce observed, "Something must be done . . .,"* and the Congress amended the Interstate Commerce Act to require the Commission to consider an incentive element in its consideration of *per diem* compensation directed toward the alleviation of the critical freight car shortage; that, as the Court's opinion points out, Congress desired that the shortage be remedied expeditiously and evinced irritation with delay; that it took three years for the agency action that is now challenged; and that, by the

*H. Rep. No. 1183, 89th Cong., 1st Sess., 21 (1965).

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 16, 1972

Re: No. 70-279 - U.S. v. Florida East
Coast Railway Co.

Dear Bill:

Your suggestion in this case certainly
meets with my approval.

Sincerely,

H. A. B.

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

Recd 3 June 1972
June 14, 1972

Re: No. 70-279 - United States v. Florida East
Coast Railway Co.

Dear Chief:

In this case we noted probable jurisdiction on June 12th. The court below assumed, and Judge Friendly's opinion in the Long Island case held, that these proceedings were governed by §§ 6 and 7 of the Administrative Procedure Act, 5 USC §§ 556 and 557, rather than by § 3 (5 USC 553) alone. This, rather than the interpretation of § 556 on which the two lower courts divided, seemed to me the more important issue involved in the case, and I so stated in the Conference discussion. I would like the opportunity to propose at Conference that counsel be requested to address themselves to the following question:

"Are the proceedings here under review governed by the provisions of 5 USC §§ 556 and 557?"

Because Bill Douglas wrote the draft Per Curiam, and because I understand he does not plan to attend tomorrow's Conference, he probably will not have received my circulation and have had a chance to respond to it by that date. If these assumptions are correct, I would think it best that my proposal be considered at the Conference on June 23rd, in order that we may have had an opportunity to receive his views.

Sincerely,

Mr. Chief Justice

Copies to the Conference