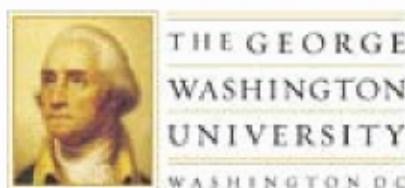


# The Burger Court Opinion Writing Database

*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



5  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

January 18, 1973

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

Dear Bill:

Please join me.

Regards,

WRB

Mr. Justice Rehnquist

Copies to the Conference

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

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 70-279

Circulated: 1/6/73

United States et al.,  
Appellants,  
v.  
Florida East Coast Railway  
Company et al.

Recirculated: \_\_\_\_\_  
On Appeal from the United  
States District Court for  
the Middle District of  
Florida.

[January —, 1973]

MR. JUSTICE DOUGLAS dissenting.

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.<sup>1</sup> 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." 49 U. S. C. § 1 (14)(a). While the Commission was given the discretion to exempt carriers from incentive payments "in the national interest," it was denied the

<sup>1</sup> 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).

15  
P1

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

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-279

United States et al.,  
Appellants,  
v.  
Florida East Coast Railway  
Company et al. } On Appeal from the United  
States District Court for  
the Middle District of  
Florida.

19122

[January —, 1973]

MR. JUSTICE DOUGLAS dissenting.

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.<sup>1</sup> 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.

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<sup>1</sup> 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).

2  
P1  
Barrett WFR/TM

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

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-279

Case No. 10110173

United States et al.,  
Appellants,  
v.  
Florida East Coast Railway  
Company et al.

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

[January —, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART concurs, dissenting.

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.<sup>1</sup> 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.

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." 49 U. S. C. § 1 (14)(a). While the Commission was given the discretion to exempt carriers from incentive payments "in the national interest," it was denied the

<sup>1</sup> 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).

Changes 5 thru 10

4th DRAFT

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

SUPREME COURT OF THE UNITED STATES

No. 70-279

From: Douglas, J.

Circulated:

United States et al.,  
Appellants,  
v.  
Florida East Coast Railway  
Company et al. } On Appeal from ~~the United~~ States District Court for  
the Middle District of  
Florida.

[January —, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART concurs, dissenting.

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.<sup>1</sup> 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.

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." 49 U. S. C. § 1 (14)(a). While the Commission was given the discretion to exempt carriers from incentive payments "in the national interest," it was denied the

<sup>1</sup> 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).

p. 1, 2, 3

## 5th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 70-279

From: Douglas, J.

Circulated:

United States et al.,  
Appellants,  
v.  
Florida East Coast Railway  
Company et al.

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

1-17-73

[January —, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART concurs, dissenting.

The present decision makes a sharp break with traditional concepts of procedural due process. The Commission order under attack is tantamount to a rate order. Charges are fixed which nonowning railroads must pay owning railroads for boxcars of the latter which are on the tracks of the former. For example the charge for a boxcar that cost from \$15,000 to \$17,000 and that is five years or younger in age amounts to \$5.19 a day, payable twice a year. Boxcars costing between \$39,000 or \$41,000 and that are five years or younger in age cost the nonowning railroad \$12.98 a day. The fees or rates charged are lesser as the age of the boxcars lengthen. 49 CFR § 1036.2. This is the imposition on carriers by administrative *fiat* of a new financial liability. I do not believe it is within our traditional concepts of due process to allow an administrative agency to saddle on anyone a new rate, charge, or fee without a full hearing that includes the right to present oral testimony, cross examine witness, and to present oral argument. That is required by the Administrative Procedure Act, 5 U. S. C. § 556 (d); § 556 (a) states that § 556 applies to hearings required by § 554. Section 554 (a) applies, with exceptions not material, here to "every case of adjudications required

129

6th DRAFT

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

## SUPREME COURT OF THE UNITED STATES

No. 70-279

From: Douglas, J.

Circulated:

JAN 19 1973

Recirculated:

United States et al.,  
Appellants,  
v.  
Florida East Coast Railway  
Company et al.

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

[January 22, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART concurs, dissenting.

The present decision makes a sharp break with traditional concepts of procedural due process. The Commission order under attack is tantamount to a rate order. Charges are fixed which nonowning railroads must pay owning railroads for boxcars of the latter which are on the tracks of the former. These charges are effective only during the months of September through February, the period of greatest boxcar use. For example the charge for a boxcar that costs from \$15,000 to \$17,000 and that is five years or younger in age amounts to \$5.19 a day. Boxcars costing between \$39,000 and \$41,000 and that are five years or younger in age cost the nonowning railroad \$12.98 a day. The fees or rates charged are lesser as the age of the boxcars lengthen. 49 CFR § 1036.2. This is the imposition on carriers by administrative *fiat* of a new financial liability. I do not believe it is within our traditional concepts of due process to allow an administrative agency to saddle anyone with a new rate, charge, or fee without a full hearing that includes the right to present oral testimony, cross examine witnesses, and to present oral argument. That is required by the Administrative Procedure Act, 5 U. S. C. § 556 (d); § 556 (a) states that § 556 applies to hearings required

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

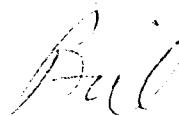
CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR. January 3, 1973

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

Dear Bill:

I agree.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

2  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

January 10, 1973

70-279 - U. S. v. Florida East  
Coast Ry. Co.

Dear Bill,

I should appreciate your adding my  
name to your dissenting opinion in this case.

Sincerely yours,

PS  
1

Mr. Justice Douglas

Copies to the Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

January 18, 1973

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

Dear Bill,

In view of the changed focus in the first part of your opinion, I would appreciate your deleting my name as joining, and adding at the end of your opinion:

"Mr. Justice Stewart joins in this dissent except insofar as it relies on 5 U.S.C. § 554."

Sincerely yours,

 W. O. Douglas

Mr. Justice Douglas

Copy to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

January 4, 1973

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

Dear Bill:

Join me, please.

Sincerely,

Byron

Mr. Justice Rehnquist

Copies to Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

January 18, 1973

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

Dear Bill:

Please join me.

Sincerely,

  
T.M.

Mr. Justice Rehnquist

cc: Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

January 12, 1973

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

Dear Bill:

Please join me.

Sincerely,

*H. A. B.*

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

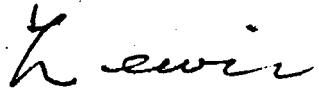
December 30, 1972

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

Dear Bill:

When your opinion is ready to be released, please note at  
the end that I took no part in the consideration or decision of the  
case.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

Wait for  
word

2

To: The Justices  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackman  
Mr. Justice Powell

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 70-279

Circulated 12/29

Received by \_\_\_\_\_

United States et al.,  
Appellants,  
v.  
Florida East Coast Railway  
Company et al. } On Appeal from the United  
States District Court for  
the Middle District of  
Florida.

[January —, 1973]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellees, two railroad companies, brought this action in the District Court of the Middle District of Florida to set aside the incentive per diem rates established by appellant Interstate Commerce Commission in a rule-making proceeding. Incentive Per Diem Charges—1968, *Ex parte* No. 252 (Sub No. 1). They challenged the order of the Commission on both substantive and procedural grounds. The District Court sustained appellees' position that the Commission had failed to comply with the applicable provisions of the Administrative Procedure Act, 5 U. S. C. § 551 *et seq.*, and therefore set aside the order without dealing with the railways' other contentions. The District Court held that the language of § 1 (14)(a)<sup>1</sup> of the Interstate Commerce

<sup>1</sup> Section 1 (14)(a) provides:

"The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobserv-

2/9/11, 12, 22

Please do not type

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

2nd DRAFT

cc: [unclear]

## SUPREME COURT OF THE UNITED STATES

No. 70-279

Rec'd [unclear] 1/17

United States et al.,  
Appellants,  
v.  
Florida East Coast Railway  
Company et al. } On Appeal from the United  
States District Court for  
the Middle District of  
Florida.

[January —, 1973]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

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"The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobserv-