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RECENT DEVELOPMENTS

ADMINISTRATIVE LAW — FEDERAL COURTS HAVE JURISDICTION TO ENJOIN NON-FINAL INTERSTATE COMMERCE COMMISSION ORDERS UPON AGENCY FAILURE TO COMPLY WITH NATIONAL ENVIRONMENTAL POLICY ACT.

SCRAP v. United States (D.D.C. 1972)

Plaintiff, an unincorporated student environmental association, filed suit in the United States District Court for the District of Columbia for temporary and final relief from orders of the Interstate Commerce Commission (ICC) issued in February¹ and April² 1972. The orders allowed a 2.5 per cent interim surcharge on railroad freight rates to take effect without suspension, subject to specific conditions.³ Alleging that the increase would raise the cost of recyclable goods vis-à-vis primary goods, SCRAP argued that the orders constituted major federal action "significantly affecting the quality of the human environment"⁴ and could not be issued without the preparation of a detailed environmental impact statement under section 4332(c) of the National Environmental Policy Act (NEPA).⁵

On plaintiff's motion for a preliminary injunction,⁶ defendant moved for dismissal, challenging the plaintiff's standing to sue, the jurisdiction of the court,⁷ and the applicability of NEPA. The Court found for the plaintiff on all three issues, *holding* that federal courts have jurisdiction to enjoin federal actions which violate the mandated statutory procedures of the National Environmental Policy Act, even if the authority to review is otherwise lacking. The court preliminarily enjoined the implementation of the April order⁸ as far as it affected the shipping of recyclable ma-

1. 340 I.C.C. 358 (1972).

2. 340 I.C.C. ____ (Apr. 24, 1972).

3. In the February order, the Commission conditioned its approval on three modifications of the proposed rate, including the addition of an expiration date of not later than June 5, 1972. On February 28, 1972, the railroads offered to file selected increases of 4.1 per cent to go into effect on April 1. The Commission suspended these rates for seven months and permitted an extension of the surcharge then in effect. *SCRAP v. United States*, 346 F. Supp. 189, 193 (D.D.C. 1972).

4. 42 U.S.C. § 4332(c) (1970).

5. *Id.* §§ 4321 *et seq.*

6. The Environmental Defense Fund, the National Parks and Conservation Association, and the Izaak Walton League of America intervened as plaintiffs, and a number of railroads intervened as defendants. The Council on Environmental Quality was made an involuntary plaintiff. 346 F. Supp. at 194 n.70.

7. All applications for injunctions against the Commission must be heard by a three-judge district court. 28 U.S.C. § 2325 (1970).

8. The February order had expired by its own terms, and the portion of the complaint concerning that order was dismissed as moot. The court retained jurisdiction over the portion of the complaint dealing with the permanent increase, but decided that it was too early to review it. 346 F. Supp. at 192 n.3.

terials, and restrained the ICC from allowing the railroad to collect a surcharge on recyclables until an adequate environmental impact statement has been issued. *SCRAP v. United States*, 346 F. Supp. 189 (D.D.C. 1972).

The defendant immediately applied to the Chief Justice of the United States Supreme Court, in his capacity as Circuit Justice, for a stay of the injunction pending appeal. Chief Justice Burger held that, although he had serious doubts about the wisdom of the decision and its implications for the future, he did not regard the preliminary injunction as constituting such an abuse of judicial discretion to warrant his granting relief to the appellants.⁹

Notwithstanding the numerous cases that have reached the Supreme Court on the question of standing, the Court has not been able to satisfactorily resolve the issue in such a fashion as to facilitate a uniform application of standing principles in the lower courts. The problem is particularly complex when the standing is based upon an allegation of a noneconomic injury.¹⁰ In two cases decided on the same day, *Association of Data Processing Service Organizations, Inc. v. Camp*¹¹ and *Barlow v. Collins*,¹² the Court attempted to establish a clear test:

The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise. . . .

. . . .

. . . [The second question is] whether the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question.¹³

Subsequently, the Court was forced to clarify its position with respect to noneconomic injury. In *Sierra Club v. Morton*,¹⁴ the Court dismissed a complaint brought by the Sierra Club against the Secretary of the Interior, and reaffirmed the requirements of personal injury by noting that "mere interest" in a problem is not sufficient, by itself, to render an organization aggrieved.¹⁵

9. *Aberdeen & Rockfish R.R. v. SCRAP*, 93 S. Ct. 1 (Burger, Circuit Justice, 1972).

10. See *Abington School Dist. v. Schempp*, 374 U.S. 203, 224 (1963) (standing granted to school children and parents directly affected by regulations requiring Bible reading in the schools); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 616 (2d Cir. 1965) (standing granted to redress an environmental injury).

11. 397 U.S. 150 (1970).

12. 397 U.S. 159 (1970).

13. *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 152-53 (1970).

14. 405 U.S. 727 (1972). Before this decision, a number of federal courts had granted standing to sue to environmental groups merely on the basis of their interest in the problem. *Environmental Defense Fund v. Hardin*, 428 F.2d 1093, 1097 (D.C. Cir. 1970); *Citizens Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97, 105 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970).

15. 405 U.S. at 739-40. In conformity to this decision, the plaintiff in the instant case referred to itself as an environmental organization trying to improve the environment for the benefit of its members. 346 F. Supp. at 191.

Questions concerning jurisdiction to review decisions of regulatory agencies have also long troubled the federal courts. The problem is especially complex when an issue subject to the authority of ICC arises because carriers have been permitted broad discretion to fix their own rates.¹⁶ The courts' willingness to take jurisdiction in controversies involving the ICC, common carriers, and members of the public has varied as the Interstate Commerce Act has been rewritten.¹⁷

Prior to 1910, the ICC lacked the power to suspend rates, and the lower courts differed as to whether they had the power to grant injunctions against the rate changes.¹⁸ In 1910, Congress revised the Interstate Commerce Act to give the ICC the power to suspend rates proposed by the carriers, to investigate the lawfulness of the rates, and to make appropriate orders concerning future rates.¹⁹ The Act further provided a mechanism by which members of the public could obtain a final agency review of rate changes.²⁰

Since the 1910 revision of the Act, most courts have indicated that they had no power to review ICC action when the ICC has refused to suspend new rates.²¹ In *Arrow Transportation Co. v. Southern Railroad*,²² the Supreme Court declared that the power to suspend rates was solely within the discretion of the ICC and that the courts could not grant injunctions when the ICC failed to suspend carrier-made rates or when the suspension period had expired.

The questions of standing to bring suit and of jurisdiction to review agency decisions were further complicated in 1969 when Congress passed the National Environmental Policy Act²³ which required federal agencies

16. This discretion is granted pursuant to statutory authority. See 49 U.S.C. § 6(3) (1970).

17. For a general history of the development of the Interstate Commerce Act, see the discussion in *Arrow Transp. Co. v. Southern R.R.*, 372 U.S. 658, 662-69 (1963).

18. Compare *Northern Pac. Ry. v. Pacific Lumber Mfrs. Ass'n*, 165 F. 1 (9th Cir. 1908) (injunction issued against new rates filed by the railroads), with *Atlantic Coast Line R.R. v. Macon Grocery Co.*, 166 F. 206 (5th Cir. 1909), *aff'd on other grounds*, 215 U.S. 501 (1910) (suit seeking such an injunction dismissed).

19. 49 U.S.C. § 15(7) (1970). Rates may be suspended for seven months. If the seven-month period has expired before the ICC investigation is concluded, the rates go into effect subject to an eventual refund, if they are found to be excessive.

20. *Id.* § 13(1). Anyone who is dissatisfied with any carrier action may file a complaint with the ICC. The complaint is forwarded to the carrier in question to see if he can rectify the situation and obviate the need for an ICC investigation.

21. See *ICC v. Inland Waterways Corp.*, 319 U.S. 671, 691 (1943); *Algoma Coal & Coke Co. v. United States*, 11 F. Supp. 487, 494 (E.D. Va. 1935). In *Algoma*, the plaintiff was advised by the court to file a complaint with the ICC under section 13 of the Interstate Commerce Act.

22. 372 U.S. 658 (1963). Cases prior to *Arrow* had reached the same result. However, since the *Arrow* Court analyzed the question so thoroughly, its decision is most frequently cited for this point. For later cases reaffirming the *Arrow* decision, see *National Indus. Traffic League v. United States*, 287 F. Supp. 129 (D.D.C. 1968), *aff'd* 393 U.S. 535 (1969); *Movers & Warehousemen's Ass'n v. United States*, 227 F. Supp. 249, 251 (D.D.C. 1964).

23. 42 U.S.C. §§ 4321 *et seq.* (1970). Section 4332 provides:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted

to prepare a detailed environmental impact statement to be considered in connection with any proposed major federal action that might adversely affect the environment.²⁴ Members of the public, disturbed by federal projects that polluted the air, spoiled scenic sights, or encroached upon recreational lands, began seeking injunctions against agencies for failure to prepare an impact statement pursuant to NEPA.²⁵

Generally, the federal courts have been willing to assume jurisdiction in environmental cases.²⁶ However, in a recent case,²⁷ the Second Circuit dismissed the plaintiff's complaint and ruled that a decision by the ICC's appellate board to allow rate increases to take effect without suspension did not require the preparation of an environmental impact statement.²⁸

In the instant case, the court easily resolved the question of standing, reasoning that SCRAP had demonstrated the requisite personal injury by alleging that its members utilized the natural resources in the Washington area and that these resources would be rapidly exhausted if recyclable materials became too expensive for general use.²⁹ The court distinguished the instant case from *Sierra* by stating that the Sierra Club had been denied standing because it had not alleged the use of the lands

and administered in accordance with the policies set forth in this chapter, and
(2) all agencies of the Federal Government shall—

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and,
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

... Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available . . . to the public . . . and shall accompany the proposal through the existing agency review processes.

24. For a general discussion of the provisions of NEPA, see Peterson, *An Analysis of Title I of NEPA*, 1 ENVIR. L. REP. 50035 (1971); Note, *The National Environmental Policy Act: A Sheep in Wolf's Clothing*, 37 BROOKLYN L. REV. 139 (1970).

25. See *Committee for Nuclear Responsibility, Inc. v. Seaborg*, No. 71-1732 (D.C. Cir., Oct. 5, 1971); *City of New York v. United States*, 337 F. Supp. 150 (E.D.N.Y. 1972). In the *Seaborg* case, summary judgment against the plaintiff was reversed by the court and remanded for consideration of plaintiff's requested injunction against a proposed nuclear test. In *City of New York*, the ICC was ordered to issue an impact statement on the environmental effects of the abandonment of a small railroad line.

26. *Committee for Nuclear Responsibility, Inc. v. Seaborg*, No. 71-1732 (D.C. Cir., Oct. 5, 1971); *City of New York v. United States*, 337 F. Supp. 150 (E.D.N.Y. 1972).

27. *Port of N.Y. Authority v. United States*, 451 F.2d 783 (2d Cir. 1971). This case dealt with tariffs published by the Penn Central Railroad for charges for lighter-gauge service at the New York harbor. The plaintiff charged that the increased rates would divert river traffic to the highways and increase the city's air pollution.

28. *Id.* at 788.

29. 346 F. Supp. at 195.

in question,³⁰ whereas the plaintiff in the instant case had made such an allegation.³¹

However, the court could not easily dispose of the defendant's jurisdictional challenge which was based upon the *Arrow* doctrine, which had denied federal courts jurisdiction to try disputes arising from suspension proceedings of the ICC.³² The *Arrow* case, not previously questioned by any federal court, had declared that it was the primary responsibility of the ICC to determine the reasonableness of new rates and the time at which they should take effect.³³

In order to assert jurisdiction in the instant case, it was necessary to distinguish the *Arrow* case and to demonstrate that it was not controlling. The court did so by declaring that the *Arrow* doctrine was applicable to cases in which the ICC had merely refused to suspend rates proposed by a carrier, and in which the plaintiff sought to challenge the exercise of discretion on the merits.³⁴ Since the plaintiff was not questioning the wisdom of the ICC's decision but rather its adherence to a statutory mandate, the *Arrow* doctrine did not preclude taking jurisdiction. The court reasoned that when the ICC itself has failed to observe a statutory procedural requirement, an aggrieved party could turn to the courts for relief.³⁵ To buttress its position, the court rejected defendant's contention that SCRAP should have first sought a final agency order under section 13 of the Interstate Commerce Act.³⁶ The court declared that section 13 relief — as interpreted by the court in *Alabama Power Co. v. United States*³⁷ — is only available to a shipper who is seeking reparations and is of no benefit to a plaintiff challenging agency procedures; hence, plaintiff had exhausted his administrative remedies.³⁸

Having thus distinguished *Arrow* from the instant case, the court based its jurisdiction upon NEPA, calling it a powerful statute which conferred authority on the courts to review agency procedures even if such authority had previously been lacking.³⁹ In support of this position, the court cited two cases in which federal courts have utilized NEPA to review agency actions: *Committee for Nuclear Responsibility, Inc. v. Seaborg*,⁴⁰ in which a federal court issued an injunction against a proposed nuclear test because of the Atomic Energy Commission's failure to issue an adequate environmental impact statement; and *City of New York v.*

30. See *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972).

31. 346 F. Supp. at 195.

32. 372 U.S. at 667.

33. *Id.* at 668.

34. 346 F. Supp. at 198.

35. *Id.*

36. 49 U.S.C. § 13(1) (1970). The language of this section seems to indicate that only complaints against common carriers are to be entertained by the ICC. However, the defendant urged that the section could also be utilized to handle complaints alleging agency failure to follow mandatory procedures.

37. 316 F. Supp. 337 (D.D.C. 1969), *aff'd sub nom.* *Atlantic City Elec. Co. v. United States*, 400 U.S. 73 (1970).

38. 346 F. Supp. at 198.

39. *Id.* at 197.

40. No. 71-1732 (D.C. Cir. 1971).

United States,⁴¹ in which the ICC was ordered to issue an environmental impact statement on the effects of a proposed abandonment of a few miles of track by a railroad.

In deciding the instant case on the merits, the court concluded that a decision which "affects virtually every piece of freight moved by rail in the country"⁴² was a major federal action which could not be undertaken until the ICC had prepared and considered a detailed study respecting the possible adverse effects upon the environment and the feasible alternatives to the requested rate increases. The court noted that the ICC's February order had merely stated that its decision would not adversely affect the environment, and that the Commission, under pressure from SCRAP, had subsequently prepared a statement concluding that it was then impossible to determine if the rate increases would affect the environment.⁴³ The court concluded that these indecisive statements did not fulfill the statutory mandate.

In issuing a preliminary injunction,⁴⁴ the court emphasized that SCRAP had demonstrated that the environment would be irreparably harmed by the extraction of raw materials from the ground if an injunction were not granted, and that the defendant had not shown that the railroads would be irreparably harmed if the injunction were issued.⁴⁵

It should be noted that, in making its decision, the court discussed whether the somewhat detailed ICC order issued in February had merely refused to suspend rates proposed by the carriers or had actually prescribed new rates.⁴⁶ As a result of ample precedent, the court was not free to find that the order was a prescription of rates.⁴⁷ However, a finding that the rates were merely carrier-made should have prevented assumption of jurisdiction, a result required by the *Arrow* doctrine and by other federal cases in which courts, dealing with similar fact situations, had refused to grant injunctions against carrier-made rates.⁴⁸ The court avoided the dilemma by holding that NEPA alone provided a sufficient basis for its jurisdiction.⁴⁹

41. 337 F. Supp. 150, 160 (E.D.N.Y. 1972).

42. 346 F. Supp. at 200.

43. *Id.* at 200.

44. The defendant could have had the injunction dissolved by issuing a detailed environmental statement discussing the implications of the surcharge on the use of recyclables. The court was not ruling on the wisdom of the statement; once a proper statement was issued, the rates could not be suspended by the court unless the decision to implement them was totally arbitrary. *See Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

45. 346 F. Supp. at 201.

46. *Id.* at 196-97.

47. *See, e.g., ICC v. Inland Waterways Corp.*, 319 U.S. 671, 686-87 (1943), in which it was held that it was not a prescription of new rates for the ICC to find a new schedule filed by the railroads lawful. *But see, e.g., Arizona Grocery v. Atchinson, T. & S.F.R.R.*, 284 U.S. 370, 381 (1932), in which the Court held that an order creating maximum new rates was a prescription of new rates.

48. *See, e.g., Algoma Coal & Coke Co. v. United States*, 11 F. Supp. 487, 493 (E.D. Va. 1935). The railroads' petition for large increases was denied after an extensive hearing but the railroads were given permission to file moderate increases with the understanding that those rates would not be suspended.

49. 346 F. Supp. at 197.

However, this holding is weakened by the lack of convincing precedent for judicial review of the ICC's failure to follow a statutory procedural requirement.⁵⁰ In two cases cited by the court, *Long Island Railroad v. United States*,⁵¹ and *Naph-Sol Refining Co. v. United States*,⁵² complaints against the ICC were dismissed, although the courts noted that they might have taken jurisdiction had the complaints indicated that the rate suspensions violated a statutory command. In a third case,⁵³ apparently misconstrued by the *SCRAP* court, a Wisconsin district court held that a complaint charging ICC failure to follow mandated procedure was not justiciable.⁵⁴ Thus the *SCRAP* court's decision to take jurisdiction rested solely on its interpretation of NEPA, unbolstered by judicial precedents.

Moreover, the court cursorily treated certain policy considerations which should have been more thoroughly reviewed before concluding that environmental interests should take precedence. For example, the court declared that an injunction against certain railroad increases would not irreparably harm the railroads.⁵⁵ This conclusion, however, ignored the desperate revenue needs of the nation's railroads and the potential results of the injunction. If freight rates cannot be raised to match rising costs, it is probable that passenger rates would have to be increased. Such an increase could cause some commuters to abandon the railroads and to utilize automobiles instead, thereby causing an increase in air and noise pollution. Some of the railroads might even be forced into bankruptcy, which would require freight to be moved by trucks, augmenting another source of air and noise pollution. In a case strikingly similar to the instant case, *Port of New York Authority v. United States*,⁵⁶ these policy considerations were reviewed by the Second Circuit which refused to grant such an injunction. In light of the Second Circuit case, it is not apparent why the instant court deemed such considerations unworthy of closer analysis.

In essence, the validity of the court's decision rests upon its interpretation of the National Environmental Policy Act. It seems quite clear

50. *Id.* at 198.

51. 193 F. Supp. 795 (E.D.N.Y. 1961). In *Long Island R.R.*, the ICC allowed a routing restriction in a tariff to become effective, but later, after considering a petition, suspended the proposal. *Id.* at 800.

52. 269 F. Supp. 530 (W.D. Mich. 1967). The ICC at first suspended the increases, but later vacated the suspension. The plaintiff complained that the vacating order did not detail the reasons for the change. The court declared that the ICC was not required to give detailed reasons for the decision. *Id.* at 532.

53. *Oscar Mayer & Co. v. United States*, 268 F. Supp. 977 (W.D. Wis. 1967). The decision in *Oscar Mayer* adhered to the *Arrow* doctrine.

54. A number of cases prior to the *Arrow* decision had held that a court could take jurisdiction when the ICC had vacated a suspension order previously issued. The rationale for these cases was that a vacating order was in effect a final order, since there was no means by which a suspension order could be reinstated. See *Atlantic Coast Line R.R. v. United States*, 173 F. Supp. 871, 873 (E.D.N.Y. 1958); *Amarillo-Borger Express v. United States*, 138 F. Supp. 411, 420 (N.D. Tex. 1956), *vacated as moot*, 352 U.S. 1028 (1957). Although these cases have never actually been overruled, it is questionable whether they are still good law, in light of the *Arrow* decision. The court in *Naph-Sol* declined to follow this line of cases. 269 F. Supp. at 532.

55. 346 F. Supp. at 201-02.

56. 451 F.2d 783, 790 (2d Cir. 1971).

that, prior to the enactment of NEPA, the federal courts lacked jurisdiction to issue an injunction when the ICC failed to suspend proposed rates. The Interstate Commerce Act gave the ICC broad discretion in coordinating the many facets of interstate transportation,⁵⁷ and the *Arrow* case, decided prior to the enactment of NEPA, acknowledged the ICC's primary jurisdiction and held that federal courts had no jurisdiction to interfere in suspension proceedings.⁵⁸

In 1969, when Congress enacted NEPA, a bill which would have made environmental considerations more important than commercial ones could have been drafted. Congress could have included a specific provision that all disputes involving NEPA provisions were to be reviewable in the federal courts, notwithstanding the fact that the courts had formerly lacked such jurisdiction. However, contrary to the *SCRAP* court's interpretation, Congress did *not* enact such a statute. Most of NEPA's provisions were declaratory, merely acknowledging the Government's responsibility to confront the grave environmental problems facing the nation.⁵⁹ Section 4332(c),⁶⁰ which required the impact statements, was one of the few sections that ordered the federal government to take specific action. There were no provisions providing for review by the federal courts upon a violation of NEPA. Therefore, it is submitted that this statute did not extend the jurisdiction of the federal courts to those areas in which jurisdiction was formerly lacking.⁶¹

The ICC has appealed this decision to the Supreme Court,⁶² and the case is presently awaiting that Court's review. Since the order in question expired on November 30, 1972, the Court could technically dismiss the case as moot. However, the concern with respect to the extent of NEPA is likely to recur and, therefore, the Court should hear the case pursuant to the doctrine espoused in *Southern Pacific Terminal v. ICC*⁶³ — namely, that "orders capable of repetition yet evading review" should be reviewed.⁶⁴ It is quite possible that a majority of the Court will react to the decision with the same misgivings stated by Chief Justice Burger in his Circuit Justice opinion.⁶⁵ If so, the Court could simply reverse the decision, basing its action on the *Arrow* doctrine, and in accordance with the defendant's suggestion, advise the plaintiff to seek relief under section 13 of the Interstate Commerce Act.

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57. 49 U.S.C. §§ 1 *et seq.* (1970).

58. 372 U.S. at 667.

59. 42 U.S.C. §§ 4321 *et seq.* (1970).

60. *Id.* § 4332(c).

61. *See* note 23 *supra*.

62. Under 28 U.S.C. § 1253 (1970), any party may appeal from an order of a three-judge district court granting or denying an injunction directly to the Supreme Court.

63. 219 U.S. 498 (1911).

64. *Id.* at 515.

65. *Aberdeen & Rockfish R.R. v. SCRAP*, 93 S. Ct. 1 (Burger, Circuit Justice, 1972), *appeal docketed*, No. 72-562, 41 U.S.L.W. 3211 (U.S. Oct. 7, 1972). The ICC appeal in the instant case was docketed earlier. No. 72-535, 41 U.S.L.W. 3191 (U.S. Oct. 2, 1972).