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U.S. Department of Transportation

General Counsel

400 Seventh St., S.W.
Washington, D.C. 20590

SEP 19 1983

From: Jim Burnley
General Counsel

To: Richard Hauser
Deputy Counsel to the President

Re: Power of the Attorney General to Control Litigation Brought on Behalf of the Federal Maritime Commission (FMC)

In connection with the attached memorandum, which was prepared by a member of my staff, I want to emphasize the policy behind lodging full control of executive branch litigation, including that which involves the regulatory agencies, in the Justice Department. As the Fifth Circuit held in I.C.C. v. Southern Ry. Co., 543 F.2d 534, 536 (1976):

> This principle not only centralizes responsibility for the conduct of public litigation but enables the President, through the Attorney General, to supervise the various policies of the executive branch. The alternative would allow a proliferation of policies among and within the various agencies.

The rationale for this centralization was also discussed in F.T.C. v. Guignon, 390 F.2d 323, 329-330 (8th Cir. 1968), citing F.T.C. v. Claire Furnace Co., 274 U.S. 160, 173-174 (1927).

It should also be noted that the Justice Department, through the Appellate Staff of the Civil Division, appeared as an amicus in both Southern Ry. Co. and Guignon to argue in support of the Attorney General's exclusive authority.

Attachments

U.S. Department of Transportation
Office of the Secretary of Transportation

Memorandum

Subject: Power of the Attorney General to Control Litigation Brought on Behalf of the Federal Maritime Commission (FMC)

Date: SEP 19 1983

From: Kenneth N. Weinstein
Deputy Assistant General Counsel for Litigation, C-30

Reply to Attn of:

To: General Counsel, C-1

In general, the Attorney General has plenary power to control litigation brought by the United States and its agencies. Title 28 U.S.C. 516 provides:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

Similarly, 28 U.S.C. 519 directs the Attorney General to "supervise" all litigation to which the United States is a party, "except as otherwise authorized by law."

The FMC is not expressly authorized by any statute to represent itself. It could be argued, however, that the FMC has litigating authority similar to that of the Interstate Commerce Commission (ICC), since 46 U.S.C. 830 provides that "the venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside. . . any order of the [FMC] shall, except as otherwise provided, be the same as in similar suits in regard to orders of the [ICC]. . . ." 1/

The ICC has express authority to represent itself in challenges to its orders. 28 U.S.C. 2323 (paragraph 2). However, this does not apply to affirmative suits to enforce ICC orders. This subject was treated extensively in I.C.C. v. Southern Ry. Co., 543 F.2d 534 (5th Cir. 1976), reh. den., 551 F.2d 95 (1977). The court noted that the plain meaning of 28 U.S.C. 2321-2323, as well as the legislative history of those sections, demonstrated that "Congress

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1/ This memo will assume that this analogy to the ICC can be made, although it is certainly questionable whether the terms "venue and procedure" would encompass the concept of independent litigating authority. In this context, note that the ICC is statutorily authorized to employ attorneys to represent it in court [former section 16(11) of the Interstate Commerce Act, currently 49 U.S.C. 10301(f)(1)], while the FMC has no analogous authority.

has continually reasserted its intention to give the Attorney General, on behalf of the United States, exclusive control over the initiation of action s to enforce ICC orders." 543 F.2d at 537. 2/

It might be contended that the disjunctive language of 46 U.S.C. 828 authorizes independent enforcement of its orders by the FMC. Section 828 provides:

> In case of violation of any order of the [FMC] . . ., the Commission, or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties. . . .

However, the Fifth Circuit directly rejected a similar argument based upon nearly identical language in former section 16(12) of the Interstate Commerce Act (which is currently codified in various parts of 49 U.S.C. 10702, 10703, and 10705), noting that --

> it seems obvious that . . . the language in §16(12) is not sufficiently concrete to act as an exception to the Attorney General's broad authority over agency litigation. . . . This merely provides the ICC with the right to request that the Attorney General commence an appropriate actien in federal court to enforce its orders.

Southern Ry. Co., 543 F.2d at 539.

The principle that exceptions to the Attorney General's exclusive control over federal government litigation must be strictly construed is also supported by F.T.C. v. Guignon, 390 F.2d 323 (8th Cir. 1968). The court in Guignon held that the FTC had to obtain Justice Department representation to seek judicial enforcement of an administrative subpoena, even though the agency had explicit statutory authority to represent itself in courts in other types of proceedings.

It must be recognized that, in the ICC context, that Commission has authority to intervene as of right as a separte party in cases commenced by the Attorney General. 28 U.S.C. 2323; see Southern Ry. Co., 543 F.2d at 539. Thus, if the FMC did have equivalent authority (but see note 1, supra), it could intervene in the case now pending in the Southern District of New York, and thereafter represent itself (unless, of course, the Justice Department voluntarily dismissed the suit before the FMC could intervene).

2/ The court indicated that the purpose of this restriction was to "enable[ ] the President, through the Attorney General, to supervise the various policies of the executive branch. The alternative would allow a proliferation of policies among and within the various agencies." Id. at 536.

STATUTES

28 U.S.C.

§ 516. Conduct of litigation reserved to Department of Justice

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

(Added Pub.L. 89–554, § 4(c), Sept. 6, 1966, 80 Stat. 613.)

§ 519. Supervision of litigation

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

(Added Pub.L. 89–554, § 4(c), Sept. 6, 1966, 80 Stat. 614.)

§ 2321. Judicial review of Commission's orders and decisions; procedure generally; process

(a) Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title.

(b) The procedure in the district courts in actions to enforce, in whole or in part, any order of the Interstate Commerce Commission other than for payment of money or the collection of fines, penalties, and forfeitures, shall be as provided in this chapter.

(c) The orders, writs, and process of the district courts may, in the cases specified in subsection (b) and in enforcement actions and actions to collect civil penalties under subtitle IV of title 49, run, be served and be returnable anywhere in the United States.

(As amended May 24, 1949, c. 139, § 115, 63 Stat. 105; Jan. 2, 1975, Pub.L. 93–584, § 5, 88 Stat. 1917; Oct. 17, 1978, Pub.L. 95–473, § 2(a)(3)(B), 92 Stat. 1465.)

§ 2322. United States as party

All actions specified in section 2321 of this title shall be brought by or against the United States.

§ 2323. Duties of Attorney General; intervenors

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in enforcement actions and actions to collect civil penalties under subtitle IV of title 49.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

(As amended May 24, 1949, c. 139, § 116, 63 Stat. 105; Jan. 2, 1975, Pub.L. 93–584, § 6, 88 Stat. 1917; Oct. 17, 1978, Pub.L. 95–473, § 2(a)(3)(C), 92 Stat. 1465.)

STATUTES

46 U.S.C.

§ 828. Enforcement of orders of Commission

In case of violation of any order of the Federal Maritime Commission, other than an order for the payment of money, the Commission, or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process, mandatory or otherwise.

Sept. 7, 1916, c. 451, § 29, 39 Stat. 737; Ex.Ord.No.6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg.Plan No. 21, §§ 104(1), 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 1961 Reorg.Plan No. 7, § 103(a), eff. Aug. 12, 1961, 26 F.R. 7315, 755 Stat. 840.

§ 830. Venue and procedure in suits to enforce, suspend, or set aside orders

The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the Federal Maritime Commission shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

Sept. 7, 1916, c. 451, § 31, 39 Stat. 738; Ex.Ord.No.6166, § 12, June 10, 1933; June 29, 1936, c. 858, §§ 204, 904, 49 Stat. 1987, 2016; 1950 Reorg.Plan No. 21, §§ 104(1), 306, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1274, 1277; 1961 Reorg.Plan No. 7, § 103(a), eff. Aug. 12, 1961, 26 F.R. 7315, 75 Stat. 840.

on that issue by this Court. The imposition of the four-priority curtailment plan, as modified, shall not be considered by the Commission to be a determination by this Court on the merits of such plan's validity.

INTERSTATE COMMERCE COMMISSION,
Plaintiff-Appellant,

v.

SOUTHERN RAILWAY COMPANY and Central of Georgia Railroad Company,
Defendants-Appellees.

No. 74-3588.

United States Court of Appeals,
Fifth Circuit.

Dec. 3, 1976.

The Interstate Commerce Commission brought action to enjoin railroads from violating certain orders issued by the Commission. The United States District Court for the Middle District of Georgia, at Valdosta, J. Robert Elliott, Chief Judge, 380 F.Supp. 386, dismissed the complaint, and also granted defendants' motion for judgment on the pleadings, and the Commission appealed. The Court of Appeals, Coleman, Circuit Judge, held that the Interstate Commerce Commission, acting under either section 5(8) or section 16(12) of the Interstate Commerce Act, may not, without the aid or consent of the Attorney General, bring suit to enforce an order, other than for payment of money, in the federal district courts.

Affirmed in part, vacated in part and remanded.

1. Attorney General ⇐7

Except as otherwise authorized by law, the Attorney General has plenary power and supervision over all government litigation, including litigation involving regulatory agencies, and such plenary power has been supplemented by a grant of specific power over actions to enforce orders of the Interstate Commerce Commission. 28 U.S.C.A. §§ 516, 519, 2321–2323.

2. Statutes ⇐188

Court must give effect to the plain and obvious meaning of statute without reading in or reading out.

3. Commerce ⇐204

Action seeking order to enjoin railroads from violating certain orders issued by the Interstate Commerce Commission, other than for payment of money, could be brought only by the United States represented by the Attorney General, and the ICC could not bring such action without the aid or consent of the Attorney General. 28 U.S.C.A. §§ 516, 519, 2321–2323; Interstate Commerce Act, § 5, 49 U.S.C.A. § 5.

4. Administrative Law and Procedure ⇐303

When an agency is given a specific authorization to proceed in initiating litigation without assistance or supervision of the Attorney General, it may do so. 28 U.S.C.A. §§ 516, 519.

5. Commerce ⇐204

Sections of the Interstate Commerce Act authorizing district courts to issue writs or injunction "upon the complaint of the Commission," and providing that "the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any district court" for enforcement of order of the Commission other than for payment of money are not sufficiently concrete to provide an exception to the Attorney General's broad authority over agency litigation, but merely provide the ICC with the right to request that the Attorney General commence an appropriate action in federal court to enforce its orders. 28 U.S.C.A. §§ 516, 519, 2321–2323; Interstate Commerce Act, §§ 5(8), 16(12), 49 U.S.C.A. §§ 5(8), 16(12).

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6. Statutes ⇐159

Where there is an irreconcilable conflict between an earlier statute and a subsequent enactment, the subsequent enactment governs.

7. Statutes ⇐223.4

A more specific statute prevails over a general statute regardless of when enacted, if there is irreconcilable conflict between them.

8. Statutes ⇐158, 159

Repeals by implication are not favored, and earlier statute is deemed repealed by implication by later statute only if there exists a positive repugnancy between them which cannot be reconciled.

9. Commerce ⇐204

There is no irreconcilable conflict between sections of the Interstate Commerce Act which can be construed as allowing the Commission the right to request the Attorney General to invoke the jurisdiction of the courts to enforce agency action and prior statutes providing that the Attorney General shall represent the government in actions to enforce orders of the Interstate Commerce Commission other than for payment of money, and thus the later statutes did not repeal the earlier ones by implication. 28 U.S.C.A. §§ 2321–2323; Interstate Commerce Act, §§ 5(8), 16(12), 49 U.S.C.A. §§ 5(8), 16(12).

Bernard A. Gould, Daniel M. O'Donoghue, Daniel S. Linhardt, I. C. C., Washington, D. C., for plaintiff-appellant.

Ellsworth Hall, Jr., Macon, Ga., Estel Edward Bruce, Stuart C. Stock, Washington, D. C., James L. Tapley, So. Railway Co., Wm. H. Teasley, Washington, D. C., for defendants-appellees.

Leonard Schaitman, Neil H. Koslowe, Appellate Sec., Civ. Div., Dept. of Justice, Washington, D. C., for amicus curiae.

Appeal from the United States District Court for the Middle District of Georgia.

Before COLEMAN, GODBOLD and HILL, Circuit Judges.

COLEMAN, Circuit Judge.

The Interstate Commerce Commission appeals the dismissal of its action seeking a district court order to enjoin Southern Railway Company and Central of Georgia Railroad Company from violating certain orders issued by the Commission pursuant to 49 U.S.C. § 5(2) (1970). The United States was not a party to this enforcement action and the Commission did not obtain the consent or approval of the Attorney General to initiate it. We are primarily concerned with whether the ICC, acting under either § 5(8) or § 16(12) of the Interstate Commerce Act, 49 U.S.C.A. §§ 5(8), 16(12), may, without the aid or consent of the Attorney General of the United States, bring suit to enforce its orders in the federal district courts. The facts are not in dispute and need not be discussed.

The District Court held that the Commission may not, on its own, bring suit in a federal district court without the aid or consent of the Attorney General. We affirm the District Court.

I. *The Attorney General's Power Over Government Litigation*

[1] Congress has determined that the Attorney General shall have plenary power and supervision over all government litigation, including litigation involving the regulatory agencies. 28 U.S.C. provides:

§ 516. *Conduct of litigation reserved to Department of Justice*

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

* * * * * *

§ 519. *Supervision of litigation*

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

This merely restates the traditional responsibility of the Attorney General over the conduct of all litigation on behalf of the United States and its agencies. *See* Confiscation Cases, 7 Wall. (74 U.S.) 454, 458, 19 L.Ed. 196 (1868). The principle not only centralizes responsibility for the conduct of public litigation but enables the President, through the Attorney General, to supervise the various policies of the executive branch. The alternative would allow a proliferation of policies among and within the various agencies.

The plenary power of the Attorney General over all government litigation has been supplemented by a grant of specific power over actions to enforce orders of the ICC. Chapter 157 of 28 U.S.C. provides in pertinent part:

> § 2321. *Procedure generally; process*
>
> The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.
>
> * * * * * *
>
> § 2322. *United States as a party*
>
> All actions specified in section 2321 of this title shall be brought by or against the United States. June 25, 1948, c. 646, 62 Stat. 969.
>
> § 2323. *Duties of Attorney General; intervenors*
>
> The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.
>
> The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.
>
> * * * * * *
>
> The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein. June 25, 1948, c. 646, 62 Stat. 970; May 24, 1949, c. 139, § 116, 63 Stat. 105.

[2, 3] In the words of the statute, the present action is one to "enforce . . . any order of the Interstate Commerce Commission other than for the payment of money". All such actions "shall be brought by . . . the United States". The Attorney General "shall represent" the government in such actions. The ICC "may appear" as an intervenor and thereafter may continue to prosecute actions brought by the Attorney General. Since "the court must give effect to the plain and obvious meaning of the statute without reading in or reading out", *General Electric Co. v. Southern Construction Co.*, 5 Cir. 1967, 383 F.2d 135, 138, *cert. den.*, 390 U.S. 955, 88 S.Ct. 1049, 19 L.Ed.2d 1148 (1968), this is an action which can only be brought by the United States represented by the Attorney General. The history of these sections in no way detracts from this power of the Attorney General.

Prior to the enactment of the original version of 28 U.S.C. §§ 2321–2323 in 1910, the Interstate Commerce Act authorized the ICC to apply "in its own name" to the appropriate court for enforcement of its orders. Act of June 29, 1906, ch. 3591, § 5, 34 Stat. 591.[1] In order to bring the Attor-

1. Prior to 1910 the Interstate Commerce Act provided in pertinent part: "If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money,

ney General's control over ICC matters into line with his control over other governmental litigation, Congress, in 1910, enacted the Commerce Court Act.[2] Act of June 18, 1910, ch. 309, 36 Stat. 539. This Act put into effect the procedural provisions now contained in Chapter 157 and vested initial control and responsibility over ICC orders in the Attorney General.

The new legislation created a Commerce Court with exclusive jurisdiction over "all cases for the enforcement . . . of any order of the Interstate Commerce Commission other than for the payment of money". Act of June 18, 1910, ch. 309, 36 Stat. 539. It further provided that "all cases and proceedings in the commerce court which but for this Act would be brought by or against the Interstate Commerce Commission shall be brought by or against the United States" and that in such cases the Attorney General would "have charge and control of the interests of the Government."

In order to harmonize the provisions relating to enforcement of ICC orders with the changed procedures of the Commerce Court, the Interstate Commerce Act was amended to delete the authority for the Commission to apply "in its own name" for enforcement of its orders. This removed any doubt that henceforth the ICC was without authority to initiate enforcement proceedings in its own name.

In 1911, the provisions governing the initiation of ICC enforcement suits in the Commerce Court were included in substantially identical form in the first codification of the Judicial Code. Act of March 3, 1911, ch. 231, §§ 207, 211 & 212, 36 Stat. 1148–49, 1150–51. When the Commerce Court was abolished by the Urgent Deficiencies Act of 1913,[3] Congress transferred jurisdiction theretofore vested in that court to the district courts and imposed the same procedures with respect to suits to enforce ICC orders. See *ICC v. Oregon-Washington R. R. & Navigation Co.*, 288 U.S. 14, 23, 53 S.Ct. 266, 77 L.Ed. 588 (1933). These procedural provisions appeared virtually unchanged in the 1934 & 1940 editions of the United States Code. When Title 28 was enacted into positive law in 1948, the statute was renumbered § 2322 and shortened to its present form. Rather than restricting the power of the Attorney General, the Congress has continually reasserted its intention to give the Attorney General, on behalf of the United States, exclusive control over the initiation of actions to enforce ICC orders.

II. *Sec. 5(8) and Sec. 16(12) as Implied Exceptions to the Attorney General's Power*

A. *Plain Meaning*

[4, 5] It will be noted, however, that Congress has expressly provided for one exception to the Attorney General's plenary power over government litigation—"except as otherwise authorized by law"—such that

while the same is in effect, any party injured thereby, *or the Commission in its own name*, may apply to the circuit court in the district where such carrier has its principal operating office, or in which the violation or disobedience of such order shall happen, for an enforcement of such order" (emphasis added).

2. President Taft expressed the reason for the new legislation thus:

"Under the existing law, the Interstate Commerce Commission itself initiates and defends litigation in the courts for the enforcement, or in the defense, of its orders and decrees, and for this purpose it employs attorneys who, while subject to the control of the Attorney General, act upon the initiative and under the instructions of the Commission. This blending of administrative, legislative, and judicial functions tends, in my opinion, to impair the efficiency of the commission by clothing it with partisan characteristics and robbing it of the impartial judicial attitude it should occupy in passing upon questions submitted to it. In my opinion all litigation affecting the Government should be under the direct control of the Department of Justice; and I therefor recommend that all proceedings affecting orders and decrees of the Interstate Commerce Commission be brought by or against the United States *eo nomine*, and be placed in charge of an Assistant Attorney General acting under the direction of the Attorney General." H.R.Rep. No.923, 61st Cong., 2d Sess. 3 (1910).

3. Act of October 22, 1913, ch. 32, 38 Stat. 219.

when an agency is given specific authorization to proceed without the assistance or supervision of the Attorney General it may do so. 28 U.S.C. §§ 516, 519. The ICC contends, in effect, that Congress, albeit not expressly, intended to carve out an exception to the procedural limitations on government enforcement suits by enacting § 5(8)[4] to allow the ICC the right to institute suits in its own name to enforce § 5 orders. Specifically, the Commission argues that it is only by direct complaint of the Commission that the district court acquires jurisdiction to act on an allegation of a § 5 violation and that absent the complaint of the Commission the court does not have the jurisdiction to entertain a complaint by any party alleging a violation of either § 5 or an order issued by the Commission pursuant to § 5.

To support this position, the Commission points to several cases which it asserts gives the statute the same construction. *See Railroad Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 522, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947); *B. F. Goodrich Co. v. Northwest Industries, Inc.*, 3 Cir. 1970, 424 F.2d 1349, 1355, *cert. den.*, 400 U.S. 822, 91 S.Ct. 41, 27 L.Ed.2d 50; *Ill. Central R. R. Co. v. United States*, 263 F.Supp. 421, 428 (N.D.Ill., 1966), *aff'd per curiam*, 385 U.S. 457, 87 S.Ct. 612, 17 L.Ed.2d 509 (1967). However, each of these cases was brought by private parties other than the ICC and is clearly not precedent for the statutory construction urged by the ICC. The ICC's power to initiate an action such as the one before this Court has never been at issue. *B. F. Goodrich* was a private action to enjoin an alleged violation of § 5, not a Commission action to enforce a § 5 order; *Railroad Trainmen* was a private action brought by a party other than the ICC to enforce a § 5 order; *Ill. Central* was a private suit to set aside an ICC order. The court in each of these cases spoke only of the Commission's right to seek judicial enforcement of a § 5 order; it did not consider whether this was an independent right of action or merely a right to request a filing from the Attorney General, thus filing a complaint through the Attorney General.

Alternatively, the Commission argues that Congress repealed §§ 2321–2323 by implication when it enacted § 16(12). 49 U.S.C. § 16(12). Sec. 16(12) reads in relevant part:

> *§ 16, par. (12). Proceedings to enforce orders other than for payment of money.* If any carrier fails or neglects to obey any order of the commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any district court of the United States of competent jurisdiction for the enforcement of such order.

The Commission's argument is that by the use of the word "or" Congress has explicitly given standing to any one of three plaintiffs to institute an enforcement action under § 16(12). Again the Commission cites several cases to support this construction, including *United States v. City of Jackson*, 5 Cir. 1963, 318 F.2d 1, 9; *Pacific Fruit Express v. Akron, C. & Y. R. Co.*, 355 F.Supp. 700, 709 (N.D.Cal., 1973), *aff'd*, 9 Cir. 1975, 524 F.2d 1025; *United States v. Lassiter*, 203 F.Supp. 20, 24 (W.D.La.1962), *aff'd*, 371 U.S. 10, 83 S.Ct. 21, 9 L.Ed.2d 47 (1962). Again the Commission did not institute any of these actions but appeared as an intervenor. In each case the court merely reiterated the statutory prescription that either the Commission or the Attorney Gen-

4. 49 U.S.C. § 5(8) reads:

Jurisdiction of injunctions, etc., against violations of section or orders. The district courts of the United States shall have jurisdiction upon the complaint of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order. Feb. 4, 1887, c. 104, Pt. I, § 5, 24 Stat. 380; June 16, 1933, c. 91, Title II, § 202, 48 Stat. 217; Sept. 18, 1940, c. 722, Title I, § 7, 54 Stat. 905.

eral may seek judicial enforcement; it did not speak to who must initiate the action. The interaction of § 16(12) and the provisions of Chapter 157 were not considered.

It seems obvious that neither the language in § 5(8) nor the language in § 16(12) is sufficiently concrete to act as an exception to the Attorney General's broad authority over agency litigation.[5] Sec. 16(12) states only that the ICC "may apply" for enforcement of its orders. There is nothing contradictory in allowing an agency to apply, but not in its own name, for enforcement of its orders. The language simply pertains to the substantive authority of the ICC to obtain relief upon its complaint as an intervenor in enforcement procedures. Likewise, § 5(8) states only that the district court shall have jurisdiction upon the complaint of the Commission. This merely provides the ICC with the right to request that the Attorney General commence an appropriate action in federal court to enforce its orders.

B. *Statutory Construction*

[6] In addition to arguing that the plain meaning of the statute gives it standing in this case, the ICC submits that the rules of statutory construction require a reversal. The Commission argues that § 16(12) and § 5(8) were enacted subsequent to §§ 2321–2323 and, because repugnant, repeal the prior statutes by implication. Under the usual rules of statutory construction, where there is a conflict between an earlier statute and a subsequent enactment, the subsequent enactment governs. *United States v. Tynen*, 78 U.S. 88, 92, 20 L.Ed. 153 (1870); *Dist. of Columbia v. Hutton*, 143 U.S. 18, 26, 12 S.Ct. 369, 36 L.Ed. 60 (1892).

[7] Another rule of statutory construction which the Commission believes requires reversal is that which prefers the more specific statute over a conflicting general statute regardless of when enacted. *United States v. Chase*, 135 U.S. 255, 260, 10 S.Ct. 756, 34 L.Ed. 117 (1890); *Panama Canal Co. v. Anderson*, 5 Cir. 1963, 312 F.2d 98, 100. Since § 16(12) pertains to the enforcement of orders other than for the payment of money, and § 5(8) pertains to the enforcement of § 5 orders, either is more specific than §§ 2321–2323 and would control.

[8] While these rules of statutory construction are valid in the applicable circumstances, the cardinal rule of construction is that repeals by implication are not favored. *United States v. Borden Co.*, 308 U.S. 188, 198, 60 S.Ct. 182, 84 L.Ed. 181 (1939). In the absence of an affirmative showing of the intent to repeal 28 U.S.C. §§ 2321–2323, they are deemed repealed only if there exists a positive repugnancy which "cannot be reconciled". Regional Rail Reorganization Act Cases, 419 U.S. 102, 133–4, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974). Two statutes on the same subject are not irreconcilable if they are capable of co-existence. See *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974).

[9] Only where there is irreconcilable conflict do we need to consider which statute was subsequently enacted or which is the more specific. Since there is no irreconcilable conflict among these provisions as we have interpreted them, we do not need to look to rules of statutory construction. Congress has given the Attorney General the power to invoke the jurisdiction of the courts to enforce agency actions, but has allowed the Commission the right to request that the Attorney General exercise that power. In any proceeding filed by the Attorney General for the enforcement of orders other than for the payment of money, the Commission may intervene as of right.

The decision of the jurisdictional issue eliminates the necessity of addressing the merits of the appeal. Nevertheless, we commend the District Court for having dealt with both questions to the end that all issues might be presented on appeal, looking toward a complete and final disposition

5. For provisions which do so authorize an agency to appear in its own name, see Federal Trade Commission, 15 U.S.C. § 53(a); Emergency Price Control Act, *Case v. Bowles*, 327 U.S. 92, 96, 66 S.Ct. 438, 90 L.Ed. 552 (1946).

of the litigation, "in the interest of judicial economy", *Mack Trucks, Inc. v. Arrow Aluminum Castings Co.*, 5 Cir. 1975, 510 F.2d 1029, fn. 3 at page 1034.

Since the District Court was without jurisdiction of the case on the merits, its grant of the defendant's motion for judgment on the pleadings will be vacated.

On the jurisdictional issue, its judgment will be affirmed.

The case is remanded for the entry of an appropriate order.

KEY NUMBER SYSTEM

Harper SIBLEY, Jr., Plaintiff-Appellant, Cross Appellee,

v.

TANDY CORPORATION et al., Defendants,

Tandy Corporation, Defendant-Appellee, Cross Appellant.

No. 75–1243.

United States Court of Appeals, Fifth Circuit.

Dec. 3, 1976.

Rehearing Denied Feb. 18, 1977.

A shareholder in a corporation which was party to a merger agreement brought suit against the other corporate party to the agreement, alleging both breach of contract and violation of federal securities laws. The United States District Court for the Northern District of Texas at Dallas, Sarah Tilghman Hughes, J., denied defendant's motions to have the contract submitted to arbitration and to have the federal securities law claims stayed pending arbitration, and defendant appealed. The Court of Appeals, Godbold, Circuit Judge held that the securities law claim was dependent on the contract claims, and that both the policy behind the United States Arbitration Act and considerations of judicial economy required that the contractual claims be submitted to arbitration and that the federal securities law claims be stayed pending the outcome of the proceedings.

Reversed and remanded with directions.

1. Arbitration ⟹23.3

Party to corporate merger agreement did not waive its right to have differences concerning merger agreement arbitrated by failing, in litigation concerning alleged breach of agreement, to press interlocutory appeal of court's denial of its motion to stay arbitration. 9 U.S.C.A. § 2.

2. Arbitration ⟹23.10

Burden of one seeking to prove waiver of arbitration is heavy one. 9 U.S.C.A. § 2.

3. Arbitration ⟹3.3

Claims under federal securities laws are generally not subject to arbitration under preexisting arbitration clause. Securities Exchange Act of 1934, §§ 10(b), 29, 15 U.S.C.A. §§ 78j(b), 78cc; 9 U.S.C.A. § 2.

4. Arbitration ⟹23.5

Where it is impracticable, if not impossible, to separate out nonarbitrable federal securities law claims from arbitrable contract claims, court should deny arbitration in order to preserve its exclusive jurisdiction over federal securities law claims. Securities Exchange Act of 1934, §§ 10(b), 29, 15 U.S.C.A. §§ 78j(b), 78cc; 9 U.S.C.A. § 2.

5. Arbitration ⟹3.3

Where stockholder of corporate party to merger agreement containing arbitration clause filed suit against other corporate party to agreement, asserting claims of both breach of contract and violation of state and federal securities laws, and where, if arbitrator were to resolve state securities law and common-law fraud issues, he would be dealing with same facts which formed basis for claim of federal securities law violations, claims under state securities laws were not arbitrable. Securities Exchange Act of 1934, §§ 10(b), 29, 15 U.S.C.A. §§ 78j(b), 78cc; 9 U.S.C.A. § 2.

THE WHITE HOUSE
WASHINGTON

9/19/83

To: JGR

From: RAH

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

9/17/83
Dick Hauser
Sig

September 16, 1983

MEMORANDUM FOR ED MEESE

FROM: CHRIS DEMUTH CD

SUBJECT: 50-mile Rule

The short answers to the questions you raised this morning are:

- The federal court suit is for a preliminary injunction against the 50-mile rule. It is being sought on grounds of avoiding irreparable injury pending completion of an FMC administrative proceeding, in which 50-mile-rule provisions in FMC tariffs may be struck down as "unjustly discriminatory" under the Shipping Act.

- The preliminary injunction is being sought against approximately 120 international ocean carriers who have filed FMC tariffs containing 50-mile-rule provisions. The case is titled U.S. and F.M.C. v. ABC Container Line, N.V., et al.

This may not answer all of your questions about the proceeding, so I have prepared more detailed background, which is attached.

Attachment

cc: Joe Wright
Craig Fuller
John Cogan
Connie Horner

Legal and procedural aspects of 50-mile-rule case

Background:

The 50-mile rule is a provision of collective bargaining agreements between the ILA and international ocean carriers operating through East and Gulf Coast ports; these agreements are subject to the jurisdiction of the NLRB. In addition, since the 50-mile provisions in these agreements describe a practice that the ocean carriers have agreed to follow (to have employees strip and repack containers going to or from points within 50 miles of the specified ports) the practice must be included in tariffs filed with and subject to the jurisdiction of the FMC.

The legality of the 50-mile-rule has been the subject of numerous proceedings at both the FMC and NLRB over the past several years. The NLRB has gone back and forth on whether the agreement provisions are or are not unfair labor practices. During intermittent periods when the agreement provisions operated with NLRB sanction, the FMC has been in a position to review the legality of the tariff provisions under the Shipping Act. In its only final decision on the matter (in 1978), the FMC found the tariff provisions unjustly discriminatory (the discimination being between shippers inside and outside the 50-mile radii).

Last February, the NLRB held that the 50-mile rule was a valid "work preservation" practice. The rule subsequently took effect, under FMC tariffs, in April 1983. The NLRB decision is currently on appeal to the Fourth Circuit Court of Appeals in Richmond; the case could apparently go either way. Recently, an NLRB Administrative Law Judge held that, in one factual circumstance (frozen meats shipped through New Orleans), the 50-mile rule is unlawful--an invalid "work acquisition" practice rather than a valid "work preservation" practice. Prior to the decision, the New Orleans District Court had enjoined operation of this particular 50-mile rule pending the NLRB ruling.

The FMC is now conducting a new proceeding to determine whether the 50-mile-rule tariff provisions are discriminatory under the Shipping Act. The ALJ decision is expected within two months, and the full Commission decision would follow in November or December. Technically, the proceeding concerns the rule as it operated back in 1981, during a two-month window between NLRB decisions. However, a Commission decision finding the rule discriminatory during this earlier period would result in an order that the provision be stricken from existing tariffs--i.e., those in force since April 1983. Since the FMC held that a nearly identical tariff provision was discriminatory in 1978, the supposition is that it will do so again, although different facts and circumstances could affect the outcome.

The injunction proceeding:

The suit for preliminary injunction is in the District Court for the Southern District of New York. The case is titled U.S. and F.M.C. v. ABC Container Line, N.V., et al. It is brought against the approximately 120 international ocean carriers that (a) operate through East and Gulf Coast ports and (b) have tariffs on file at the FMC containing 50-mile-rule provisions. The suit asks the court to enjoin the carriers from engaging in the practice pending the FMC's ruling whether the tariff provisions are discriminatory.

The suit is grounded on the usual bases for preliminary injunctions: irreparable injury, likelihood of success on the merits, no harm to third parties, and consistency with the public interest. The "irreparable injury" is to shippers and consolidators within the 50-mile radii, and to the international commerce of the United States. Affidavits have been filed from several shippers and consolidators and by the FMC's chief economist, asserting generally that the rule is raising shipping costs substantially and leading to diversion of U.S. commerce through Canadian ports.

The argument concerning "likely success on the merits" is a bit different from that in most preliminary injunction cases. In the usual case, the plaintiff is also seeking a permanent injunction and other relief from the court, and asserts he is likely to prevail on the latter actions. Here, the FMC is asserting (a) that it is actively considering striking down the 50-mile-rule itself; (b) that it has held the practice to be unjustly discriminatory in the past; and (c) that a preliminary injunction is necessary to preserve the status quo and prevent irreparable injury to shippers, consolidators, and international commerce pending its own administrative decision later in the fall.

SEP 20 1983

MEMO FROM THE DESK OF FRANCIS X. LILLY

TO: Richard Hauser DATE: 9/20/83

RE:

Attached for your review are copies of the draft documents which we propose to file and which we will discuss with DOJ this afternoon.

F.X.L.

Attachments

DRAFT

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA AND FEDERAL MARITIME COMMISSION, Plaintiffs, v. ABC CONTAINERLINE N.V., et al., Defendants.	)	No. 83 Civ. 6571 (HFW)

STATEMENT OF THE SECRETARIES OF
LABOR AND TRANSPORTATION IN OPPOSITION TO THE
ISSUANCE OF A PRELIMINARY INJUNCTION

The Secretaries of Labor and Transportation, by the undersigned counsel, hereby oppose the issuance of a preliminary injunction in the above-captioned case since, as shown below, an order enjoining the application of certain provisions of collective bargaining agreements negotiated by the defendants and the International Longshoremen's Association ("ILA") would be contrary to the public interest of (1) encouraging the process of collective bargaining, (2) preserving industrial peace in the maritime industry, and (3) preserving the orderly flow of interstate and international commerce. As shown more fully below, the pendency of the instant action clearly has a chilling effect on collective bargaining negotiations between the ILA and the steamship companies which were nearing conclusion when they were suspended upon the filing of the complaint herein.

This Administration strongly endorses the Congressionally declared policy of the United States to encourage the practice and procedure of collective bargaining between private parties (29 U.S.C. §151) and will consistently oppose any action that impedes the collective bargaining process, which is otherwise unnecessary to protect the public interest. The complaint filed in this case does not ask this Court to resolve any dispute between the parties. It seeks only an injunction to prevent defendants from honoring agreements they have voluntarily entered into with the ILA until the FMC completes its administrative proceeding and issues its decision. The injunction sought by the Federal Maritime Commission ("FMC") is unnecessary either to preserve FMC's jurisdiction or to insure sound administration of the Shipping Act of 1916 (46 U.S.C. 801, et seq.), and the failure to issue such an injunction would not result in irreparable injury to any party sufficient to outweigh the adverse impact on the public interest.

A. INTRODUCTION

The FMC seeks an order enjoining the implementation of the so-called "50-mile rule." This rule is contained in collective bargaining agreements between the multi-employer bargaining representatives of various steamship companies and the ILA, and claims for ILA labor the work of loading and unloading any less-than-container-load shipment within 50 miles of a port. This rule, together with other rules governing the handling of containers, has been described by the Court of Appeals for the District of Columbia Circuit as a reasoned response to the difficult problem of technological innovation." Council of North Atlantic Shipping Associations (CONASA) v. FMC, 672 F.2d 171, 176 (1982), quoting ILA v. NLRB, 613 F.2d 890, 914 (D.C. Cir. 1979), aff'd 447 U.S. 490 (1980).1/

Containerization, the new technology to which these rules respond, has been the "overriding issue" in collective bargaining negotiations between the steamship companies and the ILA since 1957. Id. 672 F.2d at 175. Enforcement of the negotiated rules was previously enjoined by a succession of injunctions obtained by the National Labor Relations Board pursuant to Section 10(l) of the National Labor Relations Act (29 U.S.C. 160(l)).2/ In 1980, however, the Supreme Court held that the Board's interpretation of the National Labor Relations Act was erroneous and remanded the matter to the Board for further consideration. NLRB v. ILA, 447 U.S. 490 (1980). The injunction was reinstated following remand to the Board, as required by Section 10(e) pending a final determination by the Board that the Rules are lawful under that Act.3/

1/ A "container" is a large reusable metal receptacle that can be moved to and from a ship as a single unit. Containers can be transported by truck or rail between inland terminals where they are loaded ("stuffed") and the pier, where the containers can be hoisted on and off the vessel by crane. CONASA v. FMC, supra, 672 F.2d at 173-174.

2/ See, e.g., Balicer v. ILA Consolidated Express, 364 F.Supp. 205 (D. N.J.) aff'd mem., 491 F.2d 748, 750 (3d Cir. 1973); Pascarell v. New York Shipping Ass'n, No. 81-13 (D. N.J.), aff'd, 650 F.2d 19 (3d Cir. 1981), cert. denied, 102 S.Ct. 130 (1981).

3/ Section 10(l) of the National Labor Relations Act requires the Board's regional attorney to seek an injunction if he has reasonable cause to believe that certain provisions of the Act have been violated. To obtain such an injunction it is unnecessary to show irreparable harm, only that injunctive relief is "just and proper."

On February 28, 1983, the National Labor Relations Board issued a decision in which it reversed its earlier position, after reconsideration pursuant to the direction of the Supreme Court in NLRB v. ILA, Id., and held that the Rules on Containers, with two exceptions, had a valid work preservation object and, therefore, did not violate the National Labor Relations Act. Accordingly, the section 10(l) injunction was lifted. Thereafter, the steamship companies notified the FMC that the Rules would be enforced effective April 18, 1983.

Prior to the instant proceedings, the steamship companies and the ILA had negotiated a new three year master agreement to replace the existing agreement, which is due to expire on September 30, 1983. The parties reached agreement on a master contract, subject to ratification and the conclusion of negotiations with respect to local agreements. The new contract, like the expiring one, contains the Rules on Containers virtually unchanged. Local negotiations in New York, which set the pattern for other ports, have been all but completed. Upon the filing of the complaint in this case, the ILA suspended negotiations. Public statements by representatives of the ILA clearly indicate that union negotiators will not return to the bargaining table until this injunctive action is resolved.

B. THE ADVERSE IMPACT ON THE PUBLIC INTEREST AS A RESULT OF THE ISSUANCE OF AN INJUNCTION OUTWEIGHS ANY POTENTIAL INJURY TO ANY OTHER PARTY

The Court of Appeals for the District of Columbia Circuit noted, in CONASA v. FMC, 672 F.2d at 177-178, that the Rules on Containers "have averted . . . reductions of employment opportunities for ILA longshoremen and have reduced labor-management strife on the waterfront." (Footnote omitted). Even more importantly, the FMC's attempt to enjoin the implementation of those rules at the eleventh hour of negotiations between the steamship companies and the ILA seriously endangers the parties' efforts to use the collective bargaining process to resolve the problems inherent in the technological changes on the waterfront.

The filing of the complaint at this late date in the instant case has seriously jeopardized the probability of the steamship companies and the ILA concluding a new agreement by September 30, the date the existing agreement expires. Unless the complaint, which seeks only interim injunctive relief, is immediately dismissed and the parties return to the bargaining table, their contract is likely to expire before the new agreement has been concluded and the possibility of serious interference with interstate and international commerce will be greatly increased.

The adverse impact on the public interest in the event of any job action which interferes with the free flow of commerce outweighs any potential benefits that would flow from an injunction against continued implementation of the rules. The FMC has not demonstrated that the absence of an injunction will in any way impede its administrative processes. If it determines that the continued implementation of the Rules on Containers, in fact, violates the Shipping Act, and the appropriate court of appeals agrees, there will be ample opportunity to issue and enforce an order against the continued effectuation of the Rules. Thus, although the FMC has argued (Memorandum in support of motion for a preliminary injunction, at p. 16) that "[g]ood administration of the statute is in the public interest" (quoting from Walling v. Brooklyn Braid Co., 152 F.2d 938, 940 (2d Cir. 1945)), it has failed to show why an injunction is necessary to enhance the quality of such administration.

A preliminary injunction pending the issuance of an administrative decision--particularly where, as here, there is no specific statutory authorization for the interim and only relief requested--is an extraordinary remedy and should be granted only where clearly necessary to avoid irreparable injury. The FMC has alleged only that irreparable injury has been and will be suffered by "cargo consolidators and individual shippers who operate within the 50-mile zone." While the impact on cargo consolidators who do not use ILA labor is apparent, the effect on "individual shippers" is less clear. Initially, the Rules on Containers would affect primarily those shippers who wish to ship a less-than-container-load, to be loaded or unloaded within 50 miles of the port. However, the Rules do not prevent a shipper from shipping goods, they only make it somewhat more expensive. Financial loss, alone, does not justify preliminary injunctive relief. FMC v. Atlantic & Gulf/Panama Canal Zone, 241 F. Supp. 766, 780-781 (S.D. N.Y. 1965). And while the cargo consolidators who may be prevented from loading and unloading freight by the Rules may suffer more substantial harm, these consolidators have only been able to operate in the past because the section 10(l) injunctions prevented the implementation of the Rule. Since those injunctions were preliminary in nature, the consolidators have had notice since their issuance that the injunctions would expire if and when the National Labor Relations Board found the Rules lawful.

In summary, it is in the public interest to deny the preliminary injunction. In the interim, the ILA can return to the bargaining table in order to resolve its differences with the companies through collective bargaining. Since any injury that may be suffered by shippers protected by the shipping Act of 1916 is limited to economic loss, injunctive relief is unwarranted.

WHEREFORE, the Secretaries of Labor and Transportation respectfully request that the motion for a preliminary injunction be denied.

Respectfully submitted,

ELIZABETH HANFORD DOLE
Secretary of Transportation

By: ____________________
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DRAFT

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA AND FEDERAL MARITIME COMMISSION, Plaintiffs,	)	
v.	)	No. 83 Civ. 6571 (HFW)
ABC CONTAINERLINE N.V., <u>et al.</u>, Defendants.	)	

MOTION FOR LEAVE TO
PARTICIPATE AS AMICI CURIAE

The Secretaries of Labor and Transportation, by the undersigned counsel, hereby move for leave to participate in this proceeding as amici curiae for the limited purpose of filing the statement in opposition to the issuance of a preliminary injunction submitted herewith, and shows:

1. The Secretaries have a substantial interest in the outcome of this proceeding since, as shown more fully in the statement, the entry of an order enjoining the implementation of the Rules on Containers will have a serious adverse impact on national labor policy and may seriously interfere with the flow of interstate and international commerce.

2. The public interest set forth in the Secretaries' statement has not been addressed in the papers filed by the Federal Maritime Commission and cannot be adequately represented by the defendants in this action.

3. The exigencies of the situation, including the urgent necessity of removing the threat of injunction, preclude the Secretaries from complying with the notice provisions of Rule 3 of the Local Rules of this Court.

[4. Counsel for the parties to this action have informed the Secretaries that they do not oppose the granting of this motion.]*/

WHEREFORE, the Secretaries respectfully request that leave be granted to participate as amici curiae in this proceeding and that the statement in opposition to the issuance of a preliminary injunction submitted herewith be filed and considered by this Court.

Respectfully submitted,

ELIZABETH HANFORD DOLE
Secretary of Transportation

By: ______________________
JAMES H. BURNLEY IV
General Counsel

WARREN L. DEAN
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*/ N.B. Consent must be obtained through the Executive Branch as well as from the defendants.