Supreme Court of the United States

In the Matter of:

Brotherhood of Locomotive Firemen and Enginemen, et al.,

Appellants,

vs.

Chicago, Rock Island and Pacific Railroad Company, et al.,

Appellees

Docket No. 16 & 18

Place Washington, D. C.

Date October 15, 1968

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

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I N D E X

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

Brotherhood of Locomotive Firemen and Enginemen, et al., Appellants,	:	
vs.	:	No. 16
	:	No. 18
Chicago, Rock Island and Pacific Railroad Company, et al., Appellees	:	

Washington, D. C.
Tuesday, October 15, 1968

The above-entitled matter came on for argument

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice,
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

JAMES E. YOUNGDAHL, Esq.
711 West Third Street
Little Rock, Arkansas

LESLIE EVITTS, Esq.
Chief Assistant Attorney General of Arkansas
Justice Building
Little Rock, Arkansas
Counsel for Appellants

APPEARANCES (Continued):

ROBERT V. LIGHT, Esq.
1100 Boyle Building
Little Rock, Arkansas

MARTIN M. LUCENTE, Esq.
11 South LaSalle Street
Chicago, Illinois
Counsel for Appellees

P R O C E E D I N G S

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Numbers 16 and 18, Brotherhood of Locomotive Firemen and Enginemen, et al., versus Chicago, Rock Island and Pacific Railroad Company, et al, Appellees; and Robert N. Hardin, Prosecuting Attorney for the Seventh Judicial Circuit of Arkansas, et al., Appellants, versus Chicago, Rock Island and Pacific Railroad Company, et al., Appellees.

Mr. Youngdahl.

ORAL ARGUMENT OF JAMES E. YOUNGDAHL, ESQ.,
ON BEHALF OF APPELLANTS

MR. YOUNGDAHL: Mr. Chief Justice, may it please the Court.

This is an action by six large railroad companies and a three-judge federal court in Arkansas against officials of the State of Arkansas charged with enforcing two statutes.

The first applies to companies with at least 50 miles of railroad tracks when those companies are operating freight trains with 25 cars or more. It requires a crew of an engineer, a fireman, conductor, and three brakemen.

The second statute applies to railroad companies with at least 100 miles of new track when operating switch trains over public crossings in urban communities. It requires that a crew of an engineer, a fireman, a foreman and three

helpers.

I represent four railroad brotherhoods who were permitted to intervene in the lower court, speaking for the employees affected by these statutes, and are defending intervenors, defending appellants in this case.

At this stage of the case -- the second time this case has been heard -- at this stage of the case there are four constitutional issues.

The Court below found that the statutes violated the due process clause of the 14th Amendment and constituted an inpermissible burden on interstate commerce.

The railroads also urge in this appeal that there are classification infirmities in the law in violation of the equal protection laws and discrimination against interestate commerce.

The normal statement of the case does not apply, in our view, to this controversy because it has been 50 or 60 years long. When the opinion of the court is written in this case, it will be the eleventh entry in the U.S. Supreme Court Reports on the same Arkansas statutes.

There has been an extensive substantive discussion of the identical statutes under similar constitutional challenges in five previous opinions of this Court, all of which upheld the legislation challenged.

Evidently the railroad resources are inexhaustible

and we are back again arguing substantially the same issues in 1968.

The first case on the particular statute was in 1911 where the freight crew statute was upheld against three constitutional contentions. The railroads there argued that with automatic couplers and air brakes the third brakeman was unnecessary and required the expenditure of a needless amount of money.

Generally, the Court found and held that those questions, even then concluded by former decisions involving railroads and involving similar constitutional issues as to the commerce clause, found no violation until Act of Congress displaces the legislation; as to equal protection, several previous decisions involving mileage classifications are noted; and as to due process, the Court found some room for controversy and found that the statutes were germane to the object which the legislature had in view; so "even if deemed unwise" by the Court cannot be overruled by the Court.

The 1916 case in this Court involved the switch crew statute. More summarily again the railroads and this Court again upheld the statute in question. At this time again there were commerce clauses for protection of due process argument. The only new facts that the railroad brought up with respect to that statute in 1916 was that the switch crew statute does not apply to trains of 25 car lengths and that

the exemption results in the fact that the covered railroads switch over the same crossing as non-covered railroads, therefore having classification infirmities.

The Court noted it is impossible for legislation to be all comprehensive, that if the grouping was reasonable the statute should be upheld.

The next attempt resulted in the Norwood decision of this Court in 1931. At this time there were four constitutional arguments: due process, equal protection, commerce and the supremacy clause, arguing that the ICC Acts have pre-empted the laws.

The railroad made some new factual contentions saying there was improvement in road and equipment, that some collective bargaining agreements permitted a smaller crew and other states had smaller crews and operated all right.

This Court found there was no pre-emption by the Railway Labor Act. Other constitutional issues were in substance resolved, and, as a matter of fact, at that stage of the litigation dismissed the complaint with an extensive discussion about the cost of compliance, pointing out the railroads completely failed to show that the relative cost of compliance had increased.

That case was then tried on the merits before a three-judge court in Arkansas in 1933. The Court, after a long trial and extensive consideration, issued a long and

comprehensive decision going down fact by fact on Arkansas railroading. The three-judge court at that point thought that the issues were limited by this Court to a due process challenge of change of conditions and increased relative cost of compliance. Both of those arguments were rejected by the Western District of Arkansas which upheld the statutes and this Court affirmed in a memorandum opinion of the same year.

The next discussion of this Court of the same statute in question was in the landmark Southern Pacific against Arkansas, in 1945, where while a train length statute of Arkansas was validated by this Court, the Court, in our view, took great pains to distinguish the full crew law decisions to point out, for example, those laws do require certain impediments in interstate commerce, stopping at a state line, those impediments were not of a kind that made them constitutionally valid and pointed out that therein lies the distinction.

The next consideration by this Court of the Arkansas full crew law was in 1966 in this same case. I suggest that the approach to the Court on the preemption issue was the primary question at that time. The lower court ruled against us on the preemption and we appealed and this Court reversed, and in considering the preemption, the opinion of Mr. Justice Black noted, in view of Norwood and previous cases, that even the preemption issue was presented narrowly, that is, had specific things happened since 1933 to change the 1933 decision

about preemption?

The Court found in a six to one decision it had not. The law was upheld and discrimination against interstate commerce made by the railroad in 1966 was also injected on the record before the Court at that time.

Further, all recent reported decisions on the same issues by Courts of other jurisdictions, outside of the decision we are appealing from here, have upheld the constitutionality of similar laws.

The Indiana Supreme Court refused to even take evidence on these conditions, saying it is a matter for the legislature.

The Ohio courts rejected all the identical constitutional contentions and the New York courts in an extremely persuasive opinion analyzed at great length the New York statute very similar to Arkansas at the time of the trial. It rejected the railroad argument and upheld the statute and it was affirmed by the Appellate Division and about two weeks ago it was affirmed four to three by the New York Court of Appeals.

The record here is massive and it is extremely difficult to brief or argue the detailed facts of dozens and dozens of witnesses who gave opinions and reasons for their opinions. There are pages and pages of exhibits and huge exchanges of information about railroading.

I question whether it would be advisable in any

event to reiterate the intensive discussions about the duties of firemen and the duties of brakemen and switchmen. That discussion has been engaged in so many times and it is substantially the same.

There is argument on both sides that there is room for judgment by reasonable men both ways. The judgment of the State of Arkansas in its legislative process was it was important to the safety of the State to have these statutes. As to the duty of the firemen, the most notable kind of situation is that firemen in the sense of a man shoveling coal into a grate have long time ceased, but firemen in the sense of maintaining motive power, keeping lookout, relief, inspection and emergency duty have under the sophisticated modern conditions of railroading continue to exercise extremely important functions.

As to the brakemen, the outstanding conclusion from the extensive record in this is that brakemen do substantially now what they did in 1933. They did substantially then what the Court said they did in 1916 and 1911, in previous analyses of these statutes by this Court.

As to the equipment and facilities, the evidence is that certainly there have been some improvements in railroad conditions, railroad equipment and railroad facilities. Certainly as well there have been some factors which have made railroading more dangerous than railroading was in 1933 and 1916 and 1945. There are faster and longer and heavier trains

which are deteriorating and deteriorating the equipment and crossings over which they pass. This factor combined with items like heavier highway traffic.

The school bus program, for example, in Arkansas was unknown at the time of the Norwood case and now it's a large case involving the transportation of hundreds of children over the crossings these trains pass.

Q I gather your position is that, whatever may be the merits, all of these arguments are bearing upon these facts upon the question there is nothing for the Court to be concerned, it is the legislature?

A Yes, that is the most important aspect of our argument.

Q That is your argument with respect to the due process claim?

A That is also our argument with respect to the burden on commerce.

Q It's not for the Arkansas legislature to determine with unbridled discretion how much to burden interstate commerce?

A That is certainly true, your Honor. My response to that would be this: that the first evaluation is by the Arkansas legislature. The second evaluation is judicial, if it has not had help from Congress.

In this instance there is a legislative evaluation

of the kind of thing this Court did in Southern Pacific against Arkansas, for example, the extensive evidence was taken on the importance of crews to safety before Congress, and the last decision of this Court analyzed some of that legislative history.

Congress decided expressly, at least in expressed legislative history, not to preempt, so this Court found.

The reason for that decision, we would submit, is a determination on the merits that there is some ground for States making these decisions.

I would suggest that that would be a considerable impact on the evaluation of this court even under the burden on commerce arguments.

Q Then, of course, there are two other claims that you have to meet?

A Equal protection and discrimination. Perhaps I might refer briefly to that. Both of them say there are classifications which somehow the classifications aren't firm.

Our first argument is those questions have been resolved before. The primary basis for the exemption argument, the 1500 mile mileage track made by the railroad is that exempt companies switch over the same crossings as non-exempt companies.

This exact point was discussed and was a major element of discussion in the 1916 Arkansas full crew case in this court, St. Louis, I.M. & S. Railway v. Arkansas, finding

that while maybe the classification wasn't perfect, there seemed to be a considerable difference between 50-mile and 100-mile railroads and large railroads.

Q Very little has happened to the equal protection law since 1916.

A That is true, your Honor. But a good deal has not happened to Arkansas railroading with respect to that kind of fact.

Q What does the length of the whole line have to do with the safety of an individual?

A We can think of several things. The record shows the following kind of facts. The smaller companies have lower speeds, whereas the companies that are appellees in this case go 75 miles an hour.

The only evidence in the record on the exempted companies shows the speed limit of 75 miles per hour for the company that I happen to recall. The evidence shows that the railroads represented as the appellees in this case have trains of 150 cars long, whereas the trains represented by the exempted companies, the record shows, have consistently shorter trains. For example, customarily the movement of one or two or five or seven cars. The Arkansas legislature recognized the increased danger of longer trains.

The 50 mile railroad company exemption has been repeatedly upheld by this court, and in 1950, in Morey against

against Doud this Court observed there was particularly that that 50 mile railroad exemption was the kind of classification which was sustainable as contrasted with the classification involved in that particular case.

Q These exemptions are what, 50 miles and also domestic corporations?

A No, Your Honor, nothing of the sort. Purely 50 miles and 100 miles.

As to the interstate against intrastate discrimination argument, there is not a perfect correlation.

Q That could also be couched as an equal protection argument as well?

A Either way the classification is infirm in some way. As to those arguments, the record in a number of respects shows important distinctions.

Furthermore, the interstate intrastate dichotomy does not fit the exemption dichotomy. In other words, there are interstate railroads not covered by the statute because they do not have 50 or 100 miles of line, and vice-versa. So it is not a perfect, as the railroads would probably suggest, but the facts on the record show it is not.

Again it seems to me that particular railroad classification principles by mileage and track has been upheld for 100 years in respect to regulatory statutes by this Court.

Q Did the recent New York decision deal with classi-

fications like that? Did the New York law have comparable classifications?

A Yes, sir, your Honor. And the long opinion indicates, that, the opinion of the Supreme Court and the trial court, which is a very careful discussion of that. I do not recall whether or not the Court of Appeals referred to that particular thing or not.

One further aspect of the 50 or 100 mile classification which would support the classification as such, in our view, the railroads make great arguments out of the fact that cost of compliance is high. I would like to say something about that in a moment. But if the cost of compliance is a factor -- and clearly it could be -- the smaller railroad companies, I suppose, are less able to assume the cost of compliance with these statutes, and that might legitimately be a factor in classification, not one that we would rely on wholly, but certainly a factor.

Outside of the multitude of evidence on duties of employees and the equipment and facilities of the railroads, the most pursuasive part of the record altogether, in our view, is a mass of statistical material.

This is the first time in Arkansas full crew law cases, of the many that have been in this Court, and the first time in any full crew law case in other jurisdictions, that I know of, where we now have experience to look at. Because in

April, 1964, with the effect of the 1963 legislation of Congress, railroads did in fact reduce their operating crews substantially. Most firemen were taken off at a very rapid rate and a good many at a slower rate. Brakemen and switchmen were taken off. As a result of that, we have now a period of time to look at, and I submit that the statistics from this period are most persuasive about the connection between these statutes and safety, at the very least establish the right of the Arkansas legislature and the Arkansas people. This has also been voted on popularly in Arkansas to make the cause and effect determination resulting from those statistics.

Clearly from this evidence, that railroading is a very hazardous business and continues to be. Clearly, number 2, beginning in April, 1964, many crewmen have been taken off of trains nationally, a large percentage. Three, clearly since April, 1964, or May, railroad accidents have increased substantially; and, number 4, that when you analyze those accidents and you find those that are most attributable to crew size and crew performance, those accidents have increased especially and the rate of those accidents has increased especially.

A cause and effect decision, we say, is primarily legislative, but there are some things to assist in that kind of evaluation here.

For example, collisions. It is conceded by all the

parties that collisions are that type of accident most attributable to crew performance. Accidents went up and have gone up for a period of time, but beginning exactly at the time when most firemen were taken off of freight trains in this country collisions skyrocketed. The rate of increase changed entirely as to collisions.

For example, further causes of accidents. Causes such as disregard of stop signals, failure to secure handbrakes, running through switches, failure of engineer to keep a look out, that kind of thing most attributable to employee performance.

The rate of such accidents, accidents from such causes, rose sharply beginning in April or May, 1964. Extremely important cause factors because railroads are hard pressed to answer this kind of testimony. They answer it partly by using improper statistical techniques. They say casualties have not gone up because they measure it by billion gross ton miles, a kind of explosive factor no one else uses. They compare one year with another one year, instead of comparing periods of time. They claim that there have been reporting defects in that the amount of train accident dollars damage, in order to justify a report, has stayed constant for the last several years, but the fact is that the Department of Transportation of the United States Government has found a startling alarming rise and has repeatedly told Congress we need assistance in the railroad accident field, which in the last few years have

become more and more serious to the point of real dangerous calamity.

They say the accident rate was increasing all along but again it is possible to isolate that kind of accident which is most attributable to crew performance. And, furthermore, the rate of increase in the Department of Transportation notes the rate of increase has go up higher in the years since 1964 than it had been going up in the time before, but under the railroad's statistics, comparing 1962 and 1966, the railroads with more firemen had a smaller increase in the collision report.

Arkansas train accidents have been increasing at a slower rate than states with smaller operating crews, and during periods with the same traffic density, casualty rates are no less for diesel than for steam locomotives; and comparing pre and post 1964 experience, Arkansas now has a smaller percentage of the national casualties during the time its crew size has been proportionately larger.

One aspect of the railroads case which we contend they have totally failed to prove is the aspect of cost of compliance. Both in commerce clause, the burden on commerce cases, and in due process cases, the cost of compliance has been a major consideration by this Court. The standards for the full crew cases have been laid out expressly and in detail by this Court in the 1931 Norwood decision.

This Court pointed out it is not enough to say we spent so much money last year, but there has to be a relative cost factor presented to the Court. It has to relate to the operation of those employees per ton, per car, per mile, per something, and to say that we spent five dollars more this year than we spent last has no due process relevance.

The railroads had this in front of them and yet they totally failed to acknowledge it in this case. They simply put in evidence saying we spent $7 million in Arkansas in 1966 or 1965 in complying with this statute, and on cross-examination they said we added up all the wages of firemen and all of the wages of a third brakeman or switchman and that is $7 million dollars.

Now, that alone is not enough. But we have more in this record which revealed the deficiencies as to this aspect of the case. We have accidentally the operating papers used by one of the appellee railroads, Kansas City Southern, in making their cost of compliance calculations, in which the actual mileage expense in Arkansas for train crewmen, people in the back part of the train, and for engine crewmen, the fireman and the engineer, is presented. And the startling result, totally uncontradicted in this record, the startling result from these figures,that Kansas City Southern did not experience any increase in cost of compliance per mile of Arkansas railroading after the change in national crews, and

the other states in which it operates, and up to date or up to the period covered in the evidence.

In other words, the railroads have failed generally as to this point.

When we look farther towards the kinds of formulas which Norwood commands we find there is some evidence and that evidence told there is no cost of compliance at all. I found this startling when I first heard it, and we began to inquire into some of this evidence abaut what some of the costs might be.

Certainly the railroads have ignored, for example, the fact in places where engineers ride without a fireman, firemen are not required, they have to pay an extra allowance to the engineers. This is ignored by the railroads.

Certainly every one concedes in the record and the railroads make a big point of this in the Brief, with a smaller crew it takes a longer time to operate a train. With a longer time it kicks in certain constructive and progressive allowances which the people on the crew have to be paid.

Certainly there is substantial evidence from which the Court and certainly the legislature could conclude that the accident rate goes up startling for a smaller crew and this perhaps accounts for it. But, in any event, the only evidence showing related cost of compliance, not related one year as to the other, as the railroads argue, but related as

to kind of performance of these crew members, shows that there is virtually no cost of compliance at all.

This is, in our view, a perfect case for the application of the principle that this Court does not sit as a super-legislature. The perfect illustration of why that is so is the opinion of the Court below. The opinion of the court below is no more or less, in our view, than the report of a legislative committee saying why they would like to change the law.

It is not as was the Norwood case. It is not as was the New York case -- a careful fact by fact detail by detail analysis of what firemen do and what brakemen do, and what locomotives do and what the crossing hazards are and all those things. It is rather a general discussion of why the Judges think that the full crew laws are economically unwise, why they are unhappy with them. They say, for example, we suspect their primary paragraph on the evidence in the case says the record is voluminous and massive and there are films and pictures and testimony of dozens and dozens of witnesses and depositions and so on, and they said we are not going to make any attempt to discuss this. Probably we suspect that much of it is surplusage.

How can a Court suspect that much of the record is surplusage if it has made a factual analysis which would properly underlie a conclusion that there was no conceivable

germane connection between a legitimate state purpose, the safety of its public and its railroad men and the statute in question?

The Court below notes that the legislation hamstrings labor relations and worries about the effect on the railroad in competition with the coming barge traffic in the Arkansas River. These are classicly legislative determinations. It is certainly not a basis for constitutional invalidation such as that of the Court below.

Q Do you think there is any difference in this respect between the freight crew law and the switching crew law?

Is there a switching crew law involved?

A Yes, sir, your Honor. Two statutes. One for freight over the road service, and one for switching in the yards.

Q It's the same argument?

A As far as any legal standard, I don't see any difference at all. There are some factual differences, substantial ones.

For example, the railroads argue when a train is on the road that they can put an extra brakeman in the cab thereby making the fireman unnecessary. This is not true in the yard where all the brakemen have to be passing signals and things of that kind and the fireman himself has to be passing signals.

There are factual differences in the functions of the people involved. But insofar as the legal arguments, I

see no difference whatsoever.

Q But there is a factual argument in terms of discrimination against the interstate commerce?

A Well, there is. That applies only to the freight crew law, I presume, or the burden on commerce argument would apply under the freight crew laws because the switching crews are not in an interstate kind of situation.

Q Why isn't there discrimination? The switching crew law applies to all 100 mile railroads, doesn't it?

A Yes, sir.

Q And yet you say it is a local operation?

A That is correct.

Q Why wouldn't it apply to local trains then, short line intrastate railroads?

A Well, there is no evidence in the record, the evidence in the record consists of this kind of thing. The railroads say at X location in X town in Arkansas the 100 mile companies and less than 100 mile companies switch across the same crossing with a different size crew than involved in this statute.

Q They do?

A That is correct. That is, however, a limited condition. The large companies, and the distinction in the statute is not interstate-intrastate and the classification is not contiguous.

Q It is 100 miles. The intrastate railroads, the less

than 50 mile railroads, don't have to comply with the switching crew law?

A That is correct.

Q Why don't they? If the switching is really a local operation, what difference does it make whether you own 100 miles of track or only 50?

A I suggest the longer trains come in, the bigger companies come in to that switching area with longer trains, they switch more cars. They have more complicated movements to attend to. They are less able to take care of the cost of compliance which is involved. Those are factors which occur to me offhand.

I see no reason to disagree with this Court's 1916 decision in respect to what seems to me to be our identical argument. Primarily, we feel there are all kinds of bases for factual and opinion clashes in many aspects of this case and the record is voluminous and facts can be found to support the judgment of any reasonable man or any reasonable legislature; and under the rules of this Court about judicial intervention, we respectfully urge that the decision of the Court be reversed and the complaint dismissed.

MR. CHIEF JUSTICE WARREN: Mr. Evitts.

ORAL ARGUMENT OF LESLIE EVITTS, ESQ.

ON BEHALF OF APPELLANTS

MR. EVITTS: Mr. Chief Justice Warren, may it please

the Court. I suppose it is not often that a lawyer, a country lawyer, comes to this august chamber and concedes that he is not prepared to discuss the intricacies of the record or the law in a particular case. However, that job has been undertaken by the counsel for the Brotherhoods and that is the case in this instance.

I do simply want to emphasize on behalf of the State of Arkansas the unequivocal position that the full crew acts which are presently under attack by the railroads are a legitimate expression by the people of the State of Arkansas both through their elected representatives and by the initiative petition process which is granted by the 7th Amendment of our Constitution, and that the people are convinced that these full crew acts are necessary, whether desirable, both for the safety of the travelers in the state and for the welfare of railroad employees.

The fact that the attorneys for the State of Arkansas have not been deeply involved in the details of this case should not be construed by any means to indicate that the State is disinterested in the outcome thereof.

The appellees have suggested in their Brief that the State has made the minimum presentation and that that minimum presentatinn indicates some absence of conviction on the points. This is emphatically not so.

The State of Arkansas is not a rich state financially.

We have a Rockefeller there temporarily. But there are many demands made on the office of Attorney General and when we learned that the Brotherhoods had intended to make a thorough and complete evidentiary and legal presentation we realized that our limited resources could best be applied elsewhere.

Q How many states have laws like this? I know, of course, they are not identical.

A I understand there are five, your Honor. I believe New York, Wisconsin, Indiana, Ohio and Arkansas.

Q And each is a little different, I suppose?

A Yes, sir; it is my understanding they are.

Q Does Arkansas have a crew consist law relating to passenger trains?

A No, sir. I beg your pardon. Yes, sir, I believe so.

Q But apparently it is not an issue here?

A No, it is not in issue here.

Q Maybe you don't have passenger trains anymore?

A We have very few. Very few. They have not only discontinued them, they have taken up the tracks.

I am informed by counsel for the Brotherhood that the total legal tab for this case is going to run in the neighborhood of $100,000.

Our entire litigation budget for the Attorney General's office is $15,000 a year.

In 1958, as pointed out in the Briefs, this issue

was presented once again through the initiative petition process, and the preamble to the question presented to the people, which is shown on page 12 in our Brief, is essentially the same as the entreaties which are now made by the railroads to this Court.

The campaign was as interesting as an Arkansas political campaign can be, with handbills, newspaper ads, radio time, et cetera, and the results were decisive. The people expressed their desire 130,465 for repeal, 162,748 against the repeal. That is a pretty good turn out in 1958 for the State of Arkansas.

This Court has recently had presented to it another case from our State which was inherited as this one was. I only want to emphasize that in this case we are as dead serious as we can be. The State of Arkansas' position flatly and unequivocally--

Q You mean unlike the other case?

A No, sir. Just in case the same newspapers had been circulated up here that were circulated down home, I wanted the Court to know that we are as serious as we can be about this railroad case.

MR. CHIEF JUSTICE WARREN: Mr. Light:

ORAL ARGUMENT OF ROBERT E. LIGHT, ESQ.

ON BEHALF OF THE APPELLEES

MR. LIGHT: Mr. Chief Justice, may it please the

Court. In my presentation I will touch on some points concerning the history of this case and also on the legal standards applied by the court of law in reaching the unanimous conclusions that are contained in its opinion and decree.

I will also discuss some phases of the Brief that led the District Court to conclude that these statutes in practical operation bear no reasonable relationship to the safety of railroad operations as they are conducted over the United States and particularly as they are conducted today in Arkansas.

And, finally, I will discuss our position that these statutes constitute an inpermissible discrimination against interstate commerce, entirely aside from the undue burden against commerce argument, and also they violate the protection clause.

The District Court found it unnecessary to pass on either of these constitutional challenges because it found the statute to be clearly unconstitutional on two other distinct grounds.

My colleague, Mr. Lucente, will expand the discussion of the factual basis for the findings of the court below, which will include the statistical evidence relating to the safety of railroad operations as it bears on the question of whether the minimum crew required by these Arkansas statutes of six men on both freight and switch crews makes any con-

tribution to railroad safety. He will discuss the findings of the many Boards, Commissions, and other quasi-judicial public bodies that have tried and decided substantially the identical fact issues that are presented in this case; and, finally, he will describe the staggering burden of these statutes to the appellee railroads in terms of cost of compliance.

When this case was before the Court on the earlier appeal, about two years ago, the appellants took the position that the constitutional challenges were so insubstantial as to make the case an inappropriate one for the three-judge District Court. This Court rejected that argument and remanded the case to the District Court for trial and determination of the constitutional issues which, of course, it had not undertaken to decide in granting the summary judgment that it had earlier entered.

As we understand the plain language of this Court's decision on the earlier appeal, this simply meant that the Complaint filed in this case in April of 1964 sufficiently alleged facts that would cause these statutes to be unconstitutional, if those facts were proven; and if the railroad companies could prove what they had alleged in the Complaint, they were entitled to the relief sought.

It was in this context that the District Court on remand scheduled and then undertook a massive trial on a

massive record.

As Mr. Youngdahl indicates, over 100 witnesses testified, a tremendous volume of other evidence and exhibits were received by the Court, all directed toward permitting the District Court to decide the simple factual issue of whether these Arkansas statutes in practical operation today really have any rational relationship to railroad safety.

I stress that the issues addressed to the District Court are almost entirely factual and not legal. As that Court indicated in its own opinion, the opinion from which this appeal is prosecuted, the governing legal principles are clear and indeed are not substantially disputed. The Court then, based on the massive record before it, made this factual finding:

"We find from the overwhelming weight of the evidence that by the mid 1950's, if not before, the firemen on the diesel locomotive and the third brakeman or helper had in general ceased to perform significant safety functions in the operation and switching of freight trains and cars."

Those findings of fact on this record supporting those findings of fact led inevitably to applying the constitutional principles that had been established by this Court to the lower Court's central holding in this case, which was that under present conditions continued enforcement of the statutes makes any significant contribution to railroad

safety and that the statutes as they operate today are unreasonable and oppressive and violate the due process clause and unconstitutionally burden interstate commerce.

I should note that the District Court of three judges in this case did not follow the example of the Norwood case and refer the matter to a Special Master, although quite obviously it was going to involve very extensive accummulation of factual records. But the three judges chose to hear the case because of the factual context it was necessary for them to pass on the credibility of the witness and, of course, they enjoyed the superior position of being able to hear the witnesses that were actually presented and assessing the weight that was to be given to their conflicting claims over conflicting testimony.

The validity of these statutes has always turned on a fact question. The Norwood case in 1933 involved the same sort of examination of the facts in the District Court after it had been remanded back to the District Court. The accummulation of the sort of record that we have here today on 1929, 1930, 1931 railroad operating facts, and then the appeal from the conclusion of the Court at that time, the District Court, that there wasn't sufficient change to make the statute then unreasonable. There wasn't sufficient improvement in railroad technology and safety.

When the appeal was taken from that this Court

regarded the entire matter as factual and in a per curiam one sentence opinion said " we see no reason to disagree with the determinations of the District Court. The Decree is affirmed."

We submit respectfull that that would be an entirely appropriate disposition of the case at Bar.

The substance, very briefly, of the proof in this great record -- and to make it perfectly clear, this is a very much abbreviated portion of the record, abbreviated by agreement of the parties. Only typical extracts of testimony and typical exhibits are here, and I suspect that the whole record, if printed, would be six or seven times the volume of the three volumes that were printed.

The substance of that proof is that these railroads now before the court, these six railroads, and all the other American railroads, are operating all over the United States with crews of less than the minimum of six required by the two Arkansas laws, and that they are doing it without sacrifice of safety.

The appellee railroads operations outside of the State of Arkansas are done with crews of three and four and in some infrequent situations with five, and with no sacrifice of safety.

Approximately 40 operating employees of these railroad companies were presented by the intervenors as witnesses in this case to testify as experts on railroad operations.

Each expressed an opinion it was good for safety to have the six men described by the Arkansas statutes, although they were familiar with railroad operations conducted with a lesser crew. Many of them, if not most, had participated in such operations on crews of four and five and sometimes three, either in other states where the appellees operate, or had observed such operations of the exempted railroads in Arkansas, the 17 intrastate railroads that don't have to comply with the statutes and consequently have crews ranging from two up to six. And none of these employees, notwithstanding that opportunity to acquire expertise in railroad operations and to know what about/caused accidents, none of them could cite a single accident that they could attribute to the absence of additional men on those crews smaller than six.

Mr. Youngdahl referred to the decision a couple weeks ago up in the New York Court of Appeals.

Q I thought that counsel said many of the accidents were caused by collision, an increased number of collisions, and that the collisions were caused by the lack of observation because there were fewer men in the cab?

A That is the contention of the other side, your Honor. We respectfully submit that the facts on the record don't bear it out.

Q Is it untrue, the fact that there are collision accidents?

A As I indicated, Mr. Chief Justice, Mr. Lucente is going to discuss the statistical evidence. As I understand the statistical evidence--

Q You just made the statement that they could not show anything, and I just wanted to ask you if it was a fact that collision accidents had risen?

A As I understand, and I am going to make an abbreviated answer to that question, if the Court permits, because this is a part of Mr. Lucente's presentation.

The statistical evidence indicates that there has been an increase in the number of reportable collisions, and the number of reportable collisions is one that produces more than a fixed dollar amount as fixed by I.C.C. regulations, I believe.

But the same statistics, as I understand it -- and I have no expertise in this -- showed that the type of accident that produces injuries -- that is what we are interested in here, is safety to persons -- that type of accident that produces injuries has been on the decline.

In the decision a couple of weeks ago in the New York Court of Appeals, the Court was divided four to three. There was a vigorous dissent of three judges indicating that they would hold the statute, the same statute that was before them, as unconstitutional, as may work legislation and not as safety legislation.

Q They would hold it unconstitutional under what provision of the constitution?

A I take it under the due process clause.

Q Was it the state constitution?

A Mr. Justice Stewart, I don't recall whether they specified. The only issue upon which the entire seven justices of the New York Court of Appeals were agreed was that it had to be tested as safety legislation, and it failed because it could not constitutionally be justified as an economic measure or measure to adjust employment relationships.

Q That could have been a matter of state constitutional law?

A That is possible. And I do not recall whether the Court was explicit about which constitution. But the majority of four in the case held on the evidence, the trial court's fact finding, that it was not clearly unreasonable to require a fireman on a locomotive, under a certain set of circumstances it was permissible fact finding to make on this massive record, and the majority explicitly distinguished the opinion of the Court below in the case at Bar and said that was tried on Arkansas facts and the trial court made different fact findings, so it is entirely a factual issue.

The similarity of the case hinges on the fact that both this case and that New York case dealt with state regulation of railroad crew consists. The New York court was

dealing with a statutory requirement of one man on a crew otherwise composed of two, three or four additional members fixed by size of that crew having been fixed by arbitration award 282 or collective bargaining subsequent to it, and the Arkansas court was dealing with two statutes that have traditionally been the most burdensome crew consist litigation in the United States which accounts no doubt for the frequent occasions for judicial appraisal of the effect and validity of these statutes.

The six man requirement in the Arkansas freight crew law is the greatest number ever required by any State. Only Indiana also requires six men in a freight crew and it applies it to longer trains.

The six man requirement in the Arkansas switch crew is the highest requirement, higher than any other requirement ever assessed or fixed by a state of the United States for a switch crew. No other state has ever required six men in a switch crew.

I might say with reference to the four other states, Mr. Evitts is correct. There are four other states that still have some form of railroad concise legislation. None of it is nearly as burdensome or even comparable as this.

Q Has there been any discernible trend one way or the other toward the enactment o

A Yes, sir; there has been a clear trend, which is

acknowledged by my adversaries in their Brief, for the repeal of such legislation.

At one time there were 20 states with some form of legislation. It's down to five now.

It is a hollow suggestion to tell the appellees that they need to go to the legislature or the people of Arkansas to be relieved of this staggering burden, because the railroads tried that trip back in 1958, as our colleague suggested, without much success.

Q Haven't I read that New York is talking about repealing its statute?

A Justice Stewart, New York had three consist statutes. One requiring a freight crew of, as I recall, six. And one requiring a switch crew of five. It repealed those two statutes two years ago.

All three statutes were attacked in their law suits which began back in 1963 or 1964, and after the trial court entered its decision the legislature repealed those two, leaving only the statute that required the firemen in engine crews under any circumstances.

The District Court tested the constitutional standards or tested against the constitutional standards established by this Court. These laws on both the due process and commerce clause grounds. It correctly apprehended that the statute would be valid if they were reasonably related to

the safety of operations and if they weren't unduly repressive or restrictive or costly in comparison to the benefit, if any, that they conferred; and the Court acknowledged that if the reasonableness of the statutes remained after assessment of the evidence fairly debateable, the statutes would be sustained because that Court, like this one, does not sit to pass a legislative judgment.

But it found that, conceding as late as Norwood, that the statutes, the reasonableness of the statutes in that factual context 35 years ago, was reasonably debatable, that it does not continue to be debatable today on this record, and that the continued debate of it by the Brotherhood does not make it so.

On the commerce clause test, the Court observed that since the statutes had a distinct impact on interstate commerce, it was required to make the judicial appraisal to weigh the purported local benefits to be derived from the statutes against the national interest in an unfettered flow of interstate commerce free from local restraint.

It relied on the Court's decision in Southern Pacific against Arizona, a case where the Court found on the factual record made there that the safety benefits from the Arizona train laws were so -- I am trying to think of the phrase because I think it is significant -- so slight or problematical as to not outweigh the national interest in

unfettered commerce and the train link law was declared unconstitutional.

The Court also relied upon Morgan versus Virginia, where the Court measured the validity of passenger on interstate conveyance by race against the commerce clause, that is the context in which it was presented gave great stress to the need and desirability of uniformity of regulation of interstate commerce and found that uniformity in that sort of regulation ordering the seating of passengers on interstate conveyances was desirable in a constitutional sense and that the statutes therefore must fall.

I point out that the burden here on interstate commerce of the full crew law is far greater than that of the statute in Morgan against Virginia.

There the passengers could move in accommodation to conflicting state regulations as the conveyance moved from state to state. The conveyance didn't have to be stopped and presumably no cost was incurred to the interstate commerce in complying with that statute. Here the trains must stop or slow to comply with the statute, and here the impact of cost of compliance is overwhelming.

The Court concluded, and we submit correctly so, that the statutes are not reasonably related to safety and that that is not fairly debatable by the present day railroad operations, and it concluded that any contribution to the

statutes might be argued to safety would be entirely out of proportion to the reported benefits they confer.

It is suggested in the appellants brief that an economic justification can be offered as alternative to support the validity of these statutes.

The case made below -- the factual case made below -- is so one way that the appellants feel that the need to offer an alternative at this stage, and in their motion intervening they set out what that alternative was, what their interest was in this case. They said their interest was that they represented the employees whose jobs were protected by these statutes, who might lose their jobs if the statutes were repealed, and they also had the further interest that if they had a diminution of membership as a result of the declaring invalid these statutes, it would cost the organization of Brotherhoods a loss of income.

The District Court rejected that argument and said the earlier cases, including the decisions of this Court, had authoritatively characterized these statutes as safety statutes. Then it accepted that characterization and indicated that the statutes might well be violative of the constitution of Arkansas if it was attempted to measure or support them on an economic justification rather than safety.

The Supreme Court of Arkansas said, in the first one of these cases to come before it in 1908, that this legislation

can only be supported on account of the proposed motion of safety of the public and the employees.

This Court in its 1916 case, referring to both of these statutes, 1907 and 1913 statutes, said they were designed for the purpose of assuring more than railroad safety. This entire case, as well as all of these other crew consist cases litigated over the years, have been and has been litigated on the issue of safety. That is what the proof in this massive record went to and, as I have indicated earlier, the seven justices of the New York Court of Appeals were unanimous on that issue alone that the statute had to stand or fall on its contribution to safety.

Of all the evidence in the record, the most persuasive and most dramatic, as I think of the absurdities of these statutes and of the real impact they have on interstate commerce, are these absurd rituals at or near the Arkansas line that they require in putting on and taking off men as a train moves from another State into Arkansas, or from Arkansas into another State.

There are many examples of these extra employees placed on the train for the sole purpose of complying with the Arkansas statute.

One of the best -- and I will cite only one in the interest of time -- is the run of the Missouri Pacific Railroad Company from Coffeeville, Kansas, to Van Buren, Arkansas,

which passes through, on most of its run, through the State of Oklahoma. From Coffeeville Kansas to Greenwood Junction, Arkansas, the train is operated by a four-man crew. At Greenwood Junction the train is stopped, two additional employees climb aboard and ride the train for the balance of the journey into Van Buren, Arkansas, consisting of six miles.

On the northward trip, exactly the same thing in reverse is done. A six-man crew takes the train out of Arkansas for six miles to Greenwood Junction, Oklahoma, where two men get off the train, ride a taxi back to town, and the four men take the train through Oklahoma to Kansas. There are many examples in the record of this.

The same thing is illustrated by the yards of these railroads where the state line bisects the yards.

The Missouri Pacific yard at Texarkana, Arkansas, is bisected by the Texarkana line. In one end of the yard four men do the same work six men have to do when one of the switch engines ventures into the Arkansas side of the yard.

Q I suppose one state can make a different judgement as to what risks it is willing to put up with?

A There is no doubt about it, if the judgment is rationally related to the purported purpose of its regulation.

Q But I suppose the same rituals could take place and you could still uphold the Arkansas law; it doesn't make the Arkansas law bad.

A It just illustrates that the train safely moves from Coffeeville to Greenwood junction in charge of four men and the other two men mount it and render no service for six miles.

Q That is what the argument is all about though?

A Yes, sir. In the interest of time, I would not expand on the discussion in the Brief concerning the discrimination against commerce.

Q Could I just ask you if the Court below made findings on discrimination?

A It did not. It found it unnecessary.

Q It didn't reach that issue?

A That is right. Mr. Lucente will present the balance of the argument.

MR. CHIEF JUSTICE WARREN: Mr. Lucente.

ORAL ARGUMENT OF MARTIN M. LUCENTE, ESQ.

ON BEHALF OF APPELLEES

MR. LUCENTE: Mr. Chief Justice, may it please the Court.

My presentation will deal primarily with the factual basis for the lower court's determination. The Arkansas statutes are not reasonably related to safety. And I will in the course of that, Mr. Chief Justice, discuss the collisions to which you referred and that you asked Mr. Light about.

If I may, I would like to discuss a preliminary

matter before getting to that particular subject.

On the safety issue, the District Court made several critical findings. It found, first, that from the overwhelming weight of the evidence and since the mid 1950's neither the fireman on the diesel locomotive or third brakeman or helper contributed to safety of railroad operations.

The District Court also found, without regard to employee categories, that trains have been operated safely in other parts of the United States for many years with crews of less than six men of the size required by the Arkansas statute, and that the train operations with these smaller crews had been conducted with safety. And, finally, the District Court concluded that from the evidence as a whole, under present circumstances, continued enforcement of the statutes makes no significant contribution to railroad safety.

In reaching these conclusions and making these findings, the District Court relied heavily on evidence of comparable and safe operations with smaller crews.

In other cases involving identical issues, the Courts have relied on the same type of evidence.

In the Weinberg case, which is referred to and discussed in our Brief, the Court relied on evidence of comparable and safe operations with 44-ton yard switching diesels without a fireman, and found the ordinance requiring a fireman on that type of equipment to be unconstitutional.

In the Southern Pacific case, particuarly, this Court relied extensively on evidence of safe operations in states outside of Arizona, operating three of the seventy car limitation imposed by Arizona; and it concluded,on the basis of such safe operations in other states, that the Arizona limitation had no reasonable relation to safety.

The record in the present case permits the same type of comparison and strongly supports the District Court's conclusion that the statutory requirements at issue do not promote safety of operations.

This compared to the evaluation is greatly facilitated by the changes in crew size which have occurred since 1964 as a result of the award of arbitration board number 282. That award, which was applicable to virtually every major railroad in the United States, resulted in the elimination of a majority of the firemen positions and a reduction in the number of brakemen and helpers used on crews in road and yard service.

There is also available for the same period of time extensive data relating to safety of operations. This data permits a comparison of the safety of railroad operations over a period of time and it also permits a geographic comparison between states. And when this information with respect to safety of operations is properly related to the changes in crew size which have occurred since 1964, it is possible to draw conclusions as to the relative safety of operations with

crews of different sizes under comparable conditions.

Q You don't make any claim that fewer men in the crews makes for a safer operation?

A No, we do not. Our basic point is that the extra men required do not make any contribution to safety. The operation is as safe with the four-man crew as with the six.

Q But not safer?

A No.

Q That kind of claim could be and apparently was made in the Arizona case, that being the state law that limited the length of trains limited the numbers of freight cars on a train, the claim being that if there were shorter trains there would be more trains and therefore more grade crossings, et cetera.

You don't have that argument?

A No. Perhaps the most graphic of the comparisons which the record permits involves the Arkansas operations of the plaintiff railroads in this case and their operations in other states.

As these railroads reduce their crews under the provisions of the award of arbitration board number 282, it became and it remains commonplace for trains in through service on these railroads to operate with identical characteristics through Arkansas and adjacent states except for differences in crew size.

The size of the train, its motive power, the frequency or infrequency of stops, the characteristics of tracks, signal protection and terrain remain comparable. Only the size of the crew changes from the four-man crew in other states to the six-man crew required by the Arkansas statutes.

Trains of the Frisco railroad operating over its mainline from Missouri, Arkansas and Tennessee undergo these crew changes as they pass into and out of Arkansas.

Trains of the Rock Island operating from Tennessee to New Mexico have the same experience, going from four-man crews in other states to six man-crews in Arkansas.

And the Missouri Pacific and the Cottonback have a large volume of interstate operations which also proceeds identical in operating features and characteristics except for difference in crew size.

In yard service, Mr. Light has pointed out there are instances where a border bisects the yard and where four-man crews do the switching at one part of the yard and six-man crews do the switching when they are required to go into Arkansas.

The other part of the record on this, in addition to the changes in crew size, is the evidence which shows the relative safety of operations of the plaintiff railroads in Arkansas and in other states.

The record shows that during the five-year period

which is the most recent five-year period available at the time of the trial, from 1961 to 1966, casualties arising from train operations were reduced by 13 percent in Arkansas and sixteen percent in other states through which the plaintiff railroads operate.

I am referring now to the report of casualties comprehended by the regulations of the Interstate Commerce Commission. Casualties were reduced in both Arkansas and other states, but the reduction in other states on the plaintiff railroads was greater than in Arkansas.

Q Casualties?

A Yes, sir. That is injuries to persons.

Q How about the accidents?

A Accidents, your Honor, are comprehended under the Interstate Commerce Commission in terms of train accidents.

A train accident, to be reportable to the Interstate Commerce Commission, must involve one basic requirement. It must involve property damage to railroad equipment arising out of the operation of trains of at least $750.

Since 1961 there has been a trend of increases in train accidents reportable to the Commission. And train accidents also comprehend collisions. Collisions are one of the categories within the train accident category.

There has been an increase in train accidents reportable to the Interstate Commerce Commission since 1961.

But the fact is that casualties, injuries to people, arising out of those incidents, has been declining since 1961. So that by 1967 there was a 25 percent reduction in the casualties or injuries to people arising from these train accidents.

Q Might that not be fortuitous, just because of the fact you didn't happen to have any very large accidents that killed a great number of people? And might not that also be due to the fact that the railroads have taken off most of their passenger trains where people might be killed?

A The evidence, your Honor, shows that the reason for this increase in reportable train accidents is primarily the fact that the standard is stated in terms of damage to equipment, and that one of the features involved in determining the damage to equipment is the amount of cost involved in repairing the equipment. And this $750 standard, which has remained inflexible since 1961, has resulted in an increasing number of instances falling within the reporting requirements.

As equipment costs have increased, as labor costs have gone up, the proportion of instances in which a mishap becomes a reportable train accident has also increased.

So that the basic point that the record establishes in this connection is that, insofar as safety is concerned in terms of injuries to people, there has been an improvement in that and that there has been at least a comparable improvement in states that do not require six-man crews.

Q Wouldn't that be a direct reflection of the fact that there are fewer people in the crew?

In a train accident, the people most likely to be hurt are the crew of the train. And if there are only four on there, instead of six, that could account for fewer casualties?

A That could account for some of them, your Honor, but the fact is that only a very small number of train accidents have a potential for casualties.

The reported data for 1967 shows approximately 7200 train accidents. The reportable casualties for 1967 to persons arising out of train accidents is 924. So on its face the 924 against the 7,000 produces something in the vicinity of ten percent of train accidents that result in casualties of any kind. And when the casualties in train accidents are allocated to specific accidents so that you take into account the fact that some produce two casualties and others do not produce any, only six and a half percent of the train accidents involve casualties.

So our basic point is that the discussion of train accidents, the emphasis on what has happened to train accidents, is a concern with mishaps involving property damage that became increasingly reportable because of the yardstick to which I referred.

Q I suppose you would agree that every collision

carries with it the possibility of casualty, wouldn't you?

A No, I would not, your Honor. May I state my basis for it?

The collisions that we are referring to here, your Honor, are not primarily collisions between two trains moving in the same direction or even between two trains moving, I mean, in opposite directions, or two trains moving in the same direction.

The Commission's classification of collision also includes collisions from one car racking the side of the other, and it includes and there are reported as a great many collisions what happens when a car goes over the hump of the yard at too great a speed and runs into another car at the receiving track and classification yard and property damage of $750 occurs. That is a collision.

There may not be an employee within a great distance of that event. So I would have to disagree with the statement that collisions inevitably involve a potential for casualties because many of them occur when there is no potential for casualties.

Q I suppose if one of the cars went over an embankment it might be a casualty so far as some of the employees are concerned?

A It might be, yes, if there were employees in the area.

Q Wouldn't there be employees on the train if one of them went over the embankment?

A Not the switching cars to which I am referring. You are referring to a train operating over the line which goes over an embankment?

Q Yes.

A The employees are in the caboose and on the head end. If the derailment occurs in the middle of the train the employees may be a long distance from the point of derailment.

Q Does that mean they wouldn't be hurt?

A They might be hurt in the caboose from a sudden stop. But the likely hood of any injury in the locomotive would be fairly remote on a 150 car train where one of the middle cars derails and goes over the embankment.

Q You don't think that would endanger anybody who happened to be in the caboose?

A There would be a sudden stop in the caboose and unless the men were properly braced there might be an injury. But the caboose itself would not necessarily go over the embankment.

Q It wouldn't have to go over the embankment in order to have a casualty, would it?

A No; there could be a casualty from that type of accident.

Q It seems to me we had a recent case in this court where someone sitting in the caboose, because of a very slight accident up above, was hurt very severely.

A It is possible for that type of casualty to occur when the train stops suddenly and when the occupants of the caboose are not braced and they are bounced around in the caboose, and that does happen.

But to return just a moment, your Honor, to the collision that you inquired about earlier, the collisions that you inquired about earlier, page 985 of the record.

Q Would you say from just as a matter of common sense that an increase in the number of collisions was not a safety factor and that it could be seriously considered in a matter of this kind?

A I would not say that. I think an increase in the number of collisions, without any explanation of why they are increasing, would be something of very great significance in a case of this kind.

What I have tried to do is to explain the reasons why the reportable statistics do not portend anything of great significance with respect to the safety of individuals.

Q Is there anything in the reportability of accidents that would affect the collision part of your argument as to whether there might be casualties or not?

A No. The standard to which I refer, the $750 standard,

does not relate directly to the casualty potential of the collision.

Q I understood counsel to say that in Arkansas,or in other states there was a much greater increase in collisions during a given period recently than in Arkansas.

A I did not understand that. I don't believe there is data available which shows collisions by states.

Q Not by states but the rest of the country, it was considerably higher than in Arkansas.

Is that true?

A The data that I am familiar with in the record does not permit a comparison between Arkansas and the rest of the country insofar as collisions are concerned.

It does in so far as the entire category of train accidents are concerned, but I am not aware of any breakdown with respect to collisions. But there is a page in the record--

Q You could assume, couldn't you, that if it is related to all accidents some of them would be collisions?

A Yes, sir. But the data with respect to collisions does permit a breakdown between railroads operating with firemen and railroads operating without firemen, and at page 985 of the record there is such a breakdown. The collisions reported since 1961 are broken down at page 985 of the record into two categories. The collisions experienced by those

carriers operating their freight and yard service with 33 percent of the positions occupied by firemen, and railroads operating their freight and yard service with 67 percent of their service using firemen. And that breakdown with respect to collisions shows that from 1964 to 1966 the group operating predominantly with firemen experienced an increase of 31 percent in collisions, but the group operated predominantly without firemen experienced an increase of 17 percent.

Q That is yard service?

A Freight and yard service both.

MR. CHIEF JUSTICE WARREN: We will recess.

(Whereupon, at 12 noon a luncheon recess was taken, to reconvene at 12:30 p.m. this date.)

AFTERNOON SESSION

12:30 p.m.

MR. CHIEF JUSTICE WARREN: Mr. Lucente, you may continue your argument.

ORAL ARGUMENT OF MARTIN LUCENTE (resumed)

MR. LUCENTE: Thank you, Mr. Chief Justice.

In the remaining time, I wish to refer particularly to a report made by a so-called National Joint Board with respect to safety of operations following the award of Arbitration Board No. 282. The National Joint Board consisted of representatives of the railroads and of the two brotherhoods, representing engine crew employees, the firemen and engineers.

The Board's report discusses the safety of operations which the parties make. I emphasize particularly that the studies made by the Brotherhood of Locomotive Engineers, which is discussed in this report, disclosed that the elimination of firemen's jobs did not adversely effect its railroad safety operation.

This report was made in January of 1966, almost two years after the effective date of the arbitration award. The engineers, I emphasize, as a remaining member of the engine crews and yard service, have a most immediate and direct interest in safety of operation. When the report in question was made, the engineers had been participating in such operations for a period

of almost two years and the organization undertook to make its study representative of railroads throughout the United States. The Grand Chief of the Brotherhood, relying on these studies, stated in a letter to the Chairman of the Committee on Commerce of the United States Senate that the removal of firemen under the award had not adversely affected the safety of the remaining employees, and I am quoting, "That engineers are now efficiently and safely moving their trains over the road."

I emphasize again that this was a study by the Brotherhood of Locomotive Engineers based on data submitted by its members who had been observing operations without firemen for two years and that study supports the judgment of the District Court.

Q Was there any question in there about the engineers getting more money if they didn't have a fireman?

A Under agreements made with the Brotherhood of Locomotive Engineers there have been wage increases which were applicable to operations without firemen. In other words, the first agreement, the only one with which I am familiar, provided that engineers operating in freight service without a fireman would receive an additional $1.50 per day. That type of agreement was made.

Thank you.

Q Could I ask you just one question. What if the Court disagreed with you on your contention that these laws are not

related to safety? Have you lost the case there?

A I take it under the authorities, Your Honor, that we do have the burden of showing that the safety benefits, if any, arriving from the statutes are ---

Q If we disagree with you on that, do we then have to reach the discrimination question?

A I think the discrimination and equal protection.

Q They are both related to safety. I assume they can be discriminatory?

A Yes, the discrimination and equal protection arguments might still be valid.

Q So the lower court has not passed on that?

A That's right, the lower court did not pass on those two points.

Q Do you think that the very factors that would show these laws are related to safety would also show there is a difference between 50-mile trains and longer trains?

A The statutes in question, Your Honor, apply with respect to lengths of the road in the state and switching operations for a large railroad can be precisely the same as switching operations for a small railroad.

Q Unless your opponents were saying that the longer roads have longer trains?

A But in switching operations, Your Honor, the longer trains would not effect the movement of the cars within the

switching yard. When the train first comes into the yard, it is broken up and operations thereafter are in terms of cuts of cars, which in most instances are the same regardless of the size of the train that comes into the yard.

Q How about the freight that would operate the switching?

A The freight operations, the question of whether the length of the line means anything with respect to the size of the crew, Your Honor, is answered, I believe, in the evidence by the fact that the arbitration award of Board No. 282 laid down a series of guidelines which provided considerations to be taken into account by special boards in determining what the size of the crew should be on a particular run or assignment.

Q This is the same kind of an argument that goes to whether or not these laws relate to any safety at all or not?

A The argument does depend on that.

Q So that if the laws are related to safety, you would also lose your discrimination argument, at least in the freight area?

A I believe, though, there is still a valid inquiry as to whether the 100-mile limit and the 50-mile limit is a differentiating circumstance as far as our safety is concerned.

Q Even in the freight area?

A Even in the freight area. Over the road the 100-mile railroad might haul a 150-car train, which is then interchanged---

Q Do you think we can decide that issue here?

A The record does contain a great deal of evidence of the operation.

Q We don't have any findings on that?

A There are no findings on that point, but there is a great deal of evidence on the operation of the small railroads.

Q Ordinarily we don't make findings of that.

Q I suppose you would object to just our even doing it if we did it and ruled against you?

A Yes, sir.

Q What would be your position, should we remand this case or not?

A If the question turns on equal protection and the discrimination against Commerce's point, I believe that perhaps it should be remanded to the lower courts for the taking of further evidence and for the findings on this issue.

Q Was there evidence taken on it?

A There was evidence taken on it, Your Honor, and we put in a considerable amount of evidence on that. If the question were one on the adequacy of the record, I don't believe it would be necessary to remand. I felt the findings were essential for both purposes rather than for just the one.

MR. CHIEF JUSTICE WARREN: Mr. Youngdahl.

ORAL ARGUMENT OF JAMES E. YOUNGDAHL

MR. YOUNGDAHL: Mr. Chief Justice, may it please the

Court:

With reference to Mr. Justice White's last point in the general issue about the justification of a 100-mile classification in the switch yard, to be overly candid, perhapd, I shudder at the fact of going back to try this case again.

Q It would not be a matter of trying it again. Weren't the issues which were made up in the Trial Court included discrimination and equal protection?

A That is correct.

Q And the record was made and closed with those issues in it?

A Yes, sir.

Q It is just a question of findings then.

A I understand, Your Honor, that the compelling principle in a constitutional challenge is the plaintiffs have the burden of showing that the law is unconstitutional. There are cases that the Court is well familiar with which state that if any state of facts is known or can reasonably be conceived of, that is sufficient.

There is a good deal of evidence in here that ---

Q Some cases may have said that in the equal protection area, but do you think that they have said that in the commerce area?

A I don't understand commerce to be involved.

Q Or in discrimination of interstate commerce?

A As discriminated against interstate commerce, our answer would be that the two groups are not at all contiguous, well formed, interstate covered, intrastate not covered. To the contrary, without going into detail at this time as to the question of whether or not there is justification for a hundred mile classification in yard operations, the evidence shows the companies operating longer trains that are covered that are not covered and that longer sets of cars are operating contrary to what Mr. Lucente said that are covered that are not covered.

The evidence shows that the companies that are covered carry more volatile materials, for example, materials that have more opportunity to blow up and blow up a whole town are covered and not covered. Furthermore, we would rely heavily on the many years of decisions by this Court about mileage classifications and particularly the 1916 decision in this case in which equal protection and all classification arguments involved only the Arkansas switching crew as distinguished from the old freight statute.

In reference to the question about whether the New York Court of Appeals ruled on this point, if I may quote just a sentence or two from the decision of the New York Court of Appeals about two weeks ago, "Plaintiffs do not establish on the record the statute denies them equal protection of the law. Citing Morrow against Dowd, some differences applying specifically to rail have been sustained by this Court setting New York Central

against Williams, which was one of the cases we relied on."

It goes on to discuss that further, as I am sure the Court will familiarize itself with.

Q Are copies of that available?

A We will be glad to make them available. It was just issued about two weeks ago.

Q Would you do that please?

A Yes, I will.

As to whether or not there is a passenger crew statute I will emphasize there is a full crew law in Arkansas applying to passenger crew trains. The railroads have in past instances challenged that statute and they do not here for reasons which I suggest have some value in this Court decision now.

Q I don't understand that. What reasons do you suggest?

A I do not understand why if they contend it is just as safe not to have a fireman, why it is not just as safe on a passenger train as on a freight train, that is what I mean.

As to the question of collision, I urge the Courts to look at the record in this respect, because I think that it contains extremely persuasive information. On pages 419 to 500 of the appendix on pages 48 to 53 of our brief-in-chief, we discussed this matter and powerful evidence of the fact that the kind of accidents attributable to crew performance and absence of crew have gone up startlingly since the crew was reduced nationally.

Q What page was that?

A The appendix was page 419 to 500, the testimony of Mr. Homer. There were particular charts involving collisions on many pages, including pages 1168 to '69, and those are discussed more thoroughly on pages 48 to 53 of our original brief. The railroad suggests that the whole matter here can be explained here in terms of reporting requirements.

I point to pages 6 and 7 of our reply brief where the Department of Transportation quotation issued on April 10, 1968, deals with the matter of railroad accidents and their alarming circumstances under present and recently developed conditions. The same thing such as the National Transportation Safety Board's review of data during the past several years for train accidents shows progressively worsening trends in rates, occurrences, deaths and damages.

As the Court observed in questioning Mr. Lucente, the fact that the casualties may have dropped could be explained by many things. There is a very easy way to handle that. Use as an exposure factor as a factor for measuring factors for casualties, man-hours. That is what everybody used, as the record shows and that is what the railroads used.

But here they chose to measure casualties by such things as billion gross ton-miles. Obviously the ton-miles per employee are going up greatly as the crews go down, as passengers go down, as passenger crews go down, and as carload increases. Obviously when you measure casualties by billion gross ton-miles,

you will get some kind of a drop.

Casualties in terms of some kind of meaningful explanation do not at all result in that. The result is they have risen in train accidents since 1964. In any event, it seems to us that this is a peculiarly legislative situation, the cause and effect kind of thing, deciding whether it really was caused or really was not caused by something which followed another.

We submit this is a matter for the Arkansas Legislature to determine. We concede there is a legislative trend for full crew laws and we think we can reverse it. We look forward to any opportunity we have in that respect, but we hope it will not be done through this judicial process.

(Whereupon, the above-entitled oral argument was concluded.)