In the

Supreme Court of the United States

NORFOLK AND WESTERN RAILWAY COMPANY, Petitioner,	)	
v.	)	No. 70-97
RICHARD NEMITZ, et al., Respondents.	)	

Washington, D. C.
October 21, 1971

Pages 1 thru 51

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NORFOLK AND WESTERN RAILWAY COMPANY,

Petitioner,

v. No. 70-97

RICHARD NEMITZ, et al.,

Respondents.

Washington, D. C.,

Thursday, October 21, 1971.

The above-entitled matter came on for argument at 11:46 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

MARTIN M. LUCENTE, ESQ., One First National Plaza, Chicago, Illinois 60670, for the Petitioner.

THOMAS J. MURRAY, JR., ESQ., Murray Building, 300 Central Avenue, Sandusky, Ohio 44870, for the Respondents.

C O N T E N T S

ORAL ARGUMENT OF:	PAGE
Martin M. Lucente, Esq., for Petitioner	3
Thomas J. Murray, Jr., Esq., for Respondents	29
REBUTTAL ARGUMENT OF:	
Martin M. Lucente, Esq., for Petitioner	51

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 97, Norfolk and Western Railroad against Nemitz.

[Discussion off the record.]

MR. CHIEF JUSTICE BURGER: I think you may proceed now, Mr. Lucente.

ORAL ARGUMENT OF MARTIN M. LUCENTE, ESQ.,

ON BEHALF OF THE PETITIONER

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

The primary question presented by this case involves Section 5(2)(f) of the Interstate Commerce Act.

The initial provisions of that section require the Interstate Commerce Commission, as a prerequisite to approval of a merger, to impose protective conditions for the benefit of employees affected by the transaction.

The last sentence, as an alternative to imposition of conditions by the Commission, provides that notwithstanding any other provision of the Act, an agreement pertaining to the protection of employees may be entered into by any carrier and the duly authorized representatives of its employees.

At issue here is the relationship between the Commission's authority to impose protective conditions and the right of representatives of carriers and their employees to enter into agreements concerning that subject.

The claims asserted by the respondents in this case arise out of the 1964 merger of the Nickel Plate, the Norfolk and Western, and several other carriers. As a part of that transaction the Norfolk and Western acquired the Sandusky Line of the Pennsylvania Railroad.

The respondents were employed by the Pennsylvania and worked on the Sandusky Line prior to its sale to the Norfolk and Western. These employees seek certain payments which they contend they are entitled to under the Commission's order approving the merger.

When the N&W sought Commission approval of the merger, approximately 20 railroad unions intervened in opposition and asked the Commission to impose protective conditions for the benefit of employees who might be affected.

Following extensive negotiations, however, the Brotherhood of Railroad Trainmen, which represented the respondents, and the other unions entered into an employee protection agreement with the Norfolk and Western, dated January 10, 1962.

This agreement, which recited that it was made pursuant to the last sentence of Section 5(2)(f), provided a type of employee protection which differed significantly from that which Section 5(2)(f) requires when the Commission imposes protective conditions. When protective benefits are prescribed by the Commission, an employee's pre-merger compensation must

be protected for a period of four years or for the number of years of employment prior to the merger, whichever is less.

There is no guarantee of continued employment and the protection flows only from the employing carrier.

When the protective benefits are prescribed -- but the 1962 agreement, however, went far beyond this type of protection, and constituted, in effect, a lifetime guarantee of employment and compensation. The initial paragraph of the agreement provided that with respect to Nickel Plate employees the N&W would take such employees into its employment, and would guarantee that they would not be adversely affected with respect to employment or compensation subsequent to the merger.

Paragraph two of the agreement provided the same thing for Wabash employees.

Section 3 of the agreement covered the Pennsylvania employees on the Sandusky Line, who were given an option, first, to remain with the Pennsylvania or to become employees of the N&W. Section 3 provided that those electing N&W employment would not be deprived of employment or placed in a worse position with respect to compensation except, and I quote, "that Norfolk & Western shall not be required to provide employment to any such employee ... of greater duration than such employee enjoyed on" the Sandusky Line in the year prior to merger.

The written record of the negotiations with respect

to this agreement shows that the parties, by this proviso, intended to make the guarantee for Pennsylvania employees co-extensive with their pre-merger employment experience on the Sandusky Line.

In this respect the protection provided by Section 3 differed somewhat from that provided by Sections 1 and 2.

Under Sections 1 and 2 the employees were protected on the basis of their full pre-merger earnings while protection for Pennsylvania employees was limited to their earnings from the Sandusky Line.

The reason for this difference lies in the nature of the transaction.

With respect to the Nickel Plate and Wabash employees that were covered by Sections 1 and 2, the Pennsylvania -- or the N&W, rather, acquired the entire working territory that these employees held seniority rights over. The protection which the N&W provided was accordingly based on their pre-merger employment without limitation.

The Pennsylvania employees, on the other hand, who worked on the Sandusky Line, also worked on other portions of the Pennsylvania which were not acquired by the N&W.

Operations on the Sandusky Line were manned by employees of the Pennsylvania who had seniority rights over the entire Toledo Division. The Sandusky Line was only a part of the Toledo Division. And these employees worked part of the

timetime on the Sandusky Line and part of the time on other portions of the Toledo Division.

When the N&W acquired the Sandusky Line it thus acquired only a portion of the working territory of these employees, and it offered protection limited to the portion of the territory acquired.

This type of protection was intended primarily to discourage an excessive transfer of Pennsylvania employees to the N&W pursuant to the option, which I've already referred to.

If a transfer appeared attractive only to those with full-time earnings on the Sandusky Line, it was assumed that a sufficient number of employees would remain with the Pennsylvania to permit it to man its operations on the remaining portions of the Toledo Division, and that the number electing employment with the N&W would be fairly consistent with the operational needs on the acquired line.

Despite this purpose, some employees with limited earnings on the Sandusky Line did elect to become N&W employees. The respondents in this situation, in this case rather, illustrate the situation.

Prior to the merger, the respondents here worked primarily on other portions of the Toledo Division, spending only very limited time on the Sandusky Line.

They nevertheless chose to abandon their former working territory and to limit themselves to the Sandusky Line,

which had provided only minimal work opportunities for them.

Had these employees remained with the Pennsylvania, it is unlikely that the sale of the Sandusky Line would have had any appreciable effect on their earnings.

To return to the chronology events: The Commission approved the merger in 1964. Its report referred to the fact that the employee representatives and the N&W had entered into an agreement pertaining to employee protection, and as to such employees the Commission found that in view of the agreement no conditions need be imposed for the protection of those employees covered by such agreement.

Now, with respect to employees not covered by the agreement, the Commission did prescribe and impose in its order of approval the traditional four-year income protection, which Section 5(2)(f) requires in those circumstances.

The approved transactions were consummated in October of 1964. During the months immediately following, the N&W and the Brotherhood attempted to compute the protective benefits due the Sandusky Line employees. But the N&W was able to obtain from the Pennsylvania earnings data pertaining only to total earnings over the Toledo Division. It was unable to obtain, in the initial stages following the merger, a breakdown showing wages earned on the Sandusky Line alone.

It was consequently impossible, on the basis of that data, to determine the benefits due employees under Section 3.

Accordingly, an implementing agreement and a letter of understanding were entered into. The letter of understanding provided for monetary payments which met the immediate needs of the employee. While the implementing agreement contained a very detailed formula, with respect to the calculation of benefits, the agreement very expressly provided that such benefits were to be determined by taking the total compensation received by the affected employees for service performed on the Sandusky Line in the 12 months prior to merger, and dividing by 12.

Following this disposition of the matter, several of the employees, former Pennsylvania employees, complained to their union officials that implementing agreement 1-A and the letter of understanding did not provide the payments that they were entitled to under the 1962 agreement.

These employees contended that the 1962 agreement protected their entire earnings over the entire Toledo Division, and that implementing agreement 1-A gives them something less.

The Brotherhood officials who had negotiated these agreements advised the complaining employees that their interpretation of the 1962 agreement was wrong, and that implementing agreement 1-A was fully consistent with the 1962 agreement.

The complaining employees were then afforded a full hearing before the Brotherhood's National Board of Appeals, where their position was fully presented and thoroughly

considered. The employees also urged before the Board that the question of the meaning of the 1962 agreement, and its relationship to the implementing agreement 1-A, should be taken to arbitration, as provided by the agreement.

The Brotherhood's National Board of Appeals, its very highest appellate body, concluded that the position taken by the employees was without merit and that implementing agreement 1-A was entirely consistent with the 1962 agreement. The Board also concluded that there was no disagreement between the Brotherhood and the N&W as to the meaning of these agreements, and it consequently declined to invoke arbitration.

The employees then instituted the present action under Section 9 of the Interstate Commerce Act, on the theory that the N&W had acted contrary to the 1962 agreement, that the Commission had incorporated the 1962 agreement into its order, and that the N&W had therefore violated an order of the Interstate Commerce Commission.

The N&W moved for dismissal on summary judgment, on the ground (1) that the court was without jurisdiction since the action was one to enforce a collective bargaining agreement not an order of the Commission, (2) that the arbitration procedures of the 1962 agreement, or alternatively the processes of the National Railroad Adjustment Board, provided exclusive remedies, (3) that implementing agreement 1-A governed the rights of the employees in this matter.

The district court denied these motions, but granted a cross-motion for summary judgment and issued a declaratory judgment upholding the 1962 agreement interpretation for which the respondents contended.

The Court of Appeals affirmed, holding that under Section 5(2)(f) the Commission must prescribe protection for affected employees whether or not a prior agreement on this subject has been made.

The court acknowledge that the Commission had expressly disclaimed any intent or obligation to prescribe protective conditions, but it held that the Commission's order must nevertheless be construed to impose the provisions of the 1962 agreement because of the court's view of the meaning of Section 5(2)(f).

The court accordingly concluded that the rights set forth in the 1962 agreement were incorporated in the 1964 order and, for purposes of federal court jurisdiction, stem from such order.

MR. CHIEF JUSTICE BURGER: That will be a good place for us to begin after lunch.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Very well, you may proceed.

ORAL ARGUMENT OF MARTIN M. LUCENTE, ESQ. [Resumed]

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

I had just described the holdings of the courts below, and I should now like to discuss the respects in which we consider those decisions to be wrong.

The basic and primary error of the decisions below concerns the conclusion that the Interstate Commerce Commission is required by Section 5(2)(f) of the Act to prescribe protection for employees despite the existence of a prior collective bargaining agreement on this subject.

The terms of the Act and its legislative history clearly show that Congress intended to preserve for the parties to a merger the right to resolve employee protection problems through collective bargaining. And that an agreement on the subject was to be a self-sustaining alternative to the prescription of conditions by the Commission. This is apparent both from the terms of the Act and its legislative history.

With respect to the literal structure of the Act, the first two sentences require the Commission, as a part of its approval of a covered transaction, to prescribe conditions for

the benefit of affected employees. The last sentence specifically provides that notwithstanding any other provision of the Act, representatives of the carriers and their employees may enter into agreements pertaining to protection of employees.

The only possible reason for the inclusion of this notwithstanding language was to insure that nothing in the Act would be construed to limit the right to make agreements and to require any questions in this regard to be resolved in favor of the parties' rights to make collective bargaining agreements pertaining to employee protection.

The only provisions of the Act which relate in any way to employee protection are the provisions of Section 5(2)(f). The first two sentences of that section are thus the only possible source of restrictions on the parties' rights to agree to employee protection. It would seem indisputable, therefore, that the "notwithstanding" clause of Section 5(2)(f) eliminates any restrictions on the collective bargaining process which might otherwise be inferred from the first two sentences relating to the Commission's authority and obligations in the premises.

This apparent literal meaning is amply confirmed by the legislative history of the Section. This history shows that Section 5 was the result of an agreement between labor and management, and that Congress enacted the substantive provisions upon which the parties agreed.

The labor spokesman for the sponsoring group stated that the so-called Washington job protection agreement provided suitable protection in the event of a merger and that labor would not be seeking legislation on the subject at all, were it not for the fact that approximately 15 percent of the railroads were not parties to the agreement.

This spokesman said that if we could get all of the roads into the agreement, we would not even suggest protection as a matter of law. Thus, the requirement that the Commission impose protection for employees was intended to be operative only in the event that a voluntary agreement had not been reached on this subject prior to Commission approval.

The principal congressional spokesman supporting this legislation stated the purpose of the session as follows, and I quote,

"The proposed labor clause sets up specific standards for the Commission to follow. . . But this provision also contains a clause that permits the industry, through the processes of collective bargaining, to work out its problems in a democratic manner."

The Congressman primarily involved in the passage of Section 5(2)(f) thus clearly expressed the view that the language of Section 5(2)(f) provided standards for the Commission to follow, but only where the parties did not resolve employee protection problems through a voluntary collective

bargaining agreement.

This legislative history reveals that every group that was active in sponsoring Section 5(2)(f) was opposed to agency-dictated protection in every merger, and was insistent that the process of collective bargaining be preserved as an alternative to agency prescription of protective conditions.

Despite this overwhelming evidence of the purpose and meaning of Section 5(2)(f), the courts below construed it to severely limit the ability of unions and the carriers to enter into agreements with respect to protection and to require the Commission to impose protection in every instance.

The decisions below effectively eliminate the last sentence of Section 5(2)(f) as an operative portion of the statute.

Under these decisions, the Commission is required to review agreements relating to employee protection, to determine their adequacy, and to impose the terms and conditions which it considers proper. The collective bargaining agreement thus becomes nothing more than a suggestion to the Commission as to what it might do in the case pending before it.

If the third sentence of Section 5(2)(f) were eliminated from the statute entirely, no one would question the right of labor and management to enter into a stipulation, submit the stipulation to the Commission, suggesting what protective conditions should be imposed.

But under the decisions below that is the sole function which is now attributable to the last sentence of Section 5(2)(f). The last sentence thus becomes virtually meaningless appendage to the section.

Q Well, could I ask you, if the Commission does incorporate in its order the terms of an agreement entered into between the union and the company, may the union and the company, after the Commission enters its order,arrive at an agreement different from what the Commission has put in its order?

MR. LUCENTE: Well, under the decisions below, Mr. Justice, they may not.

Q Well, what's your view?

MR.LUCENTE: My view of the statute is that if the Commission has entered an order which imposes certain protective conditions, the parties thereafter, under the last sentence of Section 5(2)(f),have the right to enter into an agreement contractable to both --

Q But setting different terms, then, --

MR. LUCENTE: Which might set different terms than those prescribed by --

Q Well, don't you have to win on that point to win this case?

MR. LUCENTE: No. No, Your Honor, we do not. Because in this case the agreement upon which we rely principally is the

agreement that was entered into prior to the Commission's order of approval.

Q Exactly.

MR. LUCENTE: This was arrived at prior to the Commission's order of approval.

Q But let's assume that the prior agreement and the Commission's order have terms in them that are different from the later agreement.

MR. LUCENTE: Then we have to --

Q Then you have to do what?

MR. LUCENTE: - convince you, Your Honor, that under Section 5(2)(f) the parties, subsequent to a merger, may collectively bargain and adjust the conditions --

Q Right.

MR. LUCENTE: -- to suit what they consider to be the best interests --

Q So to win you've got to overturn, then, I take it, or you would like to overturn the construction of the prior agreement, given to that agreement by the district court and the Court of Appeals.

MR. LUCENTE: But if we assume, Your Honor, that the prior agreement was not incorporated in the Commission's order.

Q That's one point.

MR. LUCENTE: Then we need only prove, as I see it, that under Section 5(2)(f), the parties have a right to enter

into such a prior agreement, and if a dispute arises as to what the prior agreement means, then there is the process of arbitration and the other administrative processes open to determine that question.

The prior agreement stands then, Your Honor, as an independent self-sustaining collective bargaining agreement. And the party's right with respect to it are the same as with respect to any other collective bargaining agreement.

Q Yes, but do I understand you then to say -- suppose the Commission's order is an order pursuant to the first two sentences of the section, and it becomes operative for a year, year and a half, and then the unions and the carrier, -- what what carrier would that be?

MR. LUCENTE: Norfolk and Western.

Q The surviving carrier.

MR. LUCENTE: Surviving carrier, yes.

Q -- sit down and make brand new agreements, that then supersedes the Board's order; is that your position?

MR. LUCENTE: To the extent that it provides for different conditions, it would supersede the conditions imposed by statute.

Q Is that by reason of the proviso or not?

MR. LUCENTE: That's by reason of the proviso. The proviso, Your Honor, relates both to agreements which are made prior to Commission approval of a merger and it also relates to

agreements which are made subsequent to Commission approval of a merger. And in both instances, the "notwithstanding" language of that proviso is intended to make it clear that the parties may make an agreement pertaining to employee protection notwithstanding the other provisions of the Act. Which, in effect, means notwithstanding the first two sentences of that section. And the first two sentences of that section are the sentences pursuant to which the Commission acts when it imposes protective conditions.

Q How often does that happen, a subsequent agreement?

MR. LUCENTE: There are many subsequent agreements made, Your Honor, but it frequently happens that the subsequent agreements will implement or explain the terms of, or fill in the details of more general provisions in the prior agreement.

So that the process of negotiating with respect to conditions which arise after the merger is consummated is a very vital and active one --

Q Well, what's been the practice? When the merger is contemplated, do the unions and the carriers sit down and work out these preliminary agreements before the approval of the --

MR. LUCENTE: That has frequently been the practice, Your Honor.

Q Which as been the -- is that more generally the

case?

MR. LUCENTE: That is more generally the case, at least in the last ten years, than having the Commission prescribe conditions without any prior agreement by the parties. The more general condition currently is for the parties to sit down and work out agreements pertaining to employee protection before the Commission enters its order of approval.

Q Is there any reference made to such agreements when they are completely executed before the approval?

MR. LUCENTE: The Commission --

Q In the order of approval -- is there any reference in the order of approval?

MR. LUCENTE: The Commission in its report will refer to those. As they did in this case, Your Honor.

Q In the order of approval, is there any reference made --

MR. LUCENTE: Not in the order of approval, in the formal order of approval. But in the report it does set forth the fact that the parties have entered into an agreement and, as it does in this case, it recites that because the parties have made an agreement pertaining to this subject, there is nothing for us to do under Section 5(2)(f).

Q No first or second sentence provisions at all?

MR. LUCENTE: Well, in this case, that is right with respect to employees covered by the agreement; but I should

add this additional detail. That sometimes the agreements which are made, and do not cover all of the employees, and the Commission in its order of approval will then impose terms and conditions for the employees not covered.

Q Under the first two sentences.

MR. LUCENTE: Under the first two sentences. But when an agreement has been made, the invariable practice of the Commission, and this is discussed in detail in the amicus brief which the United States and the Commission have submitted in this case, Your Honor. The invariable practice of the Commission, where an agreement has been made, is to recite that fact in its report and then to proceed to approve the merger on the grounds that the agreement provides the protection required by the Act, and its order need not provide that protection.

Q Is it fair to assume that this custom that you've described of having the railroads and the union work out these agreements, is simply a reflection of the fact that most often they'd rather work out their own problems than have some governmental agency impose agreements on them?

MR. LUCENTE: That is undoubtedly the situation, Your Honor, and it permits the railroads and the unions to work out problems that are not only directly relevant to employes protection but are also relevant to other situations which will arise in connection with the merger. In the Great Northern-

Burlington merger, for example, which was before this Court, the parties worked out voluminous agreements implementing the manner in which the various seniority districts would be put together on the combined properties, the manner in which trains would be manned, and including among the terms of the agreement protection for employees. So it is quite customary when these agreements are made, as they almost invariably made in current mergers, for the parties to work out problems of employee protection and at the same time to work out many other labor relations problems attendant upon the contemplated merger.

The whole thing fits together as one bundle, as it were, and as one of the difficulties of the approach below is that the Court looked at the agreements only for this very narrow area of whether it provides full protection for four years based on all earnings and had ignored all of the other aspects of the agreement, and the respects in which the agreement dealt with other things and dealt with them on a very favorable basis, as far as the unions are concerned.

Now, one other further point I would like to make, in conclusion, is that the lower courts' decisions are also wrong because they fail to give appropriate effect to this Court's holdings in Republic Steel vs. Maddox, and in Vaca vs. Sipes, regarding administrative remedies and the necessity of their exhaustion before judicial remedies can be invoked.

And I call the Court's attention again to the amicus

brief filed by United States and the Commission which discusses the legislative history, and the Interstate Commerce Commission's interpretation of the statute, and arrives at the conclusions which I have stated with respect to what Section 5(2)(f) means.

Thank you.

Q Mr. Lucente, may I ask one question before you sit down:

You are adhering to your position on the jurisdictional issue here, I take it?

MR.LUCENTE: Yes.

Q Do you have a comment about the suggestion in your opponent's brief, that Norfolk and Western apparently, by its answer, conceded that the 1962 agreement was incorporated in the '64 order?

MR. LUCENTE: Yes, I do, Your Honor. In the district court, Your Honor, when the complaint was filed, it alleged that the plaintiff's claims were based upon the 1964 order of the Commission, and in a number of paragraphs it alleged that the order had been incorporated in -- the agreement had been incorporated in the order.

The Norfolk and Western first filed a motion to dismiss, before it filed an answer in the district court. The motion to dismiss, as the district court judge recognized, at pages 28 and 29 of the Appendix stated that jurisdiction did not lie in the district court because the order had not been

incorporated, the agreement had not been incorporated in the order, and that the parties were proceeding under the terms of a collective bargaining agreement not under the terms of the Commission order.

The lower court overruled that contention. It held, in effect, that under Section 5(2)(f) the parties were not permitted to enter into a collective bargaining agreement prior to approval. And it held, therefore, that the agreement must be considered to be part of the Commission's order of approval.

Now, subsequent to that, the N&W filed an answer, and in that answer it admitted the allegations of three or four paragraphs in a single part of its answer. And among the allegations admitted in that answer was the conclusion of law stated in the complaint to the effect that the agreement of 1962 had been incorporated in the Commission's order.

So N&W at that stage of the proceeding, Your Honor, was merely acknowledging what had already been established as the law of the case. We did not make any admission as to what the Commission had done in the premises, and we had merely abided by what the district court had already ruled with respect to whether or not the agreement was incorporated in the order. And of course subsequently on appeal we raised the point again that the order did not incorporate the agreement which the parties had made.

Q I have just one other question, and that is:

If you should prevail here, do these claimants, your opposition, have any place to go for relief?

MR. LUCENTE: The Commission, Your Honor, has suggested in its brief, the United States and the Commission have suggested, that under Section 5(9) of the Interstate Commerce Act, and under Section 5(2), that it has some responsibility to supplement its order if it can be shown that supplementation of its prior order is necessary in order to make the order consistent with the public interest.

So I take it that the respondents here, if they have a complaint about the adequacy of the protection in the agreement, can go back to the Commission.

Moreover, the respondents here have the right to go to the Adjustment Board with their individual complaint about what the agreements need. The Adjustment Board does not require presentation by the Brotherhood on behalf of individuals, it can present their own individual claims. And, accordingly, they can go to the Adjustment Board for a determination as to what their rights are in the premises.

Q So that here's an initial agreement in 1962, and we just ignore the Commission's order on the theory of the case, then we have a subsequent agreement. In that subsequent agreement, it just purports to interpret the prior agreement?

MR. LUCENTE: Yes.

Q It does not take the approach that the prior

agreement says A, and we are going to change the protections of this 1962 agreement setup; isn't that correct?

MR. LUCENTE: That is what is - - that's a fact in this situation. That is what happens in most cases.

Q Now, would you say that the subsequent agreement, if it took the approach that we're going to change the protection in the '62 agreement would, nevertheless, be valid?

MR. LUCENTE: Yes, I would, Your Honor.

Q Because of the "notwithstanding" clause of the section --

MR. LUCENTE: The subsequent agreement, Your Honor, stands on its own feet as an independent collective bargaining agreement.

Q Well, I don't suppose the statute would have intended to give such an agreement any validity that it didn't otherwise have.

MR. LUCENTE: Yes, I would agree with that, Your Honor.

Q What?

MR. LUCENTE: I would agree with that --

Q So that wholly aside from the statute, you think a union and an employer may renegotiate downward the benefits of a prior collective bargaining contract?

MR. LUCENTE: Yes, I think that under the "notwithstanding" clause of the proviso, Your Honor, --

Q I know, but --

MR. LUCENTE: Oh, independent of the statute, I'm sorry.

I would think so, Your Honor, because of general principles regarding the authority of a collective bargaining representative.

Q Yes.

MR. LUCENTE: And the collective bargaining representative has the authority to change the terms of a prior agreement. And --

Q Subject only, I suppose, to Vaca vs. Sipes, --

MR. LUCENTE: That's right, Your Honor.

Q -- relations of good faith, or good faith representation.

MR. LUCENTE: All we're contending for here with respect to these agreements if the recognition of the traditional principle that the collective bargaining representative, in the absence of Vaca vs. Sipes, and doctrines akin to it, has authority to bind the class that it represents, and it may do so even though the terms differ from those of the previous union-negotiated agreements.

Q Let me ask you this, and I won't hold you any more. Let's suppose we disagreed with you and agreed with the courts below, that the 1960- -- the subsequent agreement actually changed the 1962 agreement, that the 1962 agreement meant one thing and the '65 agreement meant the other; in short,

we disagreed with the union and the company as to what the '62 agreement meant. What should we do then, because both courts below have given a construction of the '62 agreement contrary to your claim.

Now, if we agree with the two courts below, then affirmance would have to rest on the idea that even if the two parties negotiating had thought there were changing the '62 agreement, they nevertheless would have changed them. I am not sure they would have.

Let's assume the '62 agreement had clearly said earnings are to be measured by reference to the entire Toledo Division. There couldn't have been any argument about it. And then the two parties sat down. Do you think they would have, nevertheless, come out saying we're going to reduce that pay, and measure it by the Sandusky service alone?

MR. LUCENTE: There is a possibility, although I think it's quite unlikely, but it has happened in mergers and --

Q Well, it has happened. What should we do, should we assume that, or would we have to remand it?

MR. LUCENTE: Well, if you could not reach the question, Your Honor, of whether the subsequent agreement changes the prior agreement, I take it, unless you had first determined that the Court of Appeals and the district court were correct in their --

Q Correct, that's just assuming --

MR. LUCENTE: -- interpretation of Section 5(2)(f).

Q Assume we agreed with them.

MR. LUCENTE: I think that if the Court arrived at that conclusion, that -- and if the issue could properly be put to the district court as to what the agreements mean, that there are issues which are properly triable back there as to what the authorities intended --

Q I know, but the court has already -- the district court and the Court of Appeals have already said that the '62 agreement has been modified by the '65 agreement.

MR. LUCENTE: But they also, the district court, Your Honor, also left open certain issues to be arbitrated and the Court of Appeals held that those issues should be resolved instead by the district court. So there is something remaining to be done in the district court.

Q Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Murray.

ORAL ARGUMENT OF THOMAS J. MURRAY, JR., ESQ.,

ON BEHALF OF THE RESPONDENTS

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

I would like to respond immediately to the discussion concerning this post-merger agreement.

We submit that the holdings of the district court and the Court of Appeals are unequivocal, that what the agree-

ments themselves show is not that the subsequent agreement modified or altered the protection given these employees by the 1962 agreement, but that it abrogated any meaningful protection that these employees received. That was their finding by simply reading the two agreements, the pre-merger agreement and the subsequent agreement.

Just how dramatically the two -- the latter agreement modified the protection which we submit and the courts found was imposed by the Commission is, I believe, set forth in some detail in our brief at page 31. And what we conclude there in our discussion of that portion of the record is that, in net effect, what happened to these men three years after the merger was that they were forced to pay back the limited benefits which Norfolk and Western said they were entitled to, because, having had received unemployment compensation during the 18-month period immediately after the merger, they, under the law, were now receiving, theoretically at least, income through the subsequent agreement, and since the amounts that they had received in unemployment compensation for the most part weren't any greater than what they had received by way of the subsequent agreements. They literally were told -- now they're back on their feet and back at work, they were literally told they had to repay this.

Now, I just point this out because it dramatizes in practical point of fact how seriously the subsequent agreements

abrogated or nullified the protective features of the pre-merger agreement.

Q Are you suggesting a bad faith or breach of fiduciary duty as in Sipes?

MR. MURRAY: Mr. Chief Justice, I don't believe the record, as it was at the time the court below entered summary judgment, permitted a sufficient development of the facts in this case, quite candidly, for me to comment categorically as to whether there was bad faith.

I would say this, that there was at the very least a perfunctory handling of the claims of these small band of Sandusky men by the union; at the very least, if not bad faith. But that particular aspect of the case did not develop the question of whether or not their union in fact --

Q Well, that's what I was leading up to. If you are suggesting or undertaking to attack the agreement, undermine it on that ground, you've got a heavy burden. Can you undermine it just becasue it turns out to be an improvident, undesirable, unwise agreement, having in mind the rather express provisions of the statute in the last sentence of the statute?

MR. MURRAY: Permit me to respond to that question this way, and I hope responsively: We are not here contending that subsequent to agreements the unions and railroads can't get together and make the, as termed in the industry, implementing agreements. Quite the contrary, we recognize

the fact that implementing agreements are absolutely necessary to carry out the various features of these mergers.

Our contention here is, and the court below held, that the very language of the third sentence of Section 5(2)(f), which says that agreements which pertain to the protection of the interest of the employee may be entered into subsequent to these orders of approval. That this, at the very least, requires that all of the protection, all of the meaningful protection given by the Interstate Commerce Commission in its order simply can't be wiped out by an agreement, whether it's based on bad faith, a mistake -- if the Court please, the district court and the Court of Appeals, we submit, didn't reach the question of the motive behind the unions in turning down the appeal of these men when they appealed to their National Board of Appeals.

It merely lifted the two agreements and said this agreement takes away everything that was given by the agreement prior to the merger.

And I might, Mr. Chief Justice, add one further point in the same vein. The position of these trainmen was that their union temporized on their behalf, and we believe that if we were permitted, had we been permitted to develop the evidence in this case, it would have been that more temporization and perfunctory handling, or lack of a graph of the complexities of their claim, on the part of that union

hierarchy which was responsible for the fact that the union -- its union did not act on their behalf.

Q , Conceivably, that might give them cause of action sometime against the union. That wouldn't be the framework of this situation, would it?

MR. MURRAY: No, Your Honor, it would not. It has been suggested, and if I may just attempt to respond to that question:

During Mr. Lucente's comments the Court referred to the -- I believe Mr. Justice White asked him, assuming that the jurisdictional determination of the court below concerning incorporation is accepted as fact. Assuming this to be the case, what would be the result?

And I believe Mr. Justice Blackmun asked the question of whether -- how Mr. Lucente would answer the question of the admission in the answer as to the fact of incorporation. We want to meet this case head on in this Court, not on any technical admissions in the answer, and we want to meet it head on for two reasons. We submit that as an intensely practical matter, unless the decisions of the courts below are affirmed on the question of jurisdiction, employees who are denied protection will have no practicable avenue of redress, to come back to Mr. Chief Justice Burger's question.

One suggestion in the brief of the appellee is that employees in the position of these trainmen could very well have

sued their own union for bad faith. That would have been one alternative course of action open to them.

And we submit that this, as well as the other arguable -- the avenues of redress which have been argued are utterly impracticable. These men were out of work, on unemployment, they were now in a restructured union situation, and to suggest that men in this position should now have to sue their own union for breach of -- assuming that that would even be a viable alternative open to them, should have to sue their own union and thereby, in effect, have to pay their own merger protection from the union dues they were paying in, we suggest is manifestly contrary to the explicit intentions of Section 5(2)(f) and its policy considerations.

Q Mr. Murray.

MR. MURRAY: Yes, Your Honor?

Q Is it your view of 5(2)(f) that there must be, without regard to whether there are prior agreements or not, at the time of approval, a provision imposed by the ICC under Sections 1 and 2?

MR. MURRAY: That is our provision -- that is our position, yes.

Q And then do you go on from that to say that the "notwithstanding" clause then is limited in application to implementing agreements, that is, agreements which implement that provision?

MR. MURRAY: No, Your Honor. We concede that, as has been the practice, that the unions and railroads can enter into agreements prior to Commission approval with respect to their own protection, and, Mr. Justice Brennan, let me respond to that --

Q Well, excuse me just one minute.

MR. MURRAY: Yes.

Q I just want to be sure. Although you do concede, I gather this is under the "notwithstanding" clause, that the unions and the railroads may enter into agreements before the merger, and after the merger, you nevertheless contend that there must be Sections 1 and 2 conditions as imposed by the ICC in the order of approval. Is that right?

MR. MURRAY: That is correct.

That is correct. And we would just -- if I may respond just briefly further. I believe the ICC, in a very exhaustive study of the legislative history, has placed its emphasis on the theory that if the Interstate Commerce Commission is not to step aside and disavow any connection or any obligations where they have met with the unions and the railroads have agreed to conditions, that the result would be encroachment upon traditional collective bargaining processes.

And what we're suggesting here, or attempted to suggest in our brief, is that the important point, the important focus in this type of situation should not be at the

pre-merger stage, but it should be on the question of how the employee who is actually caught up in these mergers in the aftermath stages is going to enforce them.

And here is why we think it is not only vital to these employees, it is vital to the railroad industry itself that, as far as the operation of the Interstate Commerce Act itself, the Section 5(11) of that Act be given full play in these situations, whether it's the employees who come to court saying, "Look, we haven't been protected as we were promised under the agreement", or whether it's the railroad, more importantly as far as the broader, economic, and social aspects of this case are concerned, I would think would be the situation where the railroad comes in and says "We're trying to get this merger implemented."

And as happened in the Northwestern case, the unions there took the position that the railroad can't put this consolidation into effect without complying with the major disputes procedure of the Railway Labor Act. And in that case the court, we think very perceptively, held that in fact exactly like the facts as the court found before it, the facts before the Court in this case, that the only way that you were going, as a practical matter, avoid a situation where the union could hold the threat of a strike over the railroad as a condition of meeting its post-merger conditions as to how this agreement, despite what the Interstate Commerce Commission said,

how its post-merger conditions with respect to the consolidation were going to be carried out.

The only way you are going to protect against this threat would be if you held that the Interstate Commerce Act apply. And in the Northwestern case, where it was the railroad that came into court and said, in cases -- in a factually similar case to this one, where the Commission had simply acknowledged the existence of a prior agreement with respect to merger conditions.

Q Well, would you be satisfied if it were held that the Interstate Commerce Commission did not incorporate these terms of the contract, that did not have to, but that a contract made pursuant to this authorization of the federal statute is enough in itself to present a federal question, enforcib le in the federal courts?

MR. MURRAY: Well, I --

Q I knew you wouldn't, but you would like to have the right answer given by the Court; but would you be satisfied as far as jurisdiction is concerned?

MR. MURRAY: As far as jurisdiction is concerned, I feel we would have established jurisdiction, yes. There would be a basis for jurisdiction.

Q Yes, and then you would reach these same questions. May a subsequent agreement modify either a prior agreement or an order of the Commission?

MR. MURRAY: I would only, Mr. Justice White, question the phrasing of that. We don't question that it can modify it. What we're talking about is can it lower --

Q Well, modify, to reduce it?

MR. MURRAY: Reduce it, yes. Take away the benefits.

Q Well, would you say it could reduce it?

MR. MURRAY: No, no, Your Honor. We say that --

Q Well, that's what I mean. May it lower the -- may a subsequent agreement lower the benefits?

And you say no.

MR. MURRAY: We say it may not lower the benefits.

Q Well, you'd say that whether it's -- whether the prior right you're claiming is based on the contract or a Commission order?

MR. MURRAY: That is correct. That is correct.

Q So those questions are inevitably in the case.

MR. MURRAY: I would have to say they are. And the only --

Q Well, Mr. Murray, if, as you have said, the 5(2)(f) has to be interpreted as saying, yes, you may have a prior agreement but there must be protective provisions in the Board's order of approval. Suppose you have a prior agreement that gives less protection than the provisions in the Board's order? Which prevails?

MR. MURRAY: Well, we would say, Your Honor, that --

if I understand your question correctly, it is our position --

Q Well, just let's take this case.

MR. MURRAY: Yes. I'm sorry --

Q Suppose they said earnings were to be -- the Board's order said earnings were to be based on Toledo service. But the prior agreement said earnings were to be computed on the basis of Sandusky service. Which would prevail?

Even though the unions and the railroads entered into the earlier Sandusky basis agreement pursuant to the "notwithstanding" clause.

MR. MURRAY: Well, we feel, Your Honor, that the soundest possible decision for the railroad industry and for the employees would be to have this Court hold that Section 5(2)(f) imposes an obligation on the Commission to assure whether, through imposition or through operation of law, a minimal level of protection up to four years' compensation protection. That, we feel, would -- and the reason I say that is --

Q Well, what you're really saying is that the Board order and not the prior agreement would be controlling -- the controlling requirement.

MR. MURRAY: That is correct. And that assumed facts that you asked me.

Q Is that the way the ICC in its amicus brief conceives that, since it may enter supplemental -- enter some

supplemental orders and award supplemental benefits over and above any agreement?

MR. MURRAY: I believe, Your Honor, that the Commission in its brief, as I recall it, took the position that these employees would be protected by the fact that the Interstate Commerce Commission could always come in and supplement its order with respect to benefits. And all that we're saying is that that's perfectly commensurate with our position, but so long as the employees who are politically weakened or who are pragmatically weakened by these mergers have at least the minimal protection. Because without it they don't have any redress, as a practical matter.

Q Then, in effect, what you're doing, your suggestion may have the effect of saying that we must add to the statute a provision, after the word "employee", "Unless such supplemental agreement reduces the benefits of the employees."

MR. MURRAY: I wouldn't say that you would have to add that. We feel that --

Q But you're reading the statute as though those words were in there.

Aren't you, really?

MR. MURRAY: Mr. Chief Justice, I believe this Court, in two cases, the Brotherhood of Maintenance of Way case and the Railway Labor Executives case, in reviewing this legislative history, held, without getting to the question of the effect of

a third sentence agreement, that the second sentence of Section 5(2)(f) imposes a mandatory minimum duty on the Commission to impose four years of compensation protection. It so construed the first and second sentences.

And what we're saying here is that, leaving aside the question of any technical admission about incorporation of the agreement, what we're saying here is that unless, at the enforcement stages, employees who are caught up in the type of situation these men were caught up in have a right to come into court and invoke the remedial scheme of the Interstate Commerce Act, which gives them attorney's fees, cost, unless they have this practical means of assuring that the protection promised them as a condition of approval of these mergers, they don't really have any practical avenue of redress.

Other than suing their own union, which has been suggested, the other two alternatives that I believe have been mentioned, are to go to the National Railroad Adjustment Board. This would be a five-year process, on the average. For men who desperately need the help now, now that the merger has dislocated them.

In this regard I want to point out something that should be stressed about the record in this case. These men's primary working connection was with the City of Sandusky. On the average, I believe, they had approximately 10 to 20 years' seniority at the time that this merger went into effect. The

year prior to this merger, their opportunities for employment at Sandusky had diminished because of the very fact which gave reason for the merger to take place in the first place, so you had a declining volume of revenue and traffic at Sandusky.

So that during that period, immediately prior to the merger, their work opportunities were limited. But these were men that had homes at Sandusky, and 15 days before this merger took place they received a notification that they could uproot and go to Toledo and remain with the Pennsy or they could take employment with the Norfolk and Western Railway Company.

And in that agreement, unequivocally, was stated -- or attached to that agreement, I should say, was the portion of the pre-merger agreements which categorically stated that if you take employment with the Norfok and Western Railway Company you will have your employment protected, and you will not be placed in a worse position with respect to compensation at any time during the Norfolk and Western employment.

We might here at this point that these men have never claimed the full arguable scope of that protection. They have never claimed that they had a right to a job at Sandusky.

Q Well, isn't that one of the points here as to what that first agreement means? It's arguable, and is it any more than that? Provided further none of such employees shall be deprived of employment or placed in a worse position with respect to compensation at any time during such employment,

except, and so forth. Does that mean just a partial year's employment? Does it mean a full year? Is it arguable, is what I'm asking, on this, Mr. Murray?

MR. MURRAY: Yes. Mr. Justice Blackmun, you just read part of Section 3. But attached to that same agreement was a very simple formula, which is admitted was part of that agreement. And it provided that the employee's protection was to be supplemented to the extent that it fell below his average monthly compensation based upon the last 12 months in which he performed service, divided by 12.

And as a practical matter, the only exposure of the Norfolk and Western at Sandusky, under this pre-merger agreement, was during the transitional period; and this is alluded to indirectly by the district court. Because this particular merger protection agreement had a built-in protection against failure of the merger. The Court may have noted that there is a proviso in there that if the Norfolk and Western traffic or revenues declined as a result of this merger, these employees will not be protected.

And all that means is that neither at -- you're at the nadir of operations, the Pennsylvania is going out of operation; the Norfolk and Western is coming in. And to the extent that after this merger the Norfolk and Western's business declined, from that point on these employees wouldn't have any protection.

The only thing that they're asking, the only thing that they have asked here, is for that simple compensation protection as a result of being out of a job at Sandusky after the merger. That's the only thing that they have asked.

Q Doesn't that really add up to where we were before, that perhaps they made an improvident agreement?

MR. MURRAY: We would concede that if your -- Mr. Chief Justice Burger, that if the union agreed to what Norfolk and Western claims they agreed here, it was at least improvident, if not egregious, and unfair. And if you look at the -- from their point of view: these men are out of work and they filed their claim. They're told, You can't be compensated for the simple reason that we don't have Pennsylvania earnings available; so wait.

And they wait a year. This is what happened to them. They wait a year, and the pressure builds up within the union so that their local chairman puts pressure on the intermediate rung and they go to Cleveland and they sit down, and they enter into this subsequent agreement which we have alluded to here.

Q Wouldn't it be a rather dangerous proposition to -- for all contracting parties to urge this kind of relief from an improvident contract, I suspect that sometimes railroads make improvident contracts. Would they be entitled to relief because of that?

MR. MURRAY: Well, all that we would say, Your Honor, is that where you have a statute with the clear policy, underlying policy reasons of the Interstate Commerce Act, Section 5(2)(f) has. Which has, as its full purpose of existence, employee protection.

To say that for any reason, because of political motivation, because of ignorance of what was in the Interstate Commerce Act, or the Interstate Commerce Commission's order, if the railroads can sit down with the representatives of these employees who are politically and practically disrupted in their lives by -- and can simply abolish out of hand the protection given by the Interstate Commerce Commission, which is exactly what happened here, then in this type of case the protection of the Interstate Commerce Act is a cruel illusion; and that's what it turned out to be to these men.

These men ended up literally in a worse position -- these employees literally ended up in a worse position than if the Interstate Commerce Act had never been written, and -- than if they had never been promised anything under the pre-merger agreement, as a practical matter.

Q Mr. Murray.

MR. MURRAY: Yes, Mr. Justice --

Q Assuming all you say, in order to give you the thing you want, don't we have to rewrite the "notwithstanding" clause?

MR. MURRAY: No, Mr. Justice Marshall, I would submit that you really don't. As a matter of fact, we feel that the "notwithstanding" clause is very much --

Q You mean Sections 1 and 2 among other things?

MR. MURRAY: Among -- that is correct. That there's nothing really inconsistent between the third sentence of Section 5(2)(f) and the first and second sentences. We feel that all that this boils down to is that the Interstate Commerce Commission is required to impose conditions where the parties can agree upon them. And where the parties agree upon them, the very least that they have to do is make sure that the employees who are going to be most drastically affected in their employment relationships receive the minimal level of protection. That's all we're saying.

We have an alternative argument in there, that even if this Court should hold that the "notwithstanding" clause relieves the Interstate Commerce Commission of any responsibility whatsoever, with respect to employee protection, that at the very least this Court should hold, as a practical matter, if you are going to have these mergers carried out at all, is that the -- at the enforcement stages they have a right to the remedial scheme of the Interstate Commerce Act, first of all; and secondly, that their unions cannot sit down and literally undue, out of hand, the protection afforded by the Interstate Commerce Commission. Or by the agreement between the union and

the railroad at the time that the protective conditions were considered and agreed upon.

Q That's a little bit like arguing, though, I suggest, that the railroad should not have its interest undone because of improvident agreements made by their lawyers, their advocates.

MR. MURRAY: Mr. Chief Justice Burger, if I may come back to a point that I tried to make a moment ago. As a practical matter, it would be far more disastrous for the railroad industry if this Court should reverse the reasoning of the district court and the Court of Appeals than it would be for the employees in the position of these plaintiffs.

If I may take a moment to explain why.

The basic holding of this Court is that -- of the courts below, is that Section 5(11) exempts the carriers and the railroads from the operation of the Railway Labor Act. These men are coming here merely saying that under the Interstate Commerce Act they have certain rights to protection.

Now, turn that around, if you would, for the sake of a hypothetical illustration.

Suppose, at Sandusky, that the employees had put their foot down through their union and said, We're not going ahead with this merger until you comply with the major dispute procedures of the Railway Labor Act. That is, we don't like certain conditions that we agreed upon, and we don't like

certain conditions that the Interstate Commerce Commission imposed here. And before you can go ahead, we'll strike if you go ahead and change our contract.

Now, all that we're saying here is that the same principles which apply, which the court applied below, that is, if you're going to get these mergers into effect and efficaciously provide employment for the employees, and if you're going to absolve the railroad from having the unions hold a threat of strike over their heads if they don't do something different to the Interstate Commerce Commission order, as was the case in Northwestern, you've simply got to reconcile the objectives of the Railway Labor Act, which we concede require collective agreements on all matters. And the requirements of the Interstate Commerce Act.

And that's what the court did, and we suggest that there's a real genius in the decisions of the courts below, a very great perception, because in effect it tires out the disputes related to mergers and makes the Interstate Commerce Act the applicable law, and obviates the risk of national rail strikes in situations where the unions don't like what the Interstate Commerce Commission requires.

And that isn't -- we feel that -- if I may say in conclusion, we feel that the results to the railroad industry itself would be far more deleterious and far more averse if the decision of the courts below were reversed, as reflected in

its most practical, intensely practical aspects by the fact situation in the Northwestern case, upon which the district court and the Court of Appeals very heavily relied.

We urge --

Q Just as a hypothetical case, Mr. Murray --

MR. MURRAY: Yes.

Q -- if the union and the employees did not like the conditions that were imposed by the ICC, and they did strike, could the strike be enjoined?

MR. MURRAY: Yes, it could, Your Honor; yes, it could.

Q Why?

MR. MURRAY: Well, the -- and that's the, if I may use the phrase, the real beauty of the decision below. Because, as the court held, the Interstate Commerce Act, and not the Railway Labor Act, applies. That's -- if I may just call your attention, Mr. Justice Stewart, to 49 USC Section 511, which exempts the carriers and the employees from the operation of the Railway Labor Act.

Q So it would be an illegal strike and could be enjoined?

MR. MURRAY; As it was done in the Northwestern case. They threatened to strike. And I -- if I may say, just in conclusion, I lost a case in the Northern District of Ohio, three and a half weeks ago, where the railroad, Norfolk and

Western, came in and relied on this very decision, the Nemitz case.

If I may take just a moment to give Mr. Justice Stewart the facts of that case:

The railroad attempted to change the merger benefits, to adjust them downward as a result of the Hours of Service Act amendments, which limit the number of hours an employee can work. And the union took a national strike ballot, and they asked me to take the case to court, and I knew this Nemitz case was here, and I knew we were going to meet it, and we did, and we lost.

And we lost because the court said that the law that applies here is the Interstate Commerce Act. And the Nemitz decision, and the rationale of the Nemitz and Northwestern decisions literally in that case, and it's C-70-145, and it will be reported in the Federal Supplement. That case literally removed the risk of a national railroad strike. And it gives an expeditious avenue of determination of disputes which arise in the aftermath of these complicated rail consolidations, which are bound to create disputes out of confusion or ignorance or whatever, as was done in this case; and in this case it just happened to be that the victims of the confusion were the employees. It could very well have been the railroads themselves.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, Mr.

Murray.

You have about three minutes left, if you need it, Mr. Lucente.

REBUTTAL ARGUMENT OF MARTIN M. LUCENTE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. LUCENTE: If the Court please, just with reference to this last case that Mr. Murray cites, the holding of the court in that case is that the arbitration provisions govern that the employees were required to arbitrate and could not maintain a judicial action for the purpose of securing an interpretation. It was not the provisions of the Interstate Commerce Act that came into play in that decision, but the fact that arbitration appeared in the underlying document. That of course is characteristic of the agreement which the employees make, also.

I believe that's all I have.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:55 p.m., the case was submitted.]