In the

Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION, ET AL.,

Petitioners,

v.

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS,

Respondents.

No. 72-1289

Washington, D.C.
November 12, 1973

Pages 1 thru 45

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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v.	:	No. 72-1289
NATIONAL ASSOCIATION OF RAILROAD PASSENGERS, Respondent.	:	

Washington, D. C.
Monday, November 12, 1973

The above-entitled matter came on for argument at 10:03 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
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

E. BARRETT, PRETTYMAN, JR., ESQ., Washington, D. C.; for the Petitioners.

GORDON P. MacDOUGALL, ESQ., 705 Rig Building, 1200 18th Street, N. W., Washington, D. C. 20036; for the Respondent.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hearguments first this morning in No. 72-1289, National Railroad Passenger Corporation, et al., v. National Association of Railroad Passengers.

Mr. Prettyman, you may proceed whenever you are ready.

ORAL ARGUMENT OF E. BARRETT PRETTYMAN, JR., ESQ.,

ON BEHALF OF THE PETITIONERS

MR. PRETTYMAN: Mr. Chief Justice and may it please the Court: I am Barrett Prettyman, and I represent the petitioners in this case, which is here on certiorari from the D. C. Circuit.

The case presents a rather narrow question, namely which parties can sue for alleged violations of the Rail Passenger Service Act of 1970, the AMTRAK Act. We claim, petitioners claim that under the statutory language and pursuant to the congressional intent, only the Attorney General and, where a labor agreement is involved, employees and their representatives can sue for these alleged violations.

The respondent, which is an association of railroad passengers, claims that anyone who is injured and aggrieved by an alleged violation of the Act can bring suit in federal district court. That really is the only issue before the Court this morning.

Before I go into the facts of the immediate case, I would like to give you just a brief background of the Act itself because it bears on the problem. This Act was passed because of a genuine concern on behalf of the Congress and the people that all intercity passenger traffic in this country was going to disappear. In 1929, there were 20,000 passenger trains in this country, and by 1970 there were only 360. The plain, hard, cold fact of the matter is that the passengers in this country simply could not pay the high cost of operating these trains.

At the same time, Congress, in passing the Act, did not intend to stop all discontinuances of trains. Quite to the contrary, it recognized that some additional paring was in order if any rail passenger traffic was going to be preserved.

Q P-a-r-i-n-g or p-a-i-r-i-n-g?

MR. PRETTYMAN: Paring, p-a-r-i-n-g, sir.

Q Cutting down.

MR. PRETTYMAN: Some additional cutting down, yes, sir. Therefore, Congress devised a rather elaborate plan, the purpose of which was, instead of the individual railroads hereafter deciding which train and when it was going to submit to the ICC for paring down, instead the Secretary of Transportation would construct a basic system of passenger service, the minimum system that the country should have, and that would consist, therefore, of all the central service which hopefully

would be preserved. And a corporation was formed, AMTRAK, which was given power to enter into contracts with the various railroads and take over their passenger service, to be funded by government funds, tickets and the railroads themselves paying entry fees. The corporation, AMTRAK, would operate this basic system and would either operate or discontinue the excess service above the basic system.

I would like to emphasize again now that the purpose of the Act was not to preserve all passenger service but, rather, in the words of the House report, to effect a rational reduction of present service in order to save any passenger service.

When the Act became effective, the Secretary of Transportation did designate the basic system, 21 city pairs, with 42 trains running daily as part of the basic system. As it developed, when AMTRAK took over passenger service, it actually operated originally some 180 passenger trains, and today that is up to 198.

The Central of Georgia's only remaining passenger trains just prior to the passage of this Act were the Nancy Hanks, between Savannah and Atlanta, and Trains 13 and 14 between Albany, Georgia and Birmingham, and these trains were not part of the basic system, consequently notice was given of their discontinuance and on April 1, 1971, when the Act did become effective, those trains were discontinued. However,

prior to that, the respondent here brought a suit in the federal district court against AMTRAK, Celtral of Georgia, and the Southern Railway seeking a temporary retraining order to prevent the discontinuance of these three trains.

It was alleged that the Act was violated because of the relationship between Central and Southern. Southern owned virtually all of the stock of Central, Southern itself had decided not to enter into contract with AMTRAK, but the Central of Georgia had and they claimed, NARP, the railroad association here, claimed that either the entire railway system had to enter into a contract or no part of it could, no subsidiary could. And it sought a permanent injunction restraining the parties from enforcing any contract which did not include the entire southern system.

The district court denied the temporary restraining order and dismissed the complaint on the theory that NARP had no standing because of section 307, which provides that if AMTRAK or any railroad violates the Act, the district court shall have jurisdiction upon petition of the Attorney General of the United States or, in a case involving the labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives. And the district courts were given jurisdiction to grant equitable relief upon petition of those parties.

Now, it is clear that the Court of Appeals reversed

and held that there was standing. Now, it is clear that Congress has the authority to limit the right to sue under an Act of this kind. This Court has so held in other cases. So the only question here really is whether Congress intended to do so. Did it intend to restrict the right to sue? We think very clearly it did.

We just take the statutory language standing alone: We will note that it doesn't provide specifically that anyone aggrieved or injured can sue. It does not even provide that the specified remedies in the statute are in addition to other remedies. It doesn't even provide that the specified remedies didn't extinguish any remedy or right of action not inconsistent herewith, which it has done in other statutes, and instead specifically names the persons who are going to be able to petition the courts.

In this case, however, we do not have to rely upon the words of the statute alone, because there is some very specific and direct legislative history that goes right to the point before the Court.

In the original draft of the bill, the District Court was given jurisdiction to sue AMTRAK, AMTRAK alone, given jurisdiction when there is a suit against AMTRAK alone, upon petition of the Attorney General or in a case involving a labor agreement upon petition of any individual affected thereby.

Now, you will note two things about that. First of all, AMTRAK alone could be sued and, secondly, it didn't say anything about labor representatives, just the employees. At the hearings which ensued, labor representatives came along with ten proposed amendments to the Act. One of them would have specifically allowed any aggrieved party to bring a suit for violation of the Act. As labor spokesmen said, as the bill now reads, only the Attorney General, except in cases involving a labor agreement, could bring action.

Now, the Secretary of Transportation, who had a good deal to do with this Act, including following up on various sections of it, thereupon wrote the committee a letter addressing himself to the various proposed amendments, and he said "I would be opposed to permitting any person to seek enforcement of section 307." Now, thereupon what happened? This is important because this is not a case of legislative history where we have the committee ignoring people who have submitted views. On the contrary. The committee actually did make specific changes in the bill. For example, according to following labor's wish, which the Secretary had no objection to, they added specifically that representatives of employees could sue, as well as the employees themselves.

Again, following labor's wish, and the Secretary thought it was unnecessary but he didn't oppose it, they introduced the allowing other railroads to be sued as well as AMTRAK.

In other words, not just AMTRAK alone but other railroads could also be sued under the Act. But because of the Secretary's objection, the committee specifically refused to introduce this concept of permitting all aggrieved persons to sue. The Secretary had objected to it and the committee left it out, and the bill was passed without it.

It seems perfectly clear to us from this that Congress intended only those parties that were designated in the bill, in the statute to be able to sue. This case therefore becomes like Switchmen's Union and Montana-Dakota Utilities and Fleischmann Distilling and Calhoun v. Harvey, and so forth, cases where the specific remedies which were mentioned excluded others, including suits by aggrieved parties.

In addition, however, there are very important policy reasons why Congress left out aggrieved parties and why this Court should not sanction it. The Secretary of Transportation, the ICC and AMTRAK all were given very unusual authority and responsibility to fashion a workable passenger transportation system in this Act.

For example, this AMTRAK is supposed to make a profit eventually, even though it was recognized that these various railroads were losing millions on their passenger traffic. So it is a very complex and difficult job that was fashioned here. And if anybody can sue the railroad, certain things are clearly going to happen. For example, even if there is a

suit in regard to the discontinuance of an important line, you are going to have delays, if temporary restraining orders are entered, which, as our beif shows, could cost literally millions to AMTRAK. But even more importantly, if more than one person sues, if suits are brought in regard to a single discontinuance in Alabama and in Georgia, et cetera, you are going to have the possibility of not only the temporary delays of one case, but you are going to have possibilities of conflict between circuits which are going to unduly delay the discontinuances that are clearly called for by the Act. This case therefore becomes similar to Holloway v. Bristol-Myers, which is cited to the Court in our reply brief, which interestingly was decided also by the D.C. Circuit but by a completely different panel from the panel that decided the instant case, and they decided that a private party, even though aggrieved, does not have a right to sue under the Federal Trade Commission Act. And the court specifically pointed out the vexatious litigation that could ensue.

They pointed out that private parties may institute piecemeal lawsuits, reflecting desparate concerns and not a coordinated enforcement program. That same principle is precisely applicable here.

Q Did you file a reply brief, Mr. Prettyman?

MR. PRETTYMAN: Yes, sir.

Q I hope you have it here, sir.

MR. PRETTYMAN: I will see that you get one.

Q Well, I can get it if you filed it. Thank you.

MR. PRETTYMAN: It was filed about a week ago.

Finally, to allow aggrieved persons to sue here simply makes no sense, if you look at the overall plan of the Act. Right now, no discontinuances of the basic system are allowed. They won't be allowed until July 1, 1974. After July 1, 1974, the railroad, AMTRAK, if it wants to discontinue a basic service train, it has to give 30 days notice, thereupon the Interstate Commerce Commission, if it decided not to investigate under section 13(a) of the Interstate Commerce Act, that is the end of it, and this Court has said in City of Chicago that there is no appeal by a private person from that decision not to investigate.

On the other hand, if the ICC does investigate the discontinuance and passes upon it, an aggrieved party can appeal that ruling to the court. It seems to us clear that certainly in regard to the basic system, it makes no sense whatever to allow an aggrieved party to bypass this procedure which has been established and to rush into district court with an original suit even before the ICC had a chance to operate.

In other words, so that I am clear, notice is given of discontinuance, and before the ICC even gets to decide whether it is going to investigate, a private party runs into

district court and brings an original suit and wants to sue because of the discontinuance. That doesn't make any sense.

As to the non-basic system traffic, certainly the Court would not allow a private party a broader authority to attack the discontinuance of a non-basic system train than it would a basic system train, because Congress has specifically provided right here in the Act that a non-basic system train can be discontinued at any time just with 30 days notice. That is all that is necessary. And the congressional will having been expressed, that you can discontinue that easily a non-basic service train, it certainly makes no sense to allow an aggrieved person to run into court and attempt to attack it.

So on all of these grounds, it seems to us, on the basis of the statutory language as it stands, on the basis of the legislative history which I have pointed out, where an aggrieved party was specifically left out on the basis of the public interest involved in seeing that AMTRAK can really operate and discontinue, et cetera, and finally on the basis of common sense in light of the legislative scheme we think that clearly the district court was right in throwing out this case.

I might just add that the Attorney General, the responsible official under the Act, agrees with us, as expressed both in letters and by the position of the Solicitor General which has been filed before the Court, the United

States agrees that aggrieved parties cannot sue and that the responsible official for bringing law suits for discontinuances, et cetera, is the Attorney General.

I would like to reserve the remainder of my time, unless the Court has questions.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Prettyman.

Mr. MacDougall?

ORAL ARGUMENT OF GORDON P. MacDOUGALL, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. MacDOUGALL: Mr. Chief Justice, and may it please the Court: My name is Gordon P. MacDougall, representing the respondent here, the National Association of Railroad Passengers. It is a nonprofit corporation, with its principal office in Washington, D. C.

We are also joined on amicus by the National Association of Regulatory Utility Commissioners or the state regulatory agencies of the fifty states. And we support the decision below which held that persons other than the Attorney General in labor organizations have a right to enforce legal duties imposed by the Rail Passenger Service Act of 1970.

I might say, it is not in the briefs, I know the reply brief of the petitioner, AMTRAK, was filed about a week ago, but also the President just a week ago signed a new law, Public Law 93-146, which made substantial revisions in the AMTRAK Act. Now, that P.L. 93-146 was not available as of

Friday, hadn't been printed as of Friday.

Q Does that have any bearing on the --

MR. MacDOUGALL: Yes, it makes certain changes in the periods of section 404. I don't think it changes the principles involved in this case.

Q Well, would it change any of the language of that particular statute?

MR. MacDOUGALL: Yes, it does change the statute, yes.

Q What does it change, 307?

MR. MacDOUGALL: It changes a number, about seven or eight sections of the statute.

Q Well, does it cake any change in --

MR. MacDOUGALL: No, no change in 307(a). I might say that the Department of Transportation, as shown in the Appendix to the brief, had the -- the Appendix to the brief of the petitioner here -- they have the March 15, 1973 report of the Department of Transportation on the AMTRAK Act, with certain legislative recommendations. And one of the legislative recommendations of DOT was to eliminate judicial review of passenger train discontinuances. Congress did not adopt that recommendation and the extensive amendments which were approved by the President last week do not embrace any changes to section 307(a) or to the right of persons to take decisions of the ICC in passenger discontinuance cases to court for judicial review. That part was left unchanged. The DOT's

recommendations were not followed.

Now, the opinion below was 35 pages, it was unanimous, and it is our judgment that the Southern Railway is under a legal duty by virtue of section 404 of the AMTRAK Act to operate the Nancy Hanks passenger train between Atlanta and Savannah until at least January 1, 1975, unless it contracts with AMTRAK before that time, and that the discontinuance that took place on May 1, 1971, purportedly under section 401(a)(1) of the Act was in violation of the Act and breached its duty to the public that we have a passenger train operating between those two cities.

We, the passengers association, are in the class to be protected by the Act, and it is the interest to be protected. We do not look at the AMTRAK Act as being primarily, as indicated perhaps this morning, as a way for the railroads to unload their passenger trains. To be sure, there is some wording in the committee's report, particulary the House committee report, saying that certainly some trains are going to have to be discontinued, but the purpose of the statute was not to discontinue trains but to keep trains in operation, to expand trains. The purpose was to prevent the complete abandonment of service. The corporation was expected to "revitalize" rail passenger service, and that the overriding purpose of this legislation is to preserve and promote intercity rail passenger service.

We were very active in NARP, we were very active in getting the AMTRAK Act through Congress, and we do not look at it as a primary function to be to allow discontinuance of trains. We look at it as to --

Q Did you make an effort to get a provision in there to give you the right to sue?

MR. MacDOUGALL: We looked at section 307(a) as a super-section, that is, that we have the right to sue, that 307(a) was something, because this was going to be a quasi-governmental corporation, and since the Attorney General might not have the right to go in and sue AMTRAK, we looked at this as a super-section, that was to give the Attorney General remedies beyond that which any ordinary person would have or which the Attorney General would otherwise have.

Q Do I interpret your answer to be no, you didn't make any effort?

MR. MacDOUGALL: No, we made no effort to put a specific section on jducial review in. In fact, there is nothing in the legislative history that shows anything on this other than that the railway labor people certainly the railway labor people, Al Chesser, of the UTU, testified, he said, "The way it looks, it appears that the public doesn't have the right of judicial review." He said it appears. Attorney Hickey, who represented a competing or a different railway labor group, which Mr. Chesser is not in, the Railway Labor

Executive Association, said -- he said, well, it looked to him that the statute did not allow judicial review. So we proposed, both Mr. Chesser and Mr. Hickey proposed amendments, they weren't exactly the same, to amend section 307(a), under their theory to get judicial review.

The committee said nothing about it in their report. Railway management opposed the labor's amendment. Management didn't say what they opposed in the amendment, they just said we are opposed. Mr. Hickey said that to the committee and -- and it is in the testimony -- he said railway management is opposed to it.

Q But that has nothing to do with your position at all, does it?

MR. MacDOUGALL: No, our position is that --

Q Your position is that the language you figure was broad enough, and now you are going to litigate it --

MR. MacDOUGALL: Well, we --

Q -- instead of asking Congress to include it.

MR. MacDOUGALL: -- we looked at section 307, which was taken from the COMSAT Act, this was taken with changes from the COMSAT Act. We looked at that section as giving the Attorney General powers that an ordinary person wouldn't have, and we felt that we have -- there is no need for it, we have the right to go to court, the courts have jurisdiction under 1337, 28 U.S.C. 1337. There is no question that the courts

have jurisdiction. There is no question that, under section 404, the certain duties the railroad has to continue train service, unless it contracts with AMTRAK. And we didn't see any particular need for a specific section just to duplicate 28 U.S.C. 1337, that says you can go to court. The courts do have jurisdiction.

In effect what Volpe said, Secretary Volpe -- the title of this section is, by the way, sanctioned -- he said "sanctions are normally imposed by the government," he said, consequently he would be opposed to permitting any person to seek enforcement of the Act, section 307. In other words, he looked at sanction as something above and beyond judicial review. And then he said with respect to inclusion of all railroads, he said he thinks existing statutes apply to them, and he says to a certain extent the corporation is exempt from such statutes or statutory requirements. Consequently, he says, I am not sure it will be necessary to make sanctions applicable to any railroad. He said this is particularly so here where such sanctions expressly reach "any action, practice or policy. The corporation has a quasi-public character in many respect, and the scope of the sanctions with respect to it is appropriate."

So I term section 307 as a super-section to safeguard the public interest because Congress was creating a quasi-public corporation and it didn't want to have all the

litigation controlled by private parties, they wanted to give the Attorney General power to jump in at some time.

I might say that section 307 doesn't say that only the Attorney General can bring suits. It says that the Attorney General is authorized to bring suit, and the word "authorize" comes from the committee report. The committee report, in describing section 307 said it authorizes the Attorney General to go to court.

Q Do you think he could have had that right if the Act had been silent on the subject?

MR. MacDOUGALL: I don't think the Attorney General--

Q Just the employees and labor organizations?

MR. MacDOUGALL: You mean if -- I don't quite get your question.

Q Well, take all references to the Attorney General out of the statute, could he bring suit?

MR. MacDOUGALL: I question whether he could under section 517 of Title 28. It says the Attorney General can go to court to protect the interest of the nine states, and it doesn't say much more than that. It is kind of a weak section. It just says that the Attorney General can always go to court, but it doesn't say what he can do. And this question came up during the legislative history of the COMSAT law, the Communications Satellite Act of 1962. That is where section 307 comes from. And there was a lot of debate on

setting up COMSAT, with all the government research that had gone into the space program, and they wanted special powers in teh Attorney General. And therefore I think that if the section had been silent as to the Attorney General, there is severe doubt that he could do the things that the Congress intended him to do because the section says the Attorney General can order anything that violates the purposes and policies of the Act -- that is what it is, purposes and policies, and it says any threatened action, he can go and get an injunction. It is kind of broad. In fact, there is some doubt, the Justice Department has expressed some doubt as to their powers.

Our brief, which is the white-covered brief, on page 29 and 30, particularly on page 30, we have the letter there of Mr. Gray, Assistant Attorney General, to Congressman Slack, which was submitted in the case to which this was consolidated below, and they say that -- the Department of Justice said that the Attorney General does not have the authority to sue for construction of the act or to enjoin a purely technical violation; rather, the authority to sue is granted to protect and enhance the legislative purpose. And they have a lot of doubt about that, and the reason for that is that when the COMSAT section, which is section 403 of the Communications Satellite Act of '62 was carried over to the AMTRAK section, a certain phrase was deleted, and that was the phrase that allows the Attorney General to go for a specific

violation of the Act.

That clause reads, "...or if the corporation or any other person shall violate any provision of this chapter," in other words, the authority of the Attorney General to go after a violation of any provision was deleted from the Communications Act when it was carried over into the AMTRAK Act, and there is some doubt as to what -- considerable doubt as to what power the Attorney General really has here. And as a practical matter, the Attorney General has never gone into court. We have asked him to do it. We filed a suit, NARP did, in the fall of 1970 against Union Pacific. Judge Jones granted an injunction and the railroad withdrew the discontinuance at Kansas City. We filed another suit in the spring of 1971 against the Southern Railway for discontinuance. Judge June Green gave us an injunction, and the railroad dropped it. In both of these cases, the Attorney General didn't come in, we had to do it ourselves and there was, of course, the question of standing at that time.

Q Mr. MacDougall, in the AMTRAK enabling legislation, do you find the sort of provision that you find in the creation of some federal corporations, authorizing it to sue or sue and be sued?

MR. MacDOUGALL: There is a section in the AMTRAK Act which, early section, section 301, it does-'t say anything about that. It just says the corporation is hereby created in

Washington, D. C. -- section 301 and 302 -- and I see nothing in it that authorized the corporation to sue or be sued. In fact, one of the matters raised by the Court of Appeals was what if AMTRAK has a dispute with another railroad, particularly with respect to the amounts due under section 401, the cost for joining AMTRAK and so forth, what if AMTRAK disagrees, AMTRAK is not given power to sue under section 307(a), if you look at it that way. It just says the Attorney General can sue or a labor organization, but AMTRAK or a railroad are not covered as plaintiffs the way section 307 reads.

So that is why we think that section 307 is really meant to be a super-section to protect the interests of --

Q Well, how about the savings clause in 307 that speaks -- I can't --

MR. MacDOUGALL: It says they can sue -- they say the District Court has jurisdiction unless otherwise prohibited by law. That is a certain savings clause in there. And there is also section (b) to it, which allows other remedies beyond the AMTRAK Act. The (a) part of it, unless otherwise prohibited, seems to have come from the COMSAT Act not to allow the Attorney General to get injunctions against labor unions. It appears to be that is where it comes from. There is no history about it, though, when Congress was debating the AMTRAK Act.

Q Mr. MacDougall, in ordinary circumstances, when

a railroad wants to discontinue a train, what does it do?

MR. MacDOUGALL: It goes to either the state commission or to the Interstate Commerce Commission.

Q Depending on what kind of a train it is? Let's assume they go to the Interstate Commerce Commission, what, do they just give a notice, do they?

MR. MacDOUGALL: If a train operates between two states, they give a notice.

Q They give a notice to the Interstate Commerce Commission?

MR. MacDOUGALL: Right.

Q And then what happens?

MR. MacDOUGALL: The ICC then either decides to hold an investigation or not to.

Q And how long does it have to do that?

MR. MacDOUGALL: It has four months.

Q And the train goes on during that period?

MR. MacDOUGALL: If the commission institutes an investigation, it requires continued operation during that period. If the train operates wholly within one state, which as the Nancy Hanks, you must go to the state commission.

Q Yes.

MR. MacDOUGALL: You must go to the state commission first. You cannot go to the ICC. And that is carried over under the AMTRAK Act.

Q Now, except for the AMTRAK Act, would you say you could go directly into court prior to any proceedings before the commission?

MR. MacDOUGALL: Yes, I would say that if a railroad -- well, let's put it this way, yes, in some cases and not in others. It depends upon the state law that would govern, because even the interstate section, section 1301, was an optional statute, they could go to the ICC or go to each state served by the train, so it would depenf on the state law.

Our point is here, apart from that, that the Congress said intercity rail passenger service shall be continued if a railroad doesn't join AMTRAK. There is a positive obligation in the AMTRAK law --

Q I understand that, but discontinuance is still subject to the same provisions, aren't they? You have to --

MR. MacDOUGALL: Not necessarily. Only if the train has been operated by AMTRAK for more than two years, otherwise AMTRAK could discontinue the train without going to the states.

Q Well, what about if a --

MR. MacDOUGALL: It depends upon whether it is in the basic system. If a train is in the basic system for two years and operated by AMTRAK for two years, then AMTRAK must go through the ICC --

Q Well, what about if a company, a railroad makes a contract with AMTRAK to operate certain trains, what about

its other trains?

MR. MacDOUGALL: Under the statute, the way we construe it, the railroad must contract --

Q Is that --

MR. MacDOUGALL: That is our complaint below, that they must contract with AMTRAK for all of their intercity passenger service. They can't, like the Southern does, pick and choose, take the profitable lines, from Washington, D. C. to New Orleans, and run that itself, but let the Nancy Hanks join, through their subsidiary, join AMTRAK and discontinue that.

The statute, 401(a)(1), says that the railroad must contract with AMTRAK for all of the intercity passenger service operated by that railroad.

Q Well, to the extent it does any administrative participation in the discontinuance process, your position is that you should be able to get into court before or wholly aside from that --

MR. MacDOUGALL: No. There the administrative procedure has to be followed. But AMTRAK could discontinue trains apart from the administrative procedure, trains that operated less than two years.

Q Well, what about this train?

MR. MacDOUGALL: This train was not subject to the ICC at all.

Q It was subject to what?

MR. MacDOUGALL: It was subject to if the Southern had contracted for all other intercity passenger service, then it could get notices effective May 1, 1971 to discontinue all other intercity passenger service without any intervention by the ICC. In fact, that is what happened throughout the country.

Q Well, was this Nancy Hanks -- what was it subject to?

MR. MacDOUGALL: It was subject to the Georgia Public Service Commission, because it operated wholly within Georgia.

Q Did the railroad give notice there?

MR. MacDOUGALL: No, it didn't have to because under its theory it was contracting with AMTRAK --

Q Yes.

MR. MacDOUGALL: -- and thereby was able to just give on May 1st a notice that they would discontinue the trains.

Q To whom?

MR. MacDOUGALL: The public, to give a notice to the public and file it with the ICC, and the ICC says --

Q Well, could the ICC have stopped it if it wanted to?

MR. MacDOUGALL: No, the ICC issued regulations in March of 1971 saying that they did not have jurisdiction to stop it. It was just a filing for notice provision, that's all.

Q But there is an interstate involved in this case,

isn't there?

MR. MacDOUGALL: There is an interstate and an intrastate train.

Q Well, on the interstate train, is it before the ICC?

MR. MacDOUGALL: No, no. There was no provision to

Q I thought you said they had to give notice to the --

MR. MacDOUGALL: Today. Today, now, if we were to have a discontinuance today, today, that is -- and, of course, these other railroads aren't operating trains today, it is mostly AMTRAK -- there are just a few railroads operating today -- if the Southern were to discontinue today, they would have to go the ICC. So would AMTRAK, unless it is a train that AMTRAK has not operated for two years.

Q And this particular one that is in this case, are they required to go to the ICC or not?

MR. MacDOUGALL: No, they were not.

Q They are not required by law?

MR. MacDOUGALL: No. Even if there had been a proper --

Q Why not?

MR. MacDOUGALL: Why not? Because when the AMTRAK Act was passed, if they followed certain procedures in the AMTRAK statute, they were allowed to discontinue the train.

In other words, if the Southern Railway contracted for all of its intercity service with AMTRAK, then Southern was allowed by the statute to file a notice to discontinue the service.

Q File notice with whom?

MR. MacDOUGALL: With the governors of all the states and with the ICC, and post it at all of the stations.

Q But that coverage would be picked up by AMTRAK?

MR. MacDOUGALL: No, no, it hasn't been, no. It would not be. You see, there were 527 intercity trains before May 1 -- there was some dispute as to how many -- 527 intercity trains. The railroads posted notice to discontinue all of them except those that didn't join AMTRAK, and then AMTRAK decided which ones to operate and operated its own service --

Q Now, who did the discontinuing?

MR. MacDOUGALL: The railroads. This suit is primarily against the railroads.

Q Well, AMTRAK also made a decision, didn't it, not to operate?

MR. MacDOUGALL: Yes, AMTRAK only decided -- well, AMTRAK didn't have complete freedom. AMTRAK had to operate the basic system service, plus service above that which they wanted to operate.

Q But they -- could AMTRAK have operated this train, if it wanted to? Was this train covered by the contract?

MR. MacDOUGALL: AMTRAK did not contract for any service to be maintained by the Central Georgia lines of the Southern.

Q Well, again, could AMTRAK have operated this train if it wanted to?

MR. MacDOUGALL: I would think AMTRAK, if the contract was valid with the Southern Railway System, it could, yes. It could have operated, made an agreement with the Central of Georgia to operate it, yes.

Q It could have, but it didn't?

MR. MacDOUGALL: It didn't, right. We are not -- we are suing on the ground that Southern has to have all of its service, all or nothing --

Q I am a little confused, Mr. MacDougall. Is it your position that assuming your basic premise, namely that it had to be all or nothing, since it was not, then Southern or Central of Georgia, its wholly owned subsidiary, may not discontinue the Nancy Hanks unless Southern does what?

MR. MacDOUGALL: The Nancy Hanks must not be discontinued until January 1, 1975 by section 404 of the AMTRAK statute.

Q Well, now, if it wants to discontinue -- oh, you mean that is an absolute prohibition?

MR. MacDOUGALL: An absolute prohibition. Absolute prohibition. It can't discontinue it by state law, ICC, or

anything. And that is true of Southern Railway. The Southern Railway, if we assume they could not contract to AMTRAK for their New Orleans to Washington, D. C. train, the Southern Railway cannot discontinue that train until January 1, 1975, unless --

Q Unless meanwhile it made a contract with AMTRAK to cover all of its passenger trains?

MR. MacDOUGALL: Right. Right. That is a specific obligation on the railroads. It must maintain the service to the public until January 1, 1975.

Q That took it out, you say, of the regular discontinuance --

MR. MacDOUGALL: Yes, it made an affirmative duty on the railroad, an affirmative right on the railroad passenger to get that service until January 1, 1975. They cannot discontinue any trains.

Q Is the Nancy Hanks riding now?

MR. MacDOUGALL: No.

Q Where is it?

MR. MacDOUGALL: I really don't know. It was discotinued --

Q Well, how are you going to start it running again if you don't even know where it is?

MR. MacDOUGALL: Well, the Southern Railway has the equipment to run the train, I am pretty sure they do. They are

operating their own train service between Washington and New Orleans.

Q I am talking about the Nancy Hanks.

MR. MacDOUGALL: Yes.

Q You don't even know where the engine is?

MR. MacDOUGALL: I really don't know. I really don't know. It is part of a -- I just don't know. It was discontinued and if

Q Well, what would the order be, that you had to go find the Nancy Hanks, and if you sold it, you would have to buy it back?

MR. MacDOUGALL: Well, the Southern, they have a pool of equipment, of diesel equipment, a pool of coach cars, and I don't -- in fact, there is a surplus now of railroad coaches and railroad equipment, and I don't think there is any difficulty in restoring that one train should we be entitled to it.

Q I don't agree with you at all. You go ahead, you make your statement.

Q Mr. MacDougall, you have been responsive and very informative in your answers to questions from the bench about the merits of your claim, but do you agree with your brother, Mr. Prettyman, that the merits of your claim aren't here at all, that what we have here is just the meaning of section 307?

MR. MacDOUGALL: Right. You have here whether --

Q Whether or not you have the right to --

MR. MacDOUGALL: -- right to go to court to assert a duty which we feel the railroad owes us.

Q You would agree with him, that that is the only issue here?

MR. MacDOUGALL: Yes. The lower court assumed the validity of our position and went on --

Q For the purposes of this issue.

MR. MacDOUGALL: Right. I point out, too, that there is no structure within the government within the Attorney General's office for making any decision as to whether to go to court or not. In fact, if you look at page 32a and 33a of the perition for cert, which is the very dark blue document, what the Attorney General does, is it gives to AMTRAK -- in this case to Mr. William O. Bittman, who is the attorney for AMTRAK in this case -- gives to Mr. Bittman the authority to raise the question of course, whether he wants it or not.

In other words, when the Attorney General does decide to go to court, as indicated in the petition for cert, they just tell AMTRAK, well, if you want to raise it before the judge you can, and here is your authority to speak on behalf of the Attorney General. There is no section to enforce the AMTRAK law within the Department of Justice. There is no framework of expertise, as the letter of Assistant Attorney

General Gray, which I pointed out on page 30 of my brief, 29 and 30 of my brief, it says DOT has the expertise. The Department of Justice doesn't have any expertise on this. There is no statutory framework or administrative agency such as we have in the Holloway case, which was cited to us this morning.

And if there isn't a right to go to court, there just is not going to be any way for us to have our rights asserted, there is no way. The Attorney General is not qualfied. All he does is delegate to the attorney for AMTRAK to represent the position of the government and there is nothing in the legislative history to show why a committee, actually a subcommittee of the House, why the subcommittee rejected labor's amendment. Labor's amendment would have gone further and asked for a right for damages and other things, and the only thing, the way we look at it, is that this section was to be a super-section, a section to authorize the Attorney General to go into court because there is an important interest of the government at stake in setting up the AMTRAK Act. There was a lot of money involved. It was a quasi-public thing. The President appoints all the directors. And this required special public attention, special standing for the Attorney General.

The last thing I would like to say is that allowing access to the court will not frustrate the statutory purpose. Counsel for the petitioner said that if there is one single train that is continued, why, it is going to be a disaster.

Well, Congress assumed that sometimes AMTRAK would not be allowed to discontinue a train that AMTRAK wanted to discontinue. They contemplated that AMTRAK might lose a case here or there. And there just is -- the only way to allow the purposes of the AMTRAK Act to be fulfilled is to allow private suits, we feel.

Now, they made a lot of argument in their brief on adequacy of service. Well, forgetting discontinuances, what about people who have complaints as to meal service, parlor cars, reservation procedures, no smoking sections, and so forth, can anybody go to court on that? Well, the answer is the AMTRAK Act, by section 801, has said you go to the ICC on that. They said the ICC shall set the standards so there is no danger from an adequacy of service standpoint that there are going to be multitudes of suits. The real thing is --

Q Theyd on't go to the ICC any more on that, do they?

MR. MacDOUGALL: Yes, they do.

Q Why?

MR. MacDOUGALL: In the AMTRAK Act --

Q Well, aren't the private suits going to take over all of that?

MR. MacDOUGALL: No. The AMTRAK statute says for adequacy of service the ICC is obligated to set up the regulations, and also that section was the one that was amended and

is now a part of Public Law 93-146. So as to the standards of service and everything, there is a procedure, and that is the ICC. It was put in there. So really we are talking about discontinuances, and allowing the private suits will enhance the statutory scheme.

There simply is no remedy elsewhere. There is no staff at the Department of Justice.

Q What if a locality wants a railroad to continue or AMTRAK to continue some local service that AMTRAK doesn't want to continue, and AMTRAK says, well, pay for our losses?

MR. MacDOUGALL: That is one of the options.

Q And what if they get into an argument about that, where is that argument to be settled?

MR. MacDOUGALL: Well, the statute is clear, if they have a case they can file it in court but it would have to be --

Q That provision specifically provides for that?

MR. MacDOUGALL: No, it does not. They would have to go to court and point to some section of the AMTRAK statute that makes AMTRAK, is a duty upon AMTRAK to provide certain service to the community under certain circumstances. They have to point to where the AMTRAK statute makes it a duty on AMTRAK to do something.

Q Well, it does make them put a duty on it, doesn't it, if the locality is willing to pay for their losses?

MR. MacDOUGALL: That's right, there is a duty on that, right. And if AMTRAK didn't do it, presumably the community would go to court and say AMTRAK is in violation of the statute.

Q There is no administrative --

MR. MacDOUGALL: There is on that, I believe, on that. There is a provision for arbitration by the Department of Transportation. I am not sure -- there is a section on that, section --

Q Well, you wouldn't -- without exhausting that, you wouldn't think you could go right into court on that?

MR. MacDOUGALL: I don't think you would have to -- any time you go to court, you have to exhaust --

Q But you say there is nothing to exhaust in your own --

MR. MacDOUGALL: Ours is not, because these are the discontinuances that became effective May 1, 1971, when the railroads posted 527 intercity trains, we thought there were only 360, there was a question of what was an intercity train, what is a commuter train, that is one issue now in the courts; another issue is did Southern Railway contract for all of its service or did they not, and there is no limited administrative remedy for that, and there is no remedy in the Department of Justice. We tried mandamus in one case, and mandamus is not the remedy, either.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. MacDougall.

Do you have anything further, Mr. Prettyman?

REBUTTAL ARGUMENT OF E. BARRETT PRETTYMAN, JR., ESQ.

ON BEHALF OF THE PETITIONERS

MR. PRETTYMAN: Yes, sir. If you would indulge me just a moment, because I --

Q I am a little confused, Mr. Prettyman, as to precisely what role now the ICC or the state agencies play.

MR. PRETTYMAN: Yes, I will answer that and track it through for you. If I may just quickly refer Mr. Justice White to 403(b), sir, there is a specific provision if the community and the railroads and AMTRAK can't reach agreement, it goes to the Secretary of Transportation for --

Q Yes.

MR. PRETTYMAN: Now, let's go back before the Act was passed and follow this through. And Mr. Justice White raised the key question here. This Act does not cut off a right which was a prior right, which existed before. Before this Act was passed, insofar as the Nancy Hanks was concerned, a party could not go to court, he would do one of two things. If the railroad wanted to cut off the Nancy Hanks, they would go first, if they wanted to, to the state, the Public Service Commission of Georgia. If they didn't get relief there, they could go, under 13(a)(2), before the ICC. He could not, a

private party could not go to court. He could bring a complaint before the Public Service Commission or the ICC, but if the ICC decided to do nothing about it, as Mr. Justice Douglas said to the Court in City of Chicago, there was no right of appeal of that decision.

So before the Act, in terms of an intrastate train, like the Nancy Hanks, the procedure was administrative and you went to court only if the ICC took the matter up, passed upon it, and decied, for example, that it wasn't going to discontinue, then and only then there was a right of review.

Now, in terms of trains 13 and 14, which were interstate, what happened before thie Act was that, again, the private party could make a complaint to the ICC. The ICC, if it decided not to investigate, that ended the matter. If it decided to investigate and passed on the merits, then there was an appeal in the three-judge district court.

So this Act didn't cut that, cut off a right which existed before. This Act substituted a slightly different system. Now, here is what happens under the Act. If it is a basic system train --

Q That is one designated by the Secretary?

MR. PRETTYMAN: Exactly.

Q Yes.

MR. PRETTYMAN: Designated as part of the basic system, which means that it is essential to our transportation

needs in passenger traffic. If it is part of that, no discontinuances can take place until July 1, 1974 -- none. After July 1, 1974, if they wanted to discontinue a train, they go pursuant to 13(a) and they go before the ICC and they file their notice and the ICC either decides to do nothing, let it be discontinued, in which case, as this Court has said, there is no appeal, or it decides to investigate, it makes a decision on the merits, and then there is the normal appeal through the courts.

Now, as to excess trains, that is trains which are not part of the basic system, and this would have affected the trains involved in this case, they weren't part of the basic system, they were purely excess trains -- insofar as those trains are concerned, they can be discontinued at any time, with two exceptions. There has to be a 30-day notice to alert the public so they can make their plans and so forth, or if the train is operated continuously by AMTRAK, picked up by AMTRAK and operated continuously for two years, it becomes part of the basic system and then everything relates to the basic system applies.

Q Otherwise, all that is required to discontinue is the notice?

MR. PRETTYMAN: Is the notice, and that shows Congress' clear intent, you see, as I indicated before. It recognized that there has to be still some more paring to get

down to what we can support.

Q You would say that the Nancy Hanks, if there was just a notice, a 30-day notice, you agree apparently that no administrative agency could stop it?

MR. PRETTYMAN: Exactly. And, sir, let's assume, for example --

Q Excuse me, Mr. Prettyman. Is there an express exception from section 13 procedures in those cases?

MR. PRETTYMAN: Yes, sir. If you look at 404(b)(2) --

Q Where is that?

MR. PRETTYMAN: Well, unfortunately, Mr. Justice, I am most apologetic, we don't give you the entire statute in our briefs, which we should have.

Q What is this now, 404 --

MR. PRETTYMAN: It is section 404(b)(2). I was not in the case originally and I apologize --

Q So with respect to the trains involved in this case, there were no administrative remedies to be exhausted or --

MR. PRETTYMAN: I understand --

Q -- or no primary jurisdiction of any agency?

MR. PRETTYMAN: No.

Q Only the notice was necessary?

MR. PRETTYMAN: Yes. Now --

Q Do you have the pertinent provisions of

404(b)(2) before you?

MR. PRETTYMAN: Yes, sir. Would you like me to read it to you, sir?

Q If you don't mind, if it doesn't take too long to find it.

MR. PRETTYMAN: 404(b)(2) says, "Except as otherwise provided in this paragraph and in section 403(a)" -- that would relate to the trains operated for two years -- "service beyond that prescribed for the basic system undertaken by the corporation upon its own initiative may be discontinued at any time. No such service undertaken by the corporation on or after January 1, 1973" -- this is now as amended -- "shall be discontinued until the expiration of the one-year period beginning on the date of the enactment of this sentence." Originally they could be simply discontinued at any time. When this was amended in '73, they put a one-year catcher on it.

Q Is that what you call the excess service?

MR. PRETTYMAN: That is the excess service, yes, sir. In other words, let's assume that instead of these trains being discontinued when the Act came into effect, let's suppose that AMTRAK had picked them up, which it could have done, in answer to your question, sir. AMTRAK could have decided, even though they weren't part of the basic system, to operate the Nancy Hanks and Trains 13 and 14. If it had decided to do so, and it has operated a number of trains in excess of the basic

system, then this would come into play and it would be operating them, if it operated them for two years, they became part of the basic system, if they were not part of the basic system and they wanted to discontinue them, this section would come into play.

Q Then if they never picked them up at all, who gives that notice, if --

MR. PRETTYMAN: In this case, it was just prior to April 1, 1971, and the Central of Georgia gave the notice that, on the effective date, April 1, 1971, the trains would be discontinued pursuant to 404.

You see, the statute allowed -- the April 1, 1971 was the date under the Act when the discontinuances hence forth could take place if they were not part of the basic system.

Q As you read that, Mr. Prettyman, I detect no express reference to an exception from the section 13 procedures, not in terms at least, there is no refernece to section 13.

MR. PRETTYMAN: That is correct. That is correct. And that is because, if you look at the way the Act is set up, there is a pure dichotomy between basic system trains --

Q Where is the provision for 30-day notice, is that in that section or some other section?

Q The 30 days applies to these trains, doesn't it?

MR. PRETTYMAN: It would apply to these trains, that is --

Q Where is that? What section is that?

MR. PRETTYMAN: 401, I believe it is, sir.

Q It is not a simple Act, is it?

MR. PRETTYMAN: Sir, it is a very complicated Act, it certainly is.

Well, 13(a)(1) provides that any railroad discontinuing a train hereunder must give notice in accordance with the notice procedures contained in 13(a)(1) of Title 49, and that is the 30 days.

The ICC has interpreted that not as calling the ICC into it, but simply as meaning that they give the notice provided in 13(a) which happens to be 30 days.

Q So the ICC has decided they have no jurisdiction to stop the discontinuance of --

MR. PRETTYMAN: Of excess.

Q Of excess.

MR. PRETTYMAN: Of excess. But they very definitely do in terms of the basic system.

Q Well, how about local agencies, can they stop it or not?

MR. PRETTYMAN: No, sir, because there is a provision -- I think it is 802 -- which says that no discontinuance of any train can be made anywhere except pursuant to this Act. In other words, the procedures in the Act must be followed as to all trains throughout the United States.

The main point, though, Mr. Justice, is that if you go back before the Act, you will find that there was simply no right at any time just to go directly into court prior to the state agency or the ICC having acted, and that is precisely the situation that they are trying to get around now by saying they can come in before the ICC or anybody else even operates.

Q Or that they can come in even though the Attorney General does not?

MR. PRETTYMAN: Yes.

Q And the Attorney General, like the agency, might decide not to intervene --

MR. PRETTYMAN: Yes. The Attorney General -- it is not quite the picture painted here -- the Attorney General has been investigating a tremendous number of complaints. It has one right now involving the Penn Central, that the Attorney General is investigating. And while there have been no suits, the Department of Justice has a man who follows this carefully, there are continuous reports to the Congress, to the Secretary, to the President about the operations, and he exercises a very diligent role in these matters.

Q Mr. Prettyman, suppose the operator of an excess train simply discontinues it without giving the 30-day notice? Does anybody have any remedy?

MR. PRETTYMAN: Then the Attorney General, I am sure,

is authorized to bring suits under the Act, could go in and perhaps the ICC itself, I don't know. But since he would not be following the Act -- let me answer it this way -- since the Act specifically provides for the 30-day notice, and since he would in effect be disobeying the Act, then the Attorney General would have the obligation to go in and make sure that the 30-day notice was given.

Q Just as he presumably does in the respondents' case here, if respondents are right on the merits?

MR. PRETTYMAN: Exactly. And he looked at this and decided that they were wrong.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:01 o'clock a.m., the case was submitted.]

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