In the

Supreme Court of the United States

BANGOR PUNTA OPERATIONS, INC., and BANGOR PUNTA CORPORATION, Petitioners	)	
v.	)	Docket No. 73-718
BANGOR & AROOSTOOK RAILROAD COMPANY nad BANGOR INVESTMENT COMPANY, Respondents.	)	

Pages 1 thru 35

Washington, D. C.
April 15, 1974

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Petitioners,

v. No. 73-718

BANGOR & AROOSTOOK RAILROAD COMPANY and BANGOR INVESTMENT COMPANY,

Respondents.

Washington, D. C.,

Monday, April 15, 1974.

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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JAMES V. RYAN, ESQ., Webster Sheffield Fleishmann Hitchcock & Brookfield, Bernstein Shur Sawyer & Nelson, One Rockefeller Plaza, New York, New York 10020; for the Petitioners.

ALAN L. LEFKOWITZ, ESQ., Gaston Snow & Ely Bartlett Verrill Dana Philbrick, Putnam & Williamson, Greenfield Davidson & Mandelstamm, 225 Franklin Street, Boston, Massachusetts 02110; for the Respondents.

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'll hear argument first this morning in No. 73-718, Bangor Punta Operations against Bangor & Aroostook Railroad.

Mr. Ryan.

ORAL ARGUMENT OF JAMES V. RYAN, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This case is before the Court on a writ of certiorari to the Court of Appeals of the First Circuit.

I represent the petitioner-defendants, Bangor Punta Corporation and its wholly owned subsidiary; Bangor Punta is a publicly held manufacturing concern.

The respondent-plaintiffs, the Bangor & Aroostook Railraod and its wholly owned subsidiary; the Bangor & Aroostock Railroad operates a railraod whose trackage is exclusively within the State of Maine.

The issue before this Court today is: May an uninjured party, by using the device of the corporate form, or claiming to vindicate an inchoate public interest, maintain an action in the federal court?

Now, this action was commenced by the filing of a complaint in the District Court in Maine in December of 1971. Although the complaint contains thirteen causes of

action, allegedly based on violations of the Securities laws, the antitrust laws, Maine statutes, and the common law, essentially it's based upon four intercompany transactions, which occurred between Bangor Punta, the petitioner here, and the Bangor & Aroostook Railroad, the nominal plaintiff here, while Bangor Punta -- while the Bangor & Aroostook Railroad was a 98 percent owned subsidiary of Bangor Punta.

Although the claims, as I say, allege various violations of federal statutes, as Judge Gignoux in the District Court stated or properly characterized them, they are claims which are typical stockholders' claims, seeking an accounting for alleged misappropriation and waste of corporate assets by controlling shareholders.

Now, after the filing of the complaint and the filing of the answer, the petitioner, Bangor Punta, moved for summary judgment based upon the admissions in the complaint.

The District Court, on settled principles of law, granted the motion, and held that the nominal plaintiff here, the Bangor & Aroostook Railroad Company, and the real party in interest here, Amoskeag Corporation, which purchased the 99 percent owned interest of Bangor Punta in the Bangor & Aroostook Railroad, are barred from maintaining this action.

On appeal to the First Circuit, this decision was unanimously reversed. Although the First Circuit agreed with the District Court and said that these are essentially stock-

holders' claims, and in a normal corporate situation a dismissal would have been proper, in this case, because a railroad was involved, which the Court of Appeals characterized as being a public or quasi-public corporation, a separate inchoate, undefined interest of the public was involved.

This interest of the public, which was held, stated to be an interest in the financial health of the BAR, provided a legally recognizable separate interest, which was served by this action.

QUESTION: Mr. Ryan, do you mean the Court of Appeals holding is applicable to the State law counts, as well as to the federal question?

MR. RYAN: Yes, sir.

QUESTION: To both?

MR. RYAN: Yes, sir.

QUESTION: Is there any Maine law that supports that?

MR. RYAN: Yes, sir. In the --

QUESTION: That supports the holding of the Court of Appeals?

MR. RYAN: No, not the holding of the Court of Appeals. Oh, no, sir. Excuse me, I misunderstood your complaint -- your question.

No. The main court said that this action could be maintained, even the State court claims, because of this

separable interest, and there is no Maine law which supports that proposition.

As Judge Gignoux noted in his opinion, the BAR did not claim in its complaint that there was any public interest or any rights of any creditors involved in this action. Nor did the BAR, before the Court of Appeals, indicate that they were suing to vindicate any specific public interest. Even before this Court, they do not allege or state that they are vindicating any specific public interest.

What they say is, is that a railroad is a public asset. And because a railroad is a public asset, the normal rules of law do not apply to the situation in this case.

Now, the facts are simple. In 1960 the Bangor & Aroostook Railroad Corporation caused the predecessor in interest of Bangor Punta to be formed, and then, by a registered exchange offer, the shareholders of the railroad became the shareholders of the parent company. This was the holding company trend which was the vogue in railroads during the late Fifties and early Sixties.

So that at the end of the transaction, the railroad became a 99 percent subsidiary of the parent holding company.

The actions which the complaint are based on, and which the complaint claims are unlawful, all occurred between 1960 and 1967. And, as Judge Gignoux stated, they are essentially claims of corporate waste, that a controlling

shareholder mismanaged the assets of a wholly owned subsidiary.

Now, on October 2nd, 1969, the Bangor Punta sold its 99 percent interest in the BAR to Amoskeag, which is again a public corporation with public stockholders, the interest in the railroad for five million dollars in cash.

In December of 1971, this lawsuit was started.

Now, as the District Court pointed out, there are three -- four, really, controlling facts which are dispositive of this case.

First of all, the real party here, the real party in interest is Amoskeag. Amoskeag owns 99 percent of this railroad, and they are not claiming to be suing to vindicate the seven-tenths of one percent, or private shareholders. No. 1.

No. 2, Amoskeag does not claim that it was defrauded, or it was misled by anything that Bangor Punta stated, or that it got less than it paid. Amoskeag purchased the stock from the wrongdoer long -- alleged wrongdoer -- after the acts occurred, and does not state that it suffered any specific injury.

What it is attempting to do by this action is obtain a windfall. It is suing to recover its purchase price of five million dollars, plus an additional two million dollars windfall, and still keep the railroad. And yet it doesn't state that it was injured.

Now, based upon --

QUESTION: But the action is brought in the name of the corporation, not in the name of Amoskeag. You say that Amoskeag is the real party in interest, but ordinarily you don't look behind a corporate plantiff to see who the stockholders are in order to determine who the real party in interest is, do you?

MR. RYAN: I think the answer to that is yes, and generally that's so. The corporation is a legal person for purposes of maintaining suits, owning property, and doing various acts.

However, in this case here, the claims are essentially stockholder claims, essentially equitable claims. And if you do not --

QUESTION: Why do you say that?

MR. RYAN: Why? -- Well, it's difficult for me to understand how one can say that a 99 percent shareholder or, in effect, you can violate rules of law regarding a subsidiary, persons could be injured. In other words, if there were a creditor here, or if there was some other person who claims injury, then I would say that you can't look behind the corporate form. But that's not this case.

QUESTION: Then what you're really saying is that this -- whatever Bangor Punta did to the railroad at the time it owned 99 percent of the stock really wasn't actionable on

the part of the railroad, even then.

MR. RYAN: Correct, Your Honor. Correct. Exactly. Because it is itself a subsidiary.

QUESTION: Mr. Ryan, who were the parties that were really wronged here, the former shareholders?

MR. RYAN: The seven-tenths of one percent. You see, Bangor Punta owned, in effect, 99 percent.

QUESTION: Have they ever instituted any kind of an action at all?

MR. RYAN: No, sir.

QUESTION: Would the situation be different in your view if Amoskeag owned only 75 percent of the stock?

MR. RYAN: It could be the same, it could be different, depending upon the facts. I don't think you can make a categorical statement that the result would be the same. I'm inclined to think in this specific case, Your Honor, it would be the same, it would be like the Matthews vs. Headley case, which I have cited in my brief. Where you can -- by -- there is no question here that if there is a recovery here of the seven million dollars, that Amoskeag has received a windfall. There's no doubt about that.

QUESTION: Something would depend on when the other 25 percent had acquired their stock, wouldn't it, in answer to Mr. Justice Blackmun's question?

MR. RYAN: It could, if they acquired their stock

after the events, they would have the same disability that Amoskeag would have, but I would assume that --

QUESTION: Assume --

MR. RYAN: Yes.

QUESTION: -- to the contrary.

MR. RYAN: That's right.

QUESTION: But if Bangor Punta had been only a 75 percent owner, rather than a 99 percent owner at the time this thing was going on, then conceivably the other 25 percent might have a very legitimate claim.

MR. RYAN: Oh, absolutely. Certainly. Certainly, Your Honor.

QUESTION: And that would be a typical minority stockholder suit, would it not?

MR. RYAN: That's correct, Your Honor. That's correct.

QUESTION: And it would not accrue to the benefit of the railroad, or would it? Had they --

MR. RYAN: It could. It would depend upon what the result would be when they're framing the relief. If the relief would result in what has been characterized in the cases as an unjustifiable windfall, well, then, a court of equity in the derivative action would be able to frame a decree accordingly. It would depend upon the facts of the specific case.

I don't think you can make a blanket rule. But

certainly in this case, where you have 99 percent, there's no question that there's a windfall here, and there's no question that a court could frame a decree in this case.

Now, as I say, that if you eliminate the public interest or claimed public interest which I'll deal with next, then it seems that the reasoning of Judge Gignoux, which was really agreed to by the First Circuit, that in the ordinary corporate case the dismissal of Judge Gignoux would have been sustained. Rule 23.1 would have prevented Amoskeag from suing itself, and that the general equitable principles prevent Amoskeag, through the guise of the corporate form, to maintain this action, on behalf of itself.

QUESTION: Certainly Rule 23.1 by its terms has no bearing on this action, does it?

MR. RYAN: Only if -- if Amoskeag sued --

QUESTION: Yes, but Amoskeag didn't sue.

MR. RYAN: That's correct. Now, I am not -- I don't have to address myself to that point. I would have to say I do think it would, but I don't -- you don't have to reach that point in this case. Because in this case you have Amoskeag standing here who is the real party in interest alleging essentially equitable claim. And it's just a court should not permit Amoskeag to be unjustly enriched by using the device of the corporate form. Unless there's some other public interest involved.

Now, what is this public interest which is where the First Circuit departed from Judge Gignoux?

The First Circuit says that there is an -- not easily definied or quantified inchoate interest in the public -- in the financial health of railroads, and that this interest is the basis for maintaining this action.

The respondents go even further and they say that a railroad is a public asset.

Well, Your Honor, we submit that a railroad is a private business corporation with certain clearly defined public duties and obligations. The Congress, through the Interstate Commerce Act and various legislation over the last fifty or sixty years,has clearly defined those areas in which there are -- the interests of the public are covered. And there is also some residual minor common law responsibilities of railroads.

There is no claim in this complaint or anywhere in the briefs that Bangor Punta violated any of these statutory rules or regulations regarding railroads. On the contrary, the Interstate Commerce Commission acknowledges that there is apparently a gap in this regulation, and this gap is what they're asking this Court to really permit a court to rectify, to cure.

Now, this gap -- what is this gap? This gap is that a holding company in the late Fifties and early Sixties, holding

companies were formed and operated railroads as wholly owned subsidiaries; and this, as of course everybody is familiar with Penn Central, that was not very successful. But we had other successful ones, Union Pacific, Chessie, there are a number that did work out.

Now, first of all, in this case, there is no allegation in this complaint that the Bangor & Aroostook can barely survive. On the contrary, the Bangor & Aroostook is a viable railroad, it is earning money, it is paying dividends, it is paying off its debt. It's one of the only railroads in the northeast, or really probably east of the Mississippi other than the Chessie, that is still paying dividends.

So it's hardly a railroad which has suffered the depredation of a pirate who has looted it.

Secondly, over the last sixty years Congress has repeatedly addressed itself to railroads' operation, public interest in railroads, it has provided numerous remedies, not only by administrative but also by private actions, in the event the administrative forces do not indemnify somebody who can prove he has been injured under one of the statutory requirements.

And this is not covered, as is conceded by the ICC and by the respondents.

Now, is it for this Court to create this remedy?

We say no. This -- the railroad is a regulated industry, highly regulated industry, and it should not be for a court to provide new remedies beyonw what Congress says are really in the public interest.

But thirdly, and more importantly, this very -- and I'll call it a problem of parents, the parent companies, holding companies with subsidiary railroads has been the subject of congressional hearings, and there is presently pending legislation in progress which addresses itself to this problem.

Now, should this Court step forward and go ahead of Congress? Congress has this very problem before it.

Now, it's interesting to note that even with the legislation in front of Congress, which has been there for four years, and hasn't been enacted, so perhaps this problem of holding companies is not quite as severe or as evil as some people would like to contend, they have enacted it.

This specific legislation doesn't even cover our situation here. Because the legislation provides that before the ICC can intervene, the service to the public in Maine from the BAR has to be threatened, and there is no allegation here and there can be no allegation here that anything that my client did threatened the public service.

So that when you come all the way back down to what's really on the bottom line, it is that there really isn't an

identifiable public interest which can be injured, which can give rise to jurisdiction or standing in a federal court.

Now, when you get past that point, you come to the really -- the really bottom line, is that Amoskeag here has not been injured. It has not suffered any injury. It's this general public somewhere that may have suffered an injury. But it has not suffered an injury. It is not a proper party plaintiff.

Someone out there may be able to maintain an action, but it's not the Amoskeag through the device of the corporate form.

Now, they argue, Your Honor, that, Well, they can frame a decree and that if there's a recovery here that there's going to be some public benefit, because some of the money might stick in the Bangor & Aroostook Railroad. Well, of course, that's really, as the Court of Appeals recognized, really can't be done; it's absurd. Cash is fungible.

If you put cash into a corporation, it can come out the other end in all kinds of ways, as long as it's solvent. If it's solvent it can legally, as any business corporation, pay dividends. And until somebody says that a solvent corporation can't pay dividends, then how are you going to stop the money from coming out?

True, you could probably put a district judge in there to run this railroad for twenty years, and somehow put

all the stops in, but that's certainly not something that a court should do, particularly when the railroad is solvent.

For that reason, Your Honor, we feel that this case should be reversed.

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

Mr. Lefkowitz.

ORAL ARGUMENT OF ALAN L. LEFKOWITZ, ESQ.,

ON BEHALF OF THE RESPONDENTS.

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

As we view the case, there are two questions involved in this litigation. The first is: Whose lawsuit is this in the first place? Is it the railroad's lawsuit or is it Amoskeag's lawsuit, the present controlling stockholder?

I think the record is clear, and I will highlight it in just a moment, that it is indeed the railroad's lawsuit.

The second question is: Assuming that it is the railroad's lawsuit, if the railroad makes a substantial recovery in the lawsuit, will this inure to the benefit of its present controlling stockholder, Amoskeag, in such a way that the windfall, in quotes, that Amoskeag may enjoy outweight the benefits of committing the railroad to right the wrongs which have been done?

QUESTION: Who else would get the benefits of this windfall, if it's the railroad --

MR. LEFKOWITZ: The public, I believe, is the interest which the First Circuit found would benefit from this.

QUESTION: Just how? Would you enlarge on that a little bit? How is the public going to get some benefit out of it?

MR. LEFKOWITZ: Yes, sir, I'm glad to. I think the record well illustrates the fact that the present owners of the railroad, Amoskeag, are engaged in the process of developing a Northern New England Rail System. Amoskeag presently owns 35 percent of the Maine Central Railroad stock, which is held in a voting trust.

It owns 99 percent of the Bangor & Aroostook stock. It is the largest single holder of the first mortgage bonds of the Boston & Maine Railroad, presently in reorganization.

What Amoskeag is trying to do, subject to the supervision of the Commission, is to put together a Northern New England System which, I suggest at least on the face of it, solves some of the problems of the railroads by unifying a number of short carriers to build into the larger system which may be in fact coming out of Con Rail.

QUESTION: Would they have any legal obligation to dedicate this windfall to that --

MR. LEFKOWITZ: It may not have any legal obligation. I can say to this Court that I know that they have a moral

obligation, and I believe that properly supervised by the District Court with an imaginative decree, that those funds could be available. Indeed, as we suggested in our brief, Amoskeag and the railroad are both prepared to enter into some kind of meaningful order by a District Court, should there be a recovery in this case, so that those funds could be used, let's say, for the system or, if not for the system, to be put into maintenance of way and maintenance of equipment to build a stronger railroad which can better serve the public.

True, as my brother states, it doesn't look as though the Bangor & Aroostook is in any problems, that may be because good management took care of this after the railroad was sold. And I think if you look in the Appendix to our brief, on the report of the Bureau of Accounts, you will see some indication of the beneficial management of this railroad.

QUESTION: Am I correct, Mr. Lefkowitz, the First Circuit however imposed no such condition as to the use of funds?

MR. LEFKOWITZ: They strongly suggested that it could be they did not because I think they were leaving that, Mr. Justice Blackmun, to the District Court, if there should be a recovery.

The brief itself, as I said, indicates that the railroad and Amoskeag would be amenable to such a decree, because the Dumaine family is interested in railroads.

QUESTION: But much of the holding of the Court of Appeals is a disagreement with Judge Gignoux on Maine law.

MR. LEFKOWITZ: As I understand it, really very little. I think the main part of the Court of Appeals holding goes to the heart of the separate identifiable interest of the public in the railroad, as contrasted with the interest of only its controlling stockholder.

QUESTION: And that's in no respect the Maine law?

MR. LEFKOWITZ: That has -- that is supported by Maine law. There is also a case which we cite in our brief, Wells Beach Casino, which states in effect that Rule 23, the equivalent of Rule 23 can be suspended, and it will be suspended in Maine in order to allow suits where there are equitable considerations involved, such as here.

So I believe that Maine law is as strong, if not stronger, than federal law in allowing this case, based on the Wells Beach Casino case.

QUESTION: Well, do you concede that the propriety of Judge Gignoux's ruling, if this were the Alpha Delta Widget Company rather than a railroad?

MR. LEFKOWITZ: I think that, ans I've thought a lot about this, I think that I would have to say to you if it were a mom-and-pop corporation or a widget company such as you're suggesting, Mr. Justice Rehnquist, I think that in those circumstances I would have to say we are not -- this

case would not support that because of the strong public interest that is involved with the railroad, and probably not a strong public interest involved with a widget company.

Bangor & Arcostook Railroad is a public utility under the law of the State of Maine, it's completely regulated as a utility. It is completely regulated by the Interstate Commerce Commission. We are dealing with a -- it seems to me we're dealing with the easiest case under these circumstances. This is the so-called private corporation, which it is, but this is the private corporation which is probably more regulated than any other private corporation.

Why? Because of the public interest in this corporation. And it's that separate identifiable public interest which the First Circuit found gave this case a different treatment.

QUESTION: Under Maine law are their dividends regulated in any way?

MR. LEFKOWITZ: As far as I know, not in -- except in the usual course, which is that they can impair capital.

QUESTION: Yes.

MR. LEFKOWITZ: But --

QUESTION: There's no other -- no other --

MR. LEFKOWITZ: There's no other regulation under Maine law --

QUESTION: Not the kind of regulation you would have

over an electric utility, for example, on requiring that they put their earnings back into reduced rates.

MR. LEFKOWITZ: Not that I know of, sir, under Maine law.

On the other hand, I think Maine law and Federal law both suggest that the amount that can be earned by a regulated company, such as this, is limited by the amount of rates they can charge, and that there is an underlying public policy that you ought not to be able to take those regulated earnings and stick them upstairs and have them produce unregulated earnings for you.

QUESTION: Mr. Lefkowitz, even as to the federal courts, Securities and Exchange Act and such, is it your view that, independently of Maine law, there's a federal law that's applicable?

MR. LEFKOWITZ: Yes, sir. Very much so. And we've tried to point that out in our brief.

First of all, I'd say that the federal counts we're talking about under Section 10b of the 1934 Act, and under the Antitrust Acts, Clayton Act section 10, are strong indications of public policy which should be vincidated.

QUESTION: Well, even if Maine law were to disagree with the Court of Appeals, you'd still say that the Court of Appeals would be right as to the counts which were from the federal law?

MR. LEFKOWITZ: Federal counts? Yes, sir. And I think that the use of Rule 23--

QUESTION: One other thing, Mr. Lefkowitz, Maine, I see, is one of the States that's adopted a certification statute, hasn't it?

MR. LEFKOWITZ: Yes, sir.

QUESTION: Permits the federal courts to ask the Maine Supreme Court what is Maine law.

MR. LEFKOWITZ: Yes, sir.

QUESTION: Was it ever suggested to the First Circuit that perhaps as to the Maine law counts, at least, that there ought to be that certification here?

MR. LEFKOWITZ: No, sir, it was not suggested as to those, although I believe the First Circuit decision rested mainly on the federal counts.

QUESTION: Well, that's my difficulty with it. But you've got thirteen counts here, of which I think five at least are State law counts on conversion basis only, aren't they?

MR. LEFKOWITZ: That is, on conversion basically, the counts are on the --

QUESTION: You have a Maine public utilities law, you have two or three common law counts, which I gather must mean Maine common law.

MR. LEFKOWITZ: Yes, sir.

No, those were not passed upon, but I believe that the Wells Beach --

QUESTION: Don't you think this is the sort of thing, to the extent that it turns on Maine law, that we ought to ask, that the Court of Appeals might have asked the Maine Supreme Court what the Maine law is?

MR. LEFKOWITZ: As to those counts under Maine law for conversion and violation of the statute under Maine law, quite possibly the Court of Appeals could have asked that. But I think -- again we're getting away from the main aspects of this case, which is that this is the railroad suing to right the wrongs that was done to it.

When we start talking, as Mr. Ryan does, about Rule 23.1 and about standing to sue before this Court, we're really talking about the second question that I was -- said I would address myself to. And that is, what are you supposed to do if in fact a windfall inures to the benefit of Amoskeag in this case?

And I think there you have the question, and the First Circuit dealt with it by saying that it was a public interest involved, the question of: Do you punish the wrongdoer for statutory violations of federal law and of State law, or do you let the wrongdoer go scot-free, as it were, because of the fact that there may be a windfall to the present controlling stockholder?

QUESTION: And innocent.

MR. LEFKOWITZ: Yes, sir, the present innocent controlling stockholder, Mr. Justice White.

There's no question about that this present stockholder didn't participate at all in what was done prior to the time Amoskeag acquired its stock, the Home Fire Insurance case, which everybody relies upon -- my brother relies upon; and our position to this showed that a new controlling stockholder, who had received the benefit of his stock by reason of the wrongdoing of the prior stockholder, couldn't bring the suit.

But the corporation could bring the suit, when moneys was taken illegally from it, $3,000 by an officer, and the court, Dean Pound in that case, wasn't worried about the $3,000 inuring to the benefit of the present controlling stockholder.

That's why we think Home Fire Insurance supports us.

What I would like to point out is that the directors of this corporation had before them, in July of 1971, a report from the Bureau of Accounts, the Interstate Commerce Commission, which had been made public, and that said: We recommend that all legal remedies be explored to require the holding company which sold the carrier to pay back to the carrier for assets taken, with no compensation and charges made where no services were performed.

And the Interstate Commerce Commission, as they point out in their brief, simply couldn't do anything about this. They had no jurisdiction over one railroad holding company, they had no jurisdiction over the transfer of assets from one corporate affiliate to another.

So if a director of the Bangor & Aroostook Railroad at that time saw that statement in the Bureau of Accounts report, as they did in July of 1971, what were they supposed to do to discharge their fiduciary duty?

As a matter of fact, as the record points out, a majority of the Board of the Bangor & Aroostook Railroad, in July of 1971, were members of the prior Board. The Board which had sat while these assets were being taken away, unbeknownst to them presumably; and a majority of that number actually voted to bring this lawsuit.

So it was not a case where Amoskeag walked in, changed the entire Board of Directors, and said: Now, let's see what we can do to get back what was taken out of this corporation.

It was the old Board majority that authorized the bringing of this suit. It was --

QUESTION: What if the one percent that wasn't controlled by Bangor Punta had brought a minority stockholders' action while Bangor Punta owned 99 percent and forced, in effect, the corporation to sue on the same count you're suing

on now? Supposing there had been a recovery, that recovery would have operated to enhance the value of BAR stock, wouldn't it?

MR. LEFKOWITZ: It would have inured to the benefit of the corporation.

The question is really, I think, would it have enhanced the value of the stock? I think that in these situations where you're making sales, as we've tried to point out in our brief, the usual question is: What are these properties worth? And what savings will be accomplished if you're putting railroads together, or flatten out the earnings projection so that you get not a one-time profit but a realization of what the railroad, on a day-to-day basis, is worth.

So, yes, possibly it might have enhanced the price of the stock, but I don't think really as much as it does in a normal corporate kind of arrangement. I think the railroad situation is something different along those lines.

QUESTION: Well, to the extent that it would have enhanced the value of the stock, Amoskeag would have had to pay more for it than when it bought it, wouldn't it?

MR. LEFKOWITZ: Well, that's what I'm saying. I really don't know. I'm not convinced that they would have, because it might have been a one-time increase in earnings, which would be so-called leveled out.

QUESTION: But, of course, that wouldn't be treated on the books as an increase in earnings, would it? It would have been a --

MR. LEFKOWITZ: I think in ICC accounting it may have to be treated that way; but, as you're speaking, sir, I think that it would enhance, perhaps, the value of the assets.

QUESTION: It would certainly increase, then, if there's fifteen million dollars more in the corporation, it would certainly increase the net worth.

MR. LEFKOWITZ: Yes, sir, it would.

QUESTION: And that would have some effect on --

MR. LEFKOWITZ: That would have some effect upon what they purchased.

I wish to emphasize, incidentally, that although there's -- Amoskeag paid five million for the stock and there is a recovery here sought, it is not seven million dollars; that's when you add up all the various counts together. It's more like two or three million dollars. So it is not in excess, really, of the purchase price.

QUESTION: If this one percent minority stockholder had brought a derivative suit and recovered substantially long before this new transaction, the new purchaser would have had to pay quite a bit higher price for the railroad, wouldn't they?

MR. LEFKOWITZ: That's what I'm not clear about, Mr. Justice Burger. Perhaps they would have, yes.

QUESTION: Well, let's suppose, hypothetically, that in the derivative stockholder suit there was a five million dollar recovery.

MR. LEFKOWITZ: Yes, sir.

QUESTION: Do you suggest there's any doubt that that would increase the value and therefore the probable asking purchase price?

MR. LEFKOWITZ: Would be higher? Indeed might be, and probably would.

So that the question now is: Are we going to let that be the controlling consideration for this Court, or are we going to allow the corporation itself now to try and recover for the wrongs which were done upon it when it was controlled by Bangor Punta.

And again I'd like to stress I think it's the public interest aspect of this, the fact that this railroad is a highly regulated company which gives special meaning in this circumstance to bringing this lawsuit.

Now, let's assume, for example, that one percent stockholders now ask the corporation to bring a derivative action. We would be met by the same argument if we were before this Court that we're presently met with. That is, the real party in interest, even though a little shareholder here has

asked that a derivative suit be brought, the real party in interest is Amoskeag, and therefore there can't be any recovery beyond the one percent. Based on the Headley case.

We suggest to this Court that the Headley case really isn't controlling under such circumstances; that if a derivative action were commenced now, the better rule would be to allow the corporation to recover fully for what had been done against it.

The effect of going with Judge Gignoux, who dismissed the entire action, is that nobody will ever be able to right the wrongs here.

Each time we will be faced with the Rule 23.1 argument, because the Court will say -- pardon me, Mr. Ryan, in effect, will say: Sorry, this is a windfall to Amoskeag. The Headley case controls.

In fact, it seems to us that this being the kind of corporation that it is, a railroad with a strong public interest, that shouldn't be the case. Somebody ought to be able to recover for this.

I think basically those are the -- that is the essence of the case.

First, that this is unquestionably the railroad's suit, it was brought by the railroad directors in response to the Bureau of Accounts; the ICC could do nothing about it. The Bureau of Accounts report said to the directors of the

corporation that it do something. And in discharge of their fiduciary duties, a lawsuit was commenced.

The real question, then -- I don't think there's any question about who is bringing the suit -- the real question, then, is: Is the windfall argument going to outpace the argument which says that this railroad ought to be able to right the wrongs that was done to it.

We earnestly submit to this Court that the answer ought to be: Allow this railroad, because it is a railroad, to bring this lawsuit. Things can be done if there is a recovery to insure to a great degree that any recovery will be used for the benefit of the public by strengthening the railroad, by giving -- by allowing it to give better service to those who it does serve.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Ryan.

REBUTTAL ARGUMENT OF JAMES V. RYAN, ESQ.,

ON BEHALF OF THE PETITIONERS.

MR. RYAN: Your Honor, just two points.

Mr. Justice Brennan, on the question as to whether a certification would have been required here, in Point IV of our Reply Brief, we point out that under the law of Maine there is no substantive right here that has been abridged. That under the law, that if this was a suit in Maine, the Hyams case would have controlled the result.

So there's no need to have a certification, as you suggest, of the law on that aspect. The Maine State law procedure --

QUESTION: Well, I gather each of you insists that the Maine law is settled in your favor?

MR. RYAN: Well, all I can say is --

QUESTION: That's quite a lawsuit in itself, isn't it?

MR. RYAN: I direct your attention to Point IV, Your Honor.

QUESTION: Well, I know, but so you say, and Mr. Lefkowitz cites us something else which he says settles the law on his side of it.

MR. RYAN: Yes, sir.

QUESTION: And I would suppose that would be a good situation to let the Maine Supreme Court tell us what the law is.

QUESTION: Well, Mr. Ryan, let's assume for the moment that someone has removed assets from a corporation illegally, and has assets to the corporation that he's converted to his own use. What real reason is there to prefer him to the corporation and its new owner? When a suit is brought to recover those illegally converted assets?

MR. RYAN: Well, I think it's --

QUESTION: You say there's a windfall, but, so

there may be, but if the assets are not recovered, it's a windfall to a wrongdoer.

MR. RYAN: Well, I know, Your Honor, the person who purchased the corporation purchases the balance sheet, and the balance sheet has assets --

QUESTION: But conceding the windfall, Mr. Ryan.

MR. RYAN: Yes, sir. Well, if he's -- the party is an uninjured party, and if you're going to permit uninjured parties to maintain action to recover alleged depredations of assets, well, then --

QUESTION: Well, what should you do with the assets that have been illegally converted? Leave them with the wrongdoer?

MR. RYAN: I don't -- I think it's -- you can't say they've been illegally converted.

QUESTION: I know, but assume they --

MR. RYAN: To assume they're illegally converted --

QUESTION: Well, that's what the lawsuit is all about.

MR. RYAN: -- there may be people who could maintain the action. In this case, the one percent. Assuming there was some real property involved or something, one percent could maintain the action, because they would have some interest.

QUESTION: Well, the corporation -- the corporation normally represents all the people who are interested in the

corporation, and that one percent would certainly benefit if the corporation recovered these illegally converted assets. If they had been illegally converted.

But that's what the lawsuit is all about.

MR. RYAN: That -- that is quite true, but I think when you look at this corporation, you look at what? You look at really Amoskeag. That's what is standing there.

QUESTION: I understand --

MR. RYAN: Not the corporate faction.

QUESTION: -- but you're just arguing again that it's a windfall, and I'm asking you why --

MR. RYAN: Essentially, yes, Your Honor, it's a windfall.

QUESTION: Well, why prefer the wrongdoer to someone who might receive a windfall, an innocent party who might receive a windfall?

MR. RYAN: Well, the only way I guess I could answer that, if you're going to permit that type of a situation, then you're going to have a lot of people going around bringing lawsuits, who haven't been injured but are going to be rectifying wrongs. And, you know, you're going to find a lot of people who are going to want to be around to sue for five million dollars, and they haven't been injured.

Now, they claim, they buy a corporate unit or they do a lot of things. But you're in effect saying, Your Honor,

is that we should permit bounty hunting.

QUESTION: Well, I take it you would have the same -- you have the same -- take the same position if there had been a hundred stockholders of the old corporation, and then there had been mismanagement and alleged conversion of assets, and then the hundred all sold out to Amoskeag.

MR. RYAN: Well, that -- then you're changing it. Here you have Bangor Punta is the one who supposedly sold out its own assets.

QUESTION: How about my question now?

Let's assume a hundred stockholders, but now there's only one and he is suing for a wrong that was done when he was not a stockholder, but there used to be a hundred when the wrong was done.

Now, what about that?

MR. RYAN: Well, I think you'd have to evaluate each transaction. I mean, if the party was defrauded, he would have certain remedies; if he were injured, he would have certain remedies. This is this one of the one hundred who could maintain action. Actions under the Securities laws, action under common law.

But that is not this situation, because the person who was injured, Mr. Justice White, was Bangor Punta, it took its own assets.

And if you left the assets in, as Mr. Chief Justice

stated --

QUESTION: Well, that is a critical part of your position, I take it?

MR. RYAN: Oh, I think so, yes, Your Honor.

QUESTION: That not only is there a sole stockholder now who didn't own the stock when the wrong was done, but there was a sole, in effect a sole stockholder when the wrong was done?

MR. RYAN: I think that there is no injured party before the Court.

Now, whether you have one or whether you have a hundred, I think the basic proposition is that Amoskeag wasn't injured, and if there was anybody injured it was Bangor Punta.

So I keep coming back, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:46 o'clock, a.m., the case in the above-entitled matter was submitted.]