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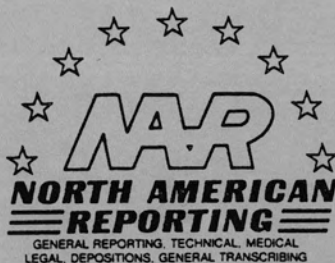
Supreme Court of the United States

CHICAGO AND NORTH WESTERN)
TRANSPORTATION COMPANY,)
)
PETITIONER,)
)
V.) No. 79-1336
)
KALO BRICK & TILE COMPANY,)
)
RESPONDENT.)

Washington, D.C.
December 9, 1980

Pages 1 thru 43

ORIGINAL



1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - :
3 CHICAGO AND NORTH WESTERN TRANS- :
4 PORTATION COMPANY, :
5

6 Petitioner, :
7

8 v. :
9

10 No. 79-1336 :
11

12 KALO BRICK & TILE COMPANY, :
13

14 Respondent. :
15 - - - - - :
16

17 Washington, D. C.

18 Tuesday, December 9, 1980

19 The above-entitled matter came on for oral ar-
20 gument before the Supreme Court of the United States
21 at 1:01 o'clock p.m.

22 APPEARANCES;

23 BRUCE E. JOHNSON, ESQ., 2600 Ruan Center, Des Moines,
24 Iowa 50309; on behalf of the Petitioner.

25 HENRI F. RUSH, JR., ESQ., Associate General Counsel,
26 Interstate Commerce Commission, Washington, D.C.
27 20423; on behalf of the Petitioner as amicus curiae.

28 M. GENE BLACKBURN, 142 North 9th Street, Fort Dodge,
29 Iowa 50501; on behalf of the Respondent.

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COTTON CONTENT

1 the Railroad's issue preclusion defense contends that in order
2 for the respondent's state law theories to be sustained the
3 respondent would have to obtain an Iowa trial court ruling
4 that the conditions that led to the cessation of service were
5 in fact within the control, or could have been prevented by
6 the Railroad. Secondly --

7 QUESTION: What was the nature of the ICC proceeding,
8 Mr. Johnson?

9 MR. JOHNSON: The ICC proceeding was an abandonment
10 application. The Railroad filed an application to receive
11 permission from the Commerce Commission to abandon its track-
12 age. The Railroad's abandonment application was filed after
13 the respondent had decided to go out of business and after
14 the respondent had ceased operating his business. The Rail-
15 road then filed an application for permission to abandon, and
16 a year and half after service ceased over the trackage, the
17 respondent filed an action in state court seeking damages
18 grounded on state law theories.

19 This case involves the Supremacy Clause, it involves
20 interstate commerce provisions which require interstate car-
21 riers to provide interstate service, transportation service;
22 Commerce Act provisions which require interstate carriers to
23 provide interstate car service; it involves the provisions of
24 the Act which regulate the abandonment and extension of lines,
25 and also the provisions of the Commerce Act that entitle

1 a shipper to commence an action for damages either before the
2 Interstate Commerce Commission or in federal district court
3 where they can prove a violation of the Commerce Act on the
4 part of interstate carrier. Kalo did not commence its action
5 before the Commission or in federal district court. Instead,
6 it went to state court and seeks damages under a state car
7 service theory, a state car service statute, a state negligence
8 statute, and common law tortious interference.

9 QUESTION: What if the shipper had sought to sue the
10 Railroad under the Hepburn Act, under the Carmack Amendment to
11 the ICC, is federal court jurisdiction there exclusive?

12 MR. JOHNSON: Section 9 would permit a damage action
13 to be filed before the Commission or in federal district court.
14 If a damage action were filed in federal district court, under
15 the circumstances of this case, I think that the federal dis-
16 trict court would stay the action and refer the issue of
17 causation of cessation of service to the Interstate Commerce
18 Commission.

19 QUESTION: But what if it were -- you say then that
20 it couldn't be filed in the state court?

21 MR. JOHNSON: No, because, if you look at --

22 QUESTION: No, what? No, you can't file it, or
23 no, you can?

24 MR. JOHNSON: No, you could not file an action
25 claiming violation of the Interstate Commerce Act in state

1 court. And here is the reason. The Commerce Act has been con-
2 strued in Puritan, among others, which is a case relied upon
3 by the Respondent -- it's been construed to restrict Section
4 9 damage actions to the forums set out in Section 9, which
5 are the Commerce Commission and federal district court. And
6 there are good reasons for doing that.

7 First of all, if you restrict it to federal district
8 court or the Commerce Commission, you are going to have one
9 system of federal law which is going to govern damage actions
10 as well as the other regulatory functions of the Commission.
11 However, if you allow the Commerce Act, if you allow damage
12 actions for violation of the Commerce Act to be filed in state
13 court, you are essentially allowing each state to create a
14 separate regulatory system consisting of damage actions and
15 the U.S. Supreme Court faced a similar situation in San Diego
16 Unions v. Garmon, where the U.S. Supreme Court recognized that
17 if it permitted state damage actions to be filed by an employer
18 for economic loss sustained because of peaceful picketing, not
19 violent picketing, then in effect it would be allowing a state
20 court system to create a system of regulation by damage actions
21 which would create a separate body of law competing with the
22 body of law that is created under the federal judicial system
23 interpreting and applying the National Labor Relations Act.

24 QUESTION: But it's one thing to say that the body of
25 law has to be common and uniform; but it's another thing to say

1 that concurrent jurisdiction exists between the state courts
2 and the federal courts in applying that uniform body of law.

3 MR. JOHNSON: The Esch Car Service Act, and in the
4 context of this case, more importantly, I think, the Trans-
5 portation Act of 1920 evidence a new and radically different
6 philosophy of Congress with regard to regulation of interstate
7 commerce.

8 The Transportation Act of 1920 was designed to give
9 plenary control, exclusive jurisdiction to the federal system
10 to govern the provision of interstate transportation service,
11 the abandonment of lines, the extension of lines, and the rea-
12 son for that, the Court in Transit Commission v. U. S. stated,
13 is because it had been found that concurrent state and
14 federal jurisdiction in the areas of interstate commerce
15 addressed in the 1920 Act had been found to be detrimental to
16 interstate commerce.

17 The competing local interest in this case, the
18 respondent's local interest, is economic loss, and if you
19 analyze his state law claims, although the claims of the
20 respondent are couched in terms of state law, they are claiming
21 damage to their business because of cessation of interstate
22 transportation service. And each state law claim requires
23 proof of two things: first, the existence of a duty on the
24 part of the Railroad to provide interstate transportation
25 service; and secondly, to prove that such a duty was breached

1 by the Railroad.

2 It is undisputed -- and this is the crucial and
3 central fact of this case -- it is undisputed that every rail
4 shipment to and from Kalo's factory was in interstate commerce.
5 Now, if there is no duty on the part of the Railroad after
6 April 4, 1973, when the line became physically impassable,
7 there is no duty on the part of the Railroad after that date
8 to provide interstate transportation service, then Kalo's
9 state law claims fall, because they all presuppose the exist-
10 tence of that duty. This is not a situation where there is a
11 physical injury or something of that nature where there may
12 have existed a stronger local interest.

13 QUESTION: Would your position here be any different
14 if ten percent of the shipments were intrastate?

15 MR. JOHNSON: That issue has been addressed by some
16 state courts and that percentage; basically, in state courts,
17 most of the state courts have said, that's not enough intra-
18 state commerce to set aside the overriding national interest.
19 But I think the way to determine that question is to look at
20 Section 1-17(a) of the Commerce Act, which says the states'
21 regulation of intrastate commerce is invalid if it conflicts
22 with a lawful order of the Commission. And I think that the
23 cases indicate that under the Commerce Act, the Commerce Act
24 will govern even intrastate commerce if the effect of intra-
25 state commerce on interstate commerce is so great that it

1 creates an undue burden on interstate commerce.

2 In this case we have no intrastate rail shipments,
3 it's strictly interstate. There's never been any factual
4 dispute about that in this lawsuit. And the respondent has
5 characterized this as a negligence case, a car service case,
6 common law tortious interference. But none of those state law
7 theories hold any weight unless the respondent proves a duty
8 to provide interstate rail service to its plant site.

9 And that is an inquiry which should be addressed under the pro-
10 visions of the Interstate Commerce Act.

11 QUESTION: You say, then, that the State of Iowa
12 can't tell a railroad it must provide the car service to a
13 particular plant, even though it doesn't conflict directly with
14 the ICC provisions?

15 MR. JOHNSON: The State of Iowa cannot require provi-
16 sion of interstate car service under state law. The Esch Car
17 Service Act was enacted to preempt state law, and Missouri
18 Pacific Railroad v. Stroud in 1926 stated that state law has
19 no application to provision of car service in interstate com-
20 merce. Now, the Federal Courthouse in Fort Dodge is four
21 blocks from the State Courthouse and the Interstate Commerce
22 Act provides that if there is a violation of the federal car
23 service provisions or transportation service provisions, that
24 may be attacked in the Commerce Commission or in federal dis-
25 trict court. And it's attacked under the provisions of the

1 Interstate Commerce Act.

2 The Interstate Commerce Act has been construed to
3 make the forum provisions of Section 9 exclusive with regard
4 to a damage action commenced pursuant to Section 8 of the
5 Interstate Commerce Act. And, as I indicated earlier, the
6 reason for -- in addition to the reason for having interstate
7 service questions determined under one act, the Interstate
8 Commerce Act, there is another reason, and that is that the
9 philosophy of the Interstate Commerce Act has been to place
10 the interests in forming a national transportation system, an
11 economically efficient national transportation system, over and
12 above the competing local interests.

13 QUESTION: Mr. Johnson, do I correctly understand that
14 this argument based on the absence of any state law duty is
15 equally strong if there had been no abandonment proceeding?
16 You don't rely on the abandonment proceeding in connection
17 with this argument?

18 MR. JOHNSON: I do not. The abandonment proceeding
19 -- the ruling of the Commerce Commission buttresses our argu-
20 ment in two respects. First, before there was any trial court
21 ruling -- which, by the way, the trial court ruled in our
22 favor and the Court of Appeals saw fit to reverse.

23 Before there was any trial court judgment, the
24 Commerce ruled, the Commerce Commission ruled that our cessa-
25 tion of service was not due to any condition that we could

1 have controlled. Now, that puts the Court of Appeals of Iowa's
2 ruling directly in conflict with Section 1-17(a) which says
3 that even regulation of intrastate service is invalid if it
4 conflicts with the lawful order of the Commission.

5 Here we have the Court of Appeals saying that a
6 Webster County District Court can regulate by damage action
7 interstate transportation service in direct contradiction to
8 an order of the ICC. The Respondent admitted in its brief
9 that central and necessary to its state law claim is a finding
10 by the trial court that the cessation of service was due to
11 conditions within the control of the Railroad. And the ICC
12 has found just the opposite.

13 So having followed the Interstate Commerce Act,
14 followed the provisions, gone to the ICC, participated in a
15 proceeding in which Kalo was a party, and having our conduct
16 approved by the ICC, we now find ourselves in the situation of
17 being subjected to exposure of a state law damage action which
18 can be successful by the respondent's admission in its brief
19 only if a trial court reaches a finding opposite to the
20 finding that ICC has already made in a lawful proceeding.

21 So I think that the ICC's order should be issue
22 preclusive, even if there were jurisdiction in the state
23 court. But more importantly, I think that there should be no
24 jurisdiction permitted to a state court when you're talking
25 about simply provision of interstate transportation service.

1 QUESTION: Do you say the plaintiff could attack the
2 action of the Railroad either before the ICC or in the federal
3 district court?

4 MR. JOHNSON: Under Section 9 the plaintiff may seek
5 damages in either of those forums for a violation of the
6 Interstate Commerce Act.

7 QUESTION: But, if he sues in the federal district
8 court, don't the controlling cases suggest or hold that the
9 district court should refer the guts of the case to the ICC?

10 MR. JOHNSON: I feel that in the situation we have
11 in this case, where you have physical impassability of the
12 line, I think a district court, where you're talking about
13 awarding damages --

14 QUESTION: Well, whether the suspension of service
15 was justified or not?

16 MR. JOHNSON: Yes. I think they would refer this
17 to --

18 QUESTION: Or would they have to? That's what I
19 want to know.

20 MR. JOHNSON: I believe they would. In an abandonment
21 proceeding some of the --

22 QUESTION: Because of primary jurisdiction?

23 MR. JOHNSON: Yes. Because it would require -- if
24 you're going to make a final and conclusive award of damages,
25 I think that you should refer to the ICC, but --

1 QUESTION: Suppose the reference was made and the
2 ICC ruled that cessation was proper and no damages, can the
3 district court then come to the contrary conclusion?

4 MR. JOHNSON: Well, that's an appealable decision.

5 QUESTION: Well, so in that very case? In that very
6 case or -- now, I thought appeal was to a court of appeal?

7 MR. JOHNSON: Yes.

8 QUESTION: Right?

9 MR. JOHNSON: Yes, I think it's --

10 QUESTION: So the district court can't come to a
11 contrary conclusion?

12 MR. JOHNSON: Well, I think if the district court
13 decided in the facts of the case that it required the discre-
14 tion or expertise of the Commission referred it, then the
15 district court would follow the Commission's ruling. If it
16 decided it did not require the expertise of the Commission,
17 and it could decide the issue itself, then it would not refer
18 to the Commission.

19 QUESTION: But what if it decided that it should have
20 the benefit of the Commission's views, the Commission said the
21 abandonment was justified, could the district court overturn --
22 that finding of the Commission?

23 MR. JOHNSON: No, I believe that the district
24 court --

25 QUESTION: Don't you have to appeal that to the

1 Court of Appeals now?

2 MR. JOHNSON: Yes. That would be my opinion, because
3 I believe the district court is saying that this is not a deci-
4 sion I think I should make, I think it's within the primary
5 jurisdiction of the Commission. And then I think appeal of
6 that order would be under the statutory procedures for appeal-
7 ing the Commerce decision.

8 QUESTION: Well, suppose you start off with damages
9 before the Commission, don't go to the district court, what
10 kind of a proceeding is that? That is a damages action, I
11 take it?

12 MR. JOHNSON: Yes, as I understand it. And --

13 QUESTION: Well, then what if the ICC says the ces-
14 sation was justified?

15 MR. JOHNSON: Then they would not award damages.

16 QUESTION: Well, and then -- let's assume you then
17 go to the district court, would the Railroad -- I suppose you
18 would suggest the Railroad would plead res judicata?

19 MR. JOHNSON: Yes, I think it would be preclusive.

20 QUESTION: There's no difference between that case,
21 and than when you start off in the district court, is there?

22 MR. JOHNSON: In the state court, you mean?

23 QUESTION: No, in the district.

24 MR. JOHNSON: If there's primary jurisdiction.

25 I would prefer to reserve what time I have left, if any, for

1 rebuttal, if I may. We have divided argument with the
2 Commerce Commission. Thank you.

3 MR. CHIEF JUSTICE BURGER: Mr. Rush.

4 ORAL ARGUMENT OF HENRI F. RUSH, JR., ESQ.,
5 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

6 MR. RUSH: Mr. Chief Justice and may it please the
7 Court:

8 This Court has held in a number of decisions inter-
9 preting the Esch Car Service Act, a statute which my colleague
10 referred to, and also the Transportation Act of 1920, which
11 brought for the first time extension and abandonment of rail
12 lines under the jurisdiction of the Federal Government, under
13 federal regulation.

14 This Court has held that the provisions of these
15 Acts vests exclusive responsibility for the regulation of car
16 service and cessation of service in the Interstate Commerce
17 Commission. Principally among those and on which we largely
18 rest our case in this proceeding are this Court's decisions in
19 Colorado v. United States, in the Purcell case, in the Transit
20 Commission case, and in the case of Mo. Pac. v. Stroud.

21 The Government has urged this Court to grant certi-
22 rari and appears today to present a single point, but one that
23 is of extreme importance to the Commission in performing its
24 responsibilities under the provisions I have just referred to.

25 That point is that the recognition of a state or

1 common law cause of action for damages in state court in mat-
2 ters relating to an interstate railroad cessation of service
3 would undermine the accomplishment of federal objectives em-
4 bodied in the abandonment and car service provisions of the
5 Interstate Commerce Act.

6 QUESTION: Mr. Rush, what do you do with that last
7 paragraph in Stroud that says the state law has no application
8 to the furnishing of cars to shippers for the transportation
9 of freight in interstate commerce?

10 MR. RUSH: Well, I would hang my hat on it, Justice
11 Rehnquist. I mean, that seems to me exactly the point here,
12 that a state damage action is asserted on a matter involving
13 either car service or abandonment, both of which have been
14 found to be within the exclusive province of the Federal
15 Government and the Commission to regulate. So that, I mean,
16 I would simply underline that sentence that you read, that
17 it does have no applicability. And that as this Court recog-
18 nized in the Government case, damages are as effective a way
19 of regulating as injunctive or regulatory relief. Indeed,
20 I would suggest to this Court that the right asserted here
21 to obtain damages after the fact is vastly more pernicious and
22 disruptive of the federal scheme than the seeking of injunctive
23 relief.

24 QUESTION: Is it a form of review, in a sense, of
25 the Commission's action? Judicial review by a state court?

1 MR. RUSH: Mr. Chief Justice, that thought hadn't oc-
2 curred to me. They ignored our decision so I think they were not
3 purporting to perform nonfederal Hobbs Act required review.

4 But it certainly --

5 QUESTION: It has the same consequence, does it not?

6 MR. RUSH: Yes, sir.

7 QUESTION: As though they were reviewing you and the
8 Commission and reversing you?

9 MR. RUSH: Yes, I think it would. And, of course,
10 a state court could in theory refer a question to the Commis-
11 sion and get an answer back from the Commission. And so I
12 would suppose it might be closer to that, although they did
13 not refer the question, nor did they in any fashion defer. And
14 as my colleague, Mr. Johnson points out, they can't defer, for
15 the plaintiff to succeed.

16 QUESTION: Well, would the state court be bound by
17 the action that it got back from the ICC?

18 MR. RUSH: A state court? I should think so.
19 A federal court, I would think that our decision on referral
20 under the Referral Act would be as binding on that Court as the
21 reasoning which went into it.

22 QUESTION: Then, you don't really have a uniform
23 system if, as your colleague contends, where you have it in
24 the federal court alone, since the federal court according to
25 you is not bound to follow the ICC.

1 MR. RUSH: No, but it would be subject to normal
2 principles of judicial review so that provided the reasoning
3 was sound and we stayed within our statutory authority, they
4 would be obligated to follow it, in my view.

5 QUESTION: Why wouldn't that be reviewable in the
6 Court of Appeals rather than in the district court?

7 MR. RUSH: Because if it were referred, initial re-
8 view is by law in the district court that referred it.

9 QUESTION: That's because of the referral statute?

10 MR. RUSH: Yes, Justice White. They perform a mixed
11 review and acceptance of the referral, but then appeal from
12 that, of course, goes to the Court of Appeals.

13 QUESTION: But review is on the record, isn't it, or
14 is it?

15 MR. RUSH: Yes, it would be on the record, just as
16 any other agency proceeding. Once --

17 QUESTION: But the district court couldn't rehear the
18 whole matter, could it? It would have to review it on the
19 record?

20 MR. RUSH: No, sir. No --

21 QUESTION: Why?

22 MR. RUSH: It would be my view they cannot review it
23 ab initio, that they would have to accept the record made
24 before the Commission. And in that respect it --

25 QUESTION: And if the findings are supported by

1 substantial evidence, accept them.

2 MR. RUSH: That's correct. So there would be a heavy
3 presumption favoring the valid interpretation of the Commis-
4 sion. I do not want to leave the impression that it had to
5 be accepted regardless, was my only point.

6 But to turn to this question of damages and the
7 problem that we perceive in connection with that, the respon-
8 dents don't suggest, nor could they in the face of the cases
9 decided by this Court which I have named, that the state court
10 could require the restoration of service. But injunctive
11 relief, actually, is preferable from the standpoint that you
12 have the equitable considerations being laid in that context.
13 And the cases cited in the respondent's own brief demon-
14 strate that when action is brought in federal court, as all
15 of their cases parenthetically I would note, were -- they have
16 been properly brought before a federal court -- the question
17 becomes one of whether it is equitable to require restoration
18 of service pending a decision by the Commission. That in-
19 junction, of course, dies when a decision has been handed down
20 by the Commission, if in fact a mandatory injunction is
21 entered.

22 QUESTION: And then the Commission's decision is
23 reviewable only in the normal appellate process?

24 MR. RUSH: That's correct, Justice Rehnquist.
25 Respondents in the Court of Appeals relied through their

1 proposition supporting an award of damages ultimately entirely
2 on three decisions of this Court, decided in 1915 and 1916,
3 interpreting Section 22 of the Act.

4 We believe those cases are all distinguishable on
5 the ground that no question of the reasonableness of the
6 Railroad's challenged practice was before the courts, and hence
7 if one were to take a primary jurisdiction approach to the
8 issue of preemption, there would have been nothing to defer
9 to the Commission's primary jurisdiction. However, more fun-
10 damentally, we submit that those decisions ought to be found
11 not to have survived the enactment of the Esch Car Service Act
12 and the Transportation Act of 1920.

13 As I have indicated, this court has held that those
14 enactments vested sole jurisdiction or responsibility, I
15 should say, in the Commission for regulation of the matters of
16 car service and cessation of rail service. This Court has
17 consistently recognized that Section 22 is not to be read
18 literally to absolutely preserve common law rights. It's early
19 decision in Texas & Pacific Railway v. Abilene Cotton Oil
20 Company found that to hold that a state right of damages sur-
21 vived because of Section 22 would be destructive to the perva-
22 sive scheme of rate regulation embodied within the Act.
23 And hence it ought to be found not to survive.

24 We believe that the Esch Car Service Act and the
25 Transportation Act of 1920 similarly encompass a pervasive

1 scheme of regulation, where interstate commerce and interstate
2 railroads are involved, of all matters relating to the cessa-
3 tion of rail service by such an interstate carrier.

4 We ask this Court to find, as it did in -- or to
5 hold as it did in the rate area, that no such remedy survives
6 in connection with these matters under any circumstances.
7 Anything less than that, a resort to the question of, are there
8 issues of primary jurisdiction or not, will simply breed more
9 litigation, I suggest, in this area, and it is not a satisfac-
10 tory test. In the rate area the Court has absolutely and
11 clearly foreclosed state and common law remedies. We ask it
12 to do so in connection with the cessation of interstate rail
13 service.

14 QUESTION: Is primary jurisdiction simply a question
15 of deferral and then the Court ultimately deciding, or is it
16 a question that the Court simply keeps its hands off and it's
17 a decision for the Commission to finally make?

18 MR. RUSH: Literally, as I've always considered the
19 doctrine, it means that the Court must defer initially to a
20 decision by the Commission.

21 QUESTION: When you say "initially," what do you
22 mean?

23 MR. RUSH: Well, it's subject to -- as I indicated
24 to you earlier, Justice Rehnquist, a review on the traditional
25 grounds of judicial review of Commission decisions. So it has

1 some limited role, but --

2 QUESTION: It's not like a review under the Adminis-
3 trative Procedure Act, where any agency action can be reviewed
4 for it's arbitrary or contrary to law.

5 MR. RUSH: No, sir, I'm suggesting it is comparable
6 to APA review, but that that is a very limiting type of review.
7 It does not make the Court a co-equal partner, it is not at
8 liberty to say, well, here are some facts and here are some
9 facts. You looked at the facts and came out this way, we
10 looked at the facts and come out this way. If what the Com-
11 mission has done based on these facts is supported by sub-
12 stantial evidence, which as you well know is an elusive test,
13 but if it's supported by substantial evidence, it must be
14 sustained.

15 QUESTION: Well, then, for your cocounsel or your
16 associate counsel for the Railroad to state that the courthouse
17 at Fort Dodge is only four miles or four blocks away, is
18 really rather elusive so far as the plaintiff is concerned
19 because it means that the plaintiff has to come back to
20 Washington.

21 MR. RUSH: I'm not sure that I follow that argument,
22 Mr. Justice Rehnquist.

23 QUESTION: Well, I mean, you can't get a final trial
24 of your case in the federal court if you're right.

25 MR. RUSH: Yes, that's correct. That's four s

1 position.

2 QUESTION: Everybody all over the country has to
3 come back to Washington and try their case before the ICC.

4 MR. RUSH: Well, I would modify that only in one
5 respect, Justice Rehnquist. That is, we have a procedure known
6 as modified procedure which was in fact followed in this case,
7 which would have meant all they would have had to do to try
8 their case would have been to go to their mailbox and mail
9 their pleadings and evidence to the Commission. Then, but
10 only if a material issue of fact were in dispute, would the
11 matter be required to be set for cross-examination. And that
12 indeed, probably, under Commission practice, would have taken
13 place out in Iowa.

14 QUESTION: As I understand it, Mr. Rush, your posi-
15 tion is that there is no room here for the doctrine of primary
16 jurisdiction or for a reference to the Commission by a state
17 court, but that the enactment of the Interstate Commerce Act
18 and its companion legislation means that state courts are
19 completely ousted from jurisdiction in this field. Is that
20 correct?

21 MR. RUSH: That's correct, Justice Stewart. That is
22 exactly our position.

23 QUESTION: Do you mean, not only state law is ousted
24 but the state courts are ousted?

25 QUESTION: Right. Just as in ratemaking proceedings.

1 MR. RUSH: Yes, I would think that's correct. It is
2 conceivable a state court could try an action based on a
3 federal statute and issue we don't have in this case, of
4 course.

5 QUESTION: Oh, it is under the National Labor Rela-
6 tions Act. They try collective bargaining cases in the state
7 courts, although it's federal law that's administered.

8 MR. RUSH: Yes, sir, although our --

9 QUESTION: Do you think, here -- have there been
10 some holdings that federal court jurisdiction is exclusive?

11 MR. RUSH: That's correct, Your Honor, under Section
12 9 of our Act. Wrongs are complained of --

13 QUESTION: Does the present Act say so? Does it say
14 it's exclusively a federal court matter?

15 MR. RUSH: No, but the way those cases go, since
16 it says you may bring it in federal court, that that means you
17 must, if you're complaining under it.

18 QUESTION: I see; yes.

19 MR. RUSH: Thank you.

20 MR. CHIEF JUSTICE BURGER: Mr. Blackburn.

21 ORAL ARGUMENT OF M. GENE BLACKBURN, ESQ.,

22 ON BEHALF OF THE RESPONDENT

23 MR. BLACKBURN: Mr. Chief Justice, may it please the
24 Court:

25 An affirmance of the Iowa Court of Appeals decision

1 in this case would not do violence to the railroad industry,
2 nor would it do violence to the federal scheme for regulating
3 the industry or to national transportation policy. Instead,
4 Your Honors, we submit that it would cause railroads to make
5 early decisions about abandonment plans.

6 We also submit that it would avoid the practice --

7 QUESTION: By that you mean that it would go to
8 the state courts first?

9 MR. BLACKBURN: Yes, Your Honor. And --

10 QUESTION: On the abandonment of an interstate line?

11 MR. BLACKBURN: The facts of this case, Your Honor,
12 show that the railroad was neglected over a long period of
13 time and ultimately failed because of that neglect. If the
14 Transportation Company had made an early decision to abandon
15 that line, the Kalo Brick and Tile Company which is now out of
16 business could have made management decisions about relocation
17 or could have made management decisions about merger with
18 other companies.

19 QUESTION: But suppose you're contemplating building
20 this plant, no plant is there, so you build a plant there.
21 Could the state courts of Iowa compel service to that plant?

22 MR. BLACKBURN: Your Honor, we do not think that is
23 going to be an issue in this case.

24 QUESTION: No, that's hypothetical.

25 MR. BLACKBURN: Right.

1 QUESTION: Obviously not an issue here.

2 MR. BLACKBURN: No, we would not claim that at all.

3 QUESTION: But once the service is available, it must
4 be maintained?

5 MR. BLACKBURN: Right. At least the track must be
6 maintained, and the car service must be maintained under the
7 Iowa statutes.

8 QUESTION: Well, what else -- I'm not sure I follow.
9 What else would there be besides the track and the service?

10 MR. BLACKBURN: Well, we would suggest, Your Honor,
11 that those state statutes do impose duties upon the Railroad.

12 QUESTION: Well, certainly if you were dealing with
13 an interurban service between two cities in Iowa or a public
14 utility, the state would have the right to require the utility
15 to extend its services to any willing customer under existing
16 law, would it not?

17 MR. BLACKBURN: Yes, Your Honor.

18 QUESTION: In the absence of congressional preemp-
19 tion.

20 MR. BLACKBURN: Right. We would also suggest, Your
21 Honor, that it would be, it would avoid the kind -- Railroad
22 and the amicus in this case discussed somewhat obliquely the
23 unreasonable burden upon interstate commerce. We suggest to
24 this Court that there is a reverse burden upon interstate
25 commerce by the action, the unilateral neglect, the unilateral

1 abandonment that the Chicago North Western has taken, and we
2 would also suggest that an affirmance of the Iowa Court of
3 Appeals would have a tendency to stabilize the railroad indus-
4 try by striking a balance between the carrier, between the
5 shipper and between the Interstate Commerce Commission.

6 We suggest, Your Honors, that the fault, or the
7 problem with the petitioner's position in this case is simple.
8 It was pointed out by Justice Frankfurter in the case of
9 Pan American Oil Company v. Superior Court about 20 years ago,
10 and that is this, that a party who brings the suit is the
11 master to decide what law he will rely upon. And in the dis-
12 trict court of Iowa, the Kalo Brick & Tile Company relied upon
13 three theories. The first was failure to provide car service
14 upon reasonable notice and within reasonable time, pursuant
15 to Iowa Statute 479.3. The second and the most important one
16 to the issues here, is the fact that Kalo pled a cause of
17 action based upon the negligence of the Railroad and its
18 employees, a state statute.

19 And that statute, I've pointed it out here and I
20 don't like to take a lot of time reading, but it says,

21 "Every corporation operating a railroad shall be
22 liable for all damages sustained by any person in the
23 consequences of the acts of the agents."

24 There is also a third, kind of a throwaway issue and
25 that is, interference with prospective business advantage or

1 business relationships. Now, both the Railroad and the amicus
2 before this Court have characterized this case as either,
3 number one, a car service case, or number two, an abandonment
4 case. And they have conveniently for purposes which are ob-
5 vious to this decision, have avoided discussing either in their
6 briefs or in argument the question of the Iowa negligence
7 statute, which is 479.122.

8 QUESTION: Mr. Blackburn, could I ask you a question
9 about the negligence theory?

10 MR. BLACKBURN: Yes, sir.

11 QUESTION: Assume that the Railroad was losing money
12 on this line and they went in before the ICC and got an aban-
13 donment on economic grounds that it's a loss operation and it's
14 not necessary to maintain the public interest and the ICC gave
15 permission. Would there have been any duty under Iowa law
16 to continue to operate?

17 MR. BLACKBURN: Your Honor, we do not contend --
18 and here is where the amicus and the railroad and we are in
19 agreement -- we disagree, we do not disagree with very much
20 of what they said. We simply say, what they say does not
21 apply to the facts of this case.

22 QUESTION: Your answer is, no, I take it?

23 MR. BLACKBURN: My answer is, no.

24 QUESTION: Well, if there's no duty in that case,
25 they can willfully abandon. Why can't they negligently

1 abandon?

2 MR. BLACKBURN: Because the Interstate Commerce Com-
3 mission Act does provide for provisions for abandonment and
4 has language to the effect:

5 QUESTION: But I mean, as a matter of Iowa law.
6 I'm assuming they comply with federal law in either case, and
7 I'm asking you, as a matter of Iowa law, if they can willfully
8 abandon, why can't they carelessly abandon? It would --
9 that's reaching the same duty, I would think.

10 MR. BLACKBURN: Well, we would suggest they could,
11 but then they would subject themselves to the jurisdiction of
12 the Iowa court if they carelessly abandoned. We say that is
13 this case.

14 QUESTION: But if they don't have a duty to refrain
15 from willful abandonment, what is the nature of the duty to
16 refrain from negligent abandonment?

17 MR. BLACKBURN: We would suggest, Your Honor, under
18 -- the duty arises under the statute that provides --

19 QUESTION: Well, would they have a defense to your
20 action if they filed an answer and said, we didn't do this
21 negligently, we planned it five years ago. We let the ponds
22 develop and we were doing it because we intended to abandon.
23 It's exactly what our corporate objective was.

24 MR. BLACKBURN: No, I do not -- I do not think that
25 would isolate them from liability, if that's what your

1 question is.

2 QUESTION: But you seem to acknowledge there'd be no
3 cause of action if it were willful, but there is a cause of
4 action if it's negligent.

5 MR. BLACKBURN: Well, maybe I misspoke myself, Your
6 Honor. I may have --

7 QUESTION: My first question is, assume no negli-
8 gence but merely a corporate plan, let's abandon this line
9 because we're not making any money. And I'd ask you, would
10 that violate any Iowa duty? And I thought you said, no.

11 MR. BLACKBURN: Oh, I'm sorry, I intended to say, yes,
12 if that was the question.

13 QUESTION: So then your claim does not really depend
14 -- your duty exists whether they were negligent or not?

15 MR. BLACKBURN: Whether they were negligent or not,
16 yes.

17 QUESTION: At any rate, we have the decision of the
18 final court in Iowa that passed on the question that in the
19 circumstances of this case a damage action was permissible
20 under state law. So that unless there's a federal question
21 that the Iowa court decided wrongly, Iowa allows recovery here.

22 MR. BLACKBURN: Yes, Your Honor, that is true. And
23 that is based upon -- and this is an issue that goes to --
24 when this case was first started plaintiff's attorneys relied
25 upon three United States Supreme Court decisions and three

1 Iowa Supreme Court decisions and a decision of the 9th Circuit
2 Court of Appeals for establishing state court jurisdiction.
3 And to our knowledge those cases, none of them, have ever been
4 overruled.

5 It is also important, Your Honors, to find, to note,
6 we feel, to this issue, that the trial court found as a fact
7 that the Railroad, the impounding of the water was a factor
8 in the failure of this Railroad, and that the permitting ponded
9 water to stand was not good maintenance practice. That's
10 noted at Appendix, page 16a.

11 I don't want to burden the Court with facts, but I
12 think the chronology of these --

13 QUESTION: Mr. Blackburn, before you get to facts,
14 are you going to talk about the Colorado case? You talked
15 about the other one.

16 MR. BLACKBURN: Yes, Your Honor.

17 QUESTION: Thank you.

18 MR. BLACKBURN: We think those cases are all cases
19 involving regulation and not remedy, and the amicus disparages
20 our attempt to distinguish between the remedial effect as
21 opposed to the regulatory effect of a regulatory scheme.
22 And Your Honor, we suggest this, that -- and it might be some-
23 what trite to suggest that the regulatory scheme falls basi-
24 cally within what we've known as the police power, whereas the
25 remedies involve suits between parties. And so therefore we

1 think that there is a great distinction in those kinds of
2 cases.

3 QUESTION: Well, wouldn't that remedy destroy the
4 Colorado case?

5 MR. BLACKBURN: Well, Your Honor --

6 QUESTION: In quotes, as you put it? Would it
7 destroy it?

8 MR. BLACKBURN: We simply suggest that the Colorado
9 case was a regulatory case and most of the cases relied upon
10 by the amicus and the Chicago North Western are cases which
11 are apposite to this case. They are cases involving discrimi-
12 nation, they are cases involving reparations, they are cases
13 involving national transportation policy, they are cases which
14 involve any number of things which are not within the facts
15 of this case.

16 QUESTION: How about the Stroud case, that last lan-
17 guage there where it says that obviously the state law has no
18 application to the furnishing of cars to shippers for the
19 transportation of freight in interstate commerce?

20 MR. BLACKBURN: Well, that again, Your Honor, is a
21 nice statement but taken -- it's in the case itself, it's
22 stated somewhat hypothetically without reference to the facts
23 of the case. And we have no argument with the suggestion of
24 the amicus or the Chicago North Western that the Interstate
25 Commerce Commission does have exclusive jurisdiction over such

1 things as rates, over such things as abandonments, over such
2 things as rate discrimination, discrimination against the
3 furnishing of cars. But our approach is fairly narrow in that
4 it arises basically under an Iowa negligence statute which
5 has nothing to do with national transportation policy, which
6 has nothing to do with the intercession of administrative
7 expertise, and it has none of the rubric of your ordinary
8 regulation-type case.

9 The facts: basically, the Kalo Brick & Tile Company
10 which was a family business, been in business for almost a
11 hundred years, had been served for 75 years by this same
12 rail line, had been served very well until 1960 when the
13 Chicago North Western took it over. During the '60s, not
14 only did the track begin to fail, but Kalo was not getting
15 the switches, Kalo was not getting adequate cars -- they were
16 getting bad cars, they were getting all sorts of poor service.
17 They were promised better service but it never came. And so,
18 consequently, through that period of time they were led to be-
19 lieve that things will be better, but they never got better.

20 Now, the Court is obviously aware that the cause of
21 the failure of the railroad was because of impounding water
22 along the side of the tracks. In April of '73 the track
23 became impassable, and then in August Kalo because it required
24 railroad transportation to be competitive in its business,
25 sold its assets and went out of business. And it wasn't until

1 three months after that, that finally the application for a
2 certificate of convenience and necessity was filed with the
3 Interstate Commerce Commission.

4 Now, our point, going back again to the Iowa negli-
5 gence statute, is this: that tort became, that state court tort
6 action became complete on the day when the damage existed.
7 And I think that's general negligence law. So the negligence,
8 and the damages, if any, were established in August, quite a
9 bit of time prior to the time that the railroad made applica-
10 tion for abandonment.

11 Now, we submit, Your Honors --

12 QUESTION: Mr. Blackburn, for a time did Kalo trans-
13 port its interstate shipments by truck?

14 MR. BLACKBURN: There was, Your Honor, yes, a short
15 period of time when alternate facilities were offered by truck,
16 to the landing dock, to the railhead, or whatever, but that
17 simply did not work out. I think that --

18 QUESTION: Did not work out financially?

19 MR. BLACKBURN: And I think physically it does not
20 work out, because you get a certain amount of jiggling and
21 there's a special way of packing bricks, as I understand it,
22 and loading and unloading and so forth.

23 We submit that it was not -- no matter what might be
24 said about the preemption statutes, and the cases that inter-
25 pret, we simply say that it was not the clear and manifest

1 purpose of Congress to preempt the state court duty to exer-
2 cise reasonable care, or to take any cumulative remedies in the
3 state car service statutes.

4 The negative intent of the congressional Act is mani-
5 fest in several ways. Number one, throughout the Esch Car
6 Service Statute, and the Transportation Act of 1920, Congress
7 felt it right to leave intact Sections 8, 9, and 22 of that
8 Act, which are the very sections relied upon in Puritan Coal.

9 QUESTION: Are those set forth anywhere in the
10 briefs?

11 MR. BLACKBURN: Yes, Your Honor, they are.

12 QUESTION: In the Appendix?

13 MR. BLACKBURN: And in the Appendix.

14 QUESTION: Mr. Blackburn, under your theory would it
15 be possible to have exactly 50 different theories of negligence
16 for abandonment of interstate railroads?

17 MR. BLACKBURN: Your Honor --

18 QUESTION: Is that possible?

19 MR. BLACKBURN: -- therein lies the distinction.
20 We do not claim that there was negligent abandonment. We
21 claim that there was negligent maintenance of the track which
22 ultimately caused abandonment.

23 QUESTION: Could there be 51 --

24 MR. BLACKBURN: Yes.

25 QUESTION: Different maintenance of track theories

1 of negligence in the country?

2 MR. BLACKBURN: Yes.

3 QUESTION: Do you think that's what Congress wants?

4 MR. BLACKBURN: Let me rephrase that. I'm sorry I
5 preempted the question.

6 QUESTION: I think you'd better.

7 MR. BLACKBURN: I think negligence law is general
8 law. It commences from the duty to exercise reasonable care.
9 It's basically hornbook law. It does not vary that much from
10 state to state.

11 QUESTION: But could it?

12 MR. BLACKBURN: It possibly could.

13 QUESTION: I say it possibly could, so you agree it
14 possibly could.

15 MR. BLACKBURN: I agree it --

16 QUESTION: And it possibly could have 50 different
17 theories about running railroads.

18 MR. BLACKBURN: Yes, Your Honor.

19 QUESTION: And that gives you no problem?

20 MR. BLACKBURN: It gives me no problem to this ex-
21 tent, that I think it creates a -- let me analogize to another
22 area of modern tort law. The emergence in the last 20 years
23 or 25 years of products liability litigation has caused
24 manufacturers to recognize their duties and their obligations
25 to the consumers. Now, I don't think there are very many

1 people except perhaps some manufacturers who would not say
2 that that has a salutary and good effect. And I think the
3 same thing would happen in this kind of case. The railroads
4 in this case, I think, in this country, I think everyone
5 would admit are in bad condition. We've had a regulatory
6 scheme since 1887 which has not cured those conditions.
7 Now, we're simply saying that the state tort claim would put
8 the pressure on the railroads to make those decisions rather
9 than to let the railroads fall by neglect and what we term
10 abandonment by neglect.

11 QUESTION: Well, are you saying then, that's a pro-
12 ducts liability theory?

13 MR. BLACKBURN: No, I'm not suggesting that. I'm
14 simply saying that that's an analogy that the products liabil-
15 ity cases have caused manufacturers to recognize their duties.

16 QUESTION: But those have been generated largely by
17 state court fashioning of tort law remedies. Here we have con-
18 gressional statutes that govern us and we aren't free to de-
19 part from them.

20 MR. BLACKBURN: Except, Your Honor, that we're say-
21 ing that the way this case is pleaded it's not pleaded within
22 those federal guidelines. The case was pleaded as a state
23 court case. I think the best case in support of our theory,
24 and it doesn't get to the question of primary jurisdiction
25 or preemption, is the case of Johnson against Chicago,

1 Milwaukee, and St. Paul, out of the 9th Circuit, which is a
2 diversity case. And the court reached some of these issues
3 that we're talking about here.

4 In any event, Section 22 of the Act preserves to the
5 states, preserves in clear and unqualified language, existing
6 remedies. And states, the remedies provided for in this sub-
7 title are in addition to remedies existing under another law
8 or at common law. And that is in the 1978 recodification to
9 the Transportation Act, and it's significant to note that
10 that section which is 101.03 was given its separate place, and
11 it was taken out of a rate section, which was 22, which defined
12 rates, and it was given special emphasis by giving it a spe-
13 cial section.

14 We also suggest, Your Honor, that the law as pronounced
15 by this Court in the case cited by the petitioner, Jones v.
16 Rath Packing Company, is that there is an assumption against
17 preemption, particularly unless there is a clear and manifest
18 purpose otherwise. We suggest also that there is no conflict
19 between state law remedies or any federal or regulatory scheme.

20 One of the questions that was posed in opposing
21 counsel's discussion I think can be answered in this way.
22 Under Kalo's theory of negligent track maintenance and granted
23 it's a narrow theory, there is no cause of action in federal
24 court or before the Commission. We do not contend that there
25 is. There are no federal track maintenance standards.

1 The only way that Kalo could get into federal court would be,
2 under this theory, would be via diversity action, which would
3 call upon the district court to grant original jurisdiction.
4 Any claim -- and we concede -- any claim that is made under
5 the Act must be made through the Commission, and then referred
6 to the federal court, or if it's brought in federal court, I
7 would agree with the question that was previously asked that
8 it probably must be referred to the Commission.

9 But that overlooks our theory of the case. Our
10 theory, the federal act, the federal Interstate Commerce Act,
11 does not encompass negligent track maintenance. Our theory
12 is narrow but it's viable under the decisions of this Court,
13 and we know of no case which overrules the Puritan case. It's
14 never been expressly overruled, and I think this Court has
15 said on several occasions that it did not favor implied over-
16 ruling of cases.

17 But in any event our theory is based upon negligent
18 track maintenance and there's nothing about that theory which
19 imposes or incites a federal rule or a federal statute.

20 Now, one of the theories that the Railroad would
21 have us follow is, if you're harmed, you seek injunction.
22 Well, Your Honors, in this case, injunction was not an adequate
23 remedy. It would be foolish for the Kalo people to spend
24 their then inadequate resources to enjoin the abandonment of
25 a railroad that had already failed, and for which they'd been

1 told that it wasn't going to be rebuilt. But the injunction
2 theory, which they would have us follow, is a very narrow
3 theory.

4 Under the 8th Circuit decisions which are cited in, I
5 think, both briefs, the Interstate Commerce Commission v.
6 the Chicago North Western, and the Interstate Commerce Commis-
7 sion v. Chicago, Rock Island, & Pacific, the Chicago, Rock
8 Island, & Pacific case indicated that the only question before
9 in that proceeding is whether or not there is an illegal
10 abandonment. Well, at that point of the proceedings, Kalo
11 was out of business and had no incentive to proceed further
12 by injunction.

13 Likewise, those issues, of course, go to the
14 question of the primary jurisdiction. If the Interstate Com-
15 merce Commission had no primary jurisdiction -- in other words,
16 if this does not involve questions of national transportation
17 policy, if it does not require the administrative expertise to
18 solve this problem, if it is of a kind of problem that can
19 be handled by the conventional wisdom of judges, then the ICC
20 has no primary jurisdiction, unless it's found somewhere else
21 within the statute. And under our theory, once again, we'd
22 say it's not found anywhere else in the statute.

23 So if there is no primary jurisdiction, there is no
24 collateral estoppel. And there are other reasons for denying
25 collateral estoppel in this case. First, there are policy

1 reasons. The issues are not the same. The issue before the
2 Commission was limited to one thing: was the Railroad enti-
3 tled to a certificate of convenience and necessity which would
4 permit it to abandon the line? The issues before the state
5 court were negligence, car service issues, and with the defense
6 that the failure of the road was an act of God, which I think
7 is rather interesting. Because under Iowa law and under law
8 generally, and this is also cited in the 9th Circuit case of
9 Johnson v. Chicago, Milwaukee, in order for a defense in a
10 civil suit, the extents of acts of God in a civil suit to be
11 a defense, it must be the sole proximate cause.

12 Now, Kalo -- another reason for denying collateral
13 estoppel in this case before the Interstate Commerce Commission
14 is this: Kalo had no incentive to go to Washington to be in-
15 volved in those proceedings. It was out of business. This
16 Court also announced the Fairness Doctrine in the Parklane
17 Hosiery case, and we call your specific attention to Note 15
18 of that case, which sets forth the fact that it may oftentimes
19 be unfair to call a party out of and come to a foreign forum
20 to litigate issues which are beyond the reach of its own
21 discovery procedures and so forth.

22 I also call the Court's attention to the general rule
23 of the restatement of judgments which is now in a tentative
24 draft fourth edition, which says, in the case of a judgment
25 entered without contest by concession, consent, or default,

1 none of the issues is actually litigated. "Therefore the rule
2 of this section does not apply with respect to any issue in
3 a subsequent action."

4 Finally, Your Honors, with regard to the question
5 of collateral estoppel or res judicata or issue preclusion,
6 we suggest that -- and writers have suggested that there is a
7 general fear that overuse of issue preclusion will cause liti-
8 gants to overtry their cases and therefore you get a
9 reverse-adverse effect, because the reason for the collateral
10 estoppel rule in the first place is to preserve the judicial
11 economy and not extend it.

12 Also, Your Honors, I would suggest that collateral
13 estoppel should never be used as a trap for the unwary.

14 Once again, Your Honors, we would suggest that
15 an affirmance of the Iowa Court of Appeals would provide a
16 check against abandonment by neglect, and a balancing process
17 between the regulated, the regulator, and the public.

18 We thank you very much, Your Honors, and it's been
19 an honor to be here.

20 MR. CHIEF JUSTICE BURGER: Do you have anything
21 further, counsel?

22 MR. JOHNSON: A very short one.

23 MR. CHIEF JUSTICE BURGER: You have one minute
24 remaining.

25 ORAL ARGUMENT OF BRUCE E. JOHNSON, ESQ.,
ON BEHALF OF THE PETITIONER -- REBUTTAL

1 MR. JOHNSON: Thank you, Mr. Chief Justice. I'd
2 just like to call the Court's attention to the Puritan case
3 cited by the respondent, wherein the Court in Puritan says
4 that the Congress evidenced its intent to make the Commerce
5 Commission and the federal district court the exclusive forums
6 for Section 9 damage action. And their reason for that is
7 that after Section 9 was enacted by Congress, it enacted the
8 Carmack amendment on freight loss and damage claims, which
9 specifically gave actions in state or federal court.

10 Secondly, that the Johnson case, the 9th Circuit
11 case cited by respondent in his argument as his foremost case,
12 specifically states that it is deciding the case under federal
13 law and declined to apply state law. And that case was tried
14 in a federal district court.

15 I have nothing further, unless there are some
16 questions.

17 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.
18 The case is submitted.

19 (Whereupon, at 2 :09 o'clock p.m., the case in the
20 above-entitled matter was submitted.)
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CERTIFICATE

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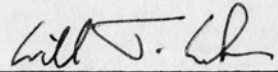
No. 79-1336

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

V.

KALO BRICK & TILE COMPANY

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