In the

ORIGINAL

Supreme Court of the United States

UNITED TRANSPORTATION UNION, Petitioner	)	
v.	)	NO. 80-1925
LONG ISLAND RAILROAD COMPANY ET AL.	)	

Washington, D. C.

January 20, 1982

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UNITED TRANSPORTATION UNION,

Petitioner

v. : 80-1925

LONG ISLAND RAILROAD COMPANY ET AL.

Washington, D.C.

Wednesday, January 20, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

EDWARD D. FRIEDMAN, ESQ., Washington, D.C.; on behalf of the Petitioner.

JOSUHA I. SCHWARTZ, ESQ., Office of the Solicitor, Washington, D.C.; as amicus curiae.

LEWIS B. KADEN, ESQ., New York, N.Y.; on behalf of the Respondent.

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C O N T E N T S

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PROCEEDINGS

CHIEF JUSTICE BURGER: We will hear arguments next in United Transportation Union against Long Island Railroad Company and others.

Mr. Friedman, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF EDWARD D. FRIEDMAN, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case involves the application of the federal railway laws to state-owned and state-operated railroads transporting a heavy volume of interstate freight and transporting as well a heavy volume of passengers, both commuter and non-commuter.

The challenged statute is the Railway Labor Act. The Railway Labor Act, as evidenced by the numerous decisions in this Court involving it, is a unique statute involving a unique industry. It was negotiated some 55 years ago in conferences between the railroad industry and the railway labor organizations induced by President Coolidge at that time, and they worked out in 1926 this statute as the basis for developing a special rule of labor relations for the railroad industry. The date of enactment was 1926.

The challenging railroad is the Long Island Railroad. The Long Island Railroad is one of the oldest railroads in operation. It has been subject to federal railway laws from the very inception of the earliest law in 1887, the Interstate Commerce Act.

The question in the case is whether the State of New York by its act of taking over the business of operating the Long Island through stock purchase from the Penn Central Railroad in 1966 withdrew the railroad from the reach of the commerce clause and therefore from the reach of the Railway Labor Act under the concept set down by this Court in the National League of Cities v. Usery.

The District Court held that New York did not succeed in withdrawing this railroad from the reaches of the commerce clause and of the Railway Labor Act, and in so holding it found that this railroad served as a critical physical link in the movement of a heavy volume of interstate freight with other railroads via the New York City gateway connecting Long Island with the rest of the United States. And the District Court concluded that the case was governed by California v. Taylor.

The Court of Appeals reversed, holding that the action of the state in operating the railroad was a sovereign act within the National League concept. It recognized that the Long Island Railroad serves as a crucial

link in the movement of interstate freight. Nonetheless, it found that the railroad served an important function in moving a heavy volume of commuters between New York and Long Island, and on this basis distinguished the California v. Taylor case.

Now, when the New York --

QUESTION: You're saying New York and Long Island. Isn't Long Island in New York?

MR. FRIEDMAN: Long Island's in the State of New York.

QUESTION: That's what I thought, yes.

MR. FRIEDMAN: Long Island, however, is a very expansive body of real estate. It extends --

QUESTION: Well, so is Texas, but it's still one state.

MR. FRIEDMAN: Oh, it's within the state. This railroad operates within the State of New York, but it operates well outside of the City of New York. It serves the entire area of Long Island, which is 126 miles long and 23 miles wide. It services the towns in Long Island. But it's a freight railroad and it's a commuter railroad. I'll get to that in just a second.

The time for purchase, the railroad, as we have noted in our brief, assured the public and assured the employees of the Long Island Railroad that all it was doing

was buying the stock, the railroad remained a private corporation, the employees remained private employees. It said that everything was the same; the only thing that was different was that there was a new set of owners and a new board of directors, but otherwise the operation of the railroad was unchanged; the same people would be pounding the same typewriters and pulling the same switches, and that the railroad employees would remain railroad employees subject to federal railway law, specifically the Railway Labor Act. And that's the way it has been.

Now, this railroad is the only common carrier by railroad serving Long Island, serving the Nassau and Suffolk County in Long Island, the furthestmost reaches. There's a map of Long Island which I attached to the brief to the sense of the relationship of the trackage in this railroad to the trackage in New York City.

The railroad has something like 325 miles of track radiating throughout the entire length and width of Long Island, serving the Long Island towns.

QUESTION: When it's running.

MR. FRIEDMAN: When it's running. Well, I understand, Your Honor, that they're --

QUESTION: I used to live up there.

MR. FRIEDMAN: They're making efforts to run it on time, and I think they're succeeding fairly well. The

railroad does connect with -- its terminal is the Pennsylvania Station in New York City, and it connects with the Pennsylvania Station over the old Penn Central tracks, now the ConRail tracks, over which it has trackage rights. So its tracks connect with the ConRail tracks, and it moves under the East River ConRail tunnel and terminates in Pennsylvania Station.

QUESTION: Do they unload some of the freight onto ConRail trains?

MR. FRIEDMAN: Yes. The freight is unloaded -- it interchanges its interstate freight through ConRail at Long Island yards called Fresh Ponds, Long Island. It's at that point that the railroad connects with the national railroads throughout the United States. The interchange takes place at Fresh Ponds. At that point the Long Island Railroad will move the freight cars to various classification yards which it has in Long Island for eventual distribution throughout the Island.

QUESTION: How many freight cars do they have?

MR. FRIEDMAN: Well, on this record the District Court found 41,000 freight cars for the year 1978.

QUESTION: So far I've never seen one. I've never seen one.

MR. FRIEDMAN: Well, if you look in those yards --

QUESTION: They only did four percent freight.

MR. FRIEDMAN: No -- four percent freight?

QUESTION: Four percent of the revenue of the Long Island Railroad is freight.

MR. FRIEDMAN: Well, the figures that I have, and the reports of the Interstate Commerce Commission are in this record, shows $20 million of freight --

QUESTION: Well, this is where I got the four percent.

MR. FRIEDMAN: No.

QUESTION: I guess I read the wrong figure.

MR. FRIEDMAN: Well, I think Respondent uses the figure four percent, but in using that figure he's using the subsidies which the state receives, I believe, from the State of New York. If we're looking at revenue, the passenger revenue on the Long Island for the year '78, which is the year on which this record was based, was something in the neighborhood of $126 million, and the freight revenue was in the neighborhood of $20 million, so the ratio is about 6 to 1. Although the railroad is principally a commuter railroad, it carries a significant amount of interstate freight. And in the yards one will see freight cars bearing the logos of railroads from every corner of the country. There'll be the Southern Pacific, and the Burlington, the Illinois Central, the Florida East Coast --

QUESTION: Is this the Long Island Railroad's yard

or Amtrak?

MR. FRIEDMAN: These are Long Island Railroad yards. There are seven of them. And the carriage of freight is a principal part of its operation as far as this area is concerned. It carried 2 million tons of freight in 1978 on the 41,000 cars. It returned those cars either loaded into the interstate system through ConRail and spread throughout the United States in the connecting carriers, or if it didn't have enough traffic to fill those cars, it had to return those cars unloaded, and those unloaded cars would be returned to the national freight car pool in the United States through the interchange with ConRail.

The freight revenue is derived largely from divisions, and these divisions are shares of a line haul rate charged by the originating carrier, which may be the Burlington coming out of Washington, it may be a railroad coming out of the middle west. It will be deriving its freight from every part of the country.

Now, its share from the divisions, which is all subject to the Interstate Commerce Act, was about $12 million in 1978 exclusive of surcharges, and the $12 represented about 18 percent of the line haul revenue. The Long Island's share was 18 percent. It also added to the divisions something called a surcharge under the Railroad Retirement Act, and that surcharge was 12 1/2 percent flat,

which produced another $6 or $7 million in 1978. The surcharge, as the Respondents point out in their brief, were recently disallowed by the Interstate Commerce Commission as not compatible with the standards. The case involving the surcharge was before this Court on petition of the Long Island Railroad a few years ago in a case called Long Island Railroad v. Aberdeen and Rockfish Railroad in which this Court remanded the case to the Interstate Commerce Commission with directions as to the handling of the refunds on the disallowed surcharge.

Long Island at the time of the surcharge proceeding filed an application with the ICC for an increase in the amount of its divisions; it wanted a greater share. That was disallowed. And most recently, following the disallowance, it filed a new set of surcharges in about the same amount as the disallowed surcharges of 12 1/2 percent, and this time its action was taken under the Staggers Rail Deregulation Act of 1981 which allows carriers to file surcharges of this nature. These surcharges were also challenged by the national railroad, and that proceeding is now pending before the Interstate Commerce Commission.

Now, in addition to this activity, the railroad carries -- it sells 260,000, on this record, commutation and non-commutation tickets. Of the 260,000 tickets, about 90,000 represent commuters traveling to and from Long Island

into New York. The balance represents passengers who are buying fares at the basic rate. The word "commuter" is derived from the word "commutation" which means to lower the rate in a situation of this kind.

As I said, its revenues from its passenger revenues were about $128 million, and its passenger equipment is similar to that used by rail passenger railroads, similar to that used by Amtrak. The freight is pulled by diesels. The passengers are pulled by electric trains, by electric cars, and by diesels.

Now, the essence of National League of Cities is that Tenth Amendment shields the state from intrusions into its sovereign affairs which threaten its continued existence as a state within the federal system, and this is not such a case. In California v. Taylor on which the District Court relied and which we feel is the governing case, California v. Taylor held that when California elected to take over the business of running a railroad serving the San Francisco docks, it placed itself in the position of a railroad employer subject to the railroad laws like any other railroad business. And we submit that when the State of New York elected to take over the business of running the Long Island Railroad it, too, placed itself in the position of Penn Central as a private railroad subject to the federal railroad laws and --

QUESTION: Mr. Friedman, may I ask, did Congress recently amend some statute addressed expressly to this railroad?

MR. FRIEDMAN: Yes, it did, Your Honor.

QUESTION: What was that?

MR. FRIEDMAN: That was an amendment to the Railway Labor Act. That arose, as I read the record, in connection with the new development in which ConRail, which has been servicing the passenger service between New York City and New Haven, is going to yield that service. A new corporation has been formed called the Amtrak Commuter Corporation which either will take over the service over a state will take over the service.

New York made its position known to the Congress that if the Congress would amend the Railway Labor Act to exclude the commuter railroads altogether, then New York State would be interested in taking over the commuter service to New Haven. Congress refused to amend the Railway Labor Act to exclude commuter railroads, but it did provide a new system which extends this interminable process of negotiating under the Railway Labor Act which was developed in 1926 by about 240 days. Now as a matter --

QUESTION: It really makes it interminable.

MR. FRIEDMAN: It makes it interminable, yes, Your Honor. Well, it now provides that the President of the

United States must designate a presidential emergency board in the railroad commuter situation upon application --

QUESTION: But what was the explicit reference to this railroad?

MR. FRIEDMAN: The reference was to any commuter railroad --

QUESTION: But not this one by name?

MR. FRIEDMAN: No, Your Honor. It's a railroad which is publicly financed. I can give that to you.

QUESTION: Are you suggesting whatever the general language is, the Long Island falls within it.

MR. FRIEDMAN: Oh, yes. The Long Island is clearly within it and it's in consequence of the -- I have it here. It's at page 8-A of the blue brief. It applies to -- "The provisions of this section shall apply to any dispute subject to this Act between a publicly funded and publicly operated carrier providing rail commuter service, including Amtrak." Publicly funded and publicly operated. This railroad --

QUESTION: Well, my impression had been, as there is here, an explicit reference to Amtrak Commuter Services Corporation.

MR. FRIEDMAN: There is an explicit reference.

QUESTION: There is to it, but there's no comparable one to the --

MR. FRIEDMAN: No. The definition, which I do not -- the definition says, "'Commuter authority' means any state, local or regional authority, corporation or other entity established for the purpose of providing commuter service, including the Metropolitan Transportation Authority, the Connecticut Department of Transportation, the Maryland Department of Transportation," et cetera -- Pennsylvania, New Jersey, Massachusetts, Port Authority.

QUESTION: Well, which one is it that operates the Long Island?

MR. FRIEDMAN: The Metropolitan Transit Authority.

QUESTION: Oh, that's the reference.

MR. FRIEDMAN: MTA.

QUESTION: I see.

MR. FRIEDMAN: And MTA is a party to this action.

Now, under that statute the President must appoint a presidential emergency board. Under normal circumstances in the freight service there's a 60-day moratorium period during which the board operates. In the commuter service it's now 120 days; the time has been doubled. And if that fails to produce an agreement, then the President must appoint another emergency board, presidential emergency board at the request of the parties or the governor, and this presidential emergency board goes into something called a last offer selection process in which it entertains the

positions of the parties, and it will --

QUESTION: And is there a prohibition in that statute against striking while that interminable procedure goes on?

MR. FRIEDMAN: Yes. The provisions of the Railway Labor Act would apply to prohibit any strike until such time as the case has been freed of all of these loops through which the collective bargaining goes. And there's one other provision in that act which is new. I should say that the Railway Labor Act is designed to avoid strikes. Its whole purpose was to minimize and avoid strikes, and it's been successful in that regard.

The amendments to the commuter act prohibit secondary strikes, which is something new in the railway labor jargon, if the Court remembers the secondaries in the Jacksonville Terminal case. But secondary strikes, strikes by the freight service cannot in any way be extended to the commuter service; so it ensures continued operation of the commuter service. If there's a commuter dispute it goes through this interminable process plus 240 days.

Now, California v. Taylor was expressly confirmed in National League of Cities. It was the only example given in footnote 18 of the kind of an activity which is not to be regarded as traditional; and it was at that time said in explanation that the states have never regarded the

operation of a railroad in interstate commerce as a traditional activity, and that's the case here. New York has attested to this fact. It's respected, observed all of the federal railway laws, including the Railway Labor Act, from the time of its purchase. It questioned the Railway Labor Act alone and then only on February 8, 1980 in the context of this suit. And all of the other railroads either owned, or operated, or subsidized in the commuter service or in the freight service or in the terminal service throughout the United States owned, operated or subsidized by states regard those railroads as not sovereign activities but as activities of railroads subject to railroad laws. And so it must be.

As Justice Rehnquist noted in Frye v. U.S., if I may paraphrase it, the activity of a state in running a railroad in interstate commerce is so unlike the traditional government activities that it has always been regarded as a part of a nationwide railway system; and that's the fact today.

Long Island Railroad is unique. It's the only railroad owned -- it's the only freight-commuter railroad owned and operated by a state, carrying the amount of freight and the amount of passengers which it has.

So we submit that this case falls well short of satisfying this Court's test of traditionality as explicitly

identified in footnote 18. But even apart from the foregoing, as we point out in our brief, we feel that the Respondents have failed to satisfy any of the tests of the National League of Cities; and I'd like to refer explicitly to the intrusion test, the concept being that the federal government may not intrude into the sovereign affairs of the state by interfering or disrupting its processes in which it functions as a state within a national system.

The Railway Labor Act and the railway labor laws have not intruded into the Long Island Railroad. They were in place in 1887, the Interstate Commerce Act. The earliest labor act was in 1888. This law was passed in 1926. When the State of New York purchased the stock of the Long Island Railroad it knew that this was a railroad. It knew that the tradition in the other cases -- and this was before U.S. v. California, which is a 1936 case -- well, this was after the California case, and it was after California v. Taylor.

QUESTION: Well, it might have thought that unless it purchased it, the road would continue to be subject to the Railway Labor Act.

MR. FRIEDMAN: Well, it didn't. It explicitly announced at that time that the Railway Labor Act would continue. It classified this corporation as a private corporation, and it has continued, even in this case as the District Court points out, all of the processes of the

Railway Labor Act are respected.

I should like to reserve the balance of my time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Schwartz.

ORAL ARGUMENT OF JOSHUA SCHWARTZ, ESQ.,

AS AMICUS CURIAE

MR. SCHWARTZ: Thank you, Mr. Chief Justice, and may it please the Court:

The United States has participated in this case in order to defend the constitutionality of the Railway Labor Act which has been called in question in this case as it is applied to a railroad operated by a state instrumentality.

The case, of course, involves the application of the Court's decision in National League of Cities v. Usery. It is our basic submission that the decision of the Court of Appeals under review represents a substantial and unwarranted alteration and extension of the test enunciated in National League of Cities regarding the doctrine of intergovernmental immunity. And we submit that a careful reading of the Court's opinion and an examination of the considerations that underlie it would lead the Court to conclude, should lead this Court to conclude that the decision of the Court of Appeals should be reversed.

In National League of Cities the Court held --

QUESTION: What if none of the statements had been

made your colleague alluded to? What if they had simply purchased the stock and operated as they have operated with no public utterances about the nature of the enterprise?

MR. SCHWARTZ: While those factors certainly, I think, strengthen the Petitioner's case here, we don't think their absences would be sufficient to require a different result from that for which we contend. There are certainly many other indicators of the state's subjective intentions in this respect, and that in itself, as I hope to explain, would not be sufficient.

The state chose as a matter of state law to classify the employees of this railroad as not state employees. Perhaps that's a public utterance, but we would submit it's an utterance of the most fundamental kind. If the state had taken no action at all, we would think that one would still look to the conduct of the other states and the expectations of states generally, and particularly in this area we would look to this Court's decision in California v. Taylor, which had been decided nine years earlier, in which the state must be bound to have been aware in taking over the railroad.

It is our submission that a state could not by its unilateral action in assuming a function which has long been subject to what we contend is a very core aspect of the commerce power, cannot remove that authority away from

Congress.

We see this case as most fundamentally analogous to the Court's decision in Case v. Bowles in which this Court also took the trouble to distinguish rather than overrule in National League of Cities. The Court explained that the power there involved the war power which was the basis on which the Court upheld the emergency price restrictions. And the issue in that case was one of the purposes for which the United States and the federal Constitution were created, and that that required that the case be distinguished.

QUESTION: Is it your position that there is no way at all that a municipal corporation could buy and operate a railroad without being subject to the federal jurisdiction?

MR. SCHWARTZ: It is our position that given the history which we do have that the way that could be accomplished is by amendment of the Railway Labor Act or amendment of the Constitution.

QUESTION: Well, I mean given your view of the present law, is there any corporate mechanism or any other way of handling the transaction that would take them out from under the RLA?

MR. SCHWARTZ: Essentially, as long as the railroad operates in interstate commerce pursuant to the

terms defined by the Interstate Commerce Act, which is not necessarily true of all commuter railroads but has been held to be true here and is not challenged in this Court here, that is our position.

QUESTION: Would that be your position if the state had constituted the employees of the railroad employees of the state, which I understand did not happen here.

MR. SCHWARTZ: Yes, that would be our position. Again, that is one of the factors which we feel tends to reveal the state's subjective intent; and there is at least language in the Court's decision in National League of Cities which looks to the state's subjective intent. I believe Mr. Justice Rehnquist's language is the states have not regarded.

Now, we see several elements there: the intention of the particular state involved, but more importantly, the intentions of the state generally. One state with an anomalous pattern of behavior we think cannot change the character of what is essential to federal sovereignty as opposed to what is essential to state sovereignty.

QUESTION: But if a railroad really is just a commuter line and has never been part of the interstate system, the answer to the Chief Justice's question is yes, they can -- it will not be subject to the Railway Labor Act.

MR. SCHWARTZ: Right. But that's not a change. If that were so, that would already be --

QUESTION: Yes, but the question was is there any way that a city can acquire a railroad without being subject. Yes, there is.

MR. SCHWARTZ: Yes, there is, if it has chosen to acquire a railroad which is not an interstate railroad. We would also submit that it was quite obvious to the State of New York that this was the character of the railroad it was buying; and there has been no contention here, and I think we would stoutly resist any contention that Congress drew an irrational line in defining as carriers subject to the Interstate Commerce Act carriers which do business in interstate commerce. Congress in fact did not reach out to the furthest recesses of its commerce power. We would submit that it's likely that the operations of an intrastate commuter railroad, particularly serving the City of New York, might be held to sufficiently affect commerce --

QUESTION: To be within the reach.

MR. SCHWARTZ: Yes, but Congress did not reach out that far. It kept its elbows a little closer in to its body, and we think reasonably so; and the State of New York nevertheless ran afoul of the line that Congress drew in defining those interstate railroads, i.e., all carriers which participate in interstate commerce.

QUESTION: And the purchase of the state does not change that.

MR. SCHWARTZ: Yes, that's correct, Your Honor.

QUESTION: So, I mean you don't have to go any further than that, do you? Once it's declared to be in interstate commerce, under the Interstate Commerce Act it comes under the RLA, and the fact that a state purchased it doesn't change that point.

MR. SCHWARTZ: Because after the decision in National League of Cities we would be obliged to say that it is because of the sequence there that is so, whereas if the Railway Labor Act were enacted in 1981 and the Long Island Railroad had been a state function like many other states, had operated for 30 or 40 years, the answer might be different.

QUESTION: I guess I was unsuccessful in trying to get you not to rely solely on the League of Cities. I don't think you need it.

MR. SCHWARTZ: I'm not sure I understand what you're driving at, Mr. Justice Marshall. It is stoutly contended here that National League of Cities is applicable. We resist that. And it is the law of Court.

QUESTION: That's where I was trying to get.

QUESTION: But you'd be making the same arguments if National League had never been decided.

MR. SCHWARTZ: I think that's a question that's really inherently incapable of resolution, Mr. Chief Justice, with all due respect. I don't know how to say what we would be arguing. We would argue for the same result, I am sure.

QUESTION: There wouldn't be a case here except for National.

MR. SCHWARTZ: That is --

(Laughter.)

MR. SCHWARTZ: I think perhaps my brother Mr. Kaden might answer that better, but I suspect that is right.

In National League of Cities the Court held that Congress -- excuse me.

QUESTION: You perhaps would be trying to get us to decide the issue the same way it was decided in the National League of Cities.

MR. SCHWARTZ: Yes. Complete with the recognition that there are state functions which are not traditional and integral to state sovereignty, as we contend here is the case with the operation of the Long Island Railroad.

I'd like to compare this case with National League of Cities itself to point out a few salient features which we think require distinguishing that case on the assumption that it is the law with which we must contend.

The statute at issue in National League of Cities

was a very different statute, and the chronology was a very different statute. It was very different. And we contend that those are very important factors.

In National League of Cities the Court was confronted with some 1974 amendments to the Fair Labor Standards Act. Those amendments eliminated a longstanding immunity for state and local government employees who had been exempted from the coverage of that act. The act itself set rigid standards, and the Court focused on the rigidity of those standards, for the wages and hours of employees. But as I say, state and local government employees were not covered. And that was so starting in 1938 when the Fair Labor Standards Act was enacted.

Congress reversed fields rather sharply in 1974, subjecting what this Court described as almost all public employees employed by the states or various political subdivisions to the Act. Among the functions covered were police protection, fire prevention, public health, sanitation, parks and recreation. And those were activities which the Court described -- and I quote again -- as "well within the traditional operations of state and local governments.

This case stands in sharp contrast to National League of Cities. The statute is one of the most narrowly drawn instruments you could imagine. It applies to one

industry, an industry which the Court has described in California v. Taylor as a state within a state, noting its unique characteristics. And of course, as has been said, it is in the history which the Court singled out, characterizing in National League of Cities as one not within the realm of protected state sovereignty.

Another factor which we believe serves to distinguish this case from the National League of Cities is the pervasive and longstanding character of federal regulation of the railroads. It really needs no citation to point out that the Interstate Commerce Act of 1887 whose terms determine the applicability of the Railway Labor Act is the seminal exercise of the federal commerce power. It's really the context in which this Court has defined that power. And the subject, of course, was railroads, and this Court has essentially invariably upheld the exercise of that power. There are few areas --

QUESTION: Mr. Schwartz, had not the federal government been in the business of regulating wages for quite a while when the National League of Cities case was decided?

MR. SCHWARTZ: Yes, Mr. Justice Stevens, but we would make several distinctions. First, it is not nearly so long as it had been in the business of regulating railroads.

QUESTION: Well, about 40 years though, isn't it?

MR. SCHWARTZ: Yes. But the point that we consider truly critical --

QUESTION: There's a constitutional distinction between 40 years and 60 years?

MR. SCHWARTZ: No, not necessarily, Your Honor, I would answer, but we think what is the clear way of resolving this case which avoids some gray areas which may exist is to point to the fact that the federal statute and cognate statutes had been in effect long before the state came into the area. Therefore, the state could have no reasonable expectation of freedom from the federal regulation, and it assumed whatever burden that regulation carried. We, of course, contend that was quite a minimal burden.

In National League of Cities the states unquestionably got there first. There is some dispute between the parties as to exactly how long the states had been doing some of those functions, whether police was a public function in the nighttime or the daytime in the City of New York in 1652 or 1852. And we could debate the historical points, but we think it's simply unnecessary to get into those areas which may have a shade of gray because it cannot be denied that the federal government pursuant to its core commerce power functions got here a long time before the state. And although I don't think it's

necessary, it seems to me a fine point is put on the matter by the fact that the Court had already decided California v. Taylor and had spoken as to what happens in exactly this situation.

There may well be issues as to how many years is enough to make something traditional, and I think it's probably appropriate to point out that those issues will not likely escape this Court even if they escape decision here. There's a lot of discussion both in Respondent's brief and particularly in the briefs of some of the amici curiae about mass transit generally. We, of course, have submitted in our brief that these commuter railroads, because of their history and physical nature, are distinct from mass transit generally.

I don't know whether I should telegraph punches to the Justices, but the Justices may wish to note that a District Court in Texas has invalidated provisions of the Fair Labor Standards Act as applied to mass transit. The court's direct appeal jurisdiction seems relevant. The Solicitor General has not determined yet whether to file a jurisdictional statement, but it has in other litigation been the Government's position that those are not traditional government functions. That case will probably wend its way here, and we urge, particularly because of that fact, that there is no reason to reach out for those issues

which we think need not be decided here.

We do stress that there are facts in this case which make it susceptible, we think, of a uniquely narrow resolution. This is apparently the only commuter railroad that's state owned and also has a freight service. It's one of two, possibly three commuter railroads that are operated by a state entity. It's generally not a very broad question. Certainly the state showed by its conduct -- that conduct offers exquisite testimony as to what the state's expectations were.

We note that the Respondent has pointed out its possible interest in operating some of the ConRail railroads. Of course, one thing that should be obvious is that some of those, one of those at least, runs over into Connecticut. I gather that there's a railroad in the Chicago area, a commuter railroad, that runs over into Indiana. Truly the Court will be aware of the problems that would be created if those railroads were held to be outside the federal commerce power. It strikes us that these are precisely the situations that the commerce power was created to deal with. This is one of the reasons why this United States was created and the Constitution adopted, to eliminate the problems that might arise if Connecticut attempted to apply one system of labor relations and New York another to employees on a road that runs from New Haven

to New York.

Here we're getting back to almost 200-year old conceptions of internal trade barriers. We submit that all these things which may sound fanciful illustrate the fundamental commerce power question which is entailed today.

There are many reasons why we believe the Court should not abandon the language in National League of Cities which comes, as I understand it, from Mr. Justice Rehnquist's dissent in Frye v. United States, stressing the importance of traditional functions.

It seems to us that this is essential, inherent in the Constitution itself. As we read not only National League but tax immunity cases, the reason for this immunity is partly because the states were here before there was a United States. But of course, that makes it perfectly appropriate to look to the functions which the states did or at least were akin enough to those functions to be regarded as within the state sovereignty, as distinguished from those functions which were not at all akin to state functions in place in the constitutional period.

We would also note one very practical factor touching on separation of powers concerns. We would suggest that if Respondent's alternative test is adopted, Congress would simply have no way of knowing when it enacts a statute which might in the future come to apply to a state

instrumentality whether it will remain constitutional. To adopt the rule that something merely deemed essential pursuant to the political process of a state is within the state sovereignty, by that reason alone statutes will become unconstitutional or not with shifting social and economic considerations; Congress and the lower courts will be left without a compass. And it seems to us inappropriate to place on Congress by judicial decree what is essentially a sunset requirement; that Congress be faced with the requirement of going through each of its enactments on a periodic basis and determining whether or not changing conditions had made them unconstitutional.

This might be a desirable thing to do, but we see nothing in the Court's decisions or the Constitution itself which requires it. Accordingly, when a state has entered into the domain in which the federal government has long been supreme, assuming a function which is not a traditional integral state function, we would submit that the state is not in the position to contest the operation of the supremacy clause, and that the decision in National League of Cities simply has no application.

We urge that the decision of the court below be reversed.

Thank you, Mr. Chief Justice.

CHIEF JUSTICE BURGER: Mr. Kaden.

ORAL ARGUMENT OF LEWIS B. KADEN, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The question before the Court in this case is whether Congress has the power to require a state to permit certain of its employees, employees involved in aspects of public transit, the right to strike.

This Court has determined that the Constitution imposes an affirmative limitation on the exercise of the federal commerce power in certain circumstances. And we submit that the facts of this case -- the fact of whether the employees of this state owned and operated railroad should have the right to strike by virtue of federal mandate -- fits easily within the critical parameters of the immunity guaranteed by National League of Cities.

Those parameters are two: first, whether the nature of the decision is such, the choice made the state is such that it touches so closely on the essence of sovereignty as to quality for immunity.

QUESTION: How about the duty to arbitrate?

MR. KADEN: We believe that if the federal government prescribed that the state must submit its disputes to arbitration, it would be just as intrusive as prescribing for the state --

QUESTION: How about the duty to bargain?

MR. KADEN: And the same would be true in the duty to bargain. The essence of --

QUESTION: And then I take it about any regulation.

MR. KADEN: That's right. The essence of sovereignty is the displacement of the state's choice, if that choice is in an area that indisputably affects an attribute of sovereignty.

QUESTION: So it's just not strike. It's right across the board any regulation.

MR. KADEN: It's the structure of employment relations.

QUESTION: How about safety?

MR. KADEN: Safety may be of a different order. There may be matters -- and I think this is indicated, for example, in Justice Blackmun's concurrence in National League of Cities and is picked up in the restatement of the National League of Cities test in the surface mining case last term.

There may be circumstances in which after a service provided by the state qualifies for this immunity from federal regulation there is yet another test to apply: whether the federal interest is so great as to override that immunity. That is not, in my judgment, a balancing test. That is not looking at the weight of the federal interest on

one side and the state interest on the other. It is rather looking at whether the state has qualified for the immunity and then asking the further question whether the federal interest is so great as to deprive the state of the immunity.

QUESTION: Are you saying it's a qualitative rather than a quantitative weighing test?

MR. KADEN: It's a test that qualifies the immunity. After the state has qualified for the immunity, then there's a further question to ask whether in this particular case the nature of the decision is such that the federal interest supersedes the state immunity.

That would be true, I would submit, for example, in the 55-mile an hour regulation that was discussed yesterday or in certain safety or environmental regulations such as --

QUESTION: But isn't safety a matter that traditionally was within the police power of the state to regulate?

MR. KADEN: Safety is indeed within the --

QUESTION: A classic example of traditional state regulation?

MR. KADEN: Exactly. And that may be sufficient to qualify it for the immunity.

QUESTION: So safety ought to be -- what about rate regulation, ICC regulation?

MR. KADEN: Rate regulation as it affects freight traffic we concede is subject to the federal power. Freight traffic affecting or in interstate commerce is not the subject of our claim to immunity, but rather commuter transit which is inextricably tied to the provision of transit services in the metropolitan area of New York.

QUESTION: How about environmental regulation? Are they immune from that, too?

MR. KADEN: There may well be environmental regulations in which the state loses its immunity because of the need for uniformity and because, I suggest, that in certain circumstances the nature of the actor does not matter. When the state structures employment conditions, it is acting at the heart of its sovereign power.

On the other hand, as you indicated, Justice Stevens, in your separate opinion in National League of Cities, when the governor's limousine drives on the roads, or when the state dumps its refuse, or when the Capitol janitor burns coal in the furnace, he's performing an activity that is indistinguishable from the kind of activity performed by private actors subject to the commerce power. And it does no damage to the state sovereignty to say that the same regulatory standard will apply to him when he's engaged in those activities.

By contrast, when the state chooses a location for

its state capital, the subject of Coyle v. Oklahoma, or when the state chooses whether to permit its employees to strike or not, then it's acting in a way that touches the heart of sovereign power.

QUESTION: Well, also in a way that's indistinguishable from when a private employer does it.

MR. KADEN: No, I don't think so, because it is at the essence of sovereignty to have a state capital. It is not just --

QUESTION: No. I'm talking about the strike. I agree with you on the capital. Only the state can decide where to puts it capital.

MR. KADEN: And I think in the case of the right to strike it's also the essence of the sovereign decision for this reason. When a state chooses to engage in collective bargaining as opposed to a private company, what the state is choosing to do is to describe a method of sharing its governmental responsibility. It is saying to other interest groups you petition the legislature to get your share of state resources, your share of the pie, but it's saying to employees you have a special method of participating in decisions affecting you that the government's going to make.

That's what gives rise to the longstanding debate about whether collective bargaining in government is an

undue delegation of governmental authority. Most states, including New York, have concluded that it's not an undue delegation. But it's the state's choice to make, we submit, because it's so fundamental a choice in terms of the exercise of state sovereignty.

QUESTION: Would that be equally true if they operated a spaghetti factory?

MR. KADEN: No, not necessarily?

QUESTION: Why not?

MR. KADEN: The state goes into a business. When the state is engaged in an enterprise, as, for example, the state of South Dakota is in the cement business that was at issue in Reeves v. Stake, or even when the state goes into the business of subsidizing some private activity, then the state is entering the marketplace. It's entering an activity in which it interrelates, as the Chief Justice said in City of Lafayette, with private --

QUESTION: Those words describe the railroad business, too.

MR. KADEN: No, it doesn't. It doesn't describe this railroad for this reason. The railroad's past may well have been that it was part of the world of railroading; it was part of the interstate system of railroads.

QUESTION: Well, so was my spaghetti factory.

MR. KADEN: But that's not its present. The state

entered this railroad business because if it didn't enter it, the railroad was bankrupt and would be abandoned.

QUESTION: So what?

QUESTION: My spaghetti factory is going bankrupt?

QUESTION: So what on the constitutional point?

MR. KADEN: Exactly. Let me take first --

QUESTION: So what?

MR. KADEN: -- The question of so what in terms of the Constitution.

QUESTION: What's the difference whether it goes broke or not?

MR. KADEN: Because the state made a judgment, a judgment, as I say, at the heart of its sovereign power, that the provision of public transit service to this 260,000 passengers a day was essential to the social and economic well-being of the metropolitan New York area, and that's what separates it from the spaghetti factory.

QUESTION: No, no. My spaghetti factory is essential for the jobs in that local neighborhood which is having a very difficult economic time.

MR. KADEN: I don't think that the employment possibilities provided by a private business enterprise are sufficiently at the heart of the exercise of sovereign power to qualify in the way I described.

QUESTION: Well, wasn't the Long Island Railroad a

private --

MR. KADEN: It was a private railroad until 1966.

QUESTION: Right.

MR. KADEN: At that time --

QUESTION: So it was just like the spaghetti factory.

MR. KADEN: At that time it was a bankrupt private railroad --

QUESTION: Just like some spaghetti factories.

MR. KADEN: Exactly. And the state was faced with the choice whether to take that railroad over and operate it or to let it be abandoned. Today that railroad operates under state control with an operating ratio of 227 percent, and I submit that we don't have, even in these troubled economic times, you can't run a business with an operating ratio of 227 percent. It runs because it's a vital and essential public service. And it runs, in addition, under the supervision of a state agency that has the responsibility for --

QUESTION: Do you comply with all of the federal regulations governing that railroad?

MR. KADEN: Excuse me, Mr. Justice Marshall?

QUESTION: Does the state follow all of the interstate commerce regulations, the federal ones?

MR. KADEN: The state with respect to its freight

traffic follows the jurisdiction of the federal statutes.

QUESTION: Well, name me the federal rules and regulations that the state does not follow.

MR. KADEN: The state takes the position in this case that it is immune from those federal regulations affecting employment conditions on its passenger railroads.

QUESTION: Now would you answer my question. Which ones do they fail or refuse to follow?

MR. KADEN: We take the position that with this Court's permission, if the Second Circuit is affirmed, we will not --

QUESTION: I'm still trying to get an answer --

MR. KADEN: We will not --

QUESTION: Do you understand my question?

MR. KADEN: Yes, I do. We will not be subject to the Railway Labor Act, we will not be subject to the Railroad Retirement Act, we will not be subject to other regulations of the employment relationship.

QUESTION: So you're above the government.

MR. KADEN: No, we are not. The State of New York as a sovereign government under the National League of Cities decision --

QUESTION: Well, isn't the United States a little sovereign, too, a little bit?

MR. KADEN: I submit that that really was the

issue in National League of Cities. The Congress --

QUESTION: Well, did that case decide that the federal government was not sovereign?

MR. KADEN: No, not at all. It decided that the states had an immunity from the exercise of certain federal powers, in that case the federal power to prescribe minimum wages and maximum hours for certain categories of state employees. And the question before the Court here is simply whether this service, transit service provided in the metropolitan area of New York through the Long Island Railroad qualifies or not.

On the question of whether the decision qualifies, whether the structuring of employment conditions qualifies, I would submit that that really has been decided. Indeed, Solicitor General Bork in the oral argument in National League of Cities conceded in a response to a question that Congress lacked the power to authorize state employees to strike. It was not a question that was directed specifically to any particular service.

So the question really comes down to whether this service qualifies, and I would suggest that the problem before the Court is a problem --

QUESTION: Mr. Kaden, I don't mean to harp on this too long, but I really would like to understand your theory on it. I think you're arguing, in effect, that

transportation is an essential, is essential for the citizens of New York, and that sort of lends substance to your claim.

What if you felt that the provision of food was essential as a substitute for welfare, that the city felt it would be much more economical and more essential to provide the food directly; hence, a spaghetti factory, other food-producing facilities. Wouldn't the argument apply?

MR. KADEN: Let me suggest the standard that resolves the question, because these problems of which services qualify and which do not have obviously troubled the lower federal courts since National League of Cities was decided.

I suggest that the standard is threefold. One, does the serivce engaged in by the state at the time the case arises provide a collective benefit, a public benefit. In most cases it will.

QUESTION: But all cases. I mean they never would spend public money foolishly.

MR. KADEN: The state might well go into a business enterprise that doesn't involve the expenditure of public funds but instead involves some potential gain, and that may not satisfy the collective benefits then.

QUESTION: If they just went into business for profit.

MR. KADEN: Exactly.

QUESTION: There are not many of those.

QUESTION: Well, suppose the government took over Westchester Airport? Then FAA wouldn't have anything to do with it, would they?

MR. KADEN: No. The federal safety regulations applying to aircraft would still apply. The question of whether the state employees --

QUESTION: Well, do you follow the safety regulations here?

MR. KADEN: Yes, we do, and we would --

QUESTION: But you don't have to.

MR. KADEN: No. As I indicated before in response to Justice Stevens, we would continue to follow those safety regulations for which the test of uniformity requires a response.

QUESTION: Those you agree with, those you agree with.

MR. KADEN: Yes.

QUESTION: Well, suppose you didn't agree with the FAA regulations? Would you just disobey them?

MR. KADEN: No. We would challenge them as we've challenged the application of the Railway Labor Act.

Let me try to describe the standard that separates in my judgment qualifying services from non-qualifying

services. The first is collective benefit. In most cases that would be satisfied.

The second is public dependent, is this a service upon which the public depends.

And the third and most important, is this a service that is available to the public to satisfy that need elsewhere.

And it's the third that separates out, in my judgment, the California Belt Railroad, the Terminal Railway in Alabama --

QUESTION: You don't have buses or cars in New York?

MR. KADEN: We do, indeed. The buses for the most part are under the jurisdiction of the Metropolitan Transportation Authority and are subject, we submit, to the same standards as this case.

QUESTION: Well, then the Long Island Railroad is not the only means of transportation.

MR. KADEN: But the abandonment of public transit in the Long Island or in the metropolitan New York areas --

QUESTION: Create a great hardship for people who rely on them. But what about closing the spaghetti factory for people who are hungry and need that food?

MR. KADEN: I think that transit is -- there may be circumstances. I'm suggesting that this test provides a

vehicle, a standard by which to evaluate the services that the state chooses to engage in and for which it claims immunity from time to time as social needs change.

QUESTION: You would agree my spaghetti factory meets the first two prongs of your test.

MR. KADEN: Yes. I'm not sure that it meets the third. But indeed, there may be circumstances where the government becomes the only provider of food. Our society, our social fabric will have changed significantly by that point.

But in the case of the commuter railroad, the economy and the social well-being of the City of New York in my judgment collapses if we don't have public transit. I think that is a fact of which the Second Circuit took notice and which this Court can take notice. And there is no other available alternative.

Unlike the railroad at issue in California v. Taylor, unlike the oil and gas development at issue in a National League of Cities case decided by the Fifth Circuit, unlike the telephone company at issue in another case, unlike even the Boston Street Railway at issue in Helvering v. Powers, this public transit service in New York is provided by the Metropolitan Transportation Authority with subsidies amounting to more than a billion dollars a year because there is no alternative and because the public

depends on this service.

If you take away the Long Island Railroad service from the 260,000 passengers a day and you take away the bus and subway service from the millions of passengers who depend on it, the economy and the society in New York as we know it collapses.

That's why transit service has occupied such an important place in the public agenda in recent years. The fact that it didn't have that place on the agenda 50 years ago or 100 years ago does not, in my view, disqualify it from the immunity afforded by National League of Cities, because the question must be what public services are those which the state most needs.

If you take the Government's view and say a railroad is a railroad, it's still part of the national railroad system because it does this little bit of freight traffic, if we abandoned the freight, the case wouldn't be before you because the statutory jurisdiction would be eliminated. It would then be a commuter railroad operating in one state and not subject to the Railway Labor Act at all.

Because we do, because we do get three or four percent of our revenue from freight traffic, a percentage declining every year, we're subject to the statute, and therefore the constitutional issue arises.

But I suggest that if you ask yourself, if the

courts faced with these problems ask themselves is this a service on which the public depends, are there any available alternatives, the cases begin to sort themselves out. The cases where the state has exercised its sovereign power to go into a business enterprise, to go into an enterprise, as Chief Justice Burger put it in the City of Lafayette case, where it interrelates and competes with private sector actors, those cases fall aside. There's no National League of Cities immunity. But the cases like this qualify.

And if you decide, as the Government urges, that this is somehow unique, this is a railroad, it's part of the world of railroading and the immunity doesn't apply, the next case to come before you is the bus and subway system in New York.

I submit the bus and subway system --

QUESTION: When did the bus and subway system get into the Interstate Commerce Commission?

MR. KADEN: If Congress --

QUESTION: Well, has the subway changed since I was there?

(Laughter.)

MR. KADEN: I have no doubt that just as Congress in 1974 applied the minimum wage -- or 1966 -- applied the minimum wage to the bus and subway system, they could apply a collective bargaining law if this immunity established by

the Court in National League of Cities did not exist. And if Congress can tell the City of New York and the State of New York that it must permit the bus and subway workers the right to strike, then the essence of state sovereignty is clearly affected.

My point is that the --

QUESTION: Well, why do you stop with the elevator operators? Why wouldn't they be in the same category?

MR. KADEN: I'm not sure that the elevator operators are providing the kind of service that meets the test of public dependent.

QUESTION: Well, the elevator operators go into as much interstate commerce as the New York subways.

MR. KADEN: But if those elevator operators are under the jurisdiction of private companies rather than the State of New York, then they are clearly within the reach of this Court, of the Congress' power under the commerce clause. I think that was the issue decided in the Hodel case, in the surface mining cases.

Now, the Government makes a good deal of the fact that we are engaged in freight traffic. We do have a certain number of freight cars. That connects us to the federal Railway Labor Act and raises this question of constitutional immunity. But I suggest that the test in circumstances where the state is engaged in some aspect of

its activity subject to the commerce power against a backdrop where it's underlying character, its fundamental character of the service qualifies for the immunity, the incidental activity can't dictate the result.

QUESTION: Your opposing counsel suggested that that was a ratio of about 6 to 1 freight to passenger. You suggest it's just a three or four percent.

MR. KADEN: Yes. Let me clarify the statistics.

QUESTION: Is it two different statistics?

MR. KADEN: I don't think anyone doubts that in 1981 we received some $9 or $10 million from freight revenue after you deduct the freight surcharge which the ICC has required be reimbursed. That $9 or $10 million contrasts with about $200 million of operating revenue -- that's 10 percent -- and over $400 million of total revenue, including public subsidies.

And my figure of four percent, which was based on 1979, would now actually be about 2 1/2 percent for 1981 if you look at the total revenue picture rather than just the fare box revenue. And I suggest that on one level the statistics don't matter whether it's four percent or six percent or two percent. What we do know from the historical record is that the amount of freight service is declining; as a result of freight rate deregulation it is likely to decline further.

And my point is that the basic character of the railroad is a part of the transit system of metropolitan New York under the jurisdiction of the MTA, and that basic character cannot be divested by virtue of four, or two, or six percent freight any more than the print shop in the New York Court of Appeals divests the court of the National League of Cities immunity, or any more than the mechanics in the police department divest the police department of National League of Cities.

QUESTION: Well, Mr. Kaden, if you accept everything you say it might be an awfully good ground for construing the Railway Labor Act to cover this.

MR. KADEN: Unfortunately, there's no way of construing the Railway Labor Act that way in view of the provision of the statute that applies its procedures to any railroad in interstate commerce. And I think it's well established that freight traffic is in interstate commerce.

QUESTION: Yes, but that's just the incidental, just an incidental, as you say. You can ignore it.

MR. KADEN: I would be pleased --

QUESTION: So what if there were no freight? What if there were no freight here? Would this be subject to the Railway Labor Act?

MR. KADEN: No, it would not. The Railway Labor Act makes clear that it does not apply to a railroad

carrying passengers intrastate. If that were our sole activity, I have no doubt that the statute would not apply.

QUESTION: Well, if we take what you say, two percent, that's nothing.

MR. KADEN: I would be pleased if the Court took that statutory --

QUESTION: Did you make that argument or not?

MR. KADEN: I think that argument was made below and rejected by both the District Court and the Second Circuit. I think --

QUESTION: Would you present that as an alternative ground to affirmance?

MR. KADEN: I would be pleased to have it as an alternative ground. I think in fact the cases are a bit against me in --

QUESTION: In what respect?

MR. KADEN: In the respect that the jurisdictional peg -- if there were no constitutional issue, Congress' capacity to --

QUESTION: Well, shouldn't we reach a statutory ground anyway first if we can, or you certainly presented it, didn't you?

MR. KADEN: Yes. If the Court can find in the state's favor on statutory grounds, we would be most pleased.

QUESTION: May I ask one other question on the

constitutional problem? What about the power of Congress to require you to contribute to some kind of pension fund for your employees, as an employer and the employees, in a federally-administered --

MR. KADEN: Yes. That's the Railway Retirement Act. With respect to existing participants in that plan there are obviously due process questions.

QUESTION: Well, forget them. Just say you're starting from scratch.

MR. KADEN: With respect to the future, if you apply the test I described --

QUESTION: The answer would be no, wouldn't it?

MR. KADEN: -- I think the answer would be no. That is no less an employment condition than a minimum wage, and certainly no less than prescribing a method of waste determination.

QUESTION: How about social security taxes?

MR. KADEN: I think in the case of social security the matter may be more difficult.

QUESTION: Why isn't it the same question? It seems to me that of course all state --

MR. KADEN: I think the degree of intrusion is much less. You are not necessarily displacing, subjecting the public employees. And I'm not sure. I must say I'm not sure about the earlier cases on social security.

QUESTION: Well, are these employees really employees of the state?

MR. KADEN: Yes. There's no question that now they are.

QUESTION: I mean they're on the official roster.

MR. KADEN: They are on the official roster of the state by virtue of the action the MTA took in 1980 to change the Long Island from a subsidiary stock corporation to a public benefit corporation.

And the Government makes much of the fact that for many years the MTA consented or accepted their status as non-public employees, but my argument is that the important thing is the state's choice. The state will exercise its sovereign choice sometimes well, sometimes poorly, sometimes late; but what the Constitution protects by virtue of National League of Cities is the power to make those choices in areas at the heart of the exercise of sovereignty. If the right to strike, if the prescription of employment conditions is such a qualifying decision, then the state has the right to make that choice in 1980 just as much as it had the right to make the choice in 1966.

In point of fact what happened is new leadership, new problems in the state involving a transit crisis, a new attention to the means of infusing into the system the kind of capital that the transit system needed was associated

with a judgment that that capital financing program had to be closely related with a coordinated approach to collective bargaining. And you couldn't have a system in which the bus and subway workers, the Triborough Bridge workers were subject to the state's collective bargaining procedures, and the 6800 employees of the Long Island operated under an entirely different regime with different rules and different procedures.

QUESTION: Which they had been operating under for how many years?

MR. KADEN: Since 1834, 1844.

QUESTION: So all of a sudden it was awful.

MR. KADEN: They had been operating as a railroad --

QUESTION: All of a sudden it became horrible.

MR. KADEN: It became horrible, Mr. Justice Marshall --

QUESTION: Because you went broke.

MR. KADEN: Exactly. Because the transit system is broke and is operating as a drain to the tune of more than a billion dollars a year on tax proceeds.

QUESTION: So you want to take that out of the workers.

MR. KADEN: No, not at all. In fact, we believe that under state law, as has been true in the bus and subway

system, we will have good collective bargaining, we will have fair wage settlements, we will avoid strikes hopefully, although as you know, we did not in 1980, and we will have most of all the State of New York making its own choice about the way in which authority is to be shared with employee organizations.

And in these circumstances, I think as Solicitor General Bork conceded in the National League of Cities argument, that decision on the design of collective bargaining procedures is at the very center of sovereign power. There's no choice, no decision in this day and age that a state government makes that is as important to the exercise of its governmental authority as its choice about how and when and whether to engage in collective bargaining.

And we submit, on the other side of the case, that there's no service that the state provides that is as much at the heart of sovereign power in the sense of public dependence and the lack of available alternatives than is transit service.

Finally, the fact of the matter is when the State of New York through the MTA addresses transit problems, it doesn't distinguish between the Long Island Railroad and the bus and subway system. It decides -- I mean what, after all, does the MTA chairman and the board decide? They pick people to run those services. They decide on a capital

budget program, including last year's authorization for $7.8 billion of improved capital improvements, $750 million on the Long Island Railroad; and they decide how to structure their relationships with the employees who provide the service, and how to negotiate fairly with them.

All those decisions are made by the chairman and the board of the MTA not by saying the Long Island is different from the bus and subway system; they're all part of the same system. And in fact, even the technology is hard to distinguish. Certainly the Long Island still has point-to-point fares, and they still have conductors collecting tickets, but three-quarters of their passenger cars are self-propelled electrical cars drawing electric power from a third rail.

The definition that APTA, the trade association, has to distinguish a heavy rail subway from a commuter railroad is that a commuter railroad is featured by point-to-point fares and railroad employment practices. And I suggest that the question of whether this commuter railroad should have railroad employment practices is not a definition that distinguishes it from subways; it's the very issue in the case. It's the question of whether this is a service that qualifies for immunity for those federal commerce regulations that go to the heart of the state's exercise of its sovereignty.

Thank you.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Friedman?

ORAL ARGUMENT OF EDWARD D. FRIEDMAN, ESQ.

ON BEHALF OF THE PETITIONER -- Rebuttal

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

I would like to make two comments in response to some of the questions. I would like to say that New York has been operating the Long Island Railroad for 14 years and is operating it today under federal laws, federal railway laws, interconnecting with other railroads throughout the United States; and there's no suggestion that its existence as a state has in any way been threatened by this state of affairs.

I should also like to point out that in the proceedings before the Interstate Commerce Commission on the freight surcharge it represented to the Interstate Commerce Commission that its rate structure was in line with ConRail and with other railroads.

It also represented before the Interstate Commerce Commission that it had no plan of any kind to give up its freight service; that if it gave up its freight service, some 200,000 trucks would be required to pick up whatever part of its freight that trucks could carry. And this

railroad carries the freight of freight trains. It carries coal, and copper, foodstuffs, paper and paper products, and the run of freight activity.

QUESTION: Is its trackage such that even if it reduced it could never likely be eliminated?

MR. FRIEDMAN: If the trackage were reduced?

QUESTION: No, no. Is the trackage structure, since that's not in this record, is it such that it's going to continue with this kind of freight --

MR. FRIEDMAN: Yes. All the indications in the proceedings before the Interstate Commerce Commission and in statements by the president of this organization are that it has every intention of continuing with this service. It represented to the Commerce Commission, there were suggestions in the record, that the freight service may be cross-subsidizing the passenger service, because if they were to give up the freight, a good part of the actual cost of operating the freight system would still continue necessarily because they would be operating the passenger system over the same tracks and the same facilities.

They also represented or it was also said that the economy of this whole region will be affected adversely if they give up freight. The Long Island is now engaged in a study to try to determine whether there is any cross-subsidization. The allocation of cost between

passenger service and freight service has created a problem of this kind.

In response to Justice White's question on de minimis -- if I can call it that; that's not raised by the peitition -- but the fact is that it's not de minimis. This railroad has $20 million in freight. The surcharge has to be counted. It's dollars collected for freight in order to pay its expenses. And still today it replaced that surcharge with another surcharge. And it carries two million tons of freight -- hardly de minimis -- compared with --

QUESTION: Well, even the National League of Cities argument includes the submission that this is a negligible proportion of the Long Island's gross revenue.

MR. FRIEDMAN: I don't understand.

QUESTION: Well, I thought I heard your colleague on the other side say that the freight revenue was only a very minor part of its --

MR. FRIEDMAN: Two percent. Two percent.

QUESTION: And he thought that was an important point in making his National League of Cities argument.

MR. FRIEDMAN: Well, I think the --

QUESTION: And it is, and it's part of yours to say that it's a substantial part.

MR. FRIEDMAN: I'm thinking that if the decision

is to go that way, it will be reversing California v. Taylor and United States v. California. I checked the revenue of California v. Taylor, and that's a terminal railroad serving the docks of New York, about $150,000. You can hardly compare it -- this is a connecting carrier, not a terminal carrier. This carrier is an important link in the interstate movement as it affects this area of Long Island.

I also must think that the railroads, particularly throughout the Northeast, ConRail and others are abandoning unprofitable freight lines and the unprofitable branch lines. And these branch lines are the lifeblood of the little towns which depended upon them more fundamentally than the 90,000 passengers on Long Island depended upon this.

QUESTION: Well, do you think to sustain the National League of Cities argument would lead to say that the state would have the exclusive decision as to whether the railroad should be abandoned or not?

MR. FRIEDMAN: No. I don't believe that the National League of Cities touches this case, because this is not a traditional --

QUESTION: Well, I know, but assume we affirm, does that mean that the city would be the exclusive authority on abandonment?

MR. FRIEDMAN: Oh, yes. As I would read the case or understand it, it would mean that they could withdraw

from all federal legislation.

QUESTION: Yes.

MR. FRIEDMAN: Including rates.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:15 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

UNITED TRANSPORTATION UNION v. LONG ISLAND RAILROAD COMPANY, ET AL.
80-1925

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BY Sharon Hogan Connelly