

In the

ORIGINAL

Supreme Court of the United States

RAILWAY LABOR EXECUTIVES'	)	
ASSOCIATION,	)	
Appellant,	)	
v.	)	NO. 80-415
WILLIAM M. GIBBONS, TRUSTEE,	)	
ET AL.; AND	)	
	)	
RAILWAY LABOR EXECUTIVES'	)	
ASSOCIATION,	)	
Appellant,	)	
v.	)	NO. 80-1239
	)	
WILLIAM M. GIBBONS, TRUSTEE,	)	
ETC., ET AL.	)	

Washington, D. C.

December 2, 1981

Pages 1 thru 74

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3 RAILWAY LABOR EXECUTIVES'                   :

4   ASSOCIATION,                               :

5                               Appellant,                   :

6                   v.                               :   No. 80-415

7 WILLIAM M. GIBBONS, TRUSTEE,                   :

8   ET AL.; and                               :

9 RAILWAY LABOR EXECUTIVES'                   :

10 ASSOCIATION,                               :

11                               Appellant,                   :

12                   v.                               :   No. 80-1239

13 WILLIAM M. GIBBONS, TRUSTEE,                   :

14   ETC., ET AL.                               :

15 - - - - - :

16   Washington, D. C.

17   Wednesday, December 2, 1981

18               The above-entitled matter came on for oral

19 argument before the Supreme Court of the United States at

20 11:07 o'clock a.m.

21

22

23

24

25

1 APPEARANCES:

2 JOHN O'B. CLARKE, JR., ESQ., Washington, D. C.;

3 on behalf of the Appellant.

4 MRS. ELINOR H. STILLMAN, ESQ., Office of the

5 Solicitor General, Department of Justice,

6 Washington, D. C., on behalf of federal

7 Appellees supporting Appellant.

8 DANIEL R. MURRAY, ESQ., Chicago, Illinois; on

9 behalf of the non-federal Appellees.

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1

P R O C E E D I N G S

2

CHIEF JUSTICE BURGER: We will hear arguments next  
3 in Railway Labor Executives' Association against Gibbons.

4

Mr. Clarke, you may proceed.

5

ORAL ARGUMENT OF JOHN O'B. CLARKE, JR., ESQ.,

6

ON BEHALF OF THE APPELLANT

7

MR. CLARKE: Mr. Chief Justice, and may it please  
8 the Court, about 18 months ago Congress enacted the Rock  
9 Island Transition and Employee Assistance Act, and as it  
10 considered to be an integral part of that Act it added what  
11 it considered to be essential to the continuation of rail  
12 service in the midwest, and that is, it added an alternative  
13 employee protective program that it said should be made  
14 available immediately to the employees of the Rock Island  
15 who were displaced as a result of the demise of that  
16 carryover.

17

That program was enjoined approximately nine days,  
18 ten days after it was enacted, signed into law by President  
19 Carter. Congress readdressed the situation during the  
20 summer of 1980, and in the Staggers Rail Act enacted an  
21 amendment to the Rock Island Act which was passed and signed  
22 into law on October 14th, 1980.

23

On October 16th, an order dated October 15th but  
24 actually entered on the 16th, the Court again enjoined, the  
25 district court again enjoined the Act, because it said the

1 Stagg's Rail Act was really only a cosmetic change in the  
2 law. It didn't change the substance of the Act.

3           At that point, the Railway Labor Executives'  
4 Association, the appellant in these consolidated cases, had  
5 earlier taken an appeal to this court from the June 9th  
6 injunctive order. That appeal is 80-415. Once the court  
7 entered the injunctive order on October 16th, RLEA took an  
8 appeal to the Seventh Circuit, because in amending the  
9 Stagg's Act Congress had also amended where the appeal  
10 should go.

11           So we went to the Seventh Circuit, and the Seventh  
12 Circuit was required by the Stagg's Rail Act amendments to  
13 decide the case en banc within 60 days. It did, but  
14 unfortunately it split 3-3, and on December 16th it entered  
15 an order affirming the district court's decision.

16           The next appeal was then taken by RLEA to this  
17 Court, and on April 27th this Court accepted -- or noted  
18 probable jurisdiction in the second appeal, the 1239 case,  
19 and deferred probable jurisdiction in the -- or deferred  
20 consideration of probable jurisdiction in the first case.

21           At the outset, I would like to clear up one  
22 point. RLEA submits that the first case, 8415, the appeal  
23 was properly filed and timely filed in this Court. However,  
24 the Stagg's Rail Act Amendments mooted that case, because  
25 the Act, the injunctive order which is preventing the

1 implementation of the Rock Island Act on employee protection  
2 is actually the October injunction and not the June  
3 injunction. The June injunction is now moot, and we submit  
4 probable jurisdiction should be noted and the case vacated  
5 on grounds of mootness.

6           Going to the questions that are before this Court,  
7 the first thing that the Court, we submit, has to address is  
8 the question raised in the -- noting the probable  
9 jurisdiction. That is basically, what issues are before the  
10 Court at this time? We would submit that when we filed our  
11 brief, the only issue that was really before this Court was  
12 the question of whether or not the Staggers Rail Act  
13 amendments and the Rock Island Act had granted the estate a  
14 remedy or means to obtain compensation. If compensation was  
15 available, there cannot be, we submit, an unconstitutional  
16 taking of property, because the whole substance of the --  
17 what can be called the just compensation clause or the  
18 taking clause of the Fifth Amendment is the adequate  
19 provision of compensation.

20           QUESTION: Mr. Clarke --

21           MR. CLARKE: Yes, Your Honor.

22           QUESTION: -- do you think that Congress acting  
23 under its commerce power can impair the obligation of  
24 contracts which the state is specifically prohibited from  
25 doing by the Constitution?

1 MR. CLARKE: No, Your Honor. We do not believe  
2 that Congress has that power under the commerce clause to  
3 impair the obligation of contracts, but the problem in this  
4 case is, first of all, is that issue really before this  
5 Court? That is basically in the taking issue. The second  
6 point is, are the obligations of contract being impaired,  
7 and that gets into the question of whether there was a  
8 pre-existing obligation on the part of the estate, which we  
9 submit there was, and I will get into that in a second or  
10 two.

11 The trustee, the creditors and the trustee below  
12 and the court below, the district court, found that the Rock  
13 Island Act affected an unconstitutional taking of property  
14 because the court indicated it came as a startling concept  
15 to him, to the court, that Congress could impose an  
16 obligation upon the estate and take \$75 million to be paid  
17 to employees.

18 As he went on to say, "Congress does not have the  
19 power to take private property for public use." We submit  
20 that that is looking at the wrong part of the just  
21 compensation or taking clause. What has to be looked at, as  
22 this Court indicated before, is, at the time of the taking,  
23 was there an adequate provision made for compensation? If  
24 there was in fact an adequate provision, even though the  
25 money is not paid up front, then there cannot be an



1 unconstitutional taking, because the -- as I have indicated,  
2 the graveman of an unconstitutional taking is an  
3 uncompensated taking, and this Court has indicated in the  
4 Rail Act cases, and going back to the Cherokee case, the  
5 Kansas --

6           QUESTION: Mr. Clarke, may I ask you a question  
7 there?

8           MR. CLARKE: Yes, Your Honor.

9           QUESTION: Does everyone agree in this case that  
10 assuming there was a taking in the sense that you are taking  
11 money out of the state, that it was a taking for public use  
12 rather than a transfer of property from one group of private  
13 people to another group of private people?

14          MR. CLARKE: Your Honor, I do not believe that  
15 everyone agrees to that. We have a problem with the  
16 appellees, the Rock Island appellees, and it is their  
17 position that Congress exceeded the scope of its authority  
18 under the commerce clause by enacting a private benefit for  
19 employees. They indicated it as a basic, as Judge McCarr  
20 indicated, a basic illogic in the Rock Island Act, which  
21 hopefully I will be getting to in a second.

22          QUESTION: For there to be a Tucker Act remedy, I  
23 take it it would have to be not merely a taking in the sense  
24 you take it from X, but a taking for public use. Otherwise  
25 there wouldn't be a Tucker Act remedy, would there? If it's

1 a taking from the railroad to the employees, who are private  
2 parties, is it necessarily a Tucker Act remedy?

3 MR. CLARKE: Yes, Your Honor. We submit if it is  
4 a taking as a direction of Congress, by an Act of Congress --

5 QUESTION: Even if not for public use?

6 MR. CLARKE: -- even if not for public use. If  
7 Congress believes it was necessary, it would not be a taking  
8 clause violation. You might have a due process clause  
9 violation, but as far as the taking clause is concerned, we  
10 would submit it is not a violation.

11 QUESTION: What is your authority for the  
12 proposition that even if it is not for a public use, there  
13 nevertheless is a Tucker Act remedy?

14 MR. CLARKE: Your Honor, basically, if you take a  
15 look at the Rail Act cases, where the Court --

16 QUESTION: But there is a footnote in that opinion  
17 that says everybody agreed it was for public use.

18 MR. CLARKE: That's correct, Your Honor, but then  
19 in the part of the decision that had Footnote 16 to it, the  
20 court talked about the power of the Tucker Act, and the  
21 Tucker Act being a remedy available for a taking that is  
22 authorized by the government. Authorized by the government  
23 is by the Act of Congress. Here Congress has specifically  
24 authorized the taking because at the time of the Act it  
25 believed it had the power to do it, and we submit it did

1 have that power.

2           QUESTION: But you don't have any authority right  
3 on that proposition, do you?

4           MR. CLARKE: No, I do not, Your Honor.

5           QUESTION: Well, do you read the Fifth Amendment  
6 to provide that in the event the taking is for private use  
7 rather than public use, no compensation need be provided?

8           MR. CLARKE: No, Your Honor. If there is a  
9 taking, and it is not a taking -- it is a taking -- now,  
10 this is discounting, of course, a proper statute, a  
11 regulatory type statute such as in the Turner and Userly  
12 case, but if we have a -- the only justification for the Act  
13 of Congress is that it is a taking of property. We do  
14 submit that the Constitution requires that there be  
15 compensation for that, but we are not at that point, and  
16 this is the -- the appellant submits that first of all, the  
17 only issue that is before this court is the question of  
18 compensation for the taking, and we submit it is much  
19 simpler, and the question seems to indicate it is. Namely,  
20 the Tucker Act is there, and that solves the compensation  
21 issue.

22           The question of whether there is a taking or not  
23 is non-justiciable at this point, because it is not properly  
24 presented in a factual situation where it is a clearcut,  
25 concrete situation, and that situation is not adequate and

1 will not be presented --

2 QUESTION: What is your submission as to where  
3 that should be determined?

4 MR. CLARKE: Basically under the Tucker Act  
5 provisions in the court of the claim.

6 QUESTION: Before the court of claims?

7 MR. CLARKE: Yes, Your Honor, and I might clarify  
8 one thing. In our initial brief we indicated that the  
9 taking issue can arise where either the creditors and the  
10 trustees sue the government in the court of claims for the  
11 recovery of moneys that were paid out pursuant to the Act.  
12 We submit that a more likely scenario, however, would be  
13 that the creditors, the estate would actually borrow the  
14 money from the federal government, because Congress had  
15 provided that money there, and then the question of the  
16 legality of the priority that 101.10(a) granted to that debt  
17 would then be resolved either in the reorganization court or  
18 the court of claims.

19 QUESTION: Mr. Clarke, it may be that if the  
20 United States takes property for public use, that the taking  
21 is not subject to an injunction because there is a --  
22 compensation has been promised, but how about the situation  
23 where there is a taking -- say the United States says, we  
24 are taking your property, but we are going to take it for  
25 private use, and you can't complain now because you can go



1 to the court of claims and get paid for it. We are going to  
2 take your money, and you can get it back by going to the  
3 court of claims, but the plaintiff then says, well, that  
4 rule may be just find when the taking is for public use, but  
5 this is for private use, and we should be able to enjoin you.

6 MR. CLARKE: Your Honor, we would submit --

7 QUESTION: Do you have some authority on that  
8 point?

9 MR. CLARKE: No, I do not.

10 QUESTION: I don't think you do, if you don't have  
11 it on the point that Justice Stevens asked you about.

12 MR. CLARKE: The only authority that might come  
13 close to that point is --

14 QUESTION: That is what -- The issue here is,  
15 should the district court have enjoined?

16 MR. CLARKE: That is correct, Your Honor, and we  
17 submit it should not have enjoined because the Tucker Act  
18 was available, and the -- this is not -- the Wilson versus  
19 New case is sort of on this one point, because in order to  
20 determine that Congress is taking property for private as  
21 compared to public use, you have to look behind the  
22 enactment of -- Congress's enactment, and you have to look  
23 at the reasons that Congress did what it did.

24 Granted, this Court has the right to see if there  
25 is a rational connection, but if Congress states in the

1 preamble of its Act that it is exercising its powers under  
2 the commerce clause to enact legislation which it believes  
3 has a public purpose, and that the Act it is doing is simply  
4 compromising an obligation that already existed, and this is  
5 why we submit that the taking issue when it finally does  
6 come up is not really --

7           QUESTION: Well, if the district court thought,  
8 though, that it was entitled to give an injunction if there  
9 was a taking for private use, it seems to me the taking  
10 issue is fairly posed here. If you happen to agree with --  
11 if you happen to agree that an injunction would be  
12 authorized in the event of a taking for a private use, then  
13 the taking issue is posed.

14           MR. CLARKE: Your Honor, it goes back to the  
15 question -- it is not so much the taking issue, because the  
16 taking issue in this case is really, when does a regulation  
17 become a taking? That is the ultimate part of the taking  
18 issue. One aspect of the taking issue here would be the  
19 question of whether or not the Act that Congress did was  
20 public or private benefit.

21           Now, one thing that has been sort of missed or not  
22 highlighted in this case is the actual factual situation  
23 which leads to the conclusion that this was in fact an Act  
24 of Congress under its commerce clause for a public benefit,  
25 a very strong public interest. When the Rock Island Act was

1 being considered by Congress, it started back in February  
2 and March of 1980, before the abandonment order was even  
3 authorized to be sought for. That didn't occur until April  
4 14th, and when Congress was considering what to do with the  
5 demise of the Rock Island and the directed service which was  
6 to end on May 31st, at that point there was no more  
7 authority in the ICC to authorize any continued operation  
8 over that line, and the line would completely cease and all  
9 service would end at that point.

10           So, Congress had to address that issue, and in  
11 addressing that issue, Congress realized, as this Court has  
12 indicated from back in the 1930s, the interest of employees  
13 was an extremely important element in the perpetuation of  
14 that service, and in order to afford that employee  
15 protection, if you want to call it that, arrangements to  
16 help the people who are being affected, and to preserve the  
17 public interest, Congress had to look at the interest of  
18 employees, which this Court has again said is part of the  
19 national interest.

20           And in doing that, Congress worked, and as the  
21 legislative history indicates, Congress worked along with  
22 labor and representatives of rail management, and the  
23 arrangement that came out of that combination of the parties  
24 was a combination of the Miami Accords for the March 4  
25 hiring agreement and this particular piece of legislation.

1           The basic illogic that the court found in this  
2 legislation only comes because he is disregarding the March  
3 4 agreement. The March 4 agreement is an integral part of  
4 the Rock Island legislation, and between the two, they  
5 provide a form of protection for employees who have spent  
6 their time in operating this railroad, who would then be  
7 available for continued rail operations over that line.

8           It takes experienced people to operate a railroad,  
9 operate it safely and efficiently.

10           QUESTION: Mr. Clarke, isn't it correct the March  
11 4 agreement related to employees who were going to continue  
12 to work?

13           MR. CLARKE: That is correct, Your Honor.

14           QUESTION: Whereas this protection is for people  
15 who are terminated.

16           MR. CLARKE: That is the second half of the  
17 protection. The protection to be adequate for an employee  
18 of a railroad has to cover the situation of an employee who  
19 is hired and an employee who is not hired. The March 4  
20 agreement was to encourage carriers to hire people.

21           QUESTION: Right.

22           MR. CLARKE: And then when they are hired to give  
23 them some form of protection.

24           QUESTION: But is it not true that the benefits of  
25 this statute, if it is held valid, will all go to terminated



1 employees, not to the same people who benefit from the March  
2 4 agreement?

3 MR. CLARKE: Terminated employees, but who are  
4 still available for continued rail service in that area.

5 QUESTION: Well, yes, but --

6 MR. CLARKE: And there is another advantage --

7 QUESTION: -- but the purpose of it is to protect  
8 them in the event they don't get further jobs.

9 MR. CLARKE: Yes, but that purpose, that is the  
10 immediate, I mean, that is the way Congress -- the end that  
11 Congress used to accomplish its purpose, but its purpose  
12 that Congress said it was doing was to provide a protection  
13 for employees to enable to continued operation of lines.

14 QUESTION: But it just doesn't fit the facts.

15 MR. CLARKE: But we submit it does, Your Honor,  
16 when you look at the agreement, the March 4 hiring  
17 agreement, together with the Rock Island protection, just  
18 like the Milwaukee situation. The Milwaukee Section 9  
19 agreement combined with the March 4 agreement gave the  
20 protection for the interim operations --

21 QUESTION: Those are all for people who are still  
22 working. I understand that, but --

23 MR. CLARKE: But not on the Milwaukee agreement,  
24 Your Honor. The Milwaukee agreement had protection for  
25 people who were not working, and then the March 4 agreement

1 protected those who were carried over, but there is a very  
2 strong public benefit that comes out of this type of  
3 enactment, and that is the fact that railroad workers do not  
4 have the type of pension systems that other people have, and  
5 their whole collective bargaining agreements have protective  
6 arrangements built into it. Those protective arrangements  
7 have provided a sort of guaranteed security for employees,  
8 that in the event of any cessation of operations, that they  
9 are not just going to be forgotten.

10 QUESTION: Is the Railroad Retirement Act gone?

11 MR. CLARKE: It is not gone, Your Honor, but the  
12 benefits to these people --

13 QUESTION: Well, I thought you said they had no  
14 protection at all.

15 MR. CLARKE: The only protection they have --

16 QUESTION: But that is a protection, though, isn't  
17 it?

18 MR. CLARKE: -- \$25 a day for five days a week,  
19 and those benefits are almost exhausted --

20 QUESTION: But it is something.

21 MR. CLARKE: That is \$125 a day -- \$125 a week.

22 QUESTION: It is something.

23 MR. CLARKE: That is correct, Your Honor.

24 QUESTION: That is all I was trying to get you to  
25 say.

1           MR. CLARKE: There is protection of that sort, but  
2 the guaranteed job security that these people have enjoyed  
3 over the years guaranteed them more than that type of  
4 protection. It guaranteed them a different form of  
5 protection. It guaranteed them sort of a preservation of  
6 their jobs. And what we are facing here is a situation  
7 where Congress, when it enacted this legislation, believed  
8 that its earlier enactments had required that that be  
9 imposed in this case, and in order to make sure that that  
10 protection, which it submitted was in the public interest,  
11 be imposed, it enacted Section 106 of the Act.

12           I realize my time is very near the end. I would  
13 ask to reserve whatever time I have left for rebuttal.

14           QUESTION: May I ask you a question without  
15 intruding on your time?

16           MR. CLARKE: Yes, sir. I appreciate that.

17           QUESTION: If it is all right with the Chief  
18 Justice. Your position in part is that this did not create  
19 a new obligation, but merely compromised a pre-existing  
20 obligation.

21           MR. CLARKE: That's correct, Your Honor.

22           QUESTION: Could you tell me what in your view the  
23 magnitude of the pre-existing obligation was, and was it  
24 larger or smaller than the new obligation?

25           MR. CLARKE: Your Honor, it is hard to place an

1 actual figure on it, but the levels of protection which we  
2 submit 11-347 require, the Interstate Commerce Act, which is  
3 made mandatory here by 17(a)(1) of the -- 17(a) of the  
4 Milwaukee Act, is that there be guaranteed income for six  
5 years with all cost of living adjustments added into it, in  
6 other words, 100 percent of your income for six years from  
7 the date of your effect, or an option on the employee to  
8 take a separation allowance which equals three -- and for  
9 people with over ten years -- five years of service, 360  
10 times your last daily rate of pay.

11           QUESTION: And is it your position that the  
12 employees would have been entitled to that if this statute  
13 had never been enacted?

14           MR. CLARKE: That is correct, Your Honor.  
15 Unfortunately, the Seventh Circuit has taken a different  
16 position, but the important thing on this is, the ICC up  
17 until 1976 always considered itself to have the discretion  
18 to impose this level -- this type of protection in an entire  
19 line abandonment case, that in 1979, when Congress -- 1976,  
20 we submit Congress took that discretion away. In 1979, it  
21 transferred the remaining discretion and the power the ICC  
22 had to authorize abandonments over to the reorganization  
23 court, and the legislative history in the Rock Island Act,  
24 prior to the whole confirmation of the abandonment coming up  
25 in the reorganization court indicates that Congress believed



1 that the '79 Act and the '76 Act, based on the '76 Act, had  
2 required that level of protection in this case.

3 Thank you.

4 CHIEF JUSTICE BURGER: Mrs. Stillman?

5 ORAL ARGUMENT OF MRS. ELINOR H. STILLMAN, ESQ.,

6 ON BEHALF OF THE FEDERAL APPELLEES SUPPORTING APPELLANT

7 MRS. STILLMAN: Mr. Chief Justice, and may it  
8 please the Court, federal appellees appear here today in  
9 support of RLEA's appeal from the October order -- from the  
10 Seventh Circuit's affirmance of the district court's October  
11 order holding an Act of Congress -- enjoining an Act of  
12 Congress on grounds of its unconstitutionality. We regard  
13 the earlier case as moot.

14 The federal appellees submit that the amended Rock  
15 Island Act does not, as the district court concluded, affect  
16 an unconstitutional taking of private property. We make two  
17 basic arguments on this point. First, we submit that the  
18 Act does not take property within the meaning of the Fifth  
19 Amendment, and second, if, contrary to our submission, the  
20 Court were to find that it did effect a taking of property,  
21 we submit that a reasonable, proper, and adequate provision  
22 for compensation has been made in the Tucker Act, and  
23 therefore, for two reasons it was improper for the district  
24 court to enter this injunction. Either there was an  
25 adequate remedy at law, or there was no violation to remedy.

1 I am going to address the taking question first, a  
2 question that we do urge the Court to decide in this case.  
3 And to understand what -- why we are trying to say that this  
4 Act is not a taking, you have to step back for a moment and  
5 consider the crisis that Congress was responding to when it  
6 was considering and when it enacted the Rock Island Act, and  
7 you have to consider also the legal and historical context  
8 with respect to employee protection against which Congress  
9 was also -- to which Congress was also responding.

10 The Rock Island Act did not, as the private  
11 appellees occasionally suggest, leap unannounced out of  
12 Congress's brow three days before the district court  
13 authorized the abandonment here. In September of 1979, the  
14 Rock Island Act totally ceased operations over all of its  
15 lines. It was of critical importance to the middle west,  
16 particularly to the shipment of farm products out there, and  
17 in months thereafter this transportation system was held  
18 together just essentially by direct service orders given by  
19 the ICC.

20 Congress was justifiably concerned with the effect  
21 of the liquidation of so large a railroad, not only on the  
22 middle west but on transportation services generally, on its  
23 ripple effect with respect to other lines, and the Rock  
24 Island Act, which was a Congressional response to this, the  
25 Senate report on this issued in March of 1980, this Act

1 called for, among other things, the implementation of a plan  
2 either negotiated by the parties or devised by the ICC for  
3 providing limited compensation for those employees who were  
4 displaced as a result of the Rock Island's termination of  
5 operations.

6           It further provided that the cost of the plan  
7 would be charged to administrative expenses of the estate,  
8 that the benefits could be paid through federally guaranteed  
9 loans, and that there would be a top, a maximum of \$75  
10 million. It could not exceed that amount.

11           QUESTION: But Congress didn't attempt to  
12 intervene in the proceeding to say that the Rock Island  
13 should continue to operate.

14           MRS. STILLMAN: No, it gave certain directed  
15 service authority to the ICC.

16           QUESTION: It just accepted what the reality was.

17           MRS. STILLMAN: Well, it was trying -- what  
18 Congress was really trying to do here was create a situation  
19 which would encourage buyers for these lines. They want  
20 these lines to stay in business with other buyers. They  
21 have put money in the Act for non-railroad carriers to buy  
22 some of these lines. They want the existing service to stay  
23 there to the extent possible, and the states want this, too,  
24 and they viewed this labor protection, as counsel for RLEA  
25 has tried to suggest, as integral to holding the system

1 together, and I think what he was trying to suggest to you  
2 here when he was talking about the March 4th agreement is  
3 that a large incentive for the union to enter into that  
4 agreement was that they assumed that Congress was proceeding  
5 along the lines to enact this other legislation which would  
6 take care of these other employees. It regarded it, I  
7 think, as part of a package. That was one of the  
8 incentives. Now, maybe they would have been wiser not to  
9 sign this agreement on March 4th, 1980, and wait to see if  
10 the other thing would be upheld, but they didn't.

11           QUESTION: Well, my question really is, do you  
12 think Congress intended to amend or repeal any part of the  
13 reorganization laws?

14           MRS. STILLMAN: No. I think Congress -- here what  
15 I would like to say --

16           QUESTION: It didn't attempt to intervene in the  
17 proceeding to overturn any --

18           MRS. STILLMAN: No, I don't believe Congress  
19 thought it was overturning anything. As the counsel for  
20 RLEA has suggested, Congress as they looked at the law  
21 affecting employee protection arrangements when they were --  
22 when they were devising this statute, what was on the books  
23 then affecting this railroad was the Milwaukee Act, Section  
24 17(a) of the Milwaukee Act, which said, certificates of  
25 abandonment shall include conditions providing fair and



1 equitable arrangements for the employees, shall include. It  
2 was absolute language.

3           Now, it is true that there had been  
4 interpretations of that language as giving discretion to the  
5 reorganization court, similar to what the ICC had considered  
6 that it had under the Four R Act, discretion not to impose  
7 employee protection arrangements in some cases of whole line  
8 abandonments, but just as the ICC had always thought they  
9 had the discretion to create exceptions to their general  
10 rule that they wouldn't apply these conditions in whole line  
11 abandonments, that discretion remained here.

12           There was a very real possibility, while Congress  
13 was devising this legislation, that this estate could have  
14 had imposed on it what are called the New York dock  
15 conditions, and that is a very high level of employee  
16 protection which goes up to six years, and as to the  
17 question of how much liability there might have been here  
18 for this railroad, for the estate, if the New York dock  
19 conditions had been imposed, I think you get some idea of  
20 that from Footnote 27 on Page 52 of the private appellees'  
21 brief, where they discuss what happened under the Milwaukee  
22 statute. You know the Rock Island provisions here were  
23 modeled on Section 6 and Section --

24           QUESTION: Mrs. Stillman?

25           MRS. STILLMAN: Excuse me.

1 QUESTION: A moment ago, you used the term  
2 federally guaranteed loans.

3 MRS. STILLMAN: Yes.

4 QUESTION: Does that mean that if the original  
5 obligor defaults and the federal government has to come in  
6 and make good on its guarantee, the government has recourse  
7 against the original obligor?

8 MRS. STILLMAN: Yes. I think that money is put in  
9 escrow funds, but yes, I would say the government would have  
10 recourse.

11 What I am trying to suggest is that there was a  
12 very large potential liability here. Now, it wasn't certain  
13 whether it would be imposed. It was just, it could be  
14 imposed.

15 QUESTION: Well, it has now been decided that  
16 there was no such liability, hasn't it?

17 MRS. STILLMAN: Well, this is after the fact.

18 QUESTION: Right.

19 MRS. STILLMAN: At the time Congress was  
20 legislating this, there was --

21 QUESTION: But you are not suggesting that the  
22 unions didn't really want this legislation, are you?

23 MRS. STILLMAN: No, I will say that neither the  
24 unions nor the estate had any concrete, absolute guarantee  
25 that that --

1 QUESTION: No, but there was a history of ICC  
2 total abandonments where they had not --

3 MRS. STILLMAN: Yes, but the ICC had always said,  
4 well, we make exceptions in appropriate cases, and the ICC  
5 has never --

6 QUESTION: But the union really didn't want to  
7 take the risk. That is rather clear, I think.

8 MRS. STILLMAN: Well, there were risks on both  
9 sides, and Congress --

10 QUESTION: Well, the other side doesn't think  
11 there was much of a risk.

12 MRS. STILLMAN: -- Congress addressing these  
13 risks, and I might say again in terms of the amount of money  
14 that they were talking about here, Footnote 27 in the  
15 private appellees' brief says that it was calculated for the  
16 Milwaukee Railroad that if New York dock conditions had been  
17 applied there, the liability might have been anything up to  
18 \$1 billion. They say the best estimate was \$350 million.  
19 The Milwaukee Railroad was roughly comparable in size to the  
20 Rock Island. I think it had a few more employees, but not  
21 very many more employees.

22 And the ICC in its recommendation report to the  
23 reorganization court when it recommended approving the  
24 abandonment, they had a brief section on labor protection.  
25 They made no recommendation because they said as far as we

1 are concerned this is being taken care of by Congress, so we  
2 don't feel that we should make a recommendation. They did  
3 note their policy of not having applied it in whole line  
4 abandonments, but they nevertheless told the reorganization  
5 court a viable option is imposition of New York dock  
6 conditions. That was a very large liability, and Congress,  
7 looking at the state of the law, which would have permitted  
8 the imposition of that liability, simply said, we think,  
9 considering all of the factors here, the necessity to have  
10 labor stability which will encourage other rail buyers to  
11 buy these lines, we think we also want to, by the way,  
12 encourage employees of other marginal carriers.

13           QUESTION: Wasn't the March 4th agreement intended  
14 to enable sale of the lines by reducing the obligation of  
15 the employees?

16           MRS. STILLMAN: That's true. That's true.

17           QUESTION: Mrs. Stillman, supposing that Rock  
18 Island had been a going concern. Do you think Congress  
19 could have singled it out and said to its management, every  
20 employee on the Rock Island shall receive hourly wage of \$5  
21 an hour or more?

22           MRS. STILLMAN: Well, that would be an exercise of  
23 Congress's commerce power, which always would have to be  
24 tested for a rational basis as to whether that was a  
25 rational decision, a reasonable consideration of the class.



1 And I think it would stand or fall on that.

2           We think here this was a rational response. The  
3 Rock Island was the only large railroad in the middle west  
4 that was in these desperate straits. They were simply  
5 applying a legislative solution that fit the particular  
6 problem that they were addressing, a serious problem of  
7 interstate commerce which they had every right under the  
8 commerce power to address.

9           I would like also to address the question of  
10 whether this was just giving private property from one group  
11 of people to another group of people.

12           QUESTION: On that subject --

13           MRS. STILLMAN: Yes.

14           QUESTION: -- let me just pose a question, because  
15 I am glad to be getting to that. In your brief, although I  
16 notice, and perhaps other wrote the brief, on Page 19 you  
17 have the sentence, "When a government regulation adjusting  
18 the burdens and benefits of economic life between private  
19 parties is held to be a taking, the government ordinarily  
20 should be given an opportunity to make a choice whether to  
21 rescind the regulation or pay just compensation." Do you  
22 contend this case comes within that sentence?

23           MRS. STILLMAN: I think there are two ideas that  
24 are included there in the sentence. I think there is one  
25 idea that was suggested --

1           QUESTION: Is this an adjustment between private  
2 parties?

3           MRS. STILLMAN: An adjustment between private  
4 parties which is critical to the public interest, and to  
5 address that point, what I would like to call the Court's  
6 attention to is the case of Dayton Goose Creek Railway  
7 against United States, a very early case which involved --

8           QUESTION: Well, I would first like to know  
9 whether you think that sentence applies to this case.

10          MRS. STILLMAN: Yes, I think it does. But then I  
11 would like to explain why I think that is --

12          QUESTION: And you think Congress should be given  
13 a chance to decide whether or not, if it is a taking, they  
14 want to pay for it?

15          MRS. STILLMAN: Yes. Yes. Yes.

16          QUESTION: And that they have not yet made an  
17 unequivocal determination --

18          MRS. STILLMAN: Well, let me say this. If  
19 Congress failed to act now and that money is paid out, and  
20 this Court considers it a taking, they will be bound. I  
21 mean, there is nothing they can do once the money is paid  
22 out.

23          QUESTION: It isn't paid out yet.

24          MRS. STILLMAN: It isn't paid out yet.

25          QUESTION: And if we said there was a taking, you

1 think -- you would like to know whether it is a taking or  
2 not so Congress could know whether to repeal?

3 MRS. STILLMAN: That's correct. That's correct,  
4 yes.

5 QUESTION: They have to act within 15 days, as I  
6 understand it, of our judgment.

7 MRS. STILLMAN: Excuse me?

8 QUESTION: They would have to act within 15 days,  
9 would they not? Because if the injunction is set aside,  
10 there is a duty to decide the matter within 15 days.

11 MRS. STILLMAN: Well, that's right, but then what  
12 happens is, the ICC then has to devise a plan, and then it  
13 is approved by -- then the --

14 QUESTION: It is a rather accelerated time  
15 schedule.

16 MRS. STILLMAN: Yes, that's true. That's true.  
17 There is some dispute, I think, between the private  
18 appellees and the RLEA as to how long it would take before  
19 you could get actual payments of money.

20 But what I would like to say, going to this  
21 question of the private parties, in the Dayton Goose Creek  
22 Railway case, what happened there was, the ICC had a  
23 regulation according to which they said, if railroads are  
24 earning profits over a certain amount, above a certain rate  
25 of return, we consider those excess profits, and we are

1 going to require that they put half of those excess profits  
2 into this general fund, and this general fund will provide  
3 equipment and loans for other weaker carriers, and we see  
4 this as essential to the national transportation system.

5           This Court upheld that. Now, that was taking  
6 property from one party and giving it to another party, and  
7 the Court found that a proper use of ICC power.

8           Now, what we say here is that the money that was  
9 in the estate, the \$75 million, if you want to segregate it  
10 out, at all times existed under the potential liability,  
11 under the Milwaukee Act, under Section 17(a), of being  
12 awarded to the union under an employee protection  
13 arrangement. That was the state of the law. That potential  
14 claim existed there.

15           All that Congress did was fix that claim at a  
16 lower amount and make it certain that there would be \$75  
17 million. So really all it did was amend the law to take  
18 what was potential, make it actual, and to fix it at a lower  
19 level. We don't see this as a taking of property. We don't  
20 see this as an irrational exercise of the commerce power,  
21 nor do we see it as an intervention into the reorganization  
22 court's jurisdiction.

23           QUESTION: Well, do you see this case as one  
24 within the Tucker Act, if we, A, said there was a taking, or  
25 B, we said there was not a taking?



1 MRS. STILLMAN: If you say there is a taking, it  
2 is within the Tucker Act.

3 QUESTION: All right. Suppose we just pass the  
4 question. Say --

5 MRS. STILLMAN: The Tucker Act is there.

6 QUESTION: Would you -- I suppose that would bind  
7 the government?

8 MRS. STILLMAN: It will bind the government if  
9 they do nothing. If the money is paid out, if you say the  
10 Tucker Act is there, the money is paid out, and it later is  
11 determined to be a taking, and if the estate has paid out  
12 \$75 million, the estate would have a claim in the court of  
13 claims --

14 QUESTION: But Mrs. Stillman, what if we say it is  
15 a taking for private use? Then what happens?

16 MRS. STILLMAN: This is a somewhat more difficult  
17 question, because, of course, under United States against  
18 Testin, this Court has said that there is no liability  
19 against the United States in the court of claims except  
20 where there is a right for damages, and of course the just  
21 compensation clause provides such a right.

22 We certainly would have to agree that if there  
23 were a separation of powers violation or anything like that,  
24 there probably would not be a money remedy in the court of  
25 claims.

1           QUESTION: In which event the question of an  
2 injunction comes up.

3           MRS. STILLMAN: Yes, in which event -- but we very  
4 strongly argue here that there is no serious question that  
5 there is not in rational terms some benefit to the public  
6 interest.

7           QUESTION: Do you think the United States would be  
8 foreclosed from arguing in the court of claims that it was a  
9 taking for private use and therefore the remedy is not  
10 available? I know the appellees here, of course, argue that  
11 the remedy is available because they don't want to get --  
12 they want to get the money somewhere, presumably. But would  
13 not the United States have the right to argue, oh, no, this  
14 was not a taking for public use, this was -- there was  
15 evidence of Congressional intent to make it administrative  
16 expense and not incur an absolute liability?

17          MRS. STILLMAN: Your Honor, Congress made a  
18 finding in this legislation that it was in the public  
19 interest. Now --

20          QUESTION: That is not the same as a taking for  
21 public use.

22          MRS. STILLMAN: I think it is. I think it is. I  
23 think -- oh, yes --

24          QUESTION: Supposing Congress made a finding that  
25 General Motors could run the Ford Company better than Ford

1 does, and transfer their assets to General Motors. That  
2 would be public benefit. Would that be a taking for public  
3 use? They said interstate commerce will benefit because  
4 they are more efficient, and all that sort of thing.

5 MRS. STILLMAN: I guess one reason this is  
6 difficult is because that is a sort of substantive due  
7 process test, and as you suggest --

8 QUESTION: Well, yes, and I think it is difficult  
9 because there is no precedent --

10 MRS. STILLMAN: Yes, that's right.

11 QUESTION: -- that really supports your position.

12 MRS. STILLMAN: Well, you have suggested, I think,  
13 in your opinion in Moore against City of East Cleveland that  
14 what the Court has done at some times in the past is apply  
15 what you called a fused test, a substantive due process test  
16 with a taking test. It is sometimes hard to tell which test  
17 the Court is applying, because to some extent when you talk  
18 about justice and fairness under the takings test, you are  
19 talking about some of the same factors that you talk about  
20 under substantive due process.

21 QUESTION: But if you are not talking about a real  
22 taking, but just an unconstitutional interference with  
23 property, then you can't avoid the injunction question.

24 MRS. STILLMAN: Well, I don't --

25 QUESTION: Can you?

1 MRS. STILLMAN: It seems to me it is so clear here  
2 that there is a public -- that the public use of this money  
3 is the benefit to the public. The fact that it is being  
4 given to private parties just doesn't bear on that question.

5 QUESTION: Your avoidance of the question I take  
6 it is an answer.

7 MRS. STILLMAN: Well, I am reluctant to recklessly  
8 open up the Treasury and the court of claims, but on the  
9 other hand I don't want to suggest that this injunction  
10 should stand, because we think clearly there is no basis for  
11 its standing.

12 QUESTION: May I ask this question?

13 MRS. STILLMAN: Yes.

14 QUESTION: In deciding its position in this case,  
15 did the government give any consideration whatever to the  
16 position of the investors in this railroad concededly  
17 bankrupt and unable to operate further with assets of \$204  
18 million, and the government imposing an administrative claim  
19 of \$75 million ahead of those investors?

20 MRS. STILLMAN: Yes.

21 QUESTION: Do you think anybody would ever invest  
22 in another railroad if this can happen? Under your theory,  
23 the government could have asserted, approved, or authorized  
24 an administrative claim, and brand new one, of \$204  
25 million. Why stop at six years' compensation? Could it



1 have been 16?

2 MRS. STILLMAN: Well, under our theory, the  
3 existing law authorized the imposition of a much larger  
4 liability. Law that was on the books. Law that the  
5 investors were aware of. And --

6 QUESTION: But is the government interested in  
7 encouraging people to invest in railroads? Or does the  
8 government want to take them over?

9 MRS. STILLMAN: Your Honor, I can't speak for the  
10 government on that point. But I would simply say that we  
11 believe that the injunction here was erroneous on both  
12 grounds, that it is not a taking within the meaning of the  
13 Fifth Amendment, and that if it is, the Tucker Act remedy  
14 prevents the injunction. Thank you.

15 CHIEF JUSTICE BURGER: Mr. Murray.

16 ORAL ARGUMENT OF DANIEL R. MURRAY, ESQ.,

17 ON BEHALF OF THE NON-FEDERAL APPELLEES

18 MR. MURRAY: Mr. Chief Justice, and may it please  
19 the Court, the principal issue presented in this appeal is  
20 whether by special legislation Congress can impose upon a  
21 bankrupt railroad already in liquidation a new obligation  
22 solely for the benefit of its former employees who are no  
23 longer going to be working in the railroad industry, an  
24 obligation that will displace the interests of the creditors  
25 and the shareholders of that railroad.

1           This proceeding pends under Section 77 of the  
2 Bankruptcy Act, and this Act has two purposes, first, the  
3 public interest in continued rail service, and secondly, and  
4 an equally important purpose, the conservation of the estate  
5 in the interest of the creditors and the shareholders. Now,  
6 at the outset of these proceedings, when they were filed on  
7 March 17, 1975, Judge McGarr ordered the trustee to continue  
8 operations of the Rock Island, and at that time he had to  
9 mak a determination that the railroad was reorganizable, and  
10 that the security of the creditors would not be impaired,  
11 and I would submit to the Court that if Judge McGarr had  
12 thought at that time that there was a possibility of labor  
13 protection being imposed in the amounts that the RLEA and  
14 the government contend was possible, he never would have  
15 permitted reorganization to go on at that time. He would  
16 have stopped it right then and there, because the thought of  
17 imposing six years of wages, giving that to employees in the  
18 event of liquidation, would mean that there would be no way  
19 that the security of the creditors could be protected if  
20 reorganization proceedings would be ongoing, and I submit  
21 that that would be true in almost every railroad  
22 reorganization proceeding, that the proceeding would have to  
23 stop right there if a liability of that magnitude could be  
24 imposed upon the estate of a railroad.

25           Now, in pursuit of these public interest

1 objectives of Section 77, however, the reorganization court  
2 permitted the ongoing rail operations, and for five years,  
3 the trustee of the Rock Island paid out \$1 billion in wages  
4 and benefits to the Rock Island employees while the estate  
5 eroded in an amount in excess of \$210 million, and in answer  
6 to Justice Marshal's question about the continuation of the  
7 Railroad Unemployment Insurance Act and the Railroad  
8 Retirement Fund, I should point out that during this time of  
9 reorganization, the Rock Island trustee contributed over \$14  
10 million to the Railroad Unemployment Insurance Fund, and in  
11 excess of \$100 million to the Railroad Retirement Fund, just  
12 as the Rock Island had done in years prior to  
13 reorganization. Of course, we have no question about the  
14 propriety of those contributions.

15           As the reorganization entered its fifth year,  
16 three key events occurred, and they have been alluded to  
17 thus far in the argument. The first occurred in the summer  
18 of 1979, when the employees of the Rock Island struck the  
19 Rock Island, and as a result it ceased rail operations, and  
20 on September 26th, 1979, the Interstate Commerce Commission  
21 declared the Rock Island trustee cashless, and from that  
22 point forward the trustee himself was not able to conduct  
23 any rail operations.

24           The second key event was on January 25, 1980, when  
25 the reorganization court found that there no longer was any

1 possibility of a successful reorganization of the Rock  
2 Island, and he ordered the trustee to commence liquidation.  
3 And really, from that point forward, the Rock Island's fate  
4 was sealed. From that point forward, it was clear that the  
5 Rock Island was withdrawing from the public interest service.

6           Then, on June 2 of 1980, the reorganization court  
7 formally confirmed the total abandonment of all of its  
8 lines, and at that time declined to condition abandonment on  
9 the payment of any form of the so-called traditional labor  
10 protection, and that order was affirmed by the Seventh  
11 Circuit court of appeals.

12           It was just on the eve of that particular order  
13 that Congress enacted and President Carter signed into law  
14 the Rock Island Transition and Employee Assistance Act with  
15 its new labor protection obligation of \$75 million, and that  
16 Act in essence would impose a payment of 80 percent of a  
17 former employee's salary for up to three years or a lump sum  
18 payment to each employee of \$25,000, depending upon  
19 seniority.

20           Congress stated the purpose of that Act to be a  
21 public purpose, to continue rail service in the midwest, but  
22 as Judge McGarr found, there was no connection between the  
23 payment of a lump sum severance pay to a former employee who  
24 was no longer going to continue in any rail service, there  
25 was no connection between that and ongoing rail operations



1 in the midwest.

2           QUESTION: This Act didn't reactivate the  
3 operations of the Rock Island?

4           MR. MURRAY: It did not reactivate the operation  
5 by the trustee. There was some directed service that was  
6 ongoing, imposed by the Interstate Commerce Commission, and  
7 that is the subject of separate litigation, but as of  
8 September when the strike occurred, September of 1979, the  
9 Rock Island trustee no longer operated any railroad. That  
10 was the point at which the Rock Island stopped all rail  
11 operations.

12           We question the public purpose of this Act,  
13 because in our view it is not being paid to employees who  
14 are continuing in rail service. It is being paid to  
15 employees who are no longer in the railroad industry, who  
16 have not been employed by railroads who are continuing  
17 operations, other railroads. So there is no relationship.  
18 This case is quite unlike the Loudon case, for example,  
19 which the RLEA relies upon, where there was an ongoing rail  
20 service by the Rock Island in one of its earlier  
21 reorganizations, and there was a rationale in that case to  
22 pay labor severance pay because it was a -- that case  
23 involved a partial merger or consolidation. The railroad  
24 was ongoing. It was obtaining net income that was generated  
25 by the savings that were affected by the consolidation of

1 rail service, and in that case those savings, the Court  
2 said, could be forced to be apportioned between the  
3 employees who were displaced --

4 QUESTION: Mr. Murray, do you think the ICC could  
5 have imposed any kind of a termination burden on the estate?

6 MR. MURRAY: In the event of a total liquidation?

7 QUESTION: Yes, which --

8 MR. MURRAY: In the event of a total liquidation,  
9 we would say it could not, and that is the position that the  
10 Seventh Circuit took in connection with --

11 QUESTION: So you just flatly disagree with the  
12 government's position, and your opponent's, that there was  
13 any room at all in this reorganization proceeding to impose  
14 any termination pay?

15 MR. MURRAY: That is correct, Justice White. We  
16 believe --

17 QUESTION: No labor protective provisions were --

18 MR. MURRAY: In the event of a total abandonment  
19 by a railroad that was in liquidation. Now, I draw that  
20 particular qualification because there are cases where a  
21 railroad that is not in liquidation might decide to withdraw  
22 from rail service, and it might be a perfectly healthy  
23 enterprise, and there might be a situation in which labor  
24 protection could be imposed, but that is not our case.

25 Our case is one where this railroad has totally

1 consumed itself in the public interest, and --

2           QUESTION: Well, if the Interstate Commerce  
3 Commission had some authority to impose some labor  
4 protective provisions in this case, on the facts of this  
5 case, it just had discretion to do so, suppose it did.

6           MR. MURRAY: Yes, sir.

7           QUESTION: And then Congress came along and said,  
8 well, we are going to exercise your discretion for you.

9           MR. MURRAY: Well, I submit that in this case they  
10 did not have any discretion in the context of a railroad in  
11 liquidation.

12          QUESTION: We have to decide that, to hold for  
13 you, I guess, don't we?

14          MR. MURRAY: Well, I think that is an important  
15 question in this case, and I think the Seventh Circuit has  
16 already indicated its position on the case, that there is no  
17 longer protection.

18          QUESTION: Well, I understand that. It is before  
19 us, too.

20          MR. MURRAY: I understand that, Your Honor.

21          QUESTION: How do you distinguish the Dayton Goose  
22 Creek case?

23          MR. MURRAY: Well, that was a case where a  
24 railroad that was ongoing was required to share its excess  
25 profits with other railroads, and I think it is understood

1 that all railroads operate in a kind of community of  
2 interest. They operate their interline payments that are  
3 generated. There are all kinds of -- there is a common  
4 carrier -- there is a common fleet of cars. It is important  
5 to one ongoing railroad that all the other ongoing railroads  
6 are healthy, but that is not the situation of the Rock  
7 Island. The Rock Island is withdrawing from the railroad  
8 business.

9           Under the Brooks-Scanlon case, the creditors and  
10 the shareholders of the Rock Island cannot be compelled to  
11 continue their investment in a railroad for an indefinite  
12 period with continuing losses. There has to come an end at  
13 some point to that. And that is what Judge McGarr held  
14 happened on January 25, 1980.

15           So, the Rock Island is withdrawing from that group  
16 of common carriers that have a common enterprise together,  
17 and I think that is the distinction of that Dayton case.

18           The Seventh Circuit's reasoning has been followed  
19 by the court in the Third Circuit in the Susquehannah case,  
20 and by the special court in the valuation proceedings case,  
21 in a decision just handed down on November 24, 1981, in  
22 which the court stated that we would have considerable doubt  
23 regarding the constitutionality of Interstate Commerce  
24 Commission imposition of labor protection conditions in the  
25 abandonment of a hopelessly losing railroad.



1           QUESTION: Let me see if I understand your earlier  
2 point. Suppose a railroad decided that it was going to just  
3 cut off some of its outlying services and the ICC approved,  
4 and severance pay was ordered as a condition by the ICC.  
5 That would certainly be an appropriate corporate purpose,  
6 would it not?

7           MR. MURRAY: Absolutely. That's correct, Your  
8 Honor.

9           QUESTION: Is there any relationship between that  
10 -- Let me put it this way. I got an impression from you  
11 that if the railroad were an ongoing operation, you would  
12 have a different situation with respect to the hypothetical  
13 I just presented to you.

14          MR. MURRAY: We would be in the position, for  
15 example, of the Milwaukee Road, which is an ongoing rail  
16 operation, and it is in the process of contracting, and it  
17 does have a labor protection obligation under the  
18 traditional form of labor protection, and the Milwaukee  
19 Railroad Restructuring Act does benefit it, because it takes  
20 what would be a larger obligation and scales it down, but  
21 the Commission has always drawn a distinction between a  
22 total abandonment and a partial abandonment.

23          In a partial abandonment situation, the railroad  
24 has an interest in cutting back, scaling back that  
25 obligation. There is a savings that is generated that

1 creates a greater net income that the ICC has said should be  
2 shared with the employees who have to bear the brunt of that  
3 loss.

4           In a total abandonment situation, it is a loss  
5 situation. There is no net income from ongoing --

6           QUESTION: What if it is just a total abandonment,  
7 just a withdrawal, no liquidation, or no -- it is not in a  
8 Section 77 reorganization, and it is not liquidating?

9           MR. MURRAY: I think that is the exception I posed  
10 earlier, that there might be a situation where a perfectly  
11 healthy railroad, for whatever reason, is withdrawing.

12           QUESTION: Yes.

13           MR. MURRAY: I think that is a different case, and  
14 perhaps as a matter of statutory law a labor protection  
15 obligation could be imposed in that case. Brooks-Scanlon  
16 and the Brooks-Scanlon precedent would not be operating  
17 there.

18           QUESTION: So the railroad says, we are going to  
19 withdraw from the railroad business, but we have got a lot  
20 of money and we are going to go to some other business.

21           MR. MURRAY: Right.

22           QUESTION: Do you think that --

23           MR. MURRAY: That would be a different case, and I  
24 think that --

25           QUESTION: But that is not this case.

1 MR. MURRAY: That is not the Brooks-Scanlon case.  
2 This is a situation in which this railroad has had massive  
3 losses over the last five years, and is simply in the  
4 process of withdrawing and trying to provide for a  
5 liquidation, a complete liquidation.

6 QUESTION: What about an employer who is in a  
7 losing situation when the Fair Labor Standards Act was  
8 passed providing for minimum wages? Do you think that he  
9 could claim an exemption because he was in a bad financial  
10 position?

11 MR. MURRAY: No. As a matter of fact, I would sa  
12 that under the -- I have already indicated in the case of  
13 the Rock Island the Rock Island was paying, even though it  
14 was losing money over the course of the reorganization and  
15 was making contributions to the Railroad Retirement Fund and  
16 to the Railroad Unemployment Insurance Fund, and I would  
17 suggest that that is an instance in which there is  
18 legitimate investment-backed expectation, which is one of  
19 the tests under the New York Central cases, that that is a  
20 legitimate investment-backed expectation that an ongoing  
21 business, even if it suffers a loss, has to make some  
22 contributions, for example, to health insurance or to  
23 unemployment insurance.

24 What is so unusual about this case is that it was  
25 a retroactive obligation, that it was imposed in one lump

1 sum and it was utterly unprecedented.

2           QUESTION: But if the employer in Justice  
3 Rehnquist's example said, well, as long as I operate I have  
4 to live up to the law, but it is too expensive, I am going  
5 to quit, and if he quit, it would be a different question if  
6 the government then said, well, you can quit but you are  
7 going to have to pay your employees for a couple of years.

8           MR. MURRAY: That would be a problem. I think  
9 that is right.

10          QUESTION: Well, that is what you claim your case.

11          MR. MURRAY: Yes. Right. That's correct, Your  
12 Honor.

13          The government has argued that the Rock Island has  
14 benefitted from the labor stability that was created in the  
15 case of the Rock Island, and we think this is belied by the  
16 record. In the first place, there was a strike by the  
17 employees of the Rock Island that was the proximate cause of  
18 its collapse. But in any event, we would have to suggest  
19 that the Rock Island had suffered massive losses over the  
20 five years of operation, and how it can be suggested that  
21 the Rock Island benefitted in this particular situation is  
22 quite distinct in the record.

23          Thank you.

24          CHIEF JUSTICE BURGER: We will resume there at  
25 1:00 o'clock, counsel.



1                   (Whereupon, at 12:00 o'clock p.m., the Court was  
2 recessed, to reconvene at 1:00 o'clock p.m. of the same day.)

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AFTERNOON SESSION

2

CHIEF JUSTICE BURGER: Counsel, you may resume.

3

ORAL ARGUMENT OF DANIEL R. MURRAY, ESQ.,

4

ON BEHALF OF THE NON-FEDERAL APPELLEES - CONTINUED

5

MR. MURRAY: Thank you very much, Your Honor.

6

This morning, I alluded to the decision of the  
7 Seventh Circuit court of appeals finding that there was no  
8 labor protection in the Rock Island abandonment situation,  
9 and I would like to explain the reasoning that the Seventh  
10 Circuit provided and the reasoning that we have stated in  
11 our brief which was filed before the Seventh Circuit  
12 decision.

13

Labor protection arose originally in connection  
14 with mergers and consolidations, and the theory behind labor  
15 protection was that to the extent that a merger or  
16 consolidation resulted in a savings for a particular ongoing  
17 railroad, and jobs were lost in the process, those savings  
18 ought to be shared with the employees who lost their jobs.

19

Subsequently, Congress provided that labor  
20 protection should also be accorded in an abandonment  
21 situation. And in doing so, Congress cross-referenced the  
22 statute on abandonment with the statute on consolidations  
23 and mergers, and said that the labor protection that would  
24 be imposed in an abandonment situation would be the same as  
25 that imposed in a merger and consolidation situation. This

1 involved the payment of the so-called New York dock  
2 conditions, which were applied in a partial abandonment  
3 situation, the six years of labor protection, 80 percent of  
4 an employee's wages.

5           The ICC developed a consistent practice of  
6 exempting or declining to impose any labor protection in a  
7 total abandonment situation, and when Congress recodified  
8 the Interstate Commerce Act, it indicated in the legislative  
9 history of the adoption of that statute that no change in  
10 the law developed by the ICC respecting total abandonments  
11 was intended, and that same point was made when Congress  
12 transferred authority over abandonments in bankruptcy  
13 situations from the ICC to the reorganization court, and I  
14 should note as an aside that in the Rock Island case it is  
15 the reorganization court, under Section 17 of the Milwaukee  
16 Road Restructuring Act, that has authority and discretion as  
17 to whether to impose labor protection in an abandonment  
18 situation.

19           But all the time that Congress was recodifying  
20 these languages and amending it and transferring it, it  
21 always referred back to the language of the statute that had  
22 been interpreted by the ICC as not requiring labor  
23 protection in a total abandonment situation, and that is  
24 what the --

25           QUESTION: Has the ICC ever said it was forbidden?

1           MR. MURRAY: The ICC indicated that they would not  
2 impose it. They did not say it was forbidden. That is  
3 correct, Your Honor.

4           QUESTION: Well, you are saying it is forbidden,  
5 aren't you?

6           MR. MURRAY: It is forbidden in the situation of a  
7 liquidation where the -- under Brooks-Scanlon, where a  
8 railroad has operated at a loss consistently --

9           QUESTION: Well, the ICC has never said that.  
10 Nobody has said that.

11          MR. MURRAY: That is correct, Your Honor.

12          QUESTION: That is a new question.

13          MR. MURRAY: It has been indicated by Judge McGarr  
14 in his abandonment order, and that is correct. That is the  
15 one place it has been mentioned.

16          The particular vice of the Rock Island Transition  
17 Act is that it attempts to retroactively impose labor  
18 protection in a situation where the Rock Island has already  
19 been adjudicated entitled to liquidate. This is not a  
20 situation where Congress is trying to enact legislation that  
21 will apply to all railroads or all railroads that  
22 subsequently enter into liquidation -- into reorganization.  
23 It applies only to the situation where -- only the situation  
24 of the Rock Island after it has been adjudicated entitled to  
25 liquidate.



1           The vice of this kind of retroactive legislation  
2 in part is that it impacts upon the creditors and the  
3 shareholders of the Rock Island, because they made their  
4 investment in the railroad industry on the understanding  
5 that under this consistent ICC practice that it developed  
6 over the years, there would be no labor protection imposed  
7 in a total liquidation situation, that there would come a  
8 point --

9           QUESTION: But that is true of all investors in  
10 any corporation prior to 1938 and the passage of the Fair  
11 Labor Standards Act, isn't it? They made their investment  
12 with the understanding that the company could pay its help  
13 as little as it could get by with.

14          MR. MURRAY: It's true that that was the situation  
15 with the Fair Labor Standards Act, but what we are saying  
16 here is that this is a substantial obligation that is being  
17 imposed upon this particular railroad estate that has  
18 already served the public interest five years with \$210  
19 million. In an ordinary situation, if a corporation, a  
20 non-railroad went into bankruptcy, it would just go into  
21 straight liquidation. There would be no requirement that it  
22 continue in operation for five years with \$210 million of  
23 losses.

24          What is special about this case is that under  
25 Section 77 of the Bankruptcy Act, because a railroad has a

1 partial public service obligation, this railroad has been  
2 required to continue operations, unlike any other  
3 corporation, has been required to continue operations for  
4 five years with immense losses, and it has served the public  
5 interest totally, and it can give no more to the public  
6 interest. That is the meaning of Judge McGarr's liquidation  
7 order of January 25, 1980, and that is the distinction from  
8 any other non-railroad corporation under the Fair Labor  
9 Standards Act.

10           QUESTION: What if Congress in 1970, say, prior to  
11 the Milwaukee liquidation, prior to the Rock Island  
12 liquidation, had said affirmatively, there will be labor  
13 benefit programs for all railroads that subsequently go into  
14 liquidation?

15           MR. MURRAY: That would clearly be a more  
16 difficult case for us. It would -- there would not be the  
17 same degree of retroactivity that exists in this particular  
18 case. This case is exacerbated by the fact that it occurred  
19 after the reorganization entered its liquidation phase, and  
20 the relevance of that point is that during the course of  
21 reorganization, this railroad amassed \$250 million of  
22 expenses of administration. These are administrative  
23 claimants, small businesses, various group -- companies that  
24 dealt with the Rock Island on the assumption --

25           QUESTION: Lawyers?

1 (General laughter.)

2 MR. MURRAY: Anybody, that would be on the  
3 assumption that they would be entitled to priority under the  
4 Railroad Reorganization Statute, under Section 77, and under  
5 the very first order that Judge McGarr entered in the case.

6 Now, Congress, after the liquidation, is  
7 attempting to impose a claim that is either on the same  
8 plane with or prior to that, but it is going to have the  
9 effect of displacing or diluting those administrative  
10 claims, people who relied upon the provisions of Section 77  
11 with respect to the priority of expenses of administration,  
12 and that will have an impact upon -- if Congress can  
13 constitutionally impose such a prior claim at the twelfth  
14 hour, you know, in the course of liquidation, that will have  
15 an impact upon the ability of the courts to conduct  
16 reorganizations where there is a precarious financial  
17 situation for a particular railroad or any company, for that  
18 matter, because the possibility always exists then that  
19 Congress could come along, enact a new statute, and displace  
20 the interests of the expense of administration claimants.

21 QUESTION: Well, are you really suggesting that  
22 the state is so depleted that it would not cover all  
23 administrative expenses, including the \$75 million if it is  
24 imposed?

25 MR. MURRAY: Your Honor, at the present time --

1 QUESTION: Or do you know?

2 MR. MURRAY: We do have some idea, Your Honor,  
3 that at the present time there are \$250 million of expense  
4 of administration claims. There are between principal and  
5 interest, somewhere around \$75 million of claims of first  
6 mortgage bondholders, and the sales that have been made to  
7 date have been minimal.

8 QUESTION: So what is the estate valued at?

9 MR. MURRAY: At the present time, the escrow fund  
10 amounts to approximately \$130, \$135 million, and there are  
11 no major sales pending.

12 QUESTION: But there certainly is a liquidation  
13 value on the remaining assets.

14 MR. MURRAY: We have --

15 QUESTION: Except you can't find any value in  
16 them, I guess. Is that it?

17 MR. MURRAY: That's correct, Your Honor. It is  
18 very difficult to --

19 QUESTION: So you are really saying if \$75 million  
20 is imposed, it will -- if it is going to be paid in toto, it  
21 necessarily will be a priority administrative expense, and  
22 will dilute the other claimants to administrative expenses.

23 MR. MURRAY: At least dilute them, and perhaps  
24 displace them, depending upon the priority that is accorded  
25 by the reorganization court.



1 QUESTION: Mr. Murray, how realistic is the \$75  
2million figure?

3 MR. MURRAY: Your Honor, we have in the record an  
4affidavit by the trustee indicating that assuming 3,700  
5eligible employees -- this appears at Page 122A of the joint  
6appendix -- there would be an immediate payout of \$46  
7million and a total payout of \$69 million. That was  
8calculated in -- based upon figures that were available in  
9December of 1979, assuming 3,700 eligible employees.

10 Subsequently, it appears that there are even fewer  
11employees who have been employed by other railroads, and  
12therefore the number is expected to be higher, so it would  
13appear in all likelihood that it would be the full \$75  
14million.

15 QUESTION: Counsel, assuming that the Court were  
16to find that it was not a taking for a private purpose, the  
17railroad could then, would you concede, recover that amount  
18that it paid out under the Tucker Act?

19 MR. MURRAY: Well, assuming that it could not be  
20-- that this was not a -- for a private purpose, we would --  
21we would say that there was still irreparable harm to the  
22Rock Island estate, because this estate is in the process of  
23withdrawing from the rail service and from the public  
24service, and the effect that would have is to prevent a  
25partial distribution that the reorganization court wants to

1 make to the expense of administration claimants.

2           QUESTION: How long would it take to process a  
3 Tucker Act claim?

4           MR. MURRAY: It has taken -- this Act was passed  
5 over a year ago, and it has taken a year to litigate this.  
6 I would imagine it would take at least a year or two years,  
7 assuming the government raises certain defenses, and there  
8 is a question about the amount.

9           QUESTION: So what really is the problem is that  
10 it delays a partial distribution.

11          MR. MURRAY: That is correct, Your Honor. The  
12 real problem here is with the cost of administration --

13          QUESTION: The harm will be the difference between  
14 the interest rate that you would get on your Tucker Act  
15 claim and what you could do with your money if you got it  
16 now.

17          MR. MURRAY: Your Honor, the problem there is that  
18 there are -- there are cost of administration claimants, as  
19 Judge McGarr found, who can't afford to wait for their  
20 money. These are people, businesses who dealt with the  
21 trustee as they would deal with any other ongoing business,  
22 assuming they would be paid, and what happened in September  
23 of 1979, when the strike occurred, and when the Rock Island  
24 became cashless, is that it was unable to pay those expenses  
25 of administration that would be paid in any case, and those

1 people are now being deferred.

2           Judge McGarr indicated that he receives letters  
3 each week from these people, who are very necessitous,  
4 including local governments and state --

5           QUESTION: Why could the partial distribution not  
6 be made?

7           MR. MURRAY: Because the escrow fund is not large  
8 enough to cover both the first mortgage bonds and the \$75  
9 million lien that would be imposed upon the estate, and that  
10 is why he is not able to proceed, and he has so indicated to  
11 the various cost of administration claimants who come to his  
12 court on each status report date asking when are they going  
13 to be paid. It is because the amount of this lien that is  
14 overhanging the Rock Island estate and will overhang it if  
15 it waits until a Tucker Act claim is prosecuted, that makes  
16 it impossible to make that partial distribution.

17           QUESTION: What about a partial pro-rata  
18 distribution?

19           MR. MURRAY: Your Honor, the difficulty with that  
20 is that again, the escrow fund is not large enough to cover  
21 both the first mortgage bondholders and this \$75 million, so  
22 that there would be nothing left at that point, or just a  
23 miniscule amount left for the expense of administration  
24 claimants.

25           QUESTION: What is the priority between

1 administrative expenses and the first mortgage bondholders?

2           MR. MURRAY: Your Honor, that has not been  
3 adjudicated by the reorganization court. It is a very  
4 complicated question, and I am sure that is going to take  
5 quite a bit of time in the reorganization court. It would  
6 appear in some aspects, some aspects of the expense of  
7 administration claims are subordinate to the first mortgage  
8 bondholders, but --

9           QUESTION: But a lot of them are not, to the  
10 extent the first mortgage bondholders have profited by it.

11          MR. MURRAY: Again --

12          QUESTION: If ever.

13          MR. MURRAY: I would have to say that I think that  
14 most of the first mortgage bonds would be prior to the cost  
15 of administration claimants, but that is a question under  
16 Section 77, and Judge McGarr has not ruled upon that, and  
17 you would get different answers to that question from  
18 different --

19          QUESTION: And need not do so if the fund were  
20 large enough to cover both.

21          MR. MURRAY: That's correct. And the problem  
22 there, of course, is, you would get different answers to  
23 that question from different counsel for whom I am speaking  
24 today, so I should make that clear.

25          We are concerned, of course, in connection with



1 the Tucker Act remedy, that it may not be available here  
2 because it is a taking for private benefit of the employees,  
3 former employees of the Rock Island, and we believe does not  
4 relate to a public purpose. The government and the RLEA has  
5 tried to indicate that some public purpose is served by  
6 this, but we are suggesting that the payments that are going  
7 to be made are not payments --

8           QUESTION: Counsel, would you say that in the case  
9 of an ongoing enterprise or even a reorganization of the  
10 railroad, that for the government to impose such liability  
11 would also lack a public purpose?

12           MR. MURRAY: In that particular situation, Your  
13 Honor, because the railroad remains in the railroad  
14 business, I think it would be a harder question. I mean,  
15 that would be a -- in fact, the court has held in RLEA  
16 versus ICC that it is a --

17           QUESTION: Yes, it was my understanding we really  
18 have upheld legislation of that kind.

19           MR. MURRAY: That is correct, Your Honor, but  
20 there the thought is that it -- the rationale there is the  
21 connection between the fact that an ongoing railroad profits  
22 from the partial abandonment that is effected, and that the  
23 Congress can regulate the sharing of that profit with  
24 employees who are displaced because only a few employees  
25 have to bear the burden for which the entire railroad

1 profits.

2           QUESTION: How do you deal with the argument that  
3 presumably the investors and the railroad understood that  
4 some liability might well attach in any event under the  
5 other Act that was in force, the Milwaukee Act?

6           MR. MURRAY: Well, I think they understood it to  
7 mean that if the -- I think they understood Brooks-Scanlon  
8 and the cases that have followed Brooks-Scanlon, like New  
9 Haven Inclusion, to say that if a railroad operates at a  
10 loss consistently over the years, they have a right to  
11 withdraw their investment from rail service, and that cannot  
12 be subject to conditions such as that Congress tried to  
13 attach here.

14           I think that is really the bottom line in terms of  
15 the constitutional right, that they assumed they could  
16 withdraw their investment, and they assumed that that could  
17 not be conditioned by the imposition of a large labor  
18 protection claim, particularly in light of the consistent  
19 ICC interpretation of the abandonment statutes.

20           I want to address very briefly the question of the  
21 problem of this law as a non-uniform law in bankruptcy,  
22 because I think that is a matter that is of concern to us in  
23 this particular situation. One of the aspects of this law  
24 is that it does not attempt to generally amend Section 77 of  
25 the Bankruptcy Act to apply to all railroads, and it does

1 not attempt even to deal with all railroads that are now  
2 currently in Section 77.

3           It applies only to one railroad, which is the Rock  
4 Island Railroad, and the difficulty we have with that is, of  
5 course, that it permits Congress to tamper with an  
6 individual bankrupt estate, and we think that that -- the  
7 vice of that is that we think there is some protection that  
8 exists in the uniform law on bankruptcy clause of the  
9 Constitution, because the framers required that legislation  
10 for one must apply to all, and it prevents some tampering  
11 with one individual railroad estate, and that is --

12           QUESTION: Was the Milwaukee reorganized out of  
13 the Northern District of Illinois?

14           MR. MURRAY: Yes, it is, Your Honor. Yes, it is.  
15 But the Milwaukee is in a different situation. In fact, the  
16 way the Act applied to the Milwaukee Railroad case was quite  
17 different than the way it applied to the Rock Island case.  
18 The Milwaukee was, when the Milwaukee Railroad Restructuring  
19 Act was enacted, and is now an ongoing railroad, and of  
20 course there was a partial abandonment labor protection  
21 liability there. We don't have that situation here. When  
22 our Act was enacted, we had already been adjudicated  
23 entitled to liquidate.

24           The government argues that this is a law affecting  
25 commerce and therefore they are not bound by the uniformity

1 requirement of the bankruptcy power in the Constitution.  
2 The difficulty with this argument, I think, is that -- is  
3 twofold. On the one hand, Congress -- almost every  
4 bankruptcy law attempts -- involves in some way interstate  
5 commerce, I think one would have to say, and secondly, we  
6 think that just as the -- we think that the commerce power  
7 is qualified by other more specific constitutional  
8 provisions, and we think that is the case here. This is a  
9 more specific constitutional provision. Any law on  
10 bankruptcy must in some sense be uniform. If a bankruptcy  
11 Act can apply only to one railroad, that seems to us to  
12 suggest that the uniformity clause really doesn't have any  
13 meaning any longer.

14           Another concern that this particular Act raises is  
15 the disregard for the doctrine of separation of powers, and  
16 in that particular connection I should note that this  
17 particular legislation compels Judge McGarr to enter an  
18 order without any exercise of his own discretion, just  
19 immediately preceding the date on which he was scheduled to  
20 enter his decision on the particular matter.

21           In a sense, this particular legislation dictated  
22 the decision only days before the decision was to be made.  
23 It is thus like United States versus Klein. It is unlike Ex  
24 Parte McCordle, because there was no attempt to withdraw  
25 jurisdiction. They simply imposed a particular rule of



1 decision on Judge McGarr.

2 QUESTION: But if Congress had added a bottom line  
3 and said, by the way, to the extent the Bankruptcy Acts must  
4 be amended to achieve the above, they are so amended?

5 MR. MURRAY: I don't believe they did that,  
6 though, Your Honor.

7 QUESTION: If they had, there would be no  
8 separation of powers problem, would there?

9 MR. MURRAY: If they did it prospectively for all  
10 railroads, and did it in connection with this --

11 QUESTION: I don't think the separation of powers  
12 means it has to be uniform. You rely on the Bankruptcy Act  
13 for that.

14 MR. MURRAY: That's correct, Your Honor.

15 QUESTION: I mean, the bankruptcy clause.

16 MR. MURRAY: Right, the bankruptcy clause.

17 QUESTION: So it wouldn't be a separation of  
18 powers problem.

19 MR. MURRAY: It wouldn't, but in this particular  
20 circumstance what they did was, they tried to dictate the  
21 decision. They said that the decision that the ICC would  
22 enter would be one that was fair and equitable, but they  
23 define that to mean, whatever happened in the Milwaukee Road  
24 must happen here. Of course, the two are utterly unlike.

25 QUESTION: Mr. Murray, do you have any precedents

1 for this argument, to support you in this?

2 MR. MURRAY: Your Honor, we have cited the United  
3 States versus Klein case. I would say that it is very rare  
4 that Congress has enacted a piece of legislation in this  
5 circumstance.

6 QUESTION: My question is, are there any  
7 precedents that you can --

8 MR. MURRAY: The Klein case is the one precedent  
9 on which we rely.

10 QUESTION: Only the Klein case?

11 MR. MURRAY: We are particularly concerned about  
12 the way this particular Act operates when you combine the  
13 uniformity point that it operates only on one particular  
14 railroad, and the fact that it operates on the eve of when  
15 the court was to make a decision, and precludes a court's  
16 decision on a matter that is then pending and about to be  
17 decided. We think that raises very grave constitutional  
18 questions.

19 QUESTION: Mr. Murray, are there any specific  
20 authorities that truly resolve the question of whether this  
21 particular Act may be said to be an Act of bankruptcy, the  
22 Act that we are considering that Congress passed?

23 MR. MURRAY: Your Honor --

24 QUESTION: So as to bring into play the uniformity  
25 problem?

1           MR. MURRAY: I don't have any specific authorities  
2 that I can cite to Your Honor now. I can explain, though,  
3 that this is an Act that purports to create a claim, to  
4 adjudicate the existence of the claim, to state the priority  
5 of the claim. It is talking about a claim in bankruptcy,  
6 and of course it only relates to a bankrupt railroad. It  
7 relates to no other entity.

8           QUESTION: Or a railroad which is ceasing to  
9 operate. Maybe the bankruptcy stage is ended. I am not  
10 sure --

11          MR. MURRAY: The bankruptcy --

12          QUESTION: My concern is whether this Act may  
13 properly be characterized as a bankruptcy Act.

14          MR. MURRAY: Your Honor, my view would be that it  
15 is even more of a bankruptcy situation now. Earlier, there  
16 was some public interest component in this particular case.  
17 Now that it is in liquidation, it is in straight  
18 liquidation, and it really represents a pure bankruptcy, just  
19 as any other --

20          QUESTION: Well, this is a Section 77 proceeding,  
21 isn't it?

22          MR. MURRAY: It is still a Section 77 proceeding,  
23 but --

24          QUESTION: And that Section 77 was passed pursuant  
25 to the bankruptcy power.

1 MR. MURRAY: That is correct, Your Honor.

2 QUESTION: And this is going to be a plan of  
3 liquidation in a Section 77 proceeding.

4 MR. MURRAY: That is correct, and that is why it  
5 would be a --

6 QUESTION: And the question is, what claims are  
7 you going to pay.

8 MR. MURRAY: That is correct, Your Honor. That is  
9 why we believe it is a bankruptcy Act. I mean, it seems to  
10 us that the overwhelming component of this particular  
11 legislation involves bankruptcy, and to the extent there is  
12 any commerce implication for it, it is coincidental.

13 QUESTION: Mr. Murray?

14 MR. MURRAY: Yes, Your Honor.

15 QUESTION: Would you summarize again why you think  
16 the Staggers Act does not provide appropriate relief,  
17 assuming we find a taking?

18 MR. MURRAY: Your Honor, our concern there is with  
19 respect to the fact that this benefits employees who are not  
20 -- former employees who are not going to be working for  
21 other railroads. It doesn't serve any specific public  
22 purpose. It doesn't benefit the Rock Island in any way,  
23 because the Rock Island has no pre-existing claim in our  
24 view. Therefore, we are concerned that the government could  
25 raise the defense at the time of the Tucker Act proceeding



1 that it was not an appropriate matter under the Tucker Act.

2 All the Staggers Act says is that a Tucker Act  
3 remedy -- nothing in this Act shall preclude or limit a  
4 Tucker Act remedy. It does not say whether in fact a Tucker  
5 Act remedy exists. It is very careful not to say that. The  
6 legislation is very careful not to say that particular point.

7 The government in their brief indicates that there  
8 are situations where a Tucker Act remedy would not be  
9 available. For example, where there is no legislative  
10 authority for a particular taking, they say that that would  
11 not be an appropriate remedy under the Tucker Act.

12 What we are saying here is that there may also be  
13 -- there is no direct precedent on the point, but they may  
14 also raise the defense that this is not serving a  
15 governmental public purpose, and therefore there is no right  
16 to bring an action for compensation under the Tucker Act,  
17 and we won't know that until a later date, which will be of  
18 -- preclude any remedy to us. We are not granted the Tucker  
19 Act remedy by that Act.

20 QUESTION: Who would litigate the Tucker Act  
21 question? Would the trustee do it, or would creditors, or  
22 who?

23 MR. MURRAY: I would assume that the trustee would  
24 bring the action on behalf of all creditors. Of course, if  
25 there is no Tucker Act remedy, then the money is paid out to

1 all of the private employees, and it would be impossible to  
2 recover the money.

3 QUESTION: Well, I understand that, but somebody  
4 would have to initiate the litigation to determine whether  
5 or not the Tucker Act applied.

6 MR. MURRAY: And I assume that would be the  
7 trustee.

8 QUESTION: Yes.

9 MR. MURRAY: But it would come at a later date,  
10 after the money is paid out.

11 QUESTION: More administrative expense.

12 MR. MURRAY: Pardon me, Your Honor?

13 QUESTION: More administrative expense.

14 MR. MURRAY: That's right, Your Honor. Well, what  
15 the judge -- what Judge McGarr wishes to do at this point in  
16 the proceeding is to conclude this liquidation as soon as  
17 possible, because the liquidation has already been ongoing  
18 for five years. This railroad has lost \$210 million. It is  
19 amassed \$250 million of expense of administration claims.  
20 He wishes to pay as many claims as he can and close the  
21 estate, get this matter ended, and he believes that that is  
22 what he is entitled to do -- what he must do under the  
23 constitutional dictates of the Brooks-Scanlon case.

24 QUESTION: Mr. Murray, your concern is that if you  
25 were admitted to a Tucker Act remedy, if you brought it, the

1 United States may defend on the ground that there isn't any  
2 Tucker Act remedy because contrary to the argument they have  
3 made here today, this was not for a public purpose.

4 MR. MURRAY: Your Honor, I don't believe they have  
5 ever committed to paying the money in every circumstance,  
6 and I believe they are very careful in their brief, as I  
7 indicated --

8 QUESTION: Are you concerned that they might make  
9 that kind of defense, notwithstanding the argument they made  
10 here today?

11 MR. MURRAY: Yes, Your Honor, I would have concern  
12 about that, but there is also the point that there is  
13 irreparable harm to the Rock Island in that an estate which  
14 has already been existent in reorganization for five years,  
15 with immense losses, and all of these costs of  
16 administration claims, that is going to be prolonged for  
17 another several years while the Tucker Act claim is being  
18 prosecuted, and there is no reason for that. There might  
19 have been a reason for that in the Three R Act cases, where  
20 the government had to see specific property to maintain rail  
21 service in the northeast. Here we are talking about  
22 fungible money that could just as well come from the  
23 government if in fact any public purpose is being served --  
24 we don't think there is -- it could just as well come from  
25 the government as it could come from a bankrupt estate.

1 If this operates as a taking, what the Rock Island  
2 is doing in essence is advancing money for the federal  
3 government, and we submit that just doesn't make any sense.

4 Thank you very much, Your Honor.

5 CHIEF JUSTICE BURGER: Very well. Mr. Clarke.

6 ORAL ARGUMENT OF JOHN O'B. CLARKE, JR., ESQ.,

7 ON BEHALF OF THE APPELLANT - REBUTTAL

8 MR. CLARKE: Mr. Chief Justice, may I proceed, sir?

9 CHIEF JUSTICE BURGER: You have three minutes  
10 remaining.

11 MR. CLARKE: Okay. Thank you.

12 The one point that has been -- seems to be focused  
13 on and becomes almost like a central point is whether or not  
14 this Act, the 106 and 110 of the Act, create a private  
15 benefit rather than serves a public purpose.

16 Now, we submit that the rationale given by the  
17 creditors for what is the purpose, the whole purpose behind  
18 labor protection misses the mark. This Court in the Loudon  
19 case and then in the ICC versus the Railway Labor  
20 Executives' Association case, stressed that the only  
21 justification for imposing employee protection as part of  
22 the public -- national transportation system is to increase  
23 the stability of the labor force, and I would just like to  
24 read one short paragraph or part of a paragraph from the  
25 Railway Labor Executives' Association case, 315 US 373.



1 This is the abandonment case.

2 "There is nothing in the Act," namely the  
3 Interstate Commerce Act, "to prevent the Commission from  
4 taking action in furtherance of the public convenience and  
5 necessity merely because the total impact of that action  
6 will include benefits to the private persons" --

7 QUESTION: Mr. Clarke, how do you distinguish  
8 Brooks-Scanlon?

9 MR. CLARKE: Your Honor, Brooks-Scanlon has been  
10 interpreted by this Court to allow a railroad to eventually  
11 withdraw itself from rail service, but until the public  
12 interest in continued rail services are satisfied, the  
13 public interest factor remains a viable consideration, and  
14 the railroad can be required to continue on even if there is  
15 an erosion of the interest of secured creditors, and that is  
16 in the --

17 QUESTION: Well, certainly Brooks-Scanlon doesn't  
18 say that.

19 MR. CLARKE: Brooks-Scanlon doesn't, Your Honor,  
20 but the New Haven case, I believe the Penn Central merger  
21 and the Denver and Rio Grande case, which we have cited in  
22 our brief, indicate that the Brooks-Scanlon doctrine is  
23 qualified by the fact that although a railroad cannot be  
24 allowed to continue indefinitely at a loss, there can be a  
25 reasonable period of time while the public solution, public

1 interest solution is found, and we submit the difference  
2 that we have with the creditors and the trustee on this is  
3 that part of the public interest solution that has to be  
4 found here is how do you provide for a stabilized labor  
5 force.

6         Now, the ICC case goes on to indicate that the  
7 Loudon case specifically recognized that the imposition of  
8 conditions similar to those sought here might strengthen the  
9 national system through their effect on the morale and  
10 stability of railway workers generally. Exactly the same  
11 considerations of national importance are applicable and  
12 operative here, and we submit they are applicable and  
13 operative here as well because the entire purpose of labor  
14 protection is not just for Rock Island people, it is for all  
15 railroad employees.

16         Mr. Murray has indicated that the railway system  
17 is a national community type of establishment. What happens  
18 to -- what happens to one railroad here affects another  
19 railroad, either through direct intercourse of commerce or  
20 through the passing of the word of mouth.

21         If employees know that if the railroad goes  
22 bankrupt and they are going to be cut out in the cold unless  
23 they are lucky enough to get a job with somebody else, why  
24 should a railroad employee stay with any other carrier today  
25 that is in financial problems? It is because of that

1 consideration and the need to continue railroad workers on  
2 their jobs, and have that supply available, that this  
3 continues. This is exactly what the Act did.

4 I realize my time is up. Thank you.

5 CHIEF JUSTICE BURGER: Thank you, counsel. The  
6 case is submitted.

7 (Whereupon, at 1:28 o'clock p.m., the cases in the  
8 above-entitled matter were submitted.)

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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:

RAILWAY LABOR EXECUTIVES' ASSOCIATION vs. WILLIAM M. GIBBONS, TRUSTEE, ET AL.; and RAILWAY LABOR EXECUTIVES' ASSOCIATION v. WILLIAM M. GIBBONS, TRUSTEE, ETC., ET AL. NO. 80-415 & 80-1239

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