In the

ORIGINAL

Supreme Court of the United States

JACKSON TRANSIT AUTHORITY ET AL.,	)	
Peititioners	)	
v.	)	NO. 81-411
LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL-CIO-CLC	)	

Washington, D. C.

April 21, 1982

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JACKSON TRANSIT AUTHORITY ET AL.,

Petitioners

v. : No. 81-411

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Washington, D., C.

Wednesday, April 21, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:09 p.m.

APPEARANCES:

JOSEPH S. KAUFMAN, ESQ., Baltimore, Maryland, on behalf of the Petitioners.

MRS. LINDA R. HIRSHMAN, ESQ., Chicago, Illinois, on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Jackson Transit Authority against the union.

I think you may proceed whenever you're ready.

ORAL ARGUMENT OF JOSEPH S. KAUFMAN, ESQ.,

ON BEHALF OF PETITIONERS

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

This case directly brings before the Court today the provisions of the Urban Mass Transportation Act of 1964 for the first time. The issue presented to the Court today is whether by enacting UMTA, and particularly Section 13(c) thereof, Congress silently required federal courts to federalize municipal transit labor relations over federal grant recipients by creating a federal common law to resolve public sector transit labor disputes and thereby preempt state law.

In the first instance, the District Court in this case answered that question negatively. the Court of Appeals for the Sixth Circuit in a two-to-one decision reversed. It implied a federal private right of action by default.

Since the decision of the Sixth Circuit, another Circuit Court has reviewed this matter comprehensively and ruled to the contrary, that being

the Eleventh Circuit in the MARTA case.

This controversy that reaches the Court today is between two private parties, Jackson and the union. There is no federal interest in the outcome of this litigation. There are no federal parties presently before this Court, and the substantive outcome of this controversy requires neither construction, interpretation nor vindication of UMTA.

Additionally, in this case there is no conflict between any federal interest and the law of Tennessee. Tennessee law clearly establishes collective bargaining between municipalities and its transit workers. The outcome of this case will have no substantive -- will have no effect on the substantive rights or duties of the United States.

UMTA --

QUESTION: Well, that's true in a lot of cases, Mr. Kaufman, where nonetheless a federal right of action has been implied, isn't it? J. I. Case v. Borak and cases like that?

MR. KAUFMAN: Well, yes, sir, but the J. I. v. Borak has been somewhat cut back by your more recent decisions.

QUESTION: But even in some of our -- those cases where a private right of action has been implied,

say Cannon v. University of Chicago, there there was no federal party or the United States wasn't a party.

MR. KAUFMAN: But there was a direct command in the statutes involved in those cases which is not true here, as I will point out in a moment.

I might point out, sirs, that UMTA was on the books for some 12 years before the union sought to utilize the federal courts to bring actions such as this nature. This was one of the first attempts. If the decision of the Sixth Circuit is affirmed, municipal transit labor relations will be decided in two courts, in state courts as well as federal courts.

Now, the events in this case are somewhat unique. Prior to 1966, for approximately 20 some odd years, there was a private transit operator in Jackson, Tennessee. The union represented the transit workers in that community. In 1966 the Jackson Transit Company, as was happening throughout the country with other transit systems, went defunct. The city, in its judgment, as a public function, took over the operation of a bus system containing 12 buses and 18 unionized employees.

Jackson filed for and received an Urban Mass Transportation Act grant in the amount of $275,000 to assist in acquiring 12 new buses and rehabilitating its maintenance facilities. As part of the grant

application process Jackson entered into what is commonly known as a Section 13(c) agreement whereby the rights of the workers and the interests of the workers are protected. That 13(c) agreement was certified by the Secretary of Labor as creating fair and equitable arrangements for the protection of the interests of the employees.

From 1966 through 1975, Jackson and the union entered into three collective bargaining agreements which were obviously honored since there was no litigation between the parties.

In 1975 a fourth collective bargaining agreement was negotiated. It contained a COLA provision, a cost-of-living escalator which is the underlying basis of this suit. The city, after the execution of the agreement, found that it had never been properly ratified by the Board of Commissioners and refused to honor the COLA, and sought to renegotiate the collective bargaining agreement with the union.

The union declined. It first demanded of the Secretary of Labor that he decertify Jackson for future UMTA grants. The union, in its wisdom, decided to try to make a federal case of the matter.

Now, did Congress, in light of the aforegoing, intend for the federal court in Tennessee to create and

apply federal common law to this contract dispute between Jackson and its 18 unionized employees as a result of this single UMTA grant made some ten years previously? It is Jackson's position that the answer to this must be emphatically no. Congress, through UMTA, and particularly Section 13(c), did not intend to displace the traditional public policy enunciated in both the Wagner Act and the Taft-Hartley Act excluding by definition state and political subdivisions from all obligations of the Labor-Management Relations Act in order that local governments and communities regulate and manage their affairs and arrangements with their own employees free from federal intereference, control and federal court jurisdiction.

What is UMTA? It is a typical federal funding statute which requires at the time of federal assistance certain conditions be met. They include long range transit plans and public hearings thereon, special efforts for the elderly and handicapped, environmental impact statements, charter bus assurances so there will be no competition, and maximum participation by operators in the private sector.

One of the conditions is the conditions to protect the interests of the workers, and that is to be determined by the Secretary of Labor, and he must

certify that fair and equitable arrangements have been made to protect the interests of the workers. Section 13(c) did not create federal collective bargaining rights, and only required the Secretary of Labor during the application process to look at state law and determine if it was hostile to collective bargaining.

QUESTION: Mr. Kaufman, to what extent is the continuance of state law a binding obligation? Suppose after the grant is made the state changes its law, wipes out collective bargaining.

MR. KAUFMAN: If that were to happen, Your Honor, there is adequate provision in UMTA itself, in Section 1602(f) and (g) of the law, the Secretary is instructed to bar further grants to those communities which do not comply with their grant contracts. There is a cutting off of funding mechanism built right into the act itself.

QUESTION: Is that the end of it?

MR. KAUFMAN: No, sir. There is a provision that the Secretary can enforce agreements. He could sue on his agreement.

QUESTION: So the Secretary could go into federal court.

MR. KAUFMAN: Yes, sir. But this is where we have a private party attempting to go in.

QUESTION: What would be the law governing if the Secretary went in?

MR. KAUFMAN: The law would be govern --

QUESTION: There might be jurisdiction, but what would be the governing law?

MR. KAUFMAN: The governing law would be the law of contracts, Your Honor, which essentially is state law. There is no federal common law of contracts.

QUESTION: Well, there's a lot of contracts that federal law requires or specifies that are governed by federal law.

MR. KAUFMAN: Some are governed by -- but this contract, I think, would be governed by state law, and let me explain why I say that.

QUESTION: What about an ordinary collective bargaining contract subject to the labor laws?

MR. KAUFMAN: Those are expressly governed because Congress created federal court jurisdiction and mandated federal law apply.

QUESTION: Well, it didn't mandate it. We said it did, but that isn't what the statute said.

MR. KAUFMAN: Well then, this Court said it did, Your Honor, and I will accept that correction.

QUESTION: So it might as well have said it, might as well have said it.

QUESTION: May I ask a question about Section 13(c) agreement?

MR. KAUFMAN: Yes, sir.

QUESTION: Right on this point. I think it is quoted in -- at 17a of the Joint Appendix. There's a sentence in the agreement that says any public body or agency shall comply with the requirements of 10(c) in such manner as is necessary not to reduce or impair any rights, privileges and benefits which such employees of such transit sytem would have received or be entitled to had the system continued under its former private management.

Now, had it continued under the former management, the rights would have been federal rights, wouldn't they?

MR. KAUFMAN: Your Honor, if it had -- in this particular case that is true, but that wasn't the situation under which UMTA was --

QUESTION: But this is the agreement we are talking about.

MR. KAUFMAN: That's true, and there's also provisions I believe you will find in that agreement, if it is unenforceable, that you go back to the Secretary of Labor for new types of arrangements.

QUESTION: Well, I don't understand, in

response to Justice Blackmun's question, if this -- they would have had federal rights before and those are preserved, and after all the money is spent so there is no remedy in cutting off further funding, why couldn't the state, under your view, why couldn't the state simply pass a statute that says, well, municipal bodies don't have to abide by collective bargaining agreements because there is a public interest in management and so forth?

MR. KAUFMAN: I think it's highly impractical that that could happen, Your Honor. Nobody --

QUESTION: Well, your opponents in effect contend it happened here.

MR. KAUFMAN: It did not happen here. We negotiated three collective bargaining agreements. We have a state law that mandates that we collectively bargain. The Tennessee law makes a positive mandate upon us to do so. The only thing that we did here is we said that this agreement had not been properly ratified.

QUESTION: Right, by the municipality.

MR. KAUFMAN: If it hadn't been properly ratified, there's no contract. It's a typical common law issue of whether or not there has been the proper formation of a contract. There is no great issue here.

QUESTION: Well, what if the state passed a new statute on what it takes to ratify a contract or something of that kind? Then that would control under your view.

MR. KAUFMAN: Your Honor, I know of no state action anywheres that that has ever happened, and why I believe it would not happen, that although Jackson is a small community in Tennessee, the other communities in Tennessee that are not so small such as Memphis and Nashville and Knoxville and Chattanooga are not going to have their federal funding cut off because Jackson decided it didn't want to collectively bargain anymore.

As a practical matter what happens is that state laws have been adjusted to accommodate the situation under Section 13(c), not the reverse, the cutoff situation.

The federal --

QUESTION: As a practical matter, perhaps it wouldn't happen, but you say as a matter, conceptually, there's really no federal objection to it if the state should decide to do so.

MR. KAUFMAN: Your Honor, if you look at the whole UMTA act, the one thing that comes out clear in the legislative history was that once a grant was made, there should be as little federal interference as

possible.

There were two concepts before the Congress at that time, to have loan guarantees on one hand which would require continuous federal monitoring, and on the other hand to have a situation where all the documents are forwarded and judgement is made whether this was a good or bad project to be funded. Once it was funded, they would go on and look at the next project. There wasn't to be that type of -- and it was intentionally not to be that continuous type of monitoring as is in certain other programs that have proved disastrous to the government.

Your Honor, we can always speculate it could have happened.

QUESTION: Well, I'm not -- that's right, and I'm troubled, frankly, the thing that troubles me is the language in the agreement itself here, which seems to contemplate no difference in the substantive rights of the parties before and after, and I think you suggest there's a rather significant difference.

MR. KAUFMAN: Yes, sir.

And I think you also have to look at what the legislative history was because time and again both the sponsor of the bill, the Kennedy administration, the floor leader of the bill, Senator Williams, the Chairman

of the Committee that handled the bill, Senator Sparkman, and the Floor proponent of the bill, Senator Morse, said time and time again that this was not intended to supersede state law, that it was not intended to override state law or preempt state law in any way. It was truly to encourage states to adjust their laws, modify their laws to have collective bargaining, and if they didn't, they wouldn't get the funding.

I think probably the best example of how the law was intended to work is in the City of Macon case which is cited in our brief. When the City of Macon refused to make the necessary adjustents to make its laws compatible with collective bargaining, after the Secretary used all kind of jawboning, they didn't get their money. And that's exactly how this act was intended to work. It wasn't intended to create federal collective bargaining rights. I have serious doubts whether it could have. The states have been exempt from the federal labor relations laws ever since the inception of the Wagner Act. Time after time there have been proposals before the Congress to change that. And they have been defeated. And it has been the consistent national policy to leave the states' handling of their own labor relations to the states without federal

interference by either federal administrative bodies such as the NLRB, or the federal courts.

QUESTION: Well, that's a little bit of an overstatement, isn't it, because in the Macon case, for example, in order to get the federal funding they would have had to modify, adopt new state laws.

MR. KAUFMAN: That's correct, but --

QUESTION: And so the condition of the grant is a change in state law.

MR. KAUFMAN: It would be governed by state law. That's the critical point, sir, that state law covers --

QUESTION: But it's the state law after the grant rather than before the grant.

MR. KAUFMAN: No, sir, before the grant is approved the state law would have had to have been modified in order to make it compatible with the continuation of collective bargaining and therefore to get the money.

QUESTION: But no obligation to make it continue to be compatible.

MR. KAUFMAN: Your Honor, I don't know how you make people comply with the law that sign documents that they are going to comply with the law, that pass laws. We are dealing with situations that have never happened,

to the best of my knowledge, where a state has absolutely repealed its law.

Now, we do have situations where states have modified their laws, and there's a matter that's pending before you on cert right now at MBTA where they modified their laws regarding interest arbitration, but it didn't end collective bargaining.

Now, as I said, UMTA is, must be viewed as a typical federal funding statute such as the Court had before it in Pennhurst, and its purpose was not to create federal transit relations. Its purpose was to salvage, and yes, it was the survival of a badly deteriorated urban mass transit industry in this country. It was structured to require local solutions to local problems. 13(c) arrangements were to be the product of local negotiation and bargaining.

Neither UMTA nor Section 13(c) contains any express private remedy. If one exists, it exists only by implication, and then I respectfully submit, not warranted under the circumstances here.

It is clear from the language of the statute itself that UMTA was to meet the requirements of local needs, and it was to improve the mass transit facilities in order to facilitate desirable urban renewal. The labor protections were either secondary or ancillary to

the main purpse of this act.

Interestingly, as you read the legislative history, the reason that 13(c) even became an issue was a happening that you suggest, Justice Stevens, in Dade County, Florida. Dade County had a private transit operator in the early '60s. It, too, went bankrupt, and Dade County took over the system. Because of state law, the employees lost whatever collective bargaining rights they had. They were required to become merit system employees, and they couldn't be represented by a union. It was in that type of factual background that the unions came to the Kennedy administration and said we don't want federal funds to be used to defeat the workers' rights as happened in Dade County.

Congress and the administration had three choices in that light. The first was to have full federal involvement akin to the railroad and airline industries, under the Railway Labor Act, in other words, federalized local transit labor relations. The second option was to keep hands off and do nothing. And the third option, the one that was eventually adopted, was the carrot and stick approach, to make federal funding attractive so as to have the states that had hostile collective bargaining laws to either modify those laws or work out some innovative arrangement in order to be

able to qualify and be eligible for federal assistance.

I want to tell you why that is particularly important in the light of what was happening in 1963. In 1963 the major transit systems had already gone from the private to the public sector. New York City, Chicago, L.A., Boston, Seattle, Oakland, California, Cleveland, just to name a few, had already made the transition. They were already governed by state law procedures.

Now, if that was the case, we would have two classes of systems, those who were later going to fall into the same trend and who were still governed by federal law at that time, and those that had already made the transition, the major systems that needed the money most of all.

I don't think Congress ever intended to have two classes. They intended to have a situation to make it, as Justice Rehnquist said in the Pennhurst case, to have a nudge, an ability to try to get an accommodation with state law so it would not be hostile. At no time in this case was Tennessee law antagonistic to what was intended here.

QUESTION: Are you suggesting that all that was intended by Congress was to see that the workers would be no worse off?

MR. KAUFMAN: Yes, sir, no -- and that is the word that is used in the statute itself, a worsening. They would be no worse off.

You know, this is the fourth collective bargaining agreement that was executed between Jackson and its workers. It wasn't something that just was an attempt to defeat any of their previously existing rights or benefits. They'd had collective bargaining. They had a longstanding collective bargaining relationship.

QUESTION: Well, but isn't it true that if you prevail on your position in this case, that will be the last?

MR. KAUFMAN: No, sir.

QUESTION: Legally it could be the last.

MR. KAUFMAN: No, sir. At all times Jackson has wanted to go back to the table, and the record in this case shows that they urged the union to come back and renegotiate a collective bargaining agreement, and that is the only evidence in this record. It's part of the complaint.

QUESTION: Well, let me put it differently. Assume that the arbitrater, if it goes to -- I guess it goes -- if it goes to an arbitrater. I don't know exactly whether it would or not, but there's a ruling

that the ratification was not proper. Therefore the agreement's no longer in effect. As a matter of law you would be under no obligation to bargain, would you? Maybe as a matter of policy you would do so.

MR. KAUFMAN: I think we are under an obligation under Tennessee law to do it.

QUESTION: To --

MR. KAUFMAN: To collectively bargain. The Tennessee law is explicit on that.

QUESTION: I see.

MR. KAUFMAN: Sure we're under an obligation to, and we've never backed off that obligation.

QUESTION: Mr. Kaufman, I wanted to ask you whether it's your position that the union could force you to collectively bargain under -- by virtue of Section 13(c).

MR. KAUFMAN: No, ma'am. Section 13(c) creaes no rights. It is not like the Labor Railway Act that mandates that there be collective bargaining agreements between the railroads and their unions.

And that also brings me to a very interesting point.

QUESTION: Could I ask you just one more question to follow up Justice O'Connor's question?

You say 13(c) creates no rights, but certainly

th agreement entered into pursuant to 13(c) between the transit authority and the union creates rights, doesn't it?

MR. KAUFMAN: It creates contract rights.

QUESTION: And if it creates contract rights to collectively bargain, those could be enforced in state court.

MR. KAUFMAN: Yes, sir. State courts traditionally handle dispute --

QUESTION: Or in a federal court if there were jurisdiction.

MR. KAUFMAN: If there were jurisdiction.

QUESTION: And it would be a question of contract enforcement, not a question of a cause of action under a statute.

MR. KAUFMAN: That is correct. That's the absolute bottom line of this dispute. It's the enforcement of a contract.

I'd like to point out before I sit down and reserve my time one very important element. When this matter was before the Congress the union, through its representatives, presented to both the House and Senate committee a proposal, a proposal which would have -- and I'm going to quote -- "required protective arrangements which shall include, without being limited to,

enforceable provisions requiring," and I'm skipping, "the right of the employees to bargain collectively through representatives of their own choosing concerning wages, hours and conditions of employment, and ensuring the right and duty of the employees' bargaining agent and the employer to make and maintain collective bargaining agreements, and ensuring the existence of authority for any employer and the bargaining representatives of the employees to enter into enforceable arbitration agreements," very rigid, mandatory requirements, similar to the Railway Labor Act.

The Congress rejected this proposal. It wanted not to impose these type of requirements on the municipalities. It wanted state law wherever it was, where it existed, if it was not hostile to federal law, to govern the situation. And that is our position before this Court today.

I would like to reserve the remaining time, Mr. Chief Justice.

CHIEF JUSTICE BURGER: Mrs. Hirshman.

ORAL ARGUMENT OF LINDA R. HIRSHMAN, ESQ.

ON BEHALF OF THE RESPONDENT

MRS. HIRSHMAN: Mr. Chief Justice, and may it please the Court:

Your Honor, the Section 13(c) preserves rights. That language is right in the statute. If you look at Section 13(c)(2) you see that it says the continuation of collective bargaining rights. There is no distinction between create, for our purposes here, between creating rights and preserving the rights as they existed before.

QUESTION: Why not? Why not?

MRS. HIRSHMAN: Because when these employees were in the private sector they had rights to collective bargaining including enforceable collective bargaining agreements which could not be torn up months after they were concluded. And what Congress did in 13(c) was look at that situation and say we're going to preserve those rights for you. We are not going to all federal funding to be the vehicle by which you are transferred out of that right-laden position.

QUESTION: Well, they said if you want a grant, if you want a grant, you have to make some arrangements to preserve them.

MRS. HIRSHMAN: The statute is phrased as a condition on the receipt of federal funds.

QUESTION: Yes, yes.

MRS. HIRSHMAN: That's correct.

QUESTION: And so if you want a grant, why

you, for example, must adopt the contract that was in existence before.

MRS. HIRSHMAN: There are --

QUESTION: Does that create a right?

MRS. HIRSHMAN: Well, it preserves -- let's -- the question before us today is whether it continues collective bargaining rights. It said you must make arrangements to continue collective bargaining rights. It doesn't need to create rights in order to do that. It preserved them from the prior status.

QUESTION: You mean it said you had to agree to be subject to the National Labor Relations law?

MRS. HIRSHMAN: No. Your Honor, the Congress made it I think quite clear what it was intending to do in this case. Without amending the National Labor Relations Act it was requiring the recipients of federal transit grants to make binding commitments to their employees and also to the United States that they would not divest the employees of their labor rights, and they are enumerated in the statute.

QUESTION: So you think the condition was that they subject themselves to the National Labor Relations Act?

MRS. HIRSHMAN: No. I think that the condition was that they continue collective bargaining

rights as tht --

QUESTION: What rights? What rights?

MRS. HIRSHMAN: Well, in this case it's the right to a binding collective bargaining agreement. If there's one thing that we --

QUESTION: Under what?

MRS. HIRSHMAN: Pardon me?

QUESTION: Under what, what right to a collective bargaining agreement, the federal right?

MRS. HIRSHMAN: Yes, Your Honor.

QUESTION: So you say yes, they were agreeing to subject themselves to the National Labor Relations Act?

MRS. HIRSHMAN: To the rights that were created by the Labor Act which by virtue --

QUESTION: So your answer is yes, they just, that's the way you construe the act.

MRS. HIRSHMAN: It was preserved to them through the vehicle of Section 13(c).

QUESTION: All right. So in order to get the grant they had to agree to be bound by the National Labor Relations Act.

Is that what you're saying?

MRS. HIRSHMAN: What I'm saying is that the substantive rights that we understand when we use the

phrase collective bargaining rights includes certainly the years of history under the National Labor Relations Act, including binding collective bargaining agreements.

QUESTION: Well, let me ask, let me ask you this. Suppose there was a collective bargaining agreement in effect and the city says, well, sure, we'll continue that collective bargaining agreement for as long as it lasts. Well, the contract expires, and so there's no more contract rights right then, and then you say, well, now you must bargain for another one.

MRS. HIRSHMAN: Right.

QUESTION: Now, what right is there to do that? I mean, what -- is the basis for it the National Labor Relations Act?

MRS. HIRSHMAN: The basis for it is Section 13(c) of the Urban Mass Transportation Act which obliged them --

QUESTION: Well, it just continued rights that they had, and so what right was it?

MRS. HIRSHMAN: They would have rights whose substance and understanding is derived from the years of experience under the National Labor Relations Act but whose actual legal, enforceable source is Section 13(c) of the Urban Mass Transportation Act, and that came up

in Congress. I mean, that came up in the debates in Congress, and I think it was Senator Morse who said they would retain their rights, not by virtue of the National Labor Relations Act, but by virtue of the arrangements which 13(c) will oblige them to make.

QUESTION: Forever?

MRS. HIRSHMAN: Well, the National --

QUESTION: Once having, once having taken the money, you are forever subject to the National Labor Relations Act.

MRS. HIRSHMAN: Well, you're subject to the commitments that you make as a condition of the receipt of federal funding.

QUESTION: Well, so what that -- so yes, you say yes.

MRS. HIRSHMAN: And I say, Your Honor, that if you take your employees out of the private sector and transfer them into the public sector whereby they are not covered by the strict terms of the National Labor Relations Act, Congess intended to bind you to deal with them in the ways set forth in Section 13(c).

Your Honor, since the mid-1940s --

QUESTION: May I ask you a question?

MRS. HIRSHMAN: -- the union repre -- the employees in Jackson had a union.

QUESTION: Excuse me, Mrs. Hirshman. May I ask you one question about that precise point?

MRS. HIRSHMAN: I'm sorry.

QUESTION: Supposing the contract expires and there's bargaining for a new contract, and the municipality commits an unfair labor practice in connection with the bargaining. You don't have a remedy under the National Labor.

MRS. HIRSHMAN: No.

QUESTION: What remedy, if any, would you have?

MRS. HIRSHMAN: The 13(c) agreements commit the recipients of federal funds, as Congress intended them to be committed, to bargain collectively with us.

QUESTION: Yes.

MRS. HIRSHMAN: And I think that we would be seeking to enforce the 13(c) agreement which has a provision for arbitration of disputes over its terms. So that if, for example, the transit authority said no, it's not an unfair labor practice, or we were bargaining in good faith, whatever, then we would have, as the 13(c) agreements provide, a dispute over whether they were violating the terms of the 13(c) agreement, and we would arbitrate over that.

But that's not what they did here. They took

a collective bargaining agreement that they had signed, the same way that they had signed ordinary collective bargaining agreements for ten years, and wrote a letter to the union informing us that the collective bargaining agreement was personal to the personnel director whom they had discharged.

Now, if there's one thing that collective bargaining rights means, it means that when you sign a collective bargaining agreement, it is binding on the parties and enforceable by them. That was certainly Congress' understanding in 1964. That is certainly the only reasonable understanding of the language of the act. And that is what the sponsor of the act said about collective bargaining rights when he amended the preparatory language of encouragement to make collective bargaining rights mandatory. Senator Morse said if we only wanted to nudge the recipients of federal grants with language of encouragement, then, he said, under the committee's indefinite language, collective bargaining agreements could be ignored or set aside by systems of public ownership.

QUESTION: Where is the language you are referring to, on what page?

MRS. HIRSHMAN: Page 15 of our brief, Justice Burger.

So that we know I think from the passage of the act through Congress, we know two things. First of all, we know that Congress was not intending to nudge transit authorities. Congress was intending -- and they had that option. They had the language of encouragement of collective bargaining in an early version of the bill. They took it out and they fought hard over taking it out. And one of the justifications that Senator Morse gave to the Congress for strengthening the law to make collective bargaining rights mandatory, not just encouraging them, was that the scenario that you have heard today would, under the old language, have taken place.

QUESTION: What is at issue here, the enforceability of the collective bargaining contract that was entered into pursuant to 13(c)?

MRS. HIRSHMAN: We have both issues, Your Honor, whether the collective bargaining rights preserved to the employees through the vehicle of 13(c) includes the common understanding that collective bargaining agreements are enforceable by the parties to them in federal court.

QUESTION: All right.

MRS. HIRSHMAN: And whether --

QUESTION: You mean, and that federal law

would apply?

MRS. HIRSHMAN: Federal law would apply, Your Honor --

QUESTION: And why would it?

MRS. HIRSHMAN: Well, the second option that Congress had in front of it when it was considering Section 13(c) was whether to subordinate the protections of Section 13(c) to state law, and they rejected that option five times. It was proposed in committee. Senator Tower proposed it twice on the Senate floor. After Senator Morse --

QUESTION: Well, that doesn't necessarily -- it doesn't necessarily follow from that that a collective bargaining agreement entered into pursuant to 13(c) would be governed by federal rather than state law. Obviously there's a binding contract that's enforceable. It's just a question of whether state law or federal law would apply.

MRS. HIRSHMAN: Okay.

Your Honor, what happens, the situation that Congress was facing was the Dade County scenario where the state law not only prohibited collective bargaining, but also did not provide the employees with an action to enforce their collective bargaining agreement, so that when, you know, to understand how the law is supposed to

function you have to look at the problem that Congress was trying to solve. Congress was trying to solve the Dade County situation, and in that case the state law simply did not provide the employees with an action to enforce their collective bargaining agreement. Congress said if there's one thing we're going to do with Section 13(c), it's make sure that federal funds do not fuel repetitions of the Dade County scenario.

The fact that the law of a particular state at the moment that the grant issues is or is not hostile to the federal rights that Congress sought to protect, it seems to me, is largely irrelevant.

Should this Court require an example of a situation in which a transit authority signs 13(c) agreements under then satisfactory state law and the law -- the state then changes its law, the First Circuit's decision in Division 589 v. The Massachusetts Bay Transportation Authority is a classic example of that. The State of Massachusetts did what Your Honors were asking the Petitioner about. They took the money and they changed their law in a way which affected the rights set forth in our 13(c) agreement.

The legislature of the State of Georgia has passed a similar law. It is awaiting the Governor's signature.

When the 13(c) agreements are remitted to state court for enforcement, a host of unexpected state law defenses surfaces. For example, in Georgia, where the Eleventh Circuit's ruled that although 13(c) agreements must be honored, the honoring of them must be honored, and that their contents, the federal contents are assured by the supervision of the federal Secretary of Labor, actions to enforce them belong in the state courts.

QUESTION: When you say 13(c) agreement, are you talking about the collective bargaining contracts entered into, or the agreement entered in between the recipient and the government?

MRS. HIRSHMAN: There are actually three agreements at issue here, Your Honor. There is a grant contract with the United States.

QUESTION: Well, which one are you referring to?

MRS. HIRSHMAN: I was referring to the labor protective agreement entered into between the grant recipient and the union representing its employees which Congress required to be made as a condition of the receipt of federal funds.

QUESTION: Is that Exhibit C in the Joint Appendix?

MRS. HIRSHMAN: I don't have it with me at this moment, Your Honor, but I am sure it is.

QUESTION: And is -- would the suit that would be brought be brought to enforce that agreement technically?

MRS. HIRSHMAN: This lawsuit happens to enforce both agreements because in this case the transit grant recipient both abrogated our collective bargaining agreement and abrogated the 13(c) agreement which required them to bargain with us and make and maintain enforceable collective bargaining agreements. So the grant recipient violated both.

This case really presents the --

QUESTION: Well the National Labor Relations Act doesn't even require people to enter into an agreement.

MRS. HIRSHMAN: No, the National Labor Relations Act operates by its own terms, to generate a process of collective bargaining --

QUESTION: Well, you have to bargain. You don't have to enter into any agreement.

MRS. HIRSHMAN: Right, right.

QUESTION: Let alone an enforceable one.

MRS. HIRSHMAN: Well, but once you enter into it, Your Honor, you're bound by it.

QUESTION: Mm-hmm.

MRS. HIRSHMAN: And I think that that is the critical collective bargaining right which we are seeking to enforce here. Once the agreement is entered into, it must be enforceable by the parties thereto.

QUESTION: Well, it isn't an unfair labor practice to break the agreement, is it?

MRS. HIRSHMAN: Well --

QUESTION: That is just a 301 case, is it?

MRS. HIRSHMAN: Well, it would depend on the circumstances, Your Honor, and first you would obviously have an arbitration question, a preliminary arbitration question. But the --

QUESTION: This has an arbitration clause.

MRS. HIRSHMAN: Right.

So the fact that Tennessee law may or may not be hostile to our collective bargaining rights in this instance has no bearing on what Congress was trying to do. Congress didn't write a law that said you will have 13(c) rights but only in those states where the law is hostile to collective bargaining. They said you will have 13(c) rights. If a transit authority wants the federal money, they have to commit themselves, not to create federal labor rights for you, but to preserve the rights that you had before the federal funding.

QUESTION: Mrs. Hirshman, supposing that before the federal funding the transit authority had been operated -- was a public authority and had been acting, had been operating the system and just got the funds to improve it. Now, there it wouldn't have been subject to the National Labor Relations Act.

MRS. HIRSHMAN: That's correct, Your Honor, and we do not contend that the same relationship pertains. There is a -- what Congress, to some degree faced that in considering Section 13(c), and they said we will look at the law of the particular state that applies at the time that we're thinking about giving the federal funding, and the employees get no greater rights than they had already.

QUESTION: What if they weren't organized before?

MRS. HIRSHMAN: Well, they had, in that case -- we don't have that case here, Your Honor. It's an inchoate right, in a sense, to organize, but that certainly is very far from what we have here, where our binding collective bargaining agreement was torn up on the grounds that it was personal to the personnel director.

If in fact Tennessee law is not hostile to collective bargaining, then theoretically that conduct

should be a violation of state law as well. But that's not what we're saying.

The Congress did not create a need system whereby federal -- the employees would have federal rights some of the time and state law rights others of the time. It created a system which was mandatory in its terms, not encouragement of collective bargaining but continued collective bargaining rights, and does not subordinate itself to the doctrine of state law.

The -- because the concept of collective bargaining rights includes the concept of enforceable collective bargaining agreements as they were understood in 1964, our action arises under federal law and jurisdiction in this Court would be proper under 28 U.S.C. 1331 and 1337.

Moreover, the 13(c) agreement which is also at issue here is a contract mandated by federal law, and it's --

QUESTION: Are you suggesting that 13(c) requires that there be a binding collective bargaining agreement?

MRS. HIRSHMAN: I think that 13(c) requires that if collective bargaining agreements are concluded between the parties, that the parties abide by them, the same core meaning of collective bargaining rights that

Congress explicitly adverted to in passing 13(c).

If you make an agreement, you have to abide by it. I think that at the very least that's what Congress had in mind. That's what the Dade County abrogated in the Dade County scenario which Congress ws considering at the time, and that is what Senator Morse referred to explicitly on the Senate floor.

QUESTION: But no agreement, if there's no agreement reached, then where does this stand?

MRS. HIRSHMAN: Well, this case does not present that situation. The Congress had in mind a scheme whereby the parties would attempt to negotiate fair and equitable labor arrangements between them that they could live with, in a fashion -- the model for which is the Interstate Commerce Act labor protective arrangements. So they thought that to deal with particular problems the parties would try to negotiate a fair and equitable labor arrangement and the Secretary of Labor would supervise the terms of the 13(c) agreement to be sure that the federal statutory interest was effectuated by it.

So the 13(c) agreement is not only required by federal law, its contents, its federal contents are -- there are statutory minimums, and remaining questions are to be dealt with through the agency of negotiation

and the supervision of the Secretary.

QUESTION: Well, I'm not sure you've answered my question.

What if no agreement is ever reached?

MRS. HIRSHMAN: The most -- many Section 13(c) agreements in which the employees are transferred from private to public and lose their right to strike because Congress was clear that that was one thing they were not preserving in Section 13(c), provide for arbitration of the terms of a new collective bargaining agreement. That is the fair and equitable arrangement that the parties have arrived at as a substitution for economic weapons which --

QUESTION: But the 13(c) doesn't require that.

MRS. HIRSHMAN: 13(c) requires such fair and equitable labor protective arrangements as the Sectretary of Labor determines.

QUESTION: Well, he hasn't determined that arbitration is necessary on the terms of the contract.

MRS. HIRSHMAN: Well the 13(c) agreements, where there's a loss of strike rights, 13(c) agreements almost invariably provide for --

QUESTION: But we know that the law doesn't require it.

MRS. HIRSHMAN: Well, the law requires what the parties negotiate and the Secretary of Labor certifies as a fair and equitable arrangement, and from the beginning he certified such arrangements as fair and equitable as the statute requires.

QUESTION: Well, if this agreement that was entered into between the union and the authority pursuant to 13(c) expired and that you were negotiating a new contract and you just didn't -- there was an impasse, and they just never -- there was never a contract, are you suggesting that the transit authority would be required to submit the terms to arbitration?

MRS. HIRSHMAN: If the particular 13(c) agreement which was a condition of the result of federal funding contained a provision for interest arbitration, then the transit authority would be bound.

QUESTION: Well, did it in this cas?

MRS. HIRSHMAN: That is not in this case.

QUESTION: Well, so it didn't in this case.

MRS. HIRSHMAN: It did not in this case. All we want is that our collective bargaining agreement should be abided by here.

QUESTION: And what was the term of the collective bargaining contract that you are suing on?

MRS. HIRSHMAN: It was -- I believe it was

1975 to 1978.

QUESTION: And it's long since expired.

MRS. HIRSHMAN: It has, Your Honor.

QUESTION: And so what if you win?

MRS. HIRSHMAN: Well, there would be damages because the terms and conditions of employment were were unilaterally --

QUESTION: But only damages, only damages.

MRS. HIRSHMAN: And, and -- well, in this, on the complaint as it existed in 19 -- as it was filed in 1976, that's where we are.

QUESTION: Well, so it's a damages case.

MRS. HIRSHMAN: But the transit authority here -- in case I misspoke myself, Justice White, the transit authority here in another case is party to a 13(c) agreement which provides for interest arbitration. That is just not this case.

QUESTION: Yes. So? Again I say, what's left of this case if you win? Damages.

MRS. HIRSHMAN: It would be damages, Your Honor, and the -- and that's just by virtue of the fact that collective bargaining agreements have terms and --

QUESTION: And it's expired.

MRS. HIRSHMAN: Right.

QUESTION: What are the measures? What are the measure of damages?

MRS. HIRSHMAN: Well, it would be the difference between the wages and benefits that we were paid under the unilateral terms imposed by the employer and the collectively bargained terms that were a part of our contract.

QUESTION: Well, that might not get you very far, assuming you prevailed, isn't that so?

MRS. HIRSHMAN: Well, it's not so wide as a church nor so deep as a well, but 'tis enough; 'twill serve. I think we would be happy to have the damages, the difference between our agreement that we negotiated for with cost-of-living adjustments and so forth, and what the employer chose to give us as a matter of his --

QUESTION: Well, you're going over that rather fast, with cost-of-living adjustments. Where did they come from?

MRS. HIRSHMAN: It was in the collective bargaining agreement.

QUESTION: Well, but that's the agreement that's expired.

MRS. HIRSHMAN: Right, and that would be the measure of our damages.

QUESTION: Up until -- from '75 to '78?

MRS. HIRSHMAN: Right, right.

Your Honors --

QUESTION: Mrs. Hirshman, the fact that the agreement is required by federal law, which you have stressed, is not conclusive, is it? In Miree v. Dekalb, which is cited several times in your opponents' brief, the agreement there was required by federal law, too, and yet we held that state law would government.

MRS. HIRSHMAN: Well, you had a particular question there. That agreement was an agreement between the grant recipient and the United States, not between the grant recipient and a third party. Congress did not -- this, 13(c) is rather unusual. It is far from a garden variety federal funding statute. It is modeled on the Interstate Commerce Act which operates by virtue of mandating agreements between in that case a regulated industry, in this case a federal grant recipient, and their employees, and those agreements Congress anticipated would be enforced by the parties to them in the traditional way that labor agreements are usually enforced. So that this is not the same contract relationship as was at issue.

QUESTION: When you say the traditional way that labor agreements usually are enforced, now, if there is a collective bargaining agreement between a

school board and its teachers, that agreement is usually enforced in state court.

MRS. HIRSHMAN: Right. And what Congress sought to do was to preserve for the employees here the other structure of relationships because they saw what happened when the transit employees in Dade County were transferred to that system, and they knew that the federal funding which did in fact fuel the wholesale transfer out of the private sector and into the public sector of transit --

QUESTION: But you are saying it should govern even if there is no transfer, in other words, if the public transit company had been in the public sector before.

MRS. HIRSHMAN: No. All that 13(c) would do in that case is preserve whatever rights the employees had under state law prior to the federal funding.

QUESTION: Would that sort of a 13(c) agreement then be suable in the state courts and not the federal?

MRS. HIRSHMAN: The 13(c) agreement preserves the status quo for the employees. That is a federal right. The substance of the status quo was -- is derived from the state of the law at the time of the federal funding. That is not this case. This is the

classic --

QUESTION: I know it's not this case, but I'd be interested in your answer to it.

MRS. HIRSHMAN: Well, the -- what I'm saying is that the role that Congress -- Congress was rather explicit. It said all we're going to do for you is maintain the status quo so that we will guarantee that things can't get worse for you, but we're not going to make it any better, so that if, for example, there were a state whose collective bargaining law were totally unacceptable to the federal government, they could just refuse to fund. But the -- in the case where it stays public, which I gather is your question, the 13(c) agreements as a matter of federal law merely maintain the status quo as it existed prior to the federal funding.

Should Your Honors choose to ignore the existence in this case of a traditional collective bargaining agreement and 13(c) agreements whose making is mandated by federal law, and treat this case as one merely for enforcement of the statute, an additional basis for our claim here is provided by Section 1983. We think this case parallels this Court's decision in Maine v. Thiboutot. There, as here, the federal law required grant recipients to make arrangements whose

contents was dictated by the federal statute. It was, there as here, it was a condition of the receipt of federal funds and not a direct mandate like the Railway Labor Act.

QUESTION: Well, if you're right about 1983, you would have to say that the action under this agreement arises under federal law, wouldn't you?

MRS. HIRSHMAN: Yes, and I do say that.

QUESTION: And there, if it arises under federal law, you can get in on 1331.

MRS. HIRSHMAN: We -- right, we get to the same place. The question that --

QUESTION: So it isn't really an alternate basis at all.

MRS. HIRSHMAN: Well, actually, it actually is, because should this Court determine that the statute is not the right source of our 13(c) agreement rights, we would still have rights under the statute directly. There's been some discussion in the briefings and the Eleventh Circuit adverted to the point that somehow our rights only derived from the 13(c) agreement and not from the statute itself, and should this Court determine to consider only the statute, you would not have to imply a private right of action for us there because the public body here made a commitment to the federal

government, just like in Maine v. Thiboutot, and that -- the violation of that commitment violates the federal staute mandating the commitment to be made.

This Court has never held to my knowledge that the mere making of the commitment is sufficient to satisfy the federal statutory mandate, The ink still being wet on the paper and thereafter all of the rights contained in the commitment are, if you're just fortunate enough to have a state with good law. In Maine v. Thiboutot the state executed a plan, just like the federal statute required, containing the particular payment of welfare provisions that the statute required, and thereafter when the beneficiaries of that arrangement came to enforce it, this Court held that 1983 created a claim for them.

In sum, the United States Court of Appeals for the Sixth Circuit ruled correctly in this case, and we believe that their decision should be affirmed.

CHIEF JUSTICE BURGER: You have about three minutes, Mr. Kaufman.

ORAL ARGUMENT OF JOSEPH S. KAUFMAN, ESQ.

ON BEHALF OF PETITIONERS -- REBUTTAL

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

I think the Court understands what this case

is about now. It's a case to collect the difference between the amount that the union claims was due under the 1975 collective bargaining agreement and what they say they have been paid. It's a claim for damages to enforce nothing more than a garden variety collective bargaining agreement. There is no federal right. There is no federal law to be vindicated here. And it does not hinge on the interpretation of any federal statute.

Picking up where I left off before, we would have the most anomalous system where the large cities such as New York, Cleveland, Los Angeles, Chicago and Boston would be, having 13(c) arrangements, would be under one system and smaller communities such as Jackson would be under another system merely because of the events that caused the transition from the private sector to the public sector. I don't think Congress ever envisioned any such situation as that is now proposed.

Many states, including New York, for example, have long had the Taylor law on their books which handle situations with their local transit workers, and handled them well, and handled the situation that has been talked about in unfair labor practice. These have always been in the state court and state law well, and just as Jackson should be.

My colleague would have this Court import, or insert, municipal labor relations insofar as only transit workers are concerned silently by the incorporation of Section 301 of the Labor Management Relations Act into Section 13(c). Not one Congressman, not one Senator, and not one word in the debates would ever lead you to that conclusion. No one urged that. And I might point out that has never been urged in any lower court in this proceeding, and for the first time has been urged in this Court.

Now, collective bargaining agreements are enforceable, but if, as has been pointed out, the teachers have a violation of their collective bargaining agreement, it's solved under state law pursuant to the exemption of the Wagner and Taft-Hartley Acts, and so it should be for transit workers.

QUESTION: What if you were suing to enforce the agreement between -- what if the Secretary were suing on the agreement between the authority and the United States?

MR. KAUFMAN: I think there's express federal jurisdiction under 1345, Your Honor.

QUESTION: And that would be governed by federal law, wouldn't you say?

MR. KAUFMAN: I would think that that would be

governed by probably a hybrid of federal and state law in that case, sir.

CHIEF JUSTICE BURGER: Thank you, Counsel.

The case is submitted.

MR. KAUFMAN: Thank you, Your Honor.

(Whereupon, at 3:07 p.m., the case in the above-entitled matter was submitted.)

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CERTIFICATION

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

-JACKSON TRANSIT AUTHORITY ET AL vs. LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL-CIO-CLC # 81-411

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BY Irene Hammond