

**ORIGINAL**

**OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE**

**THE SUPREME COURT OF THE UNITED STATES**

**DKT/CASE NO.** 82-1579

**TITLE** HAYFIELD NORTHERN RAILROAD COMPANY, INC., AND MINNESOTA,  
Appellants v. CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

**PLACE** Washington, D. C.

**DATE** February 21, 1984

**PAGES** 1 thru 44



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410 FIRST STREET, N.W.

1                   IN THE SUPREME COURT OF THE UNITED STATES  
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3   HAYFIELD NORTHERN RAILROAD COMPANY,       :  
4       INC., AND MINNESOTA,                   :  
5                                   Appellants                   :  
6                                   v.                               :  
7   No. 82-1579  
8   CHICAGO AND NORTH WESTERN TRANSPORTA-   :  
9       TION COMPANY                               :  
10   - - - - -x

10   Washington, D.C.  
11   Tuesday, February 21, 1984

12                   The above-entitled matter came on for oral  
13   argument before the Supreme Court of the United States  
14   at 10:12 a.m.

15   APPEARANCES:  
16   ROBERT S. ABDALIAN, ESQ., Rochester, Minnesota; on  
17       behalf of the Appellants.  
18   MARK I. LEVY, ESQ., Washington, D.C.; on behalf of the  
19       United States as amicus curiae.  
20   ANNE E. KEATING, ESQ., Chicago, Ill.; on behalf of the  
21       Appellee.

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on behalf of the Appellants	
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on behalf of the United States	
as amicus curiae	
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Mr. Abdalian.

ON BEHALF OF APPELLANTS

This is an appeal from a decision holding that 905 of the Interstate Commerce Act preempts condemnation law where that law is applied to which has been abandoned with ICC approval. ICC has relinquished all jurisdiction and on that line and where a statutorily authorized public service corporation seeks to take that eminent domain in order to restore rail service to the Minnesota community.

MR. ABDALLIAN: That's correct. There's still  
right of way to take, Justice Blackmun, and  
also a bond at issue.

QUESTION: Do your people propose to put down new rails?



1           MR. ABDALLIAN: That's correct. That is  
2 correct.

3           The legal issue before this Court has been  
4 well defined by the Court of Appeals. The factual  
5 context in which this case comes to this Court is  
6 uncomplicated.

7           CNW, the Appellee, applied to abandon a line  
8 of rail that ran from Iowa to Minnesota. Part of that  
9 line is the 19.2 mile segment that lies totally within  
10 Minnesota, which has been referred to in all briefs as  
11 the Hayfield segment.

12           The abandonment was contested by a shippers  
13 group. The challenge to the abandonment was  
14 unsuccessful. The abandonment also was challenged by a  
15 shippers group in a way that the line could avoid  
16 abandonment through a procedure within the Commerce Act  
17 itself to subsidize the line and keep that line in  
18 interstate commerce.

19           The shippers group made an offer of subsidy to  
20 continue the line in rail service, and that subsidy  
21 offer was not accepted and the Interstate Commerce  
22 Commission set a subsidy amount. The shippers group  
23 withdrew their offer of subsidy and the shippers group  
24 disbanded.

25           Several months later -- the abandonment became

1 final in December of 1981. Several months later the  
2 Hayfield Northern was formed, a Minnesota public service  
3 corporation with the delegated power of eminent domain  
4 to condemn right of way and track for rail use.

5           Upon the founding of the Hayfield Northern,  
6 the Hayfield Northern immediately sought a temporary  
7 restraining order in state court in order to keep the  
8 line intact, as the Appellee had already commenced  
9 procedures to dismantle the track. The TRO was granted  
10 by the state court after a hearing.

11           The CNW then removed this case to federal  
12 district court. The federal district court dismissed  
13 the action with prejudice and dissolved the injunction.  
14 An appeal was immediately taken to the Eighth Circuit  
15 Court of Appeals and the Court of Appeals stayed the  
16 order of the district court upon the posting of a bond.  
17 The Court of Appeals affirmed the district court.

18           There are two issues that I wish to emphasize  
19 this morning: that is, the difference between  
20 pre-abandonment and post-abandonment matters; and that  
21 Section 10905 is not the exclusive method in which to  
22 transfer property.

23           It is common ground in this case and all  
24 parties agree that if the State of Minnesota or the  
25 Hayfield Northern or any other entity would take any

1 action that would affect a common carrier's status as a  
2 common carrier that that would be in conflict with the  
3 Commerce Act.

4           However, by the act of abandonment, the  
5 railroad being certified abandoned, the CNW, that points  
6 to the end of Interstate Commerce Commission  
7 jurisdiction and federal interest. At the point of  
8 consummation no longer do we have anything of federal  
9 interest, it is a matter of federal indifference, and  
10 state power can be exercised on that line, including the  
11 power of eminent domain.

12           The decision of the Eighth Circuit, if allowed  
13 to stand, allows a gap in sovereignty to occur. This  
14 line of rail is not subject to state power or to federal  
15 power or federal interests, and it just exists out  
16 there. There is a gap. It is a no man's land creating  
17 a void.

18           The Commerce Commission itself has held  
19 repeatedly in public rulings that once the certificate  
20 of abandonment has issued that is the end of federal  
21 interest, and that questions of title to and and  
22 disposition of rail property are a matter of state  
23 power, a matter of the reserved powers of the states.  
24 The decision of the Court of Appeals has thus changed  
25 what was considered to be the law by the Interstate

1 Commerce Commission itself, the agency that is in charge  
2 of enforcing the Interstate Commerce Act.

3 The Court of Appeals found that Section 10905,  
4 because there is a provision in which rail property can  
5 be transferred, whether that be by subsidy or  
6 acquisition and that the Commerce Commission could set a  
7 price, that somehow this became the exclusive and only  
8 method.

9 But the Act itself speaks, Section 10905  
10 speaks, to matters that all happened before abandonment,  
11 before the abandonment has been consummated. And the  
12 title of the Act is particularly instructive. It speaks  
13 of methods of avoiding abandonment, in avoidance of  
14 abandonment.

15 The Court of Appeals looked at it as the  
16 exclusive method to transfer property for continued rail  
17 service in connection with abandonment. While, that's  
18 true, it would be more accurate to say in avoidance of  
19 abandonment, and that once the abandonment is final then  
20 there is no longer any federal interest that exists,  
21 that the states are free to -- a state is free to  
22 exercise its power.

23 There is no reason to subordinate a state  
24 interest at that time to that of a private carrier, as  
25 there is no federal interest, and the Solicitor General



1 has filed a brief saying that there is no programmatic  
2 interest of the United States that would be adversely  
3 affected by the exercise of eminent domain on this line  
4 of rail. It's consistent --

5 QUESTION: Are you saying, counsel, that after  
6 the Commission has acted as it has here, that there is  
7 nothing in the case except some real estate with some  
8 iron rails resting on it? Is that it?

9 MR. ABDALIAN: That's correct.

10 QUESTION: It isn't a carrier any more.

11 MR. ABDALIAN: Excuse me?

12 QUESTION: It's not a carrier any more.

13 MR. ABDALIAN: That's correct. By the act of  
14 abandonment it loses its character as interstate rail  
15 property. It's no longer in interstate commerce. It  
16 becomes ordinary mere property, subject to the laws of  
17 Minnesota, just like any other property or any other  
18 property owner. To use the fact that it once was rail  
19 property in interstate commerce to shield itself from  
20 condemnation is unprincipled.

21 The Court of Appeals found that the very tight  
22 time constraints in this transfer to subsidy pursuant to  
23 Section 10905 would somehow be lost by a state  
24 condemnation because you would have protracted  
25 condemnation proceedings. But the 110-day period in

1    which the Commission will set a price and the transfer  
2    of the property would take place is not at all affected  
3    by the state condemnation.

4               That 110-day period will come to end and that  
5    is the end of the federal jurisdiction. It has come to  
6    an end and the railroad is able to abandon that  
7    property, and that's all that the Commission can --  
8    that's the extent of the Commission's authority. It has  
9    the permissive power to permit the abandonment if the  
10   public convenience and necessity permits.

11              There is no other power. The Commission has  
12   not stated by giving the certificate of abandonment that  
13   the railroad is entitled to those assets after the  
14   certificate issues in any set of circumstances, or that  
15   the state power of eminent domain is going to be  
16   subordinated to that of the private carrier. Once the  
17   certificate issues it is at an end.

18              And that is consistent with federal policy  
19   also, to bring the states to the forefront of restoring  
20   rail service. We are not, the Hayfield Northern is not,  
21   attempting to continue rail service on this line. Rail  
22   service cannot be continued, which it would be under  
23   10905. 10905 is a method in which the rail line can  
24   continue in service.

25              Here service has been discontinued, the

1 community has lost its service, and now a state  
2 condemnation wishes not to continue it but to recommence  
3 and restore rail service on that line.

4 QUESTION: Will the new company, will your  
5 client, in starting rail service if you win this case  
6 have to get another certificate from the ICC?

7 MR. ABDALIAN: That's correct, a certificate  
8 of public convenience and necessity, and we would have  
9 to --

10 QUESTION: Even though just a short while ago  
11 the Commission authorized the abandonment of the line?

12 MR. ABDALIAN: That's correct, that's  
13 correct. You'd have to apply anew under Section 10901  
14 of the Commerce Act and show that the public convenience  
15 and necessity permits the line to be --

16 QUESTION: Would that mean that -- would you  
17 be litigating the same issues that were litigated in the  
18 abandonment proceeding?

19 MR. ABDALIAN: No, not at all. Because the  
20 abandonment is only permissive, the Commission has not  
21 made an affirmative finding. The abandonment proceeding  
22 --

23 QUESTION: Well, did it find that the public  
24 interest and necessity did not require the use of the  
25 railroad?

1 MR. ABDALIAN: That's correct. That's right.  
2 It's required to prevent the abandonment and to --

3 QUESTION: But now it'll have to find that the  
4 public interest and necessity requires that it be  
5 started again?

6 MR. ABDALIAN: Not required, but permits,  
7 which is an easier standard under the Act.

8 The local interest in this line -- the  
9 abandonment itself, the Interstate Commerce Commission  
10 goes through a balance, balancing the interests of the  
11 private carrier in interstate commerce generally on the  
12 one hand and that of the public, the local community on  
13 the other hand.

14 QUESTION: After the abandonment, can the  
15 carrier sell the property to you?

16 MR. ABDALIAN: The carrier can sell the  
17 property if a state interest doesn't surface.

18 QUESTION: Does it need ICC approval?

19 MR. ABDALIAN: It does not need ICC approval.  
20 Once the certificate issues, it's a matter of ICC  
21 indifference. The rail line is taken off the carrier's  
22 book for interstate commerce matters. It's the end of  
23 federal jurisdiction, and to find a conflict between  
24 state and federal law where there is no federal interest  
25 --



1           QUESTION: Did your client make any effort to  
2 buy the property from the carrier?

3           MR. ABDALIAN: No, not at all. There was a  
4 shippers group, a shippers group that opposed the  
5 abandonment for substantive reasons, and then there was  
6 a shippers group that sought to have the line avoid  
7 abandonment through the vehicle of running the railroad  
8 on a subsidized basis.

9           QUESTION: Suppose as part of the balance that  
10 you spoke of that the Commission arrives at it was  
11 determined or it was proposed by the railroad and  
12 approved by the ICC that the rails were going to be  
13 taken up and used in another segment of the carrier, and  
14 that that was in contemplation.

15           What about that, just about the rails? Would  
16 they then be subject to condemnation?

17           MR. ABDALIAN: If the Interstate Commerce  
18 Commission conditioned the abandonment on the CNW's  
19 taking its rail lines and taking it from Hayfield  
20 someplace else because interstate commerce interests  
21 required that, that would be a different case.

22           QUESTION: That's not this one.

23           MR. ABDALIAN: That's not this case.

24           QUESTION: Okay.

25           MR. ABDALIAN: And that would be an

1 interference with the Commission's order. Where this  
2 does not interfere with any order of the Commission at  
3 all.

4 QUESTION: Is Hayfield in any different  
5 position from a brand new carrier that wants to, or  
6 corporation, that wants to start a railroad?

7 MR. ABDALIAN: No, it is not. No, it is not.

8 QUESTION: Mr. Abdalian, did the same shippers  
9 group which had applied under the Staggers Act  
10 proceeding to acquire the proposed abandoned line from  
11 the Hayfield Northern Railroad Company? Is that the  
12 same group essentially?

13 MR. ABDALIAN: No, it's not. There were two  
14 shippers groups. One was made up of 12, I believe,  
15 shippers that protested the abandonment on substantive  
16 grounds; the second, a group of seven that decided to  
17 subsidize it. And this is a separate legal entity, a  
18 Minnesota public service corporation that seeks to  
19 restore rail service, which is quite different than what  
20 both of the other two groups sought to accomplish.

21 QUESTION: Is there any reason to think that  
22 the value placed on the property will be different under  
23 the state condemnation proceeding than it was under the  
24 proceeding under this -- before the ICC?

25 MR. ABDALIAN: The state condemnation

1 proceeding is constrained by fair market value, and we  
2 have, since the ICC valuation, we've had intervening  
3 events. But the carrier is entitled to fair market  
4 value and just compensation under Minnesota condemnation  
5 law, and of course must be because of the Constitution.

6 QUESTION: Well, is that likely to differ  
7 substantially from the value placed in the ICC  
8 proceeding?

9 MR. AEDALIAN: It could differ. But the state  
10 court would apply state condemnation principles, and  
11 whether that would be different or not I don't know. I  
12 mean, that would depend on record evidence at the time  
13 of the state condemnation.

14 I would like to reserve the rest for  
15 rebuttal.

16 CHIEF JUSTICE BURGER: Very well.

17 ORAL ARGUMENT OF MARK I. LEVY, ESQ.,

18 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

19 MR. LEVY: Mr. Chief Justice and may it please  
20 the Court:

21 Let me briefly summarize the position of the  
22 United States in this case and then turn to the issue of  
23 opportunity costs that the Appellee has raised in his  
24 brief.

25 Our submission is that Section 10905 does not

1 preempt a state's condemnation of a rail line that has  
2 been abandoned with the approval of the Interstate  
3 Commerce Commission. ICC authority over abandonments  
4 extends up to but not beyond the point that the  
5 abandonment becomes effective and the line is no longer  
6 a common carrier in the interstate rail system.

7           Section 10905 is part of the federal  
8 regulation of carriers in interstate commerce. It  
9 pertains to pre-abandonment offers of financial  
10 assistance and provides an alternative to abandonment in  
11 order to furnish continued and uninterrupted service on  
12 the line.

13           Moreover, the time limits in Section 10905  
14 were intended to expedite the abandonment process of the  
15 ICC in order to alleviate the burden on the carrier of  
16 providing service until the effective date of the  
17 abandonment, which is postponed during the pendency of  
18 the Section 10905 offer.

19           Once ICC abandonment approval takes effect,  
20 the carrier is free of its federal obligation to  
21 maintain service and it can then abandon the line. At  
22 that point the railroad has obtained what the ICC  
23 authorized, its federal service obligation is eliminated  
24 and it is relieved of its federal common carrier  
25 duties.



1           A subsequent state condemnation proceeding to  
2 initiate new service pursuant to a fresh ICC certificate  
3 of public convenience and necessity would not interfere  
4 with the authorized abandonment or be contrary to the  
5 federal policy of expediting abandonments in order to  
6 reduce the burden that federal service requirements  
7 impose on carriers seeking to abandon a line. And  
8 Section 10905 affords no basis whatever to distinguish  
9 between former rail property and all other private  
10 property in the state that is subject to the traditional  
11 power of condemnation.

12           Now, the railroad makes an argument in its  
13 brief based on so-called opportunity costs. In an  
14 abandonment proceeding, one of the factors considered by  
15 the ICC is that federal service requirements keep a  
16 railroad from using its resources in other more  
17 profitable ways. This relative economic disadvantage or  
18 loss is the opportunity cost that the railroad incurs in  
19 connection with the line it seeks to abandon.

20           Appellee contends that a state's  
21 post-abandonment condemnation, and especially  
22 preliminary injunctive relief incident to that  
23 condemnation, restricts the railroad's reuse of its  
24 track and equipment and thus imposes on the railroad the  
25 same opportunity cost that the ICC considered in

1 granting the abandonment in the first place.

2           However, the ICC's abandonment approval only  
3 determined that, in balancing the competing  
4 considerations for and against abandonment under the  
5 public convenience and necessity, the need for this  
6 service did not justify the costs, including the  
7 opportunity costs that such service would impose on the  
8 carrier.

9           QUESTION: How long do those opportunity costs  
10 run, forever?

11           MR. LEVY: I believe that the Commission's  
12 determination is essentially retrospective or  
13 contemporaneous. It determines that the current  
14 requirements are presently keeping the railroad from  
15 using its assets in more productive ways.

16           QUESTION: Would that still be true ten years  
17 from now?

18           MR. LEVY: If there were a federal service  
19 requirement that required the service, the railroad to  
20 maintain the service and therefore prohibited other use  
21 --

22           QUESTION: I mean as to this particular  
23 property, if there is an opportunity, how long will that  
24 exist?

25           MR. LEVY: It would exist up to the time that

1 the ICC's abandonment certificate takes effect.

2 QUESTION: Well, that's over.

3 MR. LEVY: And that's over, that's correct.

4 QUESTION: So it doesn't exist.

5 MR. LEVY: That's correct. The opportunity  
6 cost is only a consideration in conjunction with state  
7 law -- excuse me, federal law. The ICC determined, and  
8 all that it determined, is that federal law does not  
9 require the imposition of these costs on the carrier.  
10 This determination that local service needs do not  
11 outweigh the burdens on the carrier and thus that  
12 abandonment may occur simply does not address the  
13 question whether the carrier can be required to leave  
14 its track and equipment in place for independent reasons  
15 of state law.

16 The ICC has authority over entry into, exit  
17 from and operations in the interstate rail system. It  
18 does not have authority, let alone exclusive authority,  
19 over post-abandonment transfers of property that were at  
20 one time used in rail service.

21 The ICC's abandonment approval does not  
22 establish an affirmative federal right in a railroad to  
23 avoid state law that would restrict its reuse of its  
24 assets, of what formerly were rail property, and such  
25 state law does not interfere with the abandonment

1 authorized by the Commission.

2 QUESTION: Are you saying, Mr. Levy, that at  
3 the present time, once the ICC has acted and there is no  
4 longer a railroad, that the Minnesota Railroad and  
5 Warehouse Commission would have no authority to tell  
6 them they must run an intrastate line?

7 MR. LEVY: Well, intrastate lines are subject  
8 to the jurisdiction of the ICC.

9 QUESTION: They're subject to, but could the  
10 Minnesota Railroad and Warehouse Commission have any  
11 authority at all with respect to ordering the  
12 continuance of this line?

13 MR. LEVY: No, it couldn't. That is the  
14 exclusive authority of the ICC.

15 Now, it may be said --

16 QUESTION: Let me ask one question. Would the  
17 ICC have the authority to condition the abandonment on  
18 the transfer of the rails to another location?

19 MR. LEVY: I think there's no question it  
20 would have the authority if it found such a condition to  
21 be necessary or appropriate to the interests of the  
22 interstate rail system.

23 QUESTION: Part of its balance of why it was  
24 willing to allow the abandonment.

25 MR. LEVY: That's exactly right.



1 QUESTION: Does it ever do that?

2 MR. LEVY: I'm not aware of any incident where  
3 it can be definitively said that the Commission did it.  
4 It may have done it in the Boston & Maine case that is  
5 cited in our brief. That involved an insolvent carrier,  
6 and the Court of Appeals' description of the ICC order  
7 suggests that the Commission did condition the  
8 abandonment on the --

9 QUESTION: And that case is still pending in  
10 the Second Circuit.

11 MR. LEVY: I wasn't aware of that. This  
12 decision that I'm referring to --

13 QUESTION: It's been pending there for 20  
14 years.

15 MR. LEVY: I think this was a First Circuit  
16 decision that is long since over. If the case is still  
17 pending, I don't think that bears on this point. But  
18 the Boston & Maine was the closest case, if there's one  
19 at all.

20 But that would be a much different case. That  
21 would be an exercise of the Commission's authority prior  
22 to abandonment, and the statute expressly authorizes in  
23 Section 10903(b)(1) the Commission to impose conditions  
24 on abandonment. And in such a case there would be an  
25 actual conflict between the state's condemnation

1 proceeding and the order of the Commerce Commission and  
2 the federal interest that underlies it.

3 QUESTION: Mr. Levy, you've mentioned  
4 equipment several times. Is equipment at issue in this  
5 case?

6 MR. LEVY: I mean that only in the generic  
7 sense.

8 QUESTION: Only the rail and real estate --

9 MR. LEVY: I'm sorry?

10 QUESTION: Only the land and the rail, which I  
11 suppose must be viewed as a fixture, are at issue?

12 MR. LEVY: I think that's right, although I  
13 can't say authoritatively that there may not be some  
14 incidental pieces of property used in connection with  
15 the track at issue. We would not distinguish between  
16 them.

17 Thank you.

18 CHIEF JUSTICE BURGER: Ms. Keating.

19 ORAL ARGUMENT OF ANNE E. KEATING, ESQ.,

20 ON BEHALF OF APPELLEE

21 QUESTION: Ms. Keating, at the outset will you  
22 explain to me why the railroad is opposing this. The  
23 railroad wanted to abandon this line.

24 MS. KEATING: Mr. Chief Justice, may it please  
25 the Court:

1           Your Honor, we feel that Congress, in enacting  
2 Section 10905 of the Staggers Rail Act, balanced several  
3 interests. It balanced the condition, the financial  
4 condition, of the railroad industry. Congress had found  
5 that the railroad industry by 1985 would have a \$16 to  
6 \$20 billion capital shortfall. It found that the  
7 railroad industry had the lowest earnings of any of the  
8 transportation modes in the United States.

9           So there was a balancing of interests of the  
10 railroad versus an ability on the part of the local  
11 communities via Section 10905 to acquire via forced sale  
12 or condemnation --

13           QUESTION: I quite understand why the railroad  
14 would wish to abandon a line on which it was losing a  
15 lot of money. But now that the line has been abandoned  
16 at the request of the railroad, why do you object to it  
17 being sold to somebody else?

18           MS. KEATING: Well, Your Honor, we believe --  
19 first of all, I should preface that there has been  
20 previous indications in the record that the principals  
21 and incorporators of the Hayfield Northern Railroad, the  
22 Appellant, were members of this Minnesota shippers group  
23 that invoked Section 10905 before the Commission.

24           QUESTION: But wouldn't you like to keep the  
25 shippers feeding on a feeder line? Wouldn't that help

1 your railroad?

2 MS. KEATING: Your Honor, in the meantime --  
3 when we received abandonment authority, at that point  
4 the finding is put into the Federal Register.  
5 Simultaneously there's a notice that says, anyone  
6 interested in offering to subsidize or purchase the line  
7 should do so within ten days. These are the Section  
8 10905 proceedings.

9 The principals and incorporators of the  
10 Hayfield Northern invoked Section 10905, had the  
11 Commission set the price, and they chose to not appeal  
12 that valuation. Then they chose to wait 'til the  
13 certificate of abandonment issued and then come back  
14 into state court, basically subverting the federal  
15 agency final decision, rather than taking it to an  
16 appellate court.

17 QUESTION: Are you saying you're afraid you'll  
18 get a lower price under state condemnation?

19 MS. KEATING: Your Honor, that is a  
20 possibility. But in the meantime, we believe this  
21 entire proceeding is a good indication of the  
22 Congressional intent in enacting Section 10905. The  
23 legislative history suggests it was a balancing between  
24 allowing the sincere efforts of shippers to acquire  
25 property, but at the same time --

1 QUESTION: What has your client got to lose,  
2 specifically, if he loses?

3 MS. KEATING: Your Honor, in the meantime from  
4 receiving our final abandonment certificate, which was  
5 in November --

6 QUESTION: You've received that?

7 MS. KEATING: Yes, sir. We in March of that  
8 year, which is the earliest you can get out to do some  
9 construction work in Minnesota, we were up to salvage  
10 the line. In the meantime we had, in reliance on our  
11 final abandonment certificate, had entered into  
12 contracts with the State of Iowa and other shippers to  
13 upgrade major grain-hauling lines with that rail.

14 The particular rail that was in the segment,  
15 the Hayfield segment, was particularly heavy-duty rail  
16 which was susceptible to being used elsewhere. So we  
17 had committed that to upgrade our tracks elsewhere. The  
18 115-pound rail which was in this segment, if put into  
19 the state projects in Iowa, where there were slow orders  
20 of 10 to 15 miles an hour, we would be able to get the  
21 speed up on these major grain-hauling lines.

22 And this kind of commitment to reuse our  
23 assets is very important to the railroad. At the time  
24 of this proceeding, we had a \$21 million capital  
25 deficit, deficit as to working capital deficit, and as a



1 result this kind of reuse of our materials to better use  
2 it elsewhere for the general shipping public we feel is  
3 very important.

4 QUESTION: As of now, you could use it  
5 elsewhere.

6 MS. KEATING: Yes, sir.

7 QUESTION: In this case.

8 MS. KEATING: Yes, sir. Yes, Your Honor. We  
9 have -- but we had a considerable delay as a result of  
10 these proceedings, and the legislative history of  
11 Section 10905 suggests that this is exactly the type of  
12 protracted legal proceedings that we can get involved in  
13 and as a result not be able to reuse our materials.

14 The federal courts as well as the Commission  
15 have indicated that there is an opportunity cost  
16 associated with not being able to use your assets to the  
17 best of your ability.

18 QUESTION: You're talking only about the rail,  
19 aren't you?

20 MS. KEATING: In this particular situation,  
21 Your Honor, it was 115-pound rail, which was very  
22 reusable. In the specific finding of the Commission  
23 they determined 95 percent of all the rail on the whole  
24 line was reusable, and there were over 200,000 ties that  
25 were reusable.

1           Put given the financial condition of the rail  
2 industry, this ability to reuse the materials on lines  
3 that have not been used or are underutilized is very  
4 important in terms of being able to provide better  
5 service elsewhere on our system.

6           QUESTION: Well, why wasn't that all taken up  
7 in the ICC in the abandonment?

8           MS. KEATING: Your Honor, we submit that  
9 Section --

10          QUESTION: I get the impression that somebody  
11 made a mistake in the abandonment, namely the railroad.

12          MS. KEATING: Well, Your Honor, we believe --

13          QUESTION: Did you make a mistake?

14          MS. KEATING: No, I don't believe, Your  
15 Honor. We felt we could rely on the final Commission  
16 decision authorizing the abandonment. The  
17 Administrative Law Judge stated in his Commission that  
18 the railroad had shown a need for reusable materials  
19 elsewhere on the system, and except for someone  
20 acquiring it under the provisions provided by Congress  
21 under 10905, we thought we could rely on those -- that  
22 final decision and then be free to reuse our materials  
23 elsewhere.

24          QUESTION: But if you get in the condemnation  
25 the fair value of the rails, why don't you come out

1 even?

2 MS. KEATING: Well, Your Honor, I believe the  
3 Eighth Circuit has indicated that there's a delay that  
4 could be caused, because we have to remember that in  
5 this situation, though the Hayfield Northern obtained  
6 its temporary restraining order in April of 1982, it has  
7 yet to file a condemnation action.

8 This kind of delay in terms of having our  
9 assets remain unproductive could cause the railroad  
10 considerable --

11 QUESTION: Isn't that covered by the bond?

12 MS. KEATING: Your Honor, we had in the state  
13 court --

14 QUESTION: You have a lawsuit on the bond if  
15 you win, don't you?

16 MS. KEATING: We had in the state court a  
17 \$2,000 bond, and a \$100,000 bond was issued in the  
18 Eighth Circuit for property that was valued at the  
19 Commission at \$1.7 million.

20 QUESTION: Yes, but if you ultimately win you  
21 would get the property. You just get the damage for  
22 delay.

23 MS. KEATING: In this particular instance,  
24 there was the temporary restraining order. But in  
25 condemnation actions per se, there is not necessarily an

1 indication that we would get anything more than our  
2 costs for defending ourselves in these perhaps numercus  
3 condemnation actions in the various counties that the  
4 line might go through.

5 QUESTION: Well, the rail is gone, isn't it?

6 MS. KEATING: Yes, Your Honor, it is.

7 QUESTION: So the condemnation action isn't  
8 going to condemn the rail, is it?

9 MS. KEATING: At this point, Your Honor, the  
10 major controversy I expect would be the injunction and  
11 the damage, whether the injunction was proper to begin  
12 with and whether or not there's damages that should be  
13 available for the railroad as a result of the delay.

14 QUESTION: But you're going to keep the rail  
15 anyway, in any event?

16 MS. KEATING: The rail has been reused, Your  
17 Honor.

18 QUESTION: But the state still wants to  
19 condemn whatever is there, I take it; is that right?

20 MS. KEATING: That was what counsel for  
21 Appellant has indicated, Your Honor.

22 QUESTION: Is there any reason why the North  
23 Western, after the line has been abandoned, should be  
24 immune from the vicissitudes of state condemnation  
25 actions, like delay, that every other property owner in

1 Minnesota is subjected to?

2 MS. KEATING: Well, we believe that the  
3 federal system that was created under 10905 is a  
4 separate and unique system and that is the exclusive  
5 method for continued rail service. And they have  
6 indicated in the memorandum of law that was submitted to  
7 the state court in obtaining its temporary restraining  
8 order that it was for continued rail purposes that they  
9 wanted it, and they wanted to prevent us from removing  
10 our track.

11 So we're saying that this is a subterfuge or  
12 circumvention of the federal orders, which they had an  
13 opportunity or day in court, so to speak --

14 QUESTION: What if Hayfield had made its move  
15 three years after the abandonment certificate, and the  
16 North Western was just doing nothing with its rails.  
17 Would the case be any different in your view?

18 MS. KEATING: Well, Your Honor, in the history  
19 of our abandonments -- and we've, in the last 15 years,  
20 had several thousand miles of abandonments -- we have  
21 always attempted to remove our materials as quickly as  
22 possible. So I don't think we'd get into that situation  
23 where it would be three years down the line.

24 I think that that hypothetical would indicate  
25 that we would act contrary to our best economic



1 interests. The opportunity costs associated with  
2 keeping the rail assets idle, as determined by the  
3 Commission, in this particular segment was around  
4 \$180,000 a year, and as the facts before the Eighth  
5 Circuit indicated, we as soon as possible were there to  
6 try to remove our tracks and reuse them.

7 QUESTION: Is part of your case right now that  
8 the right of way -- you still own some real estate,  
9 don't you?

10 MS. KEATING: Yes, Your Honor. Yes, Mr.  
11 Justice.

12 QUESTION: Is part of your case that Minnesota  
13 may not condemn or that Hayfield may not condemn the  
14 right of way?

15 MS. KEATING: Well, I think --

16 QUESTION: Isn't that a yes or no case,  
17 answer? Are you claiming that your right of way, your  
18 real estate, after the track's all off, is not subject  
19 to condemnation?

20 MS. KEATING: We're talking about an intact  
21 rail line, that is the procedure of 10905. So I would  
22 say --

23 QUESTION: Well, the railroad, that rail line,  
24 is not intact now.

25 MS. KEATING: I agree with you.

1           QUESTION: The rail is off and the ties are  
2 gone. So is that piece of real estate subject to  
3 condemnation or not?

4           MS. KEATING: It would be subject to  
5 condemnation. It would be a different issue in terms  
6 of, not being preemption, but those same parties were  
7 before the Commission and, rather than taking their  
8 final appeal as to the valuation --

9           QUESTION: I know. But again, would you say  
10 -- suppose as this case developed no move was made until  
11 your rails were all gone, your ties were all gone, and  
12 all that was there was a piece of real estate, and then  
13 Hayfield was organized and sought to condemn that right  
14 of way. Would you have come in in defense and said  
15 preemption or not?

16          MS. KEATING: No, Your Honor, because Section  
17 10905 --

18          QUESTION: So the answer is no?

19          MS. KEATING: Yes, Your Honor.

20          QUESTION: How is this land on which the rails  
21 formerly rested any different from the farms on either  
22 side of the right of way? I assume there are a lot of  
23 farms in that part of the state. How is it any  
24 different now?

25          MS. KEATING: At this point in time, Your

1 Honor, except for the fact that it had been a prior  
2 abandonment -- had been a prior railroad right of way,  
3 there wouldn't be any difference. But when the  
4 proceeding was instituted and was before the Eighth  
5 Circuit, it was an intact rail line and that is where  
6 the preemption issue which we are concerned with here  
7 today was focused.

8 It was at that point an intact rail line and  
9 at that point there was a similar -- there was an  
10 exclusive method in the federal law to provide for local  
11 communities to be able to acquire via forced sale or  
12 subsidy an intact rail line. This state method acts as  
13 a direct conflict to that federal method.

14 QUESTION: Well, if we rule against your  
15 position will it go back and be litigated on the  
16 question of whether your client has violated the  
17 injunction or something? What will it go back on, if  
18 you don't dispute that they can acquire the roadbed for  
19 the railroad?

20 MS. KEATING: The injunction was as a result  
21 of the Eighth Circuit deciding there was a delay caused  
22 by the Hayfield Northern, and it was basically on the  
23 preemption issue which was before the court. At that  
24 time it was an intact rail line.

25 QUESTION: And the track was removed after the

1 injunction issued?

2 MS. KEATING: Yes, Your Honor. When the  
3 mandate issued from the Circuit Court of Appeals the  
4 Hayfield requested that there be a rehearing en banc and  
5 also a rehearing, and they were denied. And it was -- I  
6 believe it was Justice Blackmun and other members of the  
7 Court, where they also requested a stay, and that was  
8 denied.

9 QUESTION: So what would be litigated, whether  
10 Chicago & North Western Transportation Company violated  
11 the injunction?

12 MS. KEATING: No. At that point there was not  
13 an injunction on us, Your Honor. At that point the  
14 injunction via the Eighth Circuit's order had been --

15 QUESTION: You violated no rule by moving  
16 tracks.

17 MS. KEATING: No.

18 QUESTION: And the real question is whether  
19 the other side has to pay you. If the other side wins  
20 and you lose, then you're not going to get any damages  
21 under the injunction --

22 MS. KEATING: Yes, Mr. Justice.

23 QUESTION: -- on the bond.

24 MS. KEATING: Yes, Mr. Justice.

25 QUESTION: And the case will just be over.

1 MS. KEATING: I guess that's correct, Your  
2 Honor.

3 QUESTION: May I ask, as I'm a little fuzzy on  
4 the facts, the abandonment order as I understand it was  
5 entered in late 1981. When actually were the rails  
6 removed?

7 MS. KEATING: Your Honor, the railroad  
8 instituted its salvaging process of the line in March of  
9 1982, as it was attempting to remove the rail and the  
10 assets to attempt to use it elsewhere.

11 QUESTION: And did it go forward from March of  
12 '82 just as promptly as it normally would?

13 MS. KEATING: We were stopped the day that we  
14 were up at Hayfield to attempt to remove that property,  
15 because the Hayfield Northern, the principals and  
16 incorporators who had been this Minnesota shippers  
17 group, incorporated themselves as the Hayfield Northern,  
18 went into state court, got a temporary restraining  
19 order, and from that point on we were not able to remove  
20 our property and it sat idle until the mandate of the  
21 Eighth Circuit issued, February of '83.

22 QUESTION: So you were really held up for  
23 about a year, is what it amounts to.

24 MS. KEATING: Yes.

25 QUESTION: And then after February '83 you did



1 go ahead and remove the rail.

2 QUESTION: Was the injunction -- did you say  
3 that the injunction issued by the district court -- and  
4 that was against you and in favor of Hayfield, the  
5 injunction, I take it?

6 MS. KEATING: Yes.

7 QUESTION: Was that stayed by the Court of  
8 Appeals before the disposition of the merits in the case  
9 in the Court of Appeals?

10 MS. KEATING: There was a hearing as to  
11 whether or not the -- the district court dismissed the  
12 case. We had removed it to the district court. It  
13 dismissed it based on the preemption of Section 10905.

14 QUESTION: And dissolved the injunction.

15 MS. KEATING: And dissolved the injunction.  
16 However, in the meantime the Hayfield Northern had gone  
17 to the Eighth Circuit and there was a hearing on whether  
18 or not a bond should be set, and at that point they set  
19 a bond and the injunction came back into force. So it  
20 basically was, there was continuity there in terms of an  
21 injunction basically the entire time.

22 QUESTION: And the injunction enjoined you  
23 from removing your property?

24 MS. KEATING: From disposing, selling --

25 QUESTION: Disposing.

1 MS. KEATING: -- reusing any of the assets.  
2 And that remained in force until the mandate of the  
3 Eighth Circuit issued.

4 QUESTION: So since the bond issue is still in  
5 the case, we're really judging it just as though the  
6 track had never been removed up 'til this day, and  
7 whether or not the --

8 MS. KEATING: Because if the injunction --

9 QUESTION: We judge it just as though the  
10 track was still there, and the question is whether the  
11 track is subject to condemnation,

12 MS. KEATING: Yes, Your Honor. If the  
13 injunction was properly issued, then the bond -- we  
14 would not be able to have damages on the bond, and that  
15 would be basically the question of preemption and  
16 collateral attack that we had submitted to the district  
17 court and the Eighth Circuit below.

18 QUESTION: As a practical matter your position  
19 is, I gather that the abandonment order requires  
20 everybody to allow you a reasonable time to remove the  
21 rails. If you had that time, you wouldn't care what  
22 happened after that.

23 MS. KEATING: Yes, Your Honor. We believe  
24 that there is an exclusive method that has been added to  
25 the abandonment process, and that's Section 10905 --

1 QUESTION: And that normally would take --  
2 MS. KEATING: -- which gave the --  
3 QUESTION: -- five or six months, is that what  
4 would normally be -- what is the normal length of time  
5 it would take to remove rail? Of course, I suppose that  
6 depends on how long the railroad is, doesn't it?  
7 MS. KEATING: Depending on where you're at.  
8 In our particular section, we are in the Midwest, and if  
9 you're allowed to --  
10 QUESTION: It's winter, I see.  
11 MS. KEATING: -- you will be in your regular  
12 construction season.  
13 QUESTION: Ms. Keating, I'm a little puzzled.  
14 Are you suggesting that the Minnesota shippers who went  
15 before the ICC are simply the same people in another  
16 guise as Hayfield, is that right?  
17 MS. KEATING: Counsel for Appellants have  
18 indicated that they are separate legal entities.  
19 However, the principals -- some of the principals and  
20 incorporators --  
21 QUESTION: I'm trying to get your position.  
22 As I understand, you say they're the same, really the  
23 same people.  
24 MS. KEATING: Yes.  
25 QUESTION: And you're saying they have an

1 option under the abandonment procedure under the  
2 Staggers Act, and once having availed themselves of  
3 that, which they did, and getting a valuation with which  
4 they were dissatisfied, they were, what, estopped,  
5 somehow barred by preemption doctrine from going into  
6 the state courts?

7 MS. KEATING: They had the ability to have  
8 that valuation appealed --

9 QUESTION: What I'm trying to get is your  
10 position, is that, having gone into the ICC and gotten  
11 an evaluation under the ICC procedures under the  
12 Staggers Act, an evaluation with which they were not  
13 satisfied, they didn't appeal it, is that right?

14 MS. KEATING: Yes, Your Honor.

15 QUESTION: And are you saying, in consequence,  
16 having taken advantage of the federal procedure, they  
17 are somehow estopped, barred somehow, from going into  
18 state court?

19 MS. KEATING: We believe it would be a  
20 collateral attack against that final order of the  
21 Commission that set the valuation of the line at \$1.7  
22 million.

23 QUESTION: And that's why you say this is an  
24 interference with the preemption doctrine?

25 MS. KEATING: That, and in addition, under

1 Section 10905, which was invoked in the Staggers Rail  
2 Act of 1980, there was another provision. It not only  
3 set the time periods in which these offers were to be  
4 made as far as a forced sale or subsidy. It also  
5 provided that anyone that purchased the line should  
6 continue service for a minimum of two years. That was  
7 an extra stiff requirement to continue the service, and  
8 we believe that it evinces the Congressional intent for  
9 there to be stability in the rail system and for there  
10 to be continuity.

11 So Section 10905 regulated that entire area,  
12 and there is no indication --

13 QUESTION: Well, if they had never taken  
14 advantage of 10905, if that had not happened, all they  
15 had done was what they have since done, organize to  
16 start a new railroad, would you be making the same  
17 preemption argument?

18 MS. KEATING: Yes, I would, Your Honor. We  
19 believe that there is a notice that's put in the Federal  
20 Register, a notice stating, anyone who is interested in  
21 subsidizing --

22 QUESTION: Has to go that route.

23 MS. KEATING: Yes.

24 QUESTION: Of course, the problem is the ICC  
25 does not agree with you on that.



1 MS. KEATING: Well, Your Honor, there is --

2 QUESTION: That is true?

3 MS. KEATING: -- a difference of opinion, as I  
4 understand it, among the Commission members and they did  
5 not join the Solicitor General in his brief and have not  
6 entered the case as a party of record. But I think that  
7 we should note that the Commission --

8 QUESTION: Well, with the papers that are  
9 before us the ICC does not agree with you.

10 MS. KEATING: There is some difference of  
11 opinion among their decisions. They have indicated that  
12 they understand what opportunity costs are and that  
13 there is a real cost to the railroads in terms of not  
14 being able to use their assets productively.

15 QUESTION: May I decide what I think it says?

16 MS. KEATING: Yes, Your Honor.

17 QUESTION: Thank you.

18 QUESTION: Well, I take it you're probably  
19 going to have to decide degrees; that if it were clear  
20 enough in the ICC's disposition of the abandonment  
21 proceeding that the abandonment was conditioned upon or  
22 rested upon the use of the rail elsewhere on the line,  
23 that this would be a different case.

24 MS. KEATING: Well, one of the findings that's  
25 made in every abandonment case now is the opportunity

1 costs associated with not being able to productively use  
2 one's assets. So there was a specific finding in the  
3 Commission proceedings. And while the certificate issue  
4 --

5 QUESTION: Well, your colleague on the other  
6 side says, whatever kind of a finding there was, it  
7 isn't sufficient to foreclose the use, the condemnation  
8 of the rail.

9 MS. KEATING: We would submit that there are  
10 sufficient statement in the Administrative Law Judge's  
11 decision.

12 QUESTION: And the ICC comes along and says,  
13 well, whatever we found, we certainly didn't intend to  
14 foreclose condemnation of the rail immediately after the  
15 certificate issues, and it says, we certainly didn't  
16 contemplate insulating this rail for any period of time  
17 from condemnation.

18 You disagree with the ICC as to the meaning of  
19 its order?

20 MS. KEATING: I believe that the order was one  
21 -- and that Congress is the one that has established  
22 that any forced sale or acquisition of a rail line, an  
23 intact rail line for continued rail purposes, should be  
24 done under Section 10905.

25 QUESTION: An intact rail line.

1 MS. KEATING: Yes, which it was when the  
2 Hayfield Northern obtained the temporary restraining  
3 order in state court.

4 The ICC, we believe, cannot abdicate its role  
5 as a guardianship over the railroads' financial  
6 condition, and I think it's important to note the  
7 primary purposes behind the Staggers Rail Act, which  
8 provided for Section 10905, and that was to deregulate  
9 the railroad industry and to provide lesser regulatory  
10 restraints, but also to give the railroad an opportunity  
11 to have the earnings, adequate earnings so that it could  
12 restore and maintain its rail system and thus provide  
13 better rail service for the nation; and then finally, to  
14 provide for stability in the rail system of the nation.

15 And Section 10905 as a result was a balancing  
16 test to provide this means by which within a certain  
17 time period local communities could have the opportunity  
18 of acquiring lines and being able to continue service,  
19 but at the same time there could not be this protracted  
20 delay from letting the railroads reuse their assets  
21 productively elsewhere.

22 CHIEF JUSTICE BURGER: Mr. Abdalian.

23 REBUTTAL ARGUMENT OF ROBERT S. ABDALIAN, ESQ.,

24 ON BEHALF OF APPELLANTS

25 MR. ABDALIAN: If there is a reasonable time

1 in which the rail ties and track should be left intact  
2 -- or not intact; in which the CNW could remove the rail  
3 ties, that should have been asked. The Commission  
4 should have been asked to put a condition on the  
5 abandonment, and that's where that should have been  
6 fought out. The railroad did not have a condition of  
7 the abandonment that they needed the lines and they had  
8 to put it elsewhere.

9           The reason that there was no condemnation  
10 action or petition for condemnation action brought was  
11 because immediately upon seeking the TRO in state court  
12 the issue was removed to federal court on a preemption  
13 issue, which was perceived as a threshold issue. And to  
14 bring a condemnation action in state court while this  
15 threshold issue had to be decided would be premature and  
16 it was likely not to be entertained by the state court  
17 in any event pending a resolution of this jurisdictional  
18 issue.

19           As for the estoppel argument of the CNW,  
20 estoppel would not prevent the condemnation. At most it  
21 goes to the price that was placed on the line. It's an  
22 issue preclusion consideration and not one of  
23 preemption.

24           Thank you.

25           CHIEF JUSTICE BURGER: Thank you, counsel.

1 The case is submitted.

2 (Whereupon, at 11:03 a.m., oral argument in  
3 the above-entitled case was submitted.)

4 \* \* \*

5 and that these attached pages constitute  
6 transcript of the proceedings for

7  
8 BY P. J. Miller  
(REPORTER)

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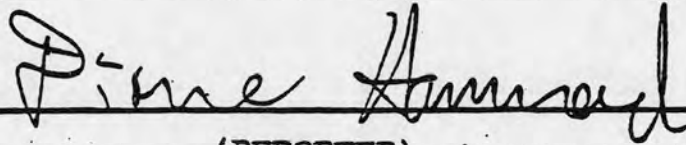
# CERTIFICATION

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:  
#82-1579-HAYFIELD NORTHERN RAILROAD COMPANY, INC., AND MINNESOTA, Appellants  
v. CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

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and that these attached pages constitute the original transcript of the proceedings for the records of the court.

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