

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

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ORIGINAL

DKT/CASE NO. 83-1492 & 83-1633

TITLE NATIONAL RAILROAD PASSENGER CORPORATION, Appellant v. ATCHISON,
TOPEKA AND SANTA FE RAILROAD COMPANY, ET AL. and
ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY, ET AL., Appellants
PLACE v. NATIONAL RAILROAD PASSENGER CORPORATION
Washington, D. C.

DATE January 15, 1985

PAGES 1 - 53



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IN THE SUPREME COURT OF THE UNITED STATES

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NATIONAL RAILROAD :
PASSENGER CORPORATION, :
Appellant :

v. : No. 83-1492

ATCHISON, TOPEKA AND :
SANTA FE RAILROAD :
COMPANY, ET AL. :

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ATCHISON, TOPEKA AND :
SANTA FE RAILROAD :
COMPANY, ET AL., :
Appellants :

v. : No. 83-1633

NATIONAL RAILROAD :
PASSENGER CORPORATION, :
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Washington, D.C.

Tuesday, January 15, 1985

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 1:56 p.m.

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APPEARANCES:

PAUL F. MICKEY, JR., ESQ., Washington, D.C.;

on behalf of National Railroad Passenger Corporation.

SAMUEL A. ALITO, ESQ., Washington, D.C.;

on behalf the United States in support of

National Railroad Passenger Corporation.

GEORGE A. PLATZ, ESQ., Chicago, Ill.;

on behalf of Atchison, Topeka and Santa Fe, et al.

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C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
PAUL F. MICKEY, JR., ESQ., on behalf of NRPC	4
SAMUEL A. ALITO, ESQ., on behalf of the United States, in support of NRPC	21
GEORGE A. PLATZ, ESQ., on behalf of Atchison, Topeka and Santa Fe	27
PAUL F. MICKEY, JR., ESQ., on behalf of NRPC - rebuttal	49

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Mickey, I think you may proceed when you're ready.

ORAL ARGUMENT OF PAUL F. MICKEY, JR., ESQ.,
ON BEHALF OF NATIONAL RAILROAD
PASSENGER CORPORATION

MR. MICKEY: Thank you, Your Honor. Mr. Chief Justice and may it please the Court:

This case involves a challenge by several freight railroads to a federal statute that requires the railroads to compensate Amtrak for free and reduced rate transportation privileges on Amtrak trains provided to the railroads' employees and retired employees. The basis of the railroads' claim is that they have a contract with the United States and this statute impairs that contract.

Mr. Alito will argue that in fact they have no binding contract rights enforceable against the United States, and I will argue that, even if they do, this statute has not impaired those rights and certainly not impaired them substantially so as to raise a constitutional issue.

The background of the case I believe is important and can be summarized in five basic facts. First, as of 1971 the nation's railroads were incurring

1 substantial deficits as a result of their common carrier
2 obligation to transport passengers. They sought to
3 discontinue their passenger trains as promptly as the
4 ICC would permit.

5 Secondly, Congress enacted the Rail Passenger
6 Service Act to give them an option. They could either
7 choose to continue operating passenger trains and
8 incurring deficits for at least three and a half more
9 years or they could transfer their passenger service to
10 Amtrak, along with a payment equal to one-half of one
11 year's deficits.

12 The option was attractive, and as a result on
13 May 1, 1971, some 97 percent of the nation's rail
14 passenger service was transferred to Amtrak. Amtrak --

15 QUESTION: 97 percent of what, total miles or
16 passengers?

17 MR. MICKEY: Passenger miles. 95 percent of
18 route miles, 97 of passenger miles. And Amtrak operated
19 somewhat less than half of those in its new system that
20 had been designated by the Department of
21 Transportation. The rest were discontinued by effect of
22 law.

23 Third, for generations there had been a
24 tradition in the railroad industry that railroad
25 employees, retired employees and dependents could travel

1 free or at reduced rates on passenger trains. One of
2 Amtrak 's first acts when it came into being was to
3 significantly curtail the scope of privileges available
4 to the railroad employees.

5 Even though Amtrak had the express right under
6 its agreement with the railroads to decide what
7 privileges, if any, would be offered to railroad
8 employees, the railroads protested loudly. They warned
9 of labor problems. Their employees protested and some
10 labor unrest occurred.

11 QUESTION: Mr. Mickey, at some appropriate
12 point will you tell me how much money we're talking
13 about?

14 MR. MICKEY: I believe that the total amount
15 that's at issue to date for the railroad parties to this
16 case is on the order of \$60 million. Mr. Platz may have
17 a more precise figure. We're talking at this point --
18 if we're talking about an amount --

19 QUESTION: Annually?

20 MR. MICKEY: No. It's on the order of a
21 million dollars annually and diminishing, and it may be
22 somewhat higher. I think that's the order.

23 QUESTION: It's diminishing why?

24 MR. MICKEY: Diminishing because the category
25 of employees who are entitled to travel under the

1 statute, for whom the railroads must compensate, is
2 shrinking. The record shows that in 1972 there were
3 2.83 million such employees. As of 1979 in the GAO
4 report, that number had shrunk to roughly one million.

5 QUESTION: These employees continue to be
6 employees of the railroads, not of Amtrak?

7 MR. MICKEY: That's a critical fact, Your
8 Honor, that the privilege was created for railroad
9 employees, and indeed only for those employees who were
10 eligible under the railroad's pre-existing policies for
11 past travel as of the date of the transfer of service.

12 QUESTION: And these employees didn't become
13 employees of Amtrak. They remained employees of the
14 railroads?

15 MR. MICKEY: The employees who are eligible
16 for privileges under the statute are those who remained
17 employees of the railroads. There may have been some
18 who transferred to Amtrak and they would not be covered
19 by this statute. They'd be covered by different
20 privileges.

21 QUESTION: Mr. Mickey.

22 MR. MICKEY: Yes, Justice.

23 QUESTION: How was this amount computed? Do
24 they get half fare or quarter or something? I mean,
25 Amtrak gets how much for what?

1 MR. MICKEY: Amtrak receives from the employee
2 railroad 25 percent of yield. That's the statutory
3 definition. Yield is the amount of revenue that Amtrak
4 gets for transporting a passenger a mile, so that --

5 QUESTION: Oh, I see.

6 MR. MICKEY: -- the yield --

7 QUESTION: It's measured against what Amtrak
8 gets.

9 MR. MICKEY: It is, that's right.

10 QUESTION: And it's 25 percent?

11 MR. MICKEY: 25 percent. In ballpark figures,
12 the yield that Amtrak earns for transporting a normal
13 passenger is eight cents. They pay roughly two cents, a
14 little more than two cents per mile.

15 The fourth background fact that I'd like to
16 mention is that, as a result of the labor unrest and as
17 a result of the protests from the railroads, there was
18 enacted in 1972 an amendment to the Rail Passenger
19 Service Act creating an entirely new statutory pass
20 privilege.

21 The new statute, the 1972 amendment, required
22 Amtrak to provide privileges to the railroads' employees
23 on a basis comparable to what they'd enjoyed before, and
24 required the railroads to pay Amtrak very modest amounts
25 for those privileges.

1 The fifth fact is that in 1979 Congress
2 revisited the issue of compensation, decided that some
3 more meaningful payment was in order, and it increased
4 the amount to the 25 percent of yield formula.

5 QUESTION: May I ask right there, that imposed
6 an obligation on Amtrak to accept these passengers. Did
7 it allow the railroad to opt out, in effect? Or was the
8 railroad -- there's no choice?

9 MR. MICKEY: No choice. The railroads'
10 employees had a statutory right to travel.

11 QUESTION: That's what I thought.

12 MR. MICKEY: The railroads had no right.

13 The railroads bring this case as one for
14 contract impairment, and I think the critical fact to
15 remember at the outset is that when you look at the Rail
16 Passenger Service Act or the basic agreement, even if
17 you assume that they are binding contracts on the United
18 States -- and again, Mr. Alito will argue that they are
19 not -- you cannot find any term in either that deals
20 with this issue.

21 Both instruments are silent on the issue of
22 compensation for employee pass privileges. Now, the
23 railroads have tried to work around that problem by
24 saying that when they were relieved from their
25 obligation to transport passengers, they were relieved

1 of all of the incidents of passenger service and that
2 transporting employees as pass riders was an incident.

3 Well, we suggest that it should be viewed very
4 differently. It is really an employee fringe benefit
5 rather than a necessary part of passenger service. It
6 has to do with the employees' obligations to their --
7 with the railroads' obligations to their employees, and
8 not to the public. And it was the obligation to
9 transport the public as a common carrier that the
10 railroads were relieved of.

11 The GAO report, which is in the joint
12 appendix, points out that prior to 1971 there were
13 freight-only railroads and there were terminal companies
14 that arranged for their employees to have pass
15 privileges on passenger trains. So it wasn't just
16 something that followed naturally and ineluctably from
17 the fact that these railroads were operating passenger
18 service.

19 QUESTION: May I just cut in once more?

20 MR. MICKEY: Sure.

21 QUESTION: I'm sorry. Assume -- I understand
22 you don't think there's a contract, but assume for a
23 moment there is. And assume that the provision of
24 intercity rail passenger service includes as part of the
25 provision the provision of service for this group of new

1 employees.

2 Why doesn't it cover that? In other words,
3 they argue, as I understand it, that this is part of
4 that whole.

5 MR. MICKEY: I'm not clear whether you're
6 asking me to assume that it's covered or to explain why
7 it is not covered.

8 QUESTION: Well, wouldn't the plain language
9 -- if the provision of transportation services for these
10 employees is a part of the provision of the total
11 obligation to provide intercity rail passenger service,
12 why then does not the plain language of the agreement
13 cause you to lose?

14 MR. MICKEY: The plain language causes us to
15 lose only if you conclude that the limited release,
16 contractual or otherwise, and we'll assume under your
17 hypothetical that it is contractual, that the railroads
18 received in 1971 addressed employee fringe benefits.

19 The release is narrowly defined. Section 401
20 of the statute says the railroads shall be relieved of
21 their obligation to provide passenger service under Part
22 I of the Interstate Commerce Act or any other statute or
23 law that pertains to this subject. Both courts below
24 looked to see if there was any legal responsibility of
25 the railroads to provider pass privileges that might be

1 embraced by that statutory release, and we believe both
2 courts below correctly concluded that it was not the
3 sort of responsibility that Congress meant to relieve
4 them of.

5 And I'd submit, if you were looking at
6 interpreting the statute or the --

7 QUESTION: You mean there wasn't any
8 responsibility to be relieved of?

9 MR. MICKEY: That's right.

10 QUESTION: The railroads could have terminated
11 that at will at any time?

12 MR. MICKEY: I answered too quickly.

13 QUESTION: I mean in as far as the law was
14 concerned?

15 MR. MICKEY: There may have been a
16 responsibility. With respect to some railroads, there
17 was a responsibility under collective bargaining.

18 QUESTION: Collective bargaining, but not
19 under the law.

20 MR. MICKEY: Not under the law, not under the
21 statute.

22 QUESTION: Not under the referenced section.

23 MR. MICKEY: Exactly, exactly. And I would
24 submit that if one concludes that Congress is bound
25 contractually by the terms of that statute, one should

1 be careful about construing the terms broadly so as to
2 cover responsibilities that aren't explicitly covered by
3 the terms of the statute.

4 QUESTION: Under the union contracts was that
5 regarded as part of the compensation of employees, to
6 have pass benefits?

7 MR. MICKEY: I have only common sense to go on
8 to answer it, but I submit that it probably was. I
9 think you end up with an overall more valuable
10 compensation package if employees are allowed to travel
11 free or at reduced rates on a lifetime basis, which was
12 the expectation that these employees had prior to
13 Amtrak.

14 QUESTION: Well, it applied to some people
15 that weren't in the union, too --

16 MR. MICKEY: Surely. It applied --

17 QUESTION: -- on railroads. So it must not
18 have been limited to the union contract.

19 MR. MICKEY: That's true.

20 QUESTION: But in either case it would be
21 arguably partial compensation. It was arising out of
22 the employment relationship.

23 MR. MICKEY: Unquestionably it did. And I
24 think when you look at the legislative history of the
25 1972 amendment and see what led Congress to impose a

1 statutory pass privilege, you see evidence that the
2 Senators who read into the record letters from employees
3 who had lost this lifetime expectancy were seriously
4 concerned about the loss of what had been understood to
5 be compensation that would endure after the employment
6 relationship terminated.

7 QUESTION: May I try and rephrase my
8 question. Does anyone now have a responsibility to
9 provide intercity rail passenger service to this group
10 of employees?

11 MR. MICKEY: To provide -- Amtrak has the
12 responsibility and is now the only carrier in the
13 country that has the responsibility to provide intercity
14 rail passenger service. The employees who were
15 described by the statute have a right to ride as pass
16 riders.

17 QUESTION: But you'd say that Amtrak is the
18 only entity that has any such responsibility?

19 MR. MICKEY: I believe that's clear. Amtrak
20 assumed service from nearly all the railroads in 1971
21 and as of about two years ago the last carrier that had
22 held onto a route transferred it to Amtrak.

23 QUESTION: The word "responsibility" really
24 doesn't mean who has to pay for it, just who has to
25 provide the service?

1 MR. MICKEY: Well, we're not trying to argue
2 that when they were relieved of the responsibility they
3 weren't relieved of the financial responsibility.
4 They've said that's the implication of our argument, and
5 we don't suggest that. We say they may have been
6 relieved, contractually or otherwise, of the
7 responsibility to run the trains and the responsibility
8 to pay for running the trains.

9 If they didn't get the financial release, the
10 operational release wouldn't have been significant.
11 We're saying that what release they got focused on the
12 obligation to run trains for the public, the common
13 carrier obligation for transportation.

14 QUESTION: They do now, under your view, have
15 a responsibility to pay for the running of the trains to
16 the extent that they provide passenger service, or at
17 least a portion of the cost, for these people?

18 MR. MICKEY: Do the railroads have that
19 obligation?

20 QUESTION: Yes.

21 MR. MICKEY: The railroads have an obligation
22 not to pay for the running of the trains. They have an
23 obligation to pay Amtrak for the benefit, the service
24 that is provided for their employees.

25 QUESTION: To buy the tickets.

1 MR. MICKEY: I don't mean to split hairs. I
2 think it may be an important -- to pay one-quarter of
3 the cost of the tickets. It's a little different.

4 QUESTION: Mr. Mickey, do Amtrak's own
5 employees get free passes?

6 MR. MICKEY: They get different degrees of
7 passes, but it has customarily been provided by Amtrak,
8 again because it is regarded as a valuable emolument.

9 QUESTION: On the matter of reimbursement,
10 some argument is made by your opponents that the amount
11 is too great. Why wouldn't reimbursement for the
12 incremental costs of providing free pass services fully
13 cover the cost of providing those services?

14 MR. MICKEY: I think by definition it would
15 fully cover the costs. I think the question is, does
16 Congress have the discretion only to adopt an
17 incremental cost formulation, and we have argued in our
18 brief that it does not have such constrained discretion,
19 that it can take into account other facts, as it did.
20 When it enacted the 1979 amendment and asked the GAO to
21 do a study, it said take into account value as well as
22 costs.

23 GAO looked at both factors, discovered that
24 they were very difficult to quantify, and said a
25 legislative judgment is in order.

1 QUESTION: Well, can Congress also take into
2 account the fact that Amtrak is losing money?

3 MR. MICKEY: I think that that was a factor.
4 I wouldn't deny that. Congressman Florio, who was the
5 chief sponsor of the 1979 amendments, said, a rough
6 quote: It's difficult to justify having the railroads'
7 employees traveling virtually for free when two out of
8 every three dollars for normal public travel are coming
9 out of the public treasury.

10 I think there was a burden associated with
11 intercity rail passenger service to be borne, and
12 Congress took into account a number of factors, one of
13 which was that operating this transportation system was
14 inherently expensive and the railroads that had
15 benefited from it should be paying some more meaningful
16 share of its costs.

17 But I'd like to suggest that, without trying
18 to define what the outer limit may be, I think if you
19 look to see whether the fully allocated cost of
20 transportation on Amtrak would be an appropriate
21 basis --

22 QUESTION: Well, Congress couldn't have come
23 in and required the air carriers, for example, to pay
24 for these pass privileges, could it?

25 MR. MICKEY: In the hypothetical there is no

1 background of facts that suggests that that was an
2 appropriate action for Congress to take in order to
3 preserve --

4 QUESTION: The railroads' position is that
5 what Congress did is much like requiring the air
6 carriers to. Amtrak was running at a loss and so
7 Congress just reaches out and grabs somebody and says,
8 you help subsidize it.

9 MR. MICKEY: I think that is a fair summary of
10 their argument. We would put it a little bit
11 differently. A benefit was created in 1972, wholly
12 aside from any deal that was cut in 1971. It was a
13 benefit that obviously responded to the desires of the
14 railroads, benefited their employees for years, gave
15 them substantial benefits.

16 In exchange for the roughly \$1 million per
17 year that the railroads pay to Amtrak, these five
18 railroads pay, they get some 40 million miles, passenger
19 miles of employee travel. The GAO has suggested that
20 there is improved morale, a richer compensation package,
21 the avoidance of labor disruption that led to enactment
22 of the statute in the first place, and these benefits I
23 think are substantial.

24 It's possible that the railroads are better
25 off, taking into account the amounts they've paid and

1 the benefits they've gotten. They may break even or
2 they may be worse off. Our position is that, if there
3 is any net loss, it is an insubstantial loss when you
4 measure the loss that they suffer against the total
5 value to them of this alleged contract.

6 The value of the alleged contract was avoiding
7 hundreds of millions of dollars of future passenger
8 train deficits, at least three and a half years more
9 deficits.

10 QUESTION: Are some of these passes on a space
11 available basis?

12 MR. MICKEY: All of the passes are on a
13 space --

14 QUESTION: All of them?

15 MR. MICKEY: All of them are. As GAO noted,
16 that generally does not pose a problem for employees who
17 seek to travel. On non-reserved trains, they simply --

18 QUESTION: There was some reference to some of
19 these people pushing off paying passengers. Then that's
20 not correct?

21 MR. MICKEY: Well, it can happen. Space
22 available on reserve trains, which make up roughly half
23 of Amtrak's system, means that you are allowed to make a
24 reservation 24 hours in advance. The trains are
25 considerably more full now than they were in 1972 and,

1 without suggesting facts that I don't think are
2 important for this issue --

3 QUESTION: Well then, it isn't a straight
4 space available.

5 MR. MICKEY: It says space available, but
6 space available when you have reserved trains requires
7 some sort of reservation. So they are allowed to make,
8 to book reservations 24 hours in advance.

9 QUESTION: A reservation then can be made on a
10 pass without paying for it?

11 MR. MICKEY: Without paying for it on the home
12 road or paying half fare on the off-road. I should
13 point out that in the GAO study it's noted that the free
14 privilege applies to some 56 percent of all pass travel,
15 or it did as of '69 when GAO did its study. And one
16 would suppose that a significant portion of the
17 remaining 44 percent begins and terminates on the home
18 road, so that the bulk of the privilege that's being
19 exercised is the free and more valuable privilege.

20 I would just summarize by saying that, in
21 light of all the benefits the railroads have gotten, we
22 believe Congress has acted well within its discretion in
23 deciding that this is a reasonable fee, one-quarter of
24 the price of a ticket.

25 And if I have any remaining moments I'd like

1 to save them for rebuttal.

2 CHIEF JUSTICE BURGER: Mr. Alito.

3 ORAL ARGUMENT OF SAMUEL A. ALITO, ESQ.,
4 ON BEHALF OF THE UNITED STATES, IN SUPPORT
5 OF NATIONAL RAILROAD PASSENGER CORPORATION

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

8 In the time that's allotted to me this
9 afternoon, I would like to concentrate on the threshold
10 issue in this case, which is whether the railroads have
11 any contractual rights whatsoever against the United
12 States.

13 The railroads' position is that the Rail
14 Passenger Service Act, the RPSA, gave them the
15 contractual right to be forever free from all passenger
16 service obligations, while at the same time allowing
17 them to retain their freight lines. Our position is
18 that the Rail Passenger Service Act merely gave them
19 regulatory relief from their passenger service
20 obligations, much as if the ICC had issued a certificate
21 of discontinuance.

22 The background of the RPSA makes this quite
23 clear. The RPSA was enacted in 1970 at a time when rail
24 passenger service in this country had become extremely
25 unprofitable, and the railroads were petitioning the ICC

1 in ever-increasing numbers to discontinue their
2 passenger trains.

3 These discontinuance proceedings, however,
4 were often hotly contested. They were lengthy, they
5 were costly, they were sometimes unsuccessful; and I
6 don't think there was any prospect that the ICC was
7 simply going to authorize the termination of all
8 passenger trains in this country. So if the RPSA had
9 not been enacted, the railroads, it seems quite clear,
10 would have been compelled to continue to operate many of
11 their passenger trains at a considerable loss for quite
12 some time.

13 The RPSA in a very real sense rescued the
14 railroads. It created a quick method for shedding all
15 their passenger lines and, as Mr. Mickey said, virtually
16 all of the railroads immediately snapped at this
17 opportunity.

18 The RPSA created a new carrier, Amtrak, to
19 take over the passenger lines and it set up a procedure,
20 a two-step procedure that was essentially the same as
21 what takes place whenever one carrier acquires another's
22 lines.

23 The first step is a contract between the
24 carriers, in this case Amtrak and the railroad. This is
25 a contract, but the United States is not a party to it

1 and is not in any way bound by it. Under this contract,
2 Amtrak agreed to take over operation of the passenger
3 lines and the railroad agreed to give up those lines.
4 The railroad also agreed to provide maintenance and
5 services and facilities to Amtrak, and also to make some
6 payments to cover some of Amtrak's expected initial
7 losses.

8 Now, the second step does involve the
9 Government, but it is non-contractual. Once the parties
10 have entered into the contract, the United States, in
11 the exercise of its commerce clause authority, relieves
12 the railroad of its common carrier duty to transport
13 passengers.

14 This puts the railroad in essentially the same
15 position as if a certificate of discontinuance had been
16 granted. The railroad doesn't have to operate passenger
17 trains any more, but it doesn't have any contract rights
18 against the United States. And as long as it continues
19 to operate freight trains, it remains subject to all of
20 the familiar common carrier obligations, which may
21 include some passenger service obligations.

22 This two-step procedure is reflected in the
23 statutory language, and the relevant provision is
24 Section 401(a)(1), which is reproduced on pages 40-A and
25 41-A of the appendix to Amtrak's jurisdictional

1 statement.

2 The first step, the contract between Amtrak
3 and the railroads, is set out in the first two
4 sentences. Amtrak is authorized to contract to take
5 over the railroads' passenger lines.

6 The second step, the regulatory relief, is set
7 out in the last sentence before the proviso: Once
8 Amtrak and the railroad have entered into the contract,
9 the railroad shall be relieved of all its
10 responsibilities as a common carrier of passengers by
11 rail in intercity rail passenger service.

12 Now, the railroads argue that this was really
13 one step, that Congress delegated to Amtrak, which is a
14 non-governmental entity, the authority to contract away
15 the power under the commerce clause to impose passenger
16 service obligations on the railroads.

17 If that were true, then this statutory
18 language, which seems to describe two steps, would be
19 redundant. Moreover, the statutory language uses the
20 language of contract when it talks about the
21 relationship between Amtrak and the railroads, but then
22 when it turns to the relationship between the railroads
23 and the United States it uses the language of
24 regulation: The railroad shall be relieved of its
25 common carrier obligations.

1 The railroads' interpretation of what took
2 place under the RPSA doesn't make sense for several
3 additional reasons. First of all, as I have alluded to,
4 it means that Congress contracted away a portion of its
5 commerce clause authority, something that Congress is
6 quite unlikely to do.

7 Second, it means that a non-governmental
8 entity, Amtrak, was delegated the authority to contract
9 away this commerce clause power. That is even more
10 unlikely.

11 Third, it means that there was a marked
12 departure from the way discontinuance matters had been
13 handled for decades. They had always been handled by
14 regulation. They had never been handled by contract.

15 And fourth, the railroads have not offered any
16 plausible explanation why Congress would have entered
17 into such a contract. The only thing the railroads
18 really gave up under the RPSA besides their passenger
19 lines, which were losing money, were payments that were
20 approximately equal to what the railroads had lost on
21 passenger service during just the preceding six months.

22 Now, this was much less than the railroads
23 would have lost if the RPSA had not been enacted at all,
24 and I think it is only a fraction of what everyone
25 realized Amtrak would lose at the beginning of its

1 operation. If this is a contract, it's a contract that
2 doesn't make any sense.

3 In sum, the railroads do not have any contract
4 rights against the United States, and so the railroads'
5 entire argument based on the impairment of contract must
6 fail. Let me also comment very briefly on our second
7 point in this case, which is that even if there was a
8 contract it was not impaired.

9 The release that the railroads obtained under
10 the RPSA is described in two places in Section
11 401(a)(1). The first reference states that the railroad
12 is relieved of its entire responsibility for the
13 provision of intercity rail passenger service, and the
14 railroads have tried to argue that that means providing
15 payment for these few pass riders.

16 I think that is a strained reading of the
17 statutory language, but it is completely refuted when
18 one looks at the second way in which the release is
19 described in Section 401(a)(1): The railroad shall be
20 relieved of its responsibilities as a common carrier of
21 passengers by rail in intercity rail passenger service.
22 Now, I believe it is a tenet of contract construction
23 that a more specific term controls the more general
24 term.

25 The latter description is more specific and I

1 think that is what was meant by the release in the
2 RPSA. The railroads no longer had to operate passenger
3 trains, and that's all. It doesn't mean they didn't
4 have to pay for the free rides taken by their
5 employees.

6 CHIEF JUSTICE BURGER: Mr. Platz.

7 ORAL ARGUMENT OF GEORGE A. PLATZ, ESQ.,
8 ON BEHALF OF THE ATCHISON, TOPEKA AND
9 SANTA FE RAILROAD COMPANY, ET AL.

10 MR. PLATZ: Mr. Chief Justice and may it
11 please the Court:

12 In 1971 the five railroads which are parties
13 to this case, relying on the terms of Section 401 of the
14 Rail Passenger Service Act, paid more than \$80 million
15 to Amtrak in exchange for relief from their "entire
16 responsibility for the provision of intercity rail
17 passenger service."

18 After eight years of escalating Amtrak
19 deficits, in 1979 Congress enacted an amendment to
20 Section 405(f) of the Rail Passenger Service Act which
21 Amtrak and the United States contend required the
22 railroads to make additional payments to Amtrak which
23 are approximately \$1.5 million per year, purportedly to
24 reimburse Amtrak for its space available pass privileges
25 for railroad employees, which the railroads contend cost

1 Amtrak vastly less than that \$1.5 million per year and
2 which the railroads have never agreed to pay for.

3 This Court has held in Lynch versus the United
4 States and earlier cases that in order for the United
5 States to be able to enter into contracts with others of
6 a financial nature --

7 QUESTION: Mr. Platz, this is more out of
8 curiosity. Where did the name "Amtrak" come from?

9 MR. PLATZ: I'm afraid I can't say that. I
10 believe the first versions of the bill called it
11 "Railpack," and I don't know who invented that name.

12 QUESTION: I'll bet somebody over there
13 knows.

14 MR. PLATZ: This Court, as I was saying, has
15 held in Lynch versus the United States that in order for
16 the United States to be able to contract, make contracts
17 of a financial nature, the Fifth Amendment prohibits it
18 from abrogating those contractual obligations in the
19 absence of supervening conditions authorizing such
20 abrogation.

21 The question before the Court here is whether
22 the payment requirement enacted by Congress in 1979, if
23 it's applicable to the railroads, impairs their release
24 in violation of this Fifth Amendment principle. And I
25 say "if applicable" because we also contend in the last

1 part of our brief that the 1979 statute can and should
2 be construed to be inapplicable to any railroad that
3 entered into the 1971 agreement.

4 But for purposes of my argument today I would
5 like to address four points that we contend require
6 affirmance even if the 1979 payment requirement does
7 apply. These four points are:

8 First, that the railroads received the
9 contract obligation from both the United States and
10 Amtrak granting permanent relief from their
11 responsibility for the provision of intercity rail
12 passenger service;

13 Second, that that release is narrowly limited
14 to relief from financial responsibility and does not
15 contract away any important governmental powers;

16 Third, that the 1979 statute, if it's
17 applicable, does impair this release;

18 And fourth, that the resulting impairment was
19 not justified by any supervening conditions or excused
20 for any other reason.

21 But before addressing those three -- those
22 four points, I would like to mention several facts that
23 we believe are quite important and were omitted or
24 inappropriately emphasized in the arguments of Amtrak.
25 First of all, when the railroads themselves had the

1 responsibility for intercity rail passenger service
2 prior to 1971, they also provided passes only on a space
3 available basis and they themselves, as the GAO has
4 found in its report, allocated only an insignificant
5 amount of costs, of incremental costs to those passes.

6 Furthermore, whenever the railroads did
7 discontinue passenger trains -- and I believe the record
8 will show that between the 1920's and 1970 the number of
9 passenger trains went down like something from 5,000 to
10 500. Whenever the railroads did discontinue a passenger
11 train prior to 1971, the pass privileges were always
12 automatically discontinued to the same extent that the
13 passenger trains were discontinued. Now --

14 QUESTION: What does that mean? You wouldn't
15 give a person a pass to ride on a train that didn't run
16 any more.

17 MR. PLATZ: I think this goes to the point
18 that the passes were merely a dependent incident of the
19 passenger service; furthermore, that the employees could
20 not reasonably have had a strong expectation and a
21 continuous right to passes because they had seen the
22 service to which they were entitled diminished over the
23 years. And also, I think it has to do with the
24 railroads' expectation under their release.

25 QUESTION: Do you mean that the pass use

1 diminished just to roughly the same extent that the
2 service was diminished, discontinued?

3 MR. PLATZ: Well, there is not in the record
4 and I don't have any information as to those specific
5 facts. But presumably, if the number of passenger
6 trains declines from 5,000 to 500, the amount of miles
7 traveled on passes undoubtedly decreased.

8 QUESTION: I'm confused about that. Is that
9 simply because there weren't that many places to go any
10 more?

11 MR. PLATZ: I suspect, yes, that's basically
12 it.

13 QUESTION: May I ask you, do you agree with
14 your opponent's view that there was -- prior to the
15 basic contract, you had no responsibility for providing
16 these free passes to employees of other railroads?

17 MR. PLATZ: We have conceded that in our
18 papers. It was a gratuity and was always considered to
19 be a gratuity.

20 QUESTION: But then how could the entire --
21 being relieved of the entire responsibility for the
22 provision of intercity rail passenger service relieve
23 you of this responsibility?

24 MR. PLATZ: Well, we contend that the
25 railroads were -- well, certainly the 1979 statute is a

1 responsibility, and we contend that when Congress said
2 "entire responsibility" in the contract it didn't mean
3 just those responsibilities that were in existence in
4 1971.

5 As I'm about to discuss in a moment, the
6 purpose of the Rail Passenger Service Act was to get the
7 railroads out of a situation of crippling passenger
8 service losses that threatened their freight service.
9 And Congress' intent was to relieve them from that
10 financial responsibility, and the words "entire
11 responsibility" surely must refer to more than just the
12 responsibilities they had in 1971, but to any subsequent
13 responsibility that Congress might attempt to impose
14 that would in effect restore these uncompensated costs.

15 QUESTION: Counsel, it wasn't all gratuity.
16 There was a little brotherhood negotiations in there.

17 MR. PLATZ: I believe the record shows --

18 QUESTION: The brotherhoods ran the
19 railroads.

20 MR. PLATZ: There is a case that has been
21 cited, Baker versus System Federation, that indicates
22 that Penn Central apparently did have -- the passes were
23 a part of the collective bargaining agreement of the
24 Penn Central.

25 I do think, though, that the GAO report

1 indicates that almost all the other railroads had a
2 provision in the collective bargaining agreement that
3 said only that employees covered by this agreement will
4 receive passes to the extent that any other employees of
5 the railroad receive them. But it wasn't -- the record
6 indicates it was only the Penn Central that actually
7 guaranteed the passes.

8 QUESTION: And another thing. If you look
9 into it, it was not on space available except on the
10 limited trains. There was no space available
11 requirement. How could you have it if you didn't have
12 reservations?

13 MR. PLATZ: As we understand it from the GAO
14 report that is in the record, the practice of the
15 railroads is, when the conductors go down and collect
16 tickets, they of course know who is riding on passes,
17 and if there are fare-paying passengers on the train who
18 are standing while the pass-riders are sitting, that the
19 pass-riders are made to give up their seats so the
20 fare-paying passengers can sit down.

21 QUESTION: Or otherwise they put them off?
22 The train is going 60 miles an hour.

23 MR. PLATZ: I'm sure they don't put them off.
24 I think all they make them do is stand, although the
25 statute on which these payments are based does say that

1 Amtrak is only required to give space available passes
2 and that's the only passes that the railroads are
3 required to pay for.

4 Another important fact that I believe Mr.
5 Mickey glossed over very quickly is the fact that the
6 1972 version of Section 405(f), which first required the
7 railroads -- first required Amtrak to supply these
8 passes, did not, as he says, just require the railroads
9 to pay a minimal amount.

10 That 1972 statute required the railroads to
11 pay the "costs" of the passes, and it delegated to the
12 Interstate Commerce Commission the authority to
13 determine what those costs were. The Interstate
14 Commerce Commission decided, after a hearing, that those
15 costs were less than one-tenth of a cent per mile and
16 that they should be reduced by the half fares that were
17 received from pass-riders.

18 By contrast, the 1979 statute that is at issue
19 here has required the railroads to pay more than two
20 cents per mile for both free travel and half-fare
21 travel, without any offset for the half fares.

22 QUESTION: I take it the earlier arrangement
23 was also a violation of the contract as you construe it,
24 but just not serious enough to fight about it?

25 MR. PLATZ: Yes, Your Honor. The railroads in

1 fact raised the argument that it impaired the contract
2 before the Commission. The Commission said it wasn't
3 within their jurisdiction to decide it. After the
4 Commission decision, the railroads did not consider it
5 worthwhile to contest the point further because of the
6 favorable nature of the Commission decision.

7 QUESTION: Mr. Platz, I guess your whole
8 argument depends on finding the existence of some
9 contractual relationship between the railroads and the
10 Federal Government --

11 MR. PLATZ: That's correct.

12 QUESTION: -- by virtue of its passage of the
13 Railroad Passenger Service Act.

14 MR. PLATZ: Your Honor, we do contend that the
15 pass requirement is irrational because of its failure to
16 take into account -- because it requires the railroads
17 to pay exactly the same amount for riders who travel for
18 free as those who travel for half-fare.

19 But you're correct, our basic argument is that
20 there is a contract between the railroads and the United
21 States that frees them from this obligation, and that's
22 the point, my first point which I'd like to address
23 now.

24 We believe that the terms of the Act and its
25 legislative history permit no other conclusion but that

1 there was a contract of both the United States and
2 Amtrak to grant the railroads permanent relief from
3 responsibility for rail passenger service. Section
4 401(a) 1), which as Mr. Alito has mentioned is set out on
5 page 40-A of Amtrak's jurisdictional statement, says
6 that Amtrak is "authorized" to enter into "a contract to
7 relieve the railroad from and after May 1, 1971, of its
8 entire responsibility for the provision of intercity
9 rail passenger service."

10 Such relief obviously could only come from the
11 United States and it therefore authorized Amtrak to
12 provide it. Furthermore, Section 401(a)(2) requires a
13 substantial payment by the railroads in the amount of
14 millions of dollars and calls it "consideration" for
15 this release.

16 We contend that these provisions not only
17 require the conclusion that the United States authorized
18 Amtrak to contract on its behalf to grant the release,
19 but also that the railroads received more for their
20 millions of dollars than a one-shot mass discontinuance
21 that could be revoked at any time. As stated by the
22 House report on the Rail Passenger --

23 QUESTION: Let me just stop you for a minute.
24 What was discontinued and then revoked at any time?
25 Certainly your obligation as a common carrier hasn't

1 been revoked. That was discontinued and it hasn't been
2 revoked. What responsibility was discontinued and then
3 later revoked?

4 MR. PLATZ: We contend that it was the
5 responsibility, the financial responsibility to pay the
6 costs, uncompensated costs, the financial responsibility
7 for the losses generated by rail passenger service. In
8 other words, if you're asking, if the question is what
9 one can construe "responsibility" to mean, that's what
10 we --

11 QUESTION: Supposing the president of the
12 railroad used to ride free and they said, now in the
13 future he's got to pay for his ticket. Does that breach
14 the contract?

15 MR. PLATZ: No, if an individual agrees to
16 pay --

17 QUESTION: The railroad must pay for the
18 officers of the road to ride.

19 MR. PLATZ: If it's compelled, if the railroad
20 is compelled to pay an amount in excess of the cost of
21 the passes, we certainly would say that, just like the
22 1979 statute, that that is a violation of the release.

23 QUESTION: Except that the president used to
24 travel in a private car.

25 MR. PLATZ: I do believe there is a separate

1 provision wherein Amtrak and the railroads have agreed
2 on private cars.

3 QUESTION: That gives him a private car?

4 MR. PLATZ: Excuse me?

5 QUESTION: Does he still have a private car?

6 MR. PLATZ: I think the agreement says that
7 Amtrak will haul private cars, but the railroad has to
8 pay for it.

9 QUESTION: Marginal cost.

10 MR. PLATZ: I don't know that the cost is set
11 forth in the agreement.

12 As I was about to say --

13 QUESTION: Could the Government, could Amtrak,
14 collect from the railroads the marginal cost?

15 MR. PLATZ: I believe that -- we contend that
16 incremental cost and marginal cost I think are the same
17 thing. We have two arguments --

18 QUESTION: All right, incremental costs,
19 then.

20 MR. PLATZ: First of all, we are saying that
21 the railroads were released from their entire
22 responsibility for rail passes, for the passes. But our
23 second point and the point on which the Court of Appeals
24 agreed with us is that this payment requirement in 1979
25 in fact requires the railroads to pay vastly more than

1 the marginal or incremental costs, and therefore --

2 QUESTION: Though not more than the public is
3 charged.

4 MR. PLATZ: Not more than the public is
5 charged.

6 QUESTION: Not as much as the public is
7 charged.

8 MR. PLATZ: Not as much, but the public
9 doesn't get space available passes.

10 QUESTION: Wouldn't your theory go so far as
11 to require the Amtrak to pay for, for instance, hospital
12 benefits for railroad employees or free Christmas
13 turkeys that were given, or whatever else might have
14 been given by the railroads? I mean, your theory is
15 that the entire financial responsibility passed over to
16 Amtrak for everything that might have been given for
17 free to railroad employees.

18 MR. PLATZ: No, we contend only the
19 responsibility for the provision of intercity rail
20 passenger service passed over to Amtrak, not any other
21 responsibility.

22 QUESTION: Well, that's considerably narrower
23 than the language you've been using.

24 MR. PLATZ: I apologize if I misrepresented
25 what our position is. But our position, of course, is

1 that the passes are intercity rail passenger service and
2 therefore they were relieved from the responsibility for
3 those.

4 QUESTION: Even though there was absolutely no
5 obligation on the part of the railroads to give those
6 passes to their employees?

7 MR. PLATZ: That's correct.

8 I would like to address, if I might, the
9 argument that Mr. Alito made with respect to whether a
10 contract exists between the United States and the
11 railroads. He argues -- and this argument, I might
12 mention, was made by the United States for the very
13 first time in this case in the reply brief that they
14 filed last week -- that the word "relieve" in the first
15 sentence of Section 401(a)(1), which I've quoted, does
16 not mean that Amtrak is authorized to grant relief to
17 the railroads, but instead means only that Amtrak is
18 authorized to acquire passenger lines from the
19 railroads.

20 We contend that this is a totally unnatural
21 meaning of the word "relieve" and it's, indeed, totally
22 different from the meaning to the same word that Mr.
23 Alito says is meant by the word "relieved" in the sixth
24 sentence of that section.

25 QUESTION: Is it not relieving them of their

1 common carrier obligation? Isn't that the correct use
2 of the term in that sense?

3 MR. PLATZ: We contend that the entire
4 responsibility for the provision of intercity rail
5 passenger service, from which the railroads were
6 relieved in that first sentence, is more than just the
7 common carrier responsibility. We contend that the
8 later sentence which deals with the common carrier
9 responsibility was only meant to make clear that all the
10 statutes presently on the books which would impose
11 common carrier passenger service responsibilities are no
12 longer applicable to the railroads, but that the more
13 encompassing phrase "entire responsibility for the
14 provision of intercity rail passenger service" includes
15 more than that.

16 Another reason we contend that the Solicitor
17 General's interpretation of the word "relieve" is wrong
18 is because it's totally unnecessary. There was no need
19 for Congress to authorize Amtrak to acquire passenger
20 lines in Section 401, as Mr. Alito contends, because
21 Amtrak was authorized to do exactly that very thing in
22 Section 305 of the Act.

23 And furthermore, in Section 306 of the Act it
24 was exempted from any need to obtain approval under the
25 Interstate Commerce Act. Therefore, it would have been

1 totally unnecessary for such a narrow meaning of the
2 word "relieve" to be used in the first sentence of
3 Section 401(a)(1).

4 In summary, the United States' interpretation,
5 we contend, is at odds with the rest of the Rail
6 Passenger Service Act, the terms of the basic agreement,
7 and the legislative history of the Act as well.

8 The second point that I would like to address
9 is that the release, we contend, is narrowly limited to
10 financial responsibility. We think it's clear from the
11 statute that Congress did not intend to relieve the
12 railroads from responsibility to operate passenger
13 trains.

14 Section 402 of the Act continues to require
15 them to operate, provide employees and services and
16 facilities to Amtrak under contract, but it guarantees
17 them just and reasonable compensation for doing so. The
18 Senate report on the Rail Passenger Service Act
19 indicates that one of its primary purposes was to
20 relieve the railroad industry from the "onerous
21 financial burden" of passenger operations, and the House
22 report on the Act specifically notes that in 1969 the
23 railroads lost \$200 million on passenger service, in a
24 year when their total net income was only about \$500
25 million.

1 The only reasonable conclusion from these
2 facts, we contend, is that Congress intended to retain
3 its power to direct the use of railroad facilities to
4 carry passengers, but that it wanted the railroads free
5 from the crippling losses of passenger service which, if
6 not stopped, would threaten the freight service as
7 well.

8 And so construed, the release does not curtail
9 any important Congressional power, but merely makes a
10 commitment to stop the railroads' passenger service
11 losses, a commitment that would have to be made
12 eventually if the railroads' freight service was to be
13 preserved.

14 My third point is --

15 QUESTION: What consideration did the Federal
16 Government obtain in exchange for the promise that you
17 say the Federal Government made in giving up all of its
18 commerce power to require the railroads to provide any
19 of this service?

20 MR. PLATZ: Well, these railroads paid, I
21 think, \$82.4 million to Amtrak. Amtrak was financed
22 entirely --

23 QUESTION: What did the Federal Government
24 get?

25 MR. PLATZ: Well, Amtrak at that time was

1 financed by the Federal Government, and I suppose that
2 meant that the Federal Government didn't have to come up
3 with that \$82.4 million.

4 QUESTION: And the \$80-some million was about
5 one-half the annual loss being suffered by the railroads
6 in giving passenger service at that time, is that
7 right?

8 MR. PLATZ: Under the statute it was one-half
9 of the fully distributed loss. Now, of course, when the
10 railroads themselves went to discontinue passenger
11 trains the Interstate Commerce Commission didn't let
12 them use fully distributed costs. It required them to
13 use variable costs.

14 And I think an alternative under the Act was
15 that they could pay 100 percent of the 1969 variable
16 loss.

17 Our third point is that this statute, if it's
18 applicable, the 1979 statute, impairs the railroads'
19 release. We contend, first of all, as I've said -- and
20 this is in support of our cross-appeal as well as an
21 alternative ground for affirming the decision below --
22 that the entire responsibility for the provision of
23 intercity rail passenger service from which the
24 railroads were relieved encompassed any obligation to
25 pay for pass riders.

1 Certainly the definition in the statute of
2 intercity rail passenger service is broad enough to
3 encompass service to pass riders. Both courts below
4 have held, however, that the passes were not part of the
5 entire responsibility from which the railroads were
6 relieved because they weren't strictly required to
7 provide the passes at that time.

8 But as I believe I've stated earlier in answer
9 to questions from Justice Stevens, we think that this is
10 much too narrow an interpretation of this broad term,
11 "entire responsibility," because it doesn't take into
12 account responsibilities that might arise after 1971,
13 and certainly the purpose of the Act, to relieve the
14 railroads from these crippling losses, requires
15 interpreting it to apply to subsequent
16 responsibilities.

17 Furthermore, the passes were really in many
18 senses inextricable from the other passenger operations
19 of the railroads and were always terminated when the
20 railroads themselves discontinued the passenger trains.
21 Therefore, as again I believe I mentioned earlier, it
22 was reasonable for the railroads to expect that passes
23 were part of the entire responsibility from which they
24 were relieved.

25 But in any event, the release clearly relieved

1 the railroads from paying the direct costs of public
2 passenger service, and the 1979 statute forces the
3 railroads to subsidize those costs, as the Court of
4 Appeals held.

5 As I mentioned earlier, in 1972 the Interstate
6 Commerce Commission determined that the costs of the
7 passes were less than one-tenth of a cent per mile and
8 that those should be reduced by the half fares. The
9 1979 statute requires the railroads to pay more than 20
10 times what the Interstate Commerce Commission found the
11 costs to be, with no reductions for half fares.

12 Because, thus, the required payments vastly
13 exceed the cost of the passes, it follows that Amtrak
14 can use these payments under the 1979 statute to pay
15 precisely those costs of public passenger service from
16 which the railroads were relieved of responsibility,
17 because Amtrak operates in many instances exactly the
18 same trains from which these railroads -- for which
19 these railroads had common carrier responsibility prior
20 to May 1, 1971.

21 This we contend violates not only the
22 railroads' reasonable expectations based on their
23 release, but the very purpose of the Rail Passenger
24 Service Act.

25 Now, Amtrak argues in its brief that it was

1 proper for Congress to require the railroads to pay the
2 value of the passes, even if this amount exceeded the
3 cost of the passes. We submit that it's irrelevant
4 whether or not the amounts of the payments equal the
5 value of the passes, because they nevertheless forced
6 the railroads to pay to subsidize the costs of public
7 passenger service from which they were released of
8 liability -- released of responsibility.

9 But furthermore, we do not even believe, as
10 I've stated, that the payments are rationally related to
11 the value of the passes, because those payments are
12 exactly the same for each mile of travel that is for
13 free as for which the riders pay half fares.

14 Now, my fourth point is that this impairment
15 of the railroads' contract was not excused, or there
16 were no supervening conditions making the payment
17 requirement proper. There are simply no rational
18 reasons why -- well, let me just put it this way: No
19 event has occurred changing conditions to make it
20 necessary for the railroads to pay more money to Amtrak
21 than they originally agreed to pay.

22 Even the supposed purpose that Mr. Mickey
23 mentioned of achieving labor harmony and preventing
24 strikes or whatever is not served by requiring the
25 railroads to pay more than the cost of the passes. The

1 payment requirement is nothing more in this sense than
2 an attempt to reduce expenditures by abrogating
3 contractual obligations of the United States, which is
4 squarely prohibited by the Lynch case.

5 Nor do the supposed benefits received by the
6 railroads justify the impairment, as Mr. Mickey has
7 argued. In the first place, the railroads dispute the
8 contention that they received any significant benefit.
9 If there really were a benefit to the railroads equal to
10 the amount of payments they're required to make,
11 Congress wouldn't have had to enact the statute
12 requiring the payments. The railroads would have been
13 willing to enter into contracts with Amtrak to pay this
14 amount.

15 Furthermore, the principle of the Lynch case
16 would be totally undermined if Congress could alter
17 contracts of the United States at will merely by
18 asserting that the alteration was a benefit to the other
19 party, rather than renegotiating the contract.

20 I would like to, in the moment I have left,
21 address very briefly the question of whether the payment
22 requirement of the 1979 statute does in fact apply to
23 the railroads. That statute imposes the requirement to
24 make the payments only if Amtrak and the railroads do
25 not "agree on a different basis for compensation."

1 Now, we contend that the basic agreement
2 signed in 1971, the release in 1971, constitutes a
3 different basis for compensation from the 1979 payment
4 requirement for the same reasons that it's impaired by
5 the 1979 payment requirement.

6 The only real issue is whether the word --
7 what the word "agree" in the 1979 statute means. We
8 contend it should not be construed to refer only to
9 agreements reached after 1979 without much clearer
10 language of an intent to invalidate prior agreements.

11 In conclusion, I would like to state that it
12 is our view that if the Court were to allow the payment
13 requirement of the 1979 statute to be applied to the
14 railroads for any of the reasons advanced by Amtrak and
15 the United States, it would cost the United States in
16 the long run far more than is involved in this case by
17 substantially increasing the risk perceived by others in
18 relying on a promise of the United States.

19 CHIEF JUSTICE BURGER: Do you have anything
20 further, Mr. Mickey? You have two minutes remaining.

21 REBUTTAL ARGUMENT OF

22 PAUL F. MICKEY, JR., ESQ., ON BEHALF OF
23 NATIONAL RAILROAD PASSENGER CORPORATION

24 MR. MICKEY: I'll try to be brief.

25 First of all on the factual matter, I think if

1 the Court looks to the facts set out in the GAO report
2 it will see that the amounts the railroads were paying
3 did not go up 20 times. What the railroads were
4 actually paying was administrative costs of the program,
5 which they had agreed to pay, and the increment was more
6 on the order of six or seven times. But I don't know
7 that that's particularly important.

8 A point that is important is that this case
9 comes here on motions, cross-motions for summary
10 judgment. The railroads' complaint has not alleged and
11 their papers have not argued, and in general I don't
12 think that Mr. Platz has contended today, that they are
13 not -- that the premise of their case is that they are
14 not getting fair value for the fees that they pay.

15 Their claim is that they have a contract right
16 and that contract right was impaired when they were
17 required to pay more than Amtrak's out of pocket costs
18 for this privilege. That's what the Court of Appeals
19 found as well.

20 There are two problems with that argument.
21 One is that it's impossible to me to find anywhere in
22 the alleged contract a right to pay no more than
23 incrementals. I don't believe Congress has so limited
24 it.

25 Secondly, it suggests that if Congress in the

1 exercise of its regulatory authority over interstate
2 commerce determines -- and I think we are fundamentally
3 working here with Congress' decisions -- that it is
4 important to preserve labor peace or to promote the
5 interests of interstate commerce that benefits such as
6 these should be preserved, and if Congress requires that
7 the benefits be preserved, as it has often done, in ways
8 that cost the railroads great deals of money -- for
9 example, labor protection payments -- nevertheless,
10 under the railroads' argument, Congress cannot require
11 these railroads to pay any sums for the benefits
12 conferred because they have a binding contract right.

13 The suggestion leads to the notion that if any
14 railroad dollars find their way into Amtrak's treasury
15 then this contract has somehow been breached, and I
16 don't think it's reasonable to believe or for the
17 railroads to have believed in '71 that Congress was
18 entering into that kind of a relationship.

19 Congress was entering on an entirely new way
20 of structuring intercity rail passenger service. It was
21 an experiment. The statute reserved Congress' right to
22 repeal, alter or amend the statute. The statute has
23 been amended every year since 1971 except for 1977 in
24 substantive ways.

25 And to suggest that Congress is so constrained

1 in shaping the relationship between Amtrak and the
2 railroads that it cannot make this kind of adjustment
3 for the benefit of the railroads' employees I think
4 would require a stronger showing than they can make.

5 QUESTION: How about Amtrak? What's that name
6 come from?

7 MR. MICKEY: Justice White, my understanding
8 of the law is that "Railpax" was adopted initially.
9 Judge Fulham's court was besieged with cases involving
10 Amtrak's early days. He took to calling it "Railpax"
11 and people decided that that was not a good name.

12 So we paid a consultant to decide what the
13 proper name was, and "Amtrak" --

14 QUESTION: So it's just a trade name?

15 MR. MICKEY: It is a trade name.

16 QUESTION: Is it official, or is -- the
17 Appellant is National Rail Passenger Corporation.

18 MR. MICKEY: That's one and the same. That's
19 the name --

20 QUESTION: Parentheses, "Amtrak"?

21 MR. MICKEY: Parentheses, "Amtrak."

22 QUESTION: Is that the way the statute --

23 MR. MICKEY: It's not in the statute, no.
24 That's our own --

25 QUESTION: There's Amtrak Commuter Corporation

1 and so forth. That was created especially.

2 MR. MICKEY: That was created by statute,
3 although it is defunct already.

4 (Laughter.)

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

7 (Whereupon, at 2:51 p.m., argument in the
8 above-entitled matter was submitted.)

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CERTIFICATION

Anderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#83-1492 - NATIONAL RAILROAD PASSENGER CORPORATION, Appellant v. ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY, et al. and

#83-1633-ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY, ET AL., Appellants v. NATIONAL RAILROAD PASSENGER CORPORATION

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

BY Paul A. Richardson

(REPORTER)

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