

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1140

TITLE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Petitioner V. JIM BUELL

PLACE Washington, D. C.

DATE December 1, 1986

PAGES 1 thru 52



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -x

ATCHISON, TOPEKA AND SANTA FE :

RAILWAY COMPANY, :

Petitioner :

v. : No. 85-1140

JIM BUELL :

- - - - -x

Washington, D.C.

Monday, December 1, 1986

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:01 o'clock a.m.

APPEARANCES:

REX E. LEE, ESQ., Washington, D.C.; on behalf of the
petitioner.

JAMES R. MC CALL, ESQ., Sacramento, California; on
behalf of the respondent.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
REX E. LEE, ESQ.,	
on behalf of the petitioner	3
JAMES R. MC CALL, ESQ.,	
on behalf of the respondent	24
REX E. LEE, ESQ.,	
on behalf of the petitioner	49

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear argument first this morning in No. 85-1140, the Atchison, Topeka and Santa Fe Railway Company against Buell.

Mr. Lee, you may proceed whenever you are ready.

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. LEE: Thank you, Mr. Chief Justice, and may it please the Court, this is a statutory construction case. There are two statutes to be construed and they are the two that govern relations between employers and employees in the railroad industry.

On the one hand, the Railway Labor Act provides for exclusive mandatory nonjudicial resolution of so-called minor disputes which the Act defines as all disputes growing out of grievances or out of the interpretation or application of bargaining agreements.

The basic objective of this minor dispute part of the Railway Labor Act was to assure that workplace controversies would be resolved by persons who were expert in railroad matters and by processes less cumbersome than courts can offer. The Federal Employers

1 Liability Act, on the other hand, gives a special
2 federally created remedy against railroads for injuries
3 that they cause.

4 The problem in this case arises out of the
5 fact that you have one federal statute that precludes a
6 judicial remedy while the other provides a judicial
7 remedy. Nevertheless, over the 60 years that these two
8 statutes have existed side by side there has been very
9 little conflict between them, and the reason is simple.

10 So long as the RLA is given, as it usually has
11 been, its traditional usually understood meaning as
12 applying to the resolution of workplace disputes, that
13 is, how the shop ought to be run and what the
14 relationship should be between supervisor and employee,
15 and the FELA on the other hand is given its traditional,
16 usually understood meaning as applying to the redress of
17 physical injuries. Then there will be few cases, if
18 any, in which courts will have any difficulty deciding
19 which statute covers which case.

20 Clearly, if that approach is followed here
21 there is no question how this case must be resolved.
22 Mr. Buell's grievance against his employer, Santa Fe,
23 really boils down to a disagreement with his foreman,
24 Mr. Wright, over their respective duties. He makes
25 three basic allegations.

1 The first is that he had been given two
2 conflicting sets of instructions as to how to fill out
3 car inspection reports, second, that he was forced to
4 assist Mr. Wright in what he considered to be illegal
5 activity, namely or principally removing ice and plywood
6 from the yard. And third, and beyond any question the
7 most important, that his supervisor did not adequately
8 discipline other employees and prevent them from
9 ridiculing and intimidating Mr. Buell by doing such
10 things as posting anonymous cartoons making fun of Mr.
11 Buell's physical appearance.

12 The first step taken by the respondent and
13 other employees was to initiate RLA grievance procedures
14 on account of Mr. Wright's alleged wrongdoings, and then
15 about a year later Mr. Buell filed this FELA suit
16 alleging that Santa Fe had wrongfully failed to prevent
17 his foreman and his fellow employees from intimidating
18 him, as a result of which he suffered severe mental and
19 emotional injuries.

20 He did not allege any physical injury.
21 Several federal courts of appeals and district courts
22 have cautioned against the potential for effectively
23 repealing the Railway Labor Act. Through what those
24 courts have called artful pleading in drafting personal
25 injury complaints under either the RLA -- excuse me,

1 under either the FELA or state law, and ironically the
2 most thoughtful of those opinions comes out of the Ninth
3 Circuit.

4 This case is the classic example of why that
5 is a legitimate concern. Look at the issues that are
6 going to have to be resolved by whoever decides this
7 case. They arise out of disagreements between an
8 employee and his foreman over the rules of the shop.
9 Were there in fact conflicting instructions, and if so
10 then which instruction should prevail. What are the
11 company rules concerning taking scrap plywood home? And
12 most important of all, what are the foreman's
13 obligations to keep other employees from making fun of
14 Mr. Buell?

15 Those are the issues in this case.

16 QUESTION: Mr. Lee, wouldn't that also be the
17 case if you had just a standard FELA negligence action
18 where prior to the accident there had been complaints
19 about slipshod procedures within the shop or about some
20 other matters that would constitute negligence? You
21 could grieve those, those negligence matters, and
22 instead of grieving them you certainly could bring an
23 FELA lawsuit later.

24 MR. LEE: Clearly you can, and clearly you can
25 do both, and those two can exist side by side.

1 QUESTION: So why is this different?

2 MR. LEE: This case is different simply
3 because there is no legitimate FELA complaint that has
4 been stated. There is no legitimate FELA cause of
5 action that has been stated in this case. In order to
6 reach --

7 QUESTION: Well, that is quite a different
8 issue, and I was going to ask you that, too. Why is
9 there any -- if you want to talk about artful pleading I
10 would think the artful pleading consists of causing an
11 intentional injury to become a negligent injury within
12 the meaning of the FELA by simply saying that a foreman
13 who inflicts intentional injury is not adequately
14 supervised.

15 Are you making that assertion here, that this
16 matter is not even covered by the FELA anyway?

17 MR. LEE: Oh, yes, we are. We are making two
18 arguments. The first is, we are doing all of it in the
19 context of the general proposition that in order to
20 reach a proper accommodation between these two statutes,
21 what you have to look at is, first, what is the
22 interpretation of each that will harmonize the two so as
23 to minimize the conflict between them, and then you have
24 to ask yourself what is the real thrust of this
25 particular complaint? Is it really in the nature of a

1 traditional FELA complaint which is tied to physical
2 injury or is it, does it really arise out of a
3 disagreement as to what are the rules of the shop and
4 who is to do what in this particular --

5 QUESTION: I am not talking physical injury,
6 Mr. Lee. I am talking negligence. I am talking
7 negligence. It is clear the FELA only applies to
8 negligent injury.

9 MR. LEE: That is correct.

10 QUESTION: And the injury alleged here is
11 proximately intentionally causing emotional distress
12 which may or may not, depending on which side you
13 believe, have led to properly alleged physical injury,
14 but you know, proximately you have intentional action on
15 the part of the foreman and some of the coworkers
16 causing emotional distress, and that has been converted
17 into a negligence action by saying that it was the
18 company's failure adequately to supervise that
19 constitutes the negligence.

20 MR. LEE: That is correct.

21 QUESTION: Now, you are not protesting that
22 and saying that that doesn't constitute a proper FELA
23 action?

24 MR. LEE: Oh, indeed we are. For the 60
25 years -- for the first 58 of the 60 years that the FELA

1 had been in existence there was never any single federal
2 court that had ever held that purely emotional injury,
3 that is, without any physical injury --

4 QUESTION: I am not talking emotional injury.
5 You keep getting back to that point. My concern is
6 intentional injury versus negligent injury. Does
7 intentional injury get converted into negligent injury
8 under the FELA simply by the fact that the company did
9 not adequately supervise so as to prevent the
10 intentional injury?

11 MR. LEE: That at least is not -- we are not
12 protesting that part of the claim. That is correct.
13 What we are contending is that there can be no FELA
14 action without a physical injury.

15 QUESTION: The same problem has arisen under
16 the Federal Tort Claims Act, which only allows -- which
17 specifically excludes claims for intentional injury but
18 it is sometimes alleged and some courts have thought it
19 is artful pleading to allege that where the government
20 fails to supervise, let's say, an enlisted man in the
21 Army who intentionally inflicts injury on somebody else,
22 that constitutes negligence under the Federal Tort
23 Claims Act.

24 MR. LEE: Yes, I think I understand your
25 question.

1 QUESTION: Do you understand where I am going?

2 MR. LEE: I think so. The FELA by its terms
3 applies only to negligence. However, it has been
4 settled for some time that it also does apply to
5 intentional injury, and in any event the reason that we
6 contend that the FELA does not apply in this case is
7 because of the lack of a physical injury or, to use the
8 Seventh Circuit's language in Lancaster, torts that work
9 their harm through physical means.

10 What you really have to do -- the heart of the
11 Ninth Circuit's error in this case was that it held
12 first that the RLA does not apply, and second that the
13 FELA does apply.

14 QUESTION: And you could win, I take it,
15 either by claiming -- by establishing that the RLA
16 applied even though in the absence of the RLA the FELA
17 might apply, or you could win by proving that the FELA
18 didn't apply whether the RLA applied or not.

19 MR. LEE: That is exactly right, and I would
20 like to take those one by one now and establish the
21 Ninth Circuit's error as to each of them.

22 QUESTION: Mr. Lee, before you proceed, it
23 would help me if you would tell me what relief could be
24 awarded respondents under the RELA.

25 MR. LEE: Under the RLA these adjustment

1 boards have the authority to give standard arbitration
2 kinds of awards. They can award reinstatement and back
3 pay.

4 QUESTION: Can they award damages?

5 MR. LEE: Well, damages in the sense of
6 reinstatement and back pay. Now, they can't award
7 damages in the sense of the kinds of damages that a
8 court would under an FEHA, but the point is that what we
9 are looking at here is Congress's intent in passing
10 these two statutes, and there is no question that
11 Congress when it passed the RLA wanted these workplace
12 disputes, these disputes over how the shop is supposed
13 to be run to be resolved through these nonjudicial
14 arbitration projects.

15 QUESTION: Mr. Lee, I am not sure you really
16 gave an answer that I thoroughly understood to Justice
17 Scalia's first question, that if it were an ordinary
18 FEHA case that arose out of sloppy procedures and so
19 forth and an injury, why would the RLA not preempt that
20 cause of action if it does in this case, and you
21 answered it by saying, well, there is no FEHA case here,
22 but that is really your second argument.

23 MR. LEE: That is correct. That is correct,
24 and perhaps I did not fully understand the thrust of his
25 question. We have two arguments and they have been

1 correctly summarized by the Chief Justice, and one of
2 them is, this is not an FELA case. Now, if it were an
3 FELA case then what you have to do at that point is to
4 ask -- there are really two subsequent questions that
5 you ask.

6 The first one is, is the real gravamen of this
7 dispute, does the real gravamen of this particular
8 dispute put it into the RLA came or the FELA camp, and
9 that is the approach that was taken by the Ninth Circuit
10 in its earlier Magnuson decision, and we think that is
11 the one that -- that is an approach that has to be taken
12 if you are to avoid the artful pleading type of
13 problem.

14 Now, there can be some instances, and perhaps
15 this is the thrust of what Justice Scalia is asking,
16 there can be some instances nevertheless when you have a
17 hard time saying, well, does it squarely fit in one or
18 does it squarely fit in the other, and under those
19 circumstances we contend that the tilt should be, in the
20 close cases, should be toward the Railway Labor Act for
21 a couple of reasons.

22 One is that the basic question here is a
23 question of what is the proper forum, and it is the
24 Railway Labor Act that deals precisely with that issue
25 of what should be the proper forum.

1 Let me deal just briefly then with the Ninth
2 Circuit -- what we consider to be the Ninth Circuit's
3 error on both of these grounds. First of all, that the
4 Railway Labor Act -- it should have held that the
5 Railway Labor Act does apply, and second, that it should
6 have held that the FELA does not apply.

7 There is no question that this case involves a
8 disagreement that arises out of the employment
9 relationship. It is at bottom a disagreement over how
10 to run a railroad and who should be doing what toward
11 that end. But the respondent nevertheless contends that
12 a workplace controversy is not a minor dispute subject
13 to the RLA's compulsory grievance procedures unless it
14 involves the interpretation of the collective bargaining
15 agreement.

16 That is the respondent's principal argument.
17 It is the principal issue that is discussed in the
18 briefs. It is essential to his case in our view, and it
19 is the lynchpin of the RLA part of the Ninth Circuit's
20 opinion, but in our view it is wrong for two reasons.
21 The first is that it just doesn't apply to this case
22 because, as explained in our briefs this controversy
23 does involve interpretation of the bargaining agreement,
24 specifically Rules 39 and 40, which are discussed in our
25 briefs, and remarkably have never been addressed by the

1 respondent.

2 But the even more important point is this. If
3 this dispute were not covered by the bargaining
4 agreement, then you have effectively repealed part of
5 the RLA because by its terms it applies to, and I am
6 quoting, "all disputes growing out of grievances or the
7 interpretation or application of bargaining
8 agreements."

9 That language very simply could not be more
10 plain. The respondent cites cases saying that the RLA
11 applies to interpretation of the bargaining agreement,
12 and of course it does, but it also applies to something
13 else, and that something else is grievances. Otherwise
14 why would Congress have used this disjunctive, "or".

15 The legislative history makes it very clear
16 that Congress meant what it said. We have those
17 citations in our brief. I will refer just to the one
18 from Congressman Barkley, who was the principal
19 legislative sponsor of this bill, that what they wanted
20 to do was to resolve, and I am quoting, "disagreements
21 over grievances, interpretations, discipline, and other
22 technicalities that arise from time to time in the
23 workshop and out on the tracks."

24 QUESTION: Well, Mr. Lee, I don't understand
25 why if you are right about the Railway Labor Act, that

1 actions from mental injury stemming from grievable
2 disputes are preempted by the Railway Labor Act, why,
3 then, are not physical injuries that also stem from
4 grievable disputes not similarly preempted?

5 MR. LEE: The reason in our view that they are
6 not, Justice O'Connor, is because you have to reach some
7 kind of an accommodation of both statutes, and you
8 cannot simply turn your back on either of them. Now, my
9 opponent takes the position that we have effectively
10 repealed the FELA. Our position is that their view, and
11 certainly in this case, if this case on its facts can go
12 into court on these allegations, then the RLA -- then
13 the RLA has been effectively repealed.

14 We think the only way to prevent that is to
15 ask in each instance what is the real thrust of this
16 particular claim, and if it is physical injury, if what
17 he is talking about is the traditional kind of thing
18 that has fallen within the FELA, then the FELA prevails,
19 but if it does not, if the real thrust of what he is
20 complaining about is how the workshop ought to be run,
21 what are the rules of the railroad, then it ought to be
22 an RLA grievable offense. There may be --

23 QUESTION: Why would you not approach this
24 case in the same way the court did with the National
25 Labor Relations Act?

1 MR. LEE: I think we do except that there are
2 two different statutes, and because there are two
3 different statutes their underlying policies cut in
4 opposite directions. The reason that in Farmer this
5 Court held that state law does not -- excuse me, that
6 the National Labor Relations Act does not preempt state
7 law was twofold.

8 The first is that in Farmer the Court simply
9 reasoned that there was nothing in the National Labor
10 Relations Act that would be impeded by allowing
11 arbitration to -- excuse me, by allowing personal
12 injuries to go ahead under state law, but the difference
13 between the NLRA and the RLA is very significant in this
14 respect.

15 The central focus of the Railway Labor Act is
16 a dispute or at least the minor disputes part of it is a
17 dispute resolution process that is extrajudicial. That
18 is entirely different from the central focus of the
19 National Labor Relations Act which does not proceed in
20 that way, and as a consequence with regard to the
21 Railway Labor Act, unlike the National Labor Relations
22 Act, you have this conflict that comes into play.

23 The other difference is that you have two
24 federal statutes that are at issue in this case and with
25 regard to the National Labor Relations Act you only had

1 one.

2 QUESTION: May I ask why it is you think that
3 the language "disputes arising out of grievances or out
4 of the interpretation or application of a grievance"
5 necessarily means that the matter does not have to be
6 based in the contract?

7 MR. LEE: Because otherwise the word
8 "grievances" simply becomes meaningless.

9 QUESTION: Why couldn't you have a grievance
10 which consists of a situation in which both the employer
11 and the employee are clear on what the agreement means
12 and what it requires in this case, what its application
13 should be in this case. The only disagreement is as to
14 the fact of the matter, whether indeed the employer did
15 this or that. There is no dispute whatever as to what
16 the agreement requires.

17 Wouldn't that be a grievance and yet not be a
18 dispute arising out of the interpretation or application
19 of agreements?

20 MR. LEE: Well, but it says interpretation or
21 application. And I think the --

22 QUESTION: But there is no dispute as to how
23 the agreement applies. It is clear that the agreement
24 requires a certain thing, and what the employee is
25 arguing is, that certain thing was not provided.

1 MR. LEE: All right. I have three answers.
2 The first is --

3 QUESTION: It is at least a plausible reading
4 of the word "grievances."

5 MR. LEE: That's right. It is at least one
6 instance in which you could have the two of them
7 existing side by side, but I think in fairness it is not
8 the more common sense reading of that term when you have
9 the or, particularly --

10 QUESTION: The problem I find is that once you
11 depart from that interpretation what in the world is not
12 covered by a grievance? An employee says that his
13 supervisor borrowed money from him and didn't pay it
14 back.

15 MR. LEE: That is exactly the point, Justice
16 Scalia.

17 QUESTION: That is a grievance.

18 MR. LEE: That is correct. That is correct.
19 Or at least if it relates to how you run a railroad,
20 that is, if it has some relationship to what Congressman
21 Barkley said was matters of discipline or how, what
22 happens in the shop or out on the tracks, that is what
23 Congress intended to do, was to give a scheme that was
24 comprehensive, so that all of these disagreements
25 concerning how you run a railroad, whether they arise

1 out of interpretation of the bargaining agreement or
2 not, were to be resolved in this way.

3 QUESTION: But they all arise out of
4 interpretation of the bargaining agreement if they
5 pertain to the running of the railroad. Certainly any
6 obligation, any obligation that the employer has must be
7 implicit. It is either expressly in the agreement or
8 impliedly in the agreement. What other obligation does
9 the employer have?

10 MR. LEE: If you take that point of view, and
11 you may be right, then certainly Rules 39 and 40 of this
12 agreement do cover this circumstance and under the facts
13 of this case then the RLA definitely does apply. I
14 would simply point out, however, that the legislative
15 history seems to say to us the contrary, that they did
16 intend it. If you are correct that the bargaining
17 agreement will be comprehensive as to all rules of the
18 shop, then it is true there is no overlap.

19 If, on the other hand, you take the point of
20 view that there may be some matters concerning how the
21 workplace ought to be run that are not covered by the
22 bargaining agreement, then we say that that is also
23 covered, and this Court has said the same thing. And
24 that is this Elgin versus Burley case which the
25 respondent concedes he must, in order to succeed,

1 persuade this Court to disown.

2 There is no reason to do that. Contrary to
3 the respondent there is no indication, no indication in
4 Andrews that it was rejected in Andrews, and Elgin
5 versus Burley by its terms has been applied by many of
6 the lower courts and the National Railroad Adjustment
7 Board itself.

8 QUESTION: Mr. Lee, do you define what place
9 to include the entire railroad? You refer to the
10 workplace.

11 MR. LEE: Yes, I do, Justice Powell, in the
12 sense that it is where Mr. -- it is on the -- in
13 Congressman Barkley, in the workplace, in the shop, and
14 out on the tracks.

15 QUESTION: So if you had an engineer who was
16 alleged to be abusive of other people working with him
17 on a particular train you would take the same
18 position?

19 MR. LEE: Yes, sir, I would.

20 QUESTION: So really your argument comes down
21 to whether or not the nature of the injury is emotional
22 distress rather than physical injury. Suppose when they
23 used to have firemen on trains that the firemen beat up
24 the engineer in a physical encounter. Would that be
25 under -- which Act?

1 MR. LEE: Under the FELA.

2 QUESTION: Under the FELA?

3 MR. LEE: Yes, because you have then the
4 physical injury.

5 QUESTION: So the big issue in this case, is a
6 distinction between physical and emotional injury,
7 regardless of where it took place.

8 MR. LEE: Yes, and while that may -- that is
9 correct, and while that may seem to be somewhat
10 arbitrary we submit it is a very important one because
11 of the need to draw some line in order that neither
12 statute completely consume the other. That is the
13 problem that you have in this case. And we think that
14 since federal courts had gone really up until this case
15 and one other without ever defining the FELA to apply to
16 any nonphysical injury, that that is a logical dividing
17 line. Certainly my opponent concedes that at the time
18 the FELA was adopted in 1908 that was the intent.

19 Nevertheless he argues that the FELA should
20 now be given coverage more broad than Congress intended
21 in the first place. We think that is wrong for two
22 reasons. The first is that if the FELA is to be
23 expanded in this coverage it ought to be Congress that
24 does it rather than the Court, but even more important
25 is this, that if you interpret the FELA as expansively

1 as my opponent would suggest, then you do put these two
2 federal statutes into conflict.

3 The basic error of the Court of Appeals
4 approach was that it went out of its way to create
5 conflict between these two federal statutes by giving an
6 unnecessarily crabbed interpretation to the RLA by
7 saying that it applied, that it did not apply to this
8 circumstance notwithstanding the existence of these
9 provisions in the bargaining agreement and
10 notwithstanding the fact that under any circumstance
11 this dispute is really about how to run a railroad, and
12 then gave an unnecessarily expansive interpretation to
13 the FELA.

14 As long as the two are carefully interpreted
15 each sensitive to the needs of the other, then there
16 need never -- then there is no reason that the two
17 cannot continue to coexist for another 60 years as they
18 have over the past. This point is really driven home by
19 the respondent's attempt to change his allegations once
20 the case gets before this Court.

21 He now contends for the first time before this
22 Court that he really has alleged physical injury for
23 reasons stated at Pages 17 and 18 of our brief it is our
24 view that that cannot be done before this Court, that he
25 has presented one state of facts before the lower

1 courts, the Ninth Circuit has made its ruling on the
2 basis of that state of facts, and we are now entitled to
3 have that ruling reviewed.

4 But even more important is this, that even if
5 he were now permitted to change his allegations this
6 would not save the Court of Appeals holding, and the
7 reason is this. Congress determined 60 years ago that
8 disputes over how the workplace should be run are to be
9 resolved nonjudicially.

10 That Congressional judgment can be thwarted by
11 the wording of complaints unless courts at some
12 appropriate point ask the question, what is the real
13 gravamen of this grievance. Is the real thrust of this
14 dispute an FELA cognizable injury or is it really a
15 disagreement over how to run the shop?

16 Here there is no question that the real focus
17 of Mr. Buell's grievance is friction between a foreman
18 and his employee. This is not a case that concerns
19 gastritis or one employee bumping another. The real
20 grievance here is that Mr. Wright was not doing a good
21 enough job of keeping the other men in line. And this
22 is borne out by the fact that the physical injury
23 argument wasn't even made until the case reached this
24 Court.

25 Mr. Chief Justice, unless the Court has

1 further questions I would like to save the rest of my
2 time.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lee.
4 We will hear now from you, Mr. McCall.

5 ORAL ARGUMENT OF JAMES R. MC CALL, ESQ.,
6 ON BEHALF OF THE RESPONDENT

7 MR. MC CALL: Mr. Chief Justice, and may it
8 please the Court, it is my privilege to address you
9 today as counsel of record for Jim Buell, a veteran
10 railroad worker of over ten years' employment with the
11 Santa Fe Railroad who in October of 1981 sustained a
12 severe and grievous injury. Of that there can be no
13 doubt.

14 Certainly the primary aspect of his injury was
15 psychiatric. He was confined to a psychiatric ward in
16 St. Joseph's Hospital in Stockton, California, for 17
17 days. For six months he was on psychiatric medication.
18 Over a year on psychotherapy before he could go back to
19 work. His admitting physician, psychiatrist Robert
20 Austin, said the man suffered a severe psychotic illness
21 related to pressures on the job. The injury, we submit,
22 was grave.

23 Santa Fe's position in the lower court was
24 simply that because the facts or some of the facts that
25 were necessarily alleged in the FELA action involved a

1 dispute or controversy or friction if you will between
2 Mr. Wright and his foreman, Mr. Buell, pardon me, Mr.
3 Buell and his foreman, Mr. Wright, that Mr. Buell was
4 precluded and unable to use the FELA as a vehicle to
5 attain redress for the injuries he suffered.

6 Now, that position has altered in this Court.
7 Now the focus has been more on the fact that psychiatric
8 injury is the primary ill or grievance that Mr. Buell
9 suffered in October. The Santa Fe position, I think,
10 needs some elaboration by me on the facts. Basically
11 Mr. Buell had worked for Santa Fe for ten years before
12 Mr. Wright became his foreman. Friction developed
13 between the two some time after Mr. Wright became
14 foreman in the fall of '1979.

15 QUESTION: Is this all in the affidavits and
16 so forth on the motion for summary judgment, Mr.
17 Buell -- rather, Mr. McCall?

18 MR. MC CALL: Justice, the affidavits -- it is
19 clear in the Buell brief that I put in, we did not
20 marshal facts showing physicality in the lower court
21 because the thrust of Santa Fe's argument there was that
22 it made no difference what type of injury was involved.
23 Their sole focus was the source of the injury was
24 something that could have been grieved.

25 QUESTION: Don't you think probably in this

1 Court you are limited to what the record shows, either
2 the complaint or the affidavits produced in the summary
3 judgment proceedings?

4 MR. MC CALL: Again we submit, Your Honor,
5 that we should be able to point to things that are in
6 the record that were not produced in the motion for
7 summary judgment simply because the motion for summary
8 judgment was rather narrow. It was directed solely to a
9 point of law, to wit, and it is hard for me to state it
10 because it is hard to get a grip on it, Mr. Buell is
11 precluded in Santa Fe's eyes in the lower court from
12 stating an FEHA cause of action because some of the
13 facts he alleged involve a grievable dispute regardless
14 of the injury.

15 The motion for summary judgment was basically
16 met on the basis of a point of law. They are saying no,
17 the FEHA is not precluded by the RLA. The fact that
18 something could be grieved does not mean that you lose a
19 right to bring an FEHA action if an injury results.

20 QUESTION: What you are referring to then is
21 something that is in the record although perhaps not
22 used in the summary judgment proceeding?

23 MR. MC CALL: That is correct, Justice, yes,
24 and I won't -- the point as to the physicality, the
25 physical causation, the physical consequence, the

1 gastritis, the common law battery, if you will, those
2 items are developed in my brief at Pages 33 through 40
3 and I won't refer to them again. In any event --

4 QUESTION: The common law battery, you assert
5 that there was a physical contact by -- was it Wright or
6 one of the coworkers?

7 MR. MC CALL: It was one of the fellow
8 workmen, a man named Williams. There was pushing and
9 shoving.

10 QUESTION: And that is in the record.

11 MR. MC CALL: That is in the record. Yes,
12 Your Honor. It is developed in my brief at the pages I
13 indicated.

14 QUESTION: Were damages sought for the pushing
15 or shoving?

16 MR. MC CALL: The damages -- the allegation in
17 the complaint was that he suffered physical and
18 emotional distress, but it is clear --

19 QUESTION: The physical stress referred to was
20 the --

21 MR. MC CALL: Gastritis.

22 QUESTION: -- the gastritis.

23 MR. MC CALL: The gastritis, and certainly --

24 QUESTION: So whatever physical injury there
25 is is, you would acknowledge, physical injury arising

1 from the emotional injury.

2 MR. MC CALL: Yes, Your Honor, very
3 definitely. The point I want to make, and I will sum up
4 my factual recitation here rather quickly, is that the
5 dispute as to the work orders, as to whether or not
6 Wright was asking Buell to perform an illegal act in
7 helping him remove Santa Fe plywood and such into
8 Wright's truck so he could take it home.

9 That was really resolved long before this
10 course of conduct about which we really complain. There
11 was a -- this was really resolved prior to the grievance
12 meeting that was held in which large numbers of men in
13 the Stockton yard complained through their union
14 representative about the abusive, harassing techniques
15 of this foreman, Mr. Wright.

16 Now, Santa Fe chose to respond to that
17 grievance by doing nothing. They didn't take Mr. Wright
18 off the job and they didn't change his conduct. At
19 least that is what the record shows. Yes, Justice.

20 QUESTION: What is the source of that
21 grievance? It goes back to a question that I asked Mr.
22 Lee. Isn't the source of the grievance that the
23 employer by reason of his collective bargaining
24 agreement has an obligation, a contractual obligation
25 not to let his supervisors behave in this fashion?

1 Isn't it ultimately based on the collective
2 bargaining agreement?

3 MR. MC CALL: If you approach it as a
4 grievance, but, Justice Scalia, under the FELA Congress
5 was very clear about wanting to make the master
6 responsible for the acts of the fellow servants in the
7 workplace, in the railroad workplace, and it would seem
8 to me that the FELA imposes a duty on Santa Fe to take
9 reasonable steps to see that their foremen do not abuse
10 their workmen, so in that sense it seems to me a classic
11 FELA case.

12 QUESTION: You assert that that is an
13 obligation separate and apart from any contractual
14 obligation?

15 MR. MC CALL: Yes. Yes, Your Honor. Yes,
16 that is our position. The particular quotation from the
17 House report on the FELA in 1908 that supports this, and
18 it is very, very clear on the notion that Congress
19 wanted the master to police, if you will, the acts of
20 the servants so they didn't injure one another appears
21 at Page 42 in the Buell brief.

22 After the grievance proceeding which Santa Fe
23 chose to take no action on, there was a letter by the
24 union representative, Mr. Pickleman, who was a
25 supervisor overseeing the work of Mr. Wright on June 6th

1 saying the men are still complaining about the
2 intimidation and harassment and the tactics that Mr.
3 Wright uses in running the work crew.

4 After this, there was harassment directed to
5 Mr. Buell that is outlined in the Buell brief and there
6 is no need to go into it, but that is the course of
7 activity of which Mr. Buell complains, really, the
8 harassment, the intimidation, and the acts after the
9 grievance proceeding.

10 If I may, I would like to offer an analogy
11 which I think is somewhat helpful to clarify the
12 difference between the Santa Fe position and ours. If
13 you assume that you had a dangerous foreman, a foreman
14 who was sadistic, clearly that would be a grievable
15 matter.

16 The workers, workmen under the foremen could
17 grieve it, they could get the union representative in
18 and they could present the issue to Santa Fe. If Santa
19 Fe chose to take no action and a number of months went
20 by and the foreman then became infuriated with one of
21 the men on the job who had complained about his
22 activities previously and brought a gun onto the
23 worksite and shot that workman we contend there would be
24 no conceivable way that the FELA would not give a cause
25 of action to the foreman.

1 Now, to bring it much closer to this case and
2 make it almost all fours on Mr. Buell's complaint, if we
3 assume that after the nonproductive grievance the
4 foreman some months later becomes infuriated with one of
5 the men who complained about his conduct as a foreman,
6 brings a gun onto the worksite, but the gun isn't
7 loaded, but of course the worker does not know that, and
8 the foreman points it at the worker and pulls the
9 trigger and it just goes click.

10 Now, in that situation let's further assume
11 that the workman in fear of his life has a psychiatric
12 event, and has a psychiatric breakdown. That, I submit,
13 is very, very close to the exact facts that we have in
14 this case, and I doubt that Congress would have wanted
15 to preclude or shut the federal courthouse doors to that
16 workman when he wanted to come in and try and make his
17 proofs to the court under the FELA.

18 QUESTION: Mr. McCall --

19 MR. MC CALL: Yes, Justice.

20 QUESTION: -- suppose the foreman's conduct is
21 grieved, and you have agreements, and it goes to the
22 adjustment board, and suppose that it is found that he
23 hasn't been harassing the man at all as a matter of
24 fact.

25 Now, under your position would he then be free

1 to go before the -- to bring his FELA action?

2 MR. MC CALL: He would be, Your Honor, if and
3 only if he had suffered an injury.

4 MAJOR WARNER: Well, let's suppose these very
5 facts here. The only thing is, there is no question
6 that he has been in the hospital.

7 MR. MC CALL: Yes.

8 QUESTION: But it is found that the foreman
9 had nothing to do with it.

10 MR. MC CALL: As far as the grievance and
11 arbitration procedures are concerned, what the foreman
12 did did not violate any term of the contract. That
13 would be to put the arbitration --

14 QUESTION: Well, the fact was, the fact is
15 that he didn't do what he claimed that the employee
16 claims he did. He didn't harass them at all. Now,
17 could you go ahead and try it out again in the FELA
18 action? I suppose you could in your position.

19 MR. MC CALL: Oh, I certainly could, Your
20 Honor. Yes, I would. It would be just like the
21 McDonald case that this Court decided unanimously in
22 1985.

23 QUESTION: Yes.

24 MR. MC CALL: I can't see how arbitration or
25 grievance is an adequate substitute for the Federal

1 District Court jury trial right that the Congress gave
2 under the FELA.

3 QUESTION: What if you lose your FELA action?
4 May you then grieve? I guess there is a time limit,
5 though, isn't there?

6 MR. MC CALL: The time limits on grievance are
7 rather severe.

8 QUESTION: Yes.

9 MR. MC CALL: So it wouldn't arise, I
10 suppose.

11 QUESTION: I am not sure how this fits with
12 what you said before. I thought you would say that this
13 matter was not a grievable matter anyway.

14 MR. MC CALL: I didn't speak well on that,
15 Justice Scalia. The matter would be grievable. The
16 foreman's conduct would be grievable. There is no doubt
17 of that. But once a workman is injured, then the worker
18 has the right to go to the FELA and recover -- pardon
19 me, sue under the FELA, the Federal District Court, and
20 recover for the injury.

21 QUESTION: But it is only grievable, according
22 to your position, if its source is the contract, and you
23 said earlier that the source of the right here was not
24 the contract.

25 MR. MC CALL: Well, there is the common law

1 duty or the duty that the FELA recognizes on the part of
2 the railroad not to be negligent in the way in which its
3 fellow servants treat each other.

4 QUESTION: Well, is that contractual or not
5 contractual or are there two duties, one a contractual
6 one which is grievable, and another one, a
7 noncontractual one which can be brought under the FELA.
8 Is that your position?

9 MR. MC CALL: Yes, Justice.

10 QUESTION: Isn't that contrary to the Elgin
11 case?

12 MR. MC CALL: The Elgin case in a long -- I
13 don't think so. I don't think so, Justice. The Elgin
14 case in a long, discursive conversation talks about
15 major disputes, minor disputes, and in an offhand way
16 says that minor disputes may include personal injury
17 actions.

18 Elgin in 1945 is premised on the Mohr case in
19 1940 which said that RLA grievance arbitration
20 procedures are not exclusive, they are just optional. A
21 worker could go in and pursue a grievance or a worker
22 could go to Court. So Elgin, as I attempt to point out
23 in my brief and as the AFL-CIO in their amicus brief
24 stresses, Elgin is premised on the idea that the RLA is
25 not -- the arbitrable procedures under RLA are not

1 exclusive.

2 This Court in Andrews held that they were in
3 1972. So in that Elgin used loose language and talked
4 in terms of personal injuries being grievable matters I
5 don't think it is controlling at this point.

6 QUESTION: Well, but it also spoke in terms
7 that grievable matters under the RLA were not just
8 contract disputes but a broader classification of
9 complaints. Now, this Court has never qualified that
10 language in Elgin, has it?

11 MR. MC CALL: Not to my knowledge, Your Honor,
12 but I --

13 QUESTION: Your position is, even if it is
14 grievable and even if it isn't covered by the contract
15 or has its root in the contract, you would say that even
16 if it is grievable, you can still have your FELO
17 action.

18 MR. MC CALL: Yes, indeed, Justice. That is
19 exactly our point, that the FELO, like 1983, like the
20 Fair Labor Standards Act, which was involved in
21 Barentine, these are individual rights given to
22 individual workers, actions by unions representing
23 workers under arbitration procedures can't preclude or
24 in any way affect those rights.

25 QUESTION: Even though to the Judge in

1 charging the jury in the FELA case would have to either
2 interpret the collective bargaining agreement as a
3 matter of law or charge them to interpret it as a matter
4 of fact?

5 MR. MC CALL: That is our basic position, Your
6 Honor, and we offer it as one of three ways we feel that
7 there can be harmonization between the FELA and the
8 RLA. I attempt to do that in our brief. I don't have
9 the page reference here but the three options we offer
10 are, the first that you have mentioned, and that is the
11 preferred option as far as we are concerned, that is the
12 position that the Ninth Circuit took.

13 Once you have an injury you don't have an RLA
14 matter any more. You could go back and -- certainly you
15 could always grieve, whether or not Mr. Wright is a
16 proper foreman. He could try and get the company to --

17 QUESTION: Yes, and you say once you have an
18 injury.

19 MR. MC CALL: Yes.

20 QUESTION: And of course it doesn't have to be
21 a physical injury. It could be unhappiness with the way
22 the foreman is administering the collective bargaining
23 agreement if it produce gastritis.

24 MR. MC CALL: It is unlikely a lawsuit is
25 going to be brought for that sort of thing.

1 QUESTION: But it could in your view.

2 MR. MC CALL: Conceivably someone could bring
3 a lawsuit for that, yes. That is correct, and when Mr.
4 Lee mentions we have got to have some way of
5 distinguishing between these two statutes I say Congress
6 has already done it. Congress has said when you have an
7 injury to any employee that is the result of negligence,
8 then you have an FELA action.

9 QUESTION: An injury has to be something to
10 him personally. It won't be some economic injury.

11 MR. MC CALL: Yes, that's correct.

12 QUESTION: It has to be some medically
13 identifiable problem that arises out of it.

14 MR. MC CALL: Yes, Justice. Yes, that
15 definitely would be the case. I can't think of anything
16 that wouldn't be a personal injury that railroad
17 negligence in the workplace would produce --

18 QUESTION: Medically identifiable but not
19 physical necessarily.

20 MR. MC CALL: Pardon me, sir?

21 QUESTION: It has to be medically
22 identifiable, not necessarily physical.

23 MR. MC CALL: Yes, Justice.

24 QUESTION: You would say that just emotional
25 disturbance would be enough.

1 MR. MC CALL: Yes, I would.

2 QUESTION: If that is medically identifiable.

3 MR. MC CALL: Yes, that it would be medically
4 identifiable and under the general tort rules you could
5 satisfy causation which is going to be a problem in
6 emotional injury, but it is a problem also in back
7 injuries, which are rather common under FELA.

8 QUESTION: Is this emotional business you are
9 talking about words only?

10 MR. MC CALL: Pardon me, Justice?

11 QUESTION: Words only?

12 MR. MC CALL: Yes, I would say that --

13 QUESTION: That is enough to you?

14 MR. MC CALL: Yes, Your Honor. It is enough
15 In many, many states --

16 QUESTION: To create an injury, like if he
17 says, you are ugly, that could create an injury?

18 MR. MC CALL: It is conceivable that that
19 could do it, although one would think that usually it
20 would take more than that and a consistent course of --

21 QUESTION: Well, Mr. McCall, do you really
22 think that Congress back in 1908 thought it was
23 authorizing an FELA, a cause of action for that kind of
24 thing or even for mental injury? Was there any state in
25 the United States at that time that even allowed

1 recovery for this type of injury?

2 MR. MC CALL: If so, I don't know it at this
3 time, Your Honor. Some of the treatise writers mention
4 cases going back into the 19th century where emotional
5 distress was --

6 QUESTION: What if we think that FELA just
7 doesn't cover emotional injuries?

8 MR. MC CALL: Then Mr. Buell certainly has a
9 hard case to bring then because that would be -- as a
10 bottom line, emotional injury has to be compensable
11 under the FELA and has to be recognized as an injury.

12 In more direct response to your question,
13 Justice O'Connor, I have no idea what was in the
14 collective intention of Congress in 1908 except I do
15 know that they intended to treat railroad workers as
16 almost a privileged class, a protected class, to give
17 them the right to bring actions when they were injured
18 that no other worker had 1908. Congress did away --

19 QUESTION: The indications, though, were that
20 Congress had in mind physical injuries arising out of
21 some kind of negligence on the part of the employer with
22 regard to the equipment or working conditions, didn't
23 it? I mean, that was the background.

24 MR. MC CALL: Oh, certainly that was the
25 background, but I submit that this Court in *Urie* versus

1 McDonald In 1949 took this direct issue on and gave to
2 me what would be a guiding precedent for that case. In
3 Urie you had a railroad worker who had suffered
4 silicosis, which, of course, is abrasion of the lungs
5 through breathing in cold dust.

6 Now, that had gone on for a long period of
7 time. The negligence would be clear. The railroad
8 should have provided a safe work place where this worker
9 was not subjected to that. He brought suit when the
10 silicosis manifest itself and he could no longer work.
11 The railroad defended by saying Congress only intended
12 in 1908 to protect workers from sudden grievous
13 accidents, the sort of thing where a worker gets run
14 over, the sort of terrible accidents that clearly
15 Congress had in mind. That was the background.

16 This Court said, no, we will not give a
17 cramped, constrained limitation to the word "injury."
18 Any injury that is compensable under evolving tort
19 notions is going to be considered an injury for purposes
20 of the FELA. Now, that is consistent with the notion
21 that we want in the FELA the master to control the acts
22 of the servants, we want the safest possible workplace
23 for the people to do the very hard and dangerous work of
24 building and maintaining the railroads.

25 QUESTION: Mr. McCall, in light of what you

1 have been saying recently, may we ignore the fact that
2 your brief alleges physical injury? At the bottom of
3 Page 12 of your brief you state that Buell suffered
4 physical injury as well as severe mental breakdown and
5 that the harassment causing his injuries included
6 physical contact and common law assault.

7 MR. MC CALL: Yes.

8 QUESTION: May we ignore that?

9 MR. MC CALL: No, Justice --

10 QUESTION: Well, does the record prove what
11 you say there?

12 MR. MC CALL: The record does contain --

13 QUESTION: Where is it? That is what I am
14 interested in.

15 MR. MC CALL: In Mr. Buell's deposition he
16 talks of being pushed and shoved.

17 QUESTION: Where do I find that deposition?

18 MR. MC CALL: It is --

19 QUESTION: In the appendix?

20 MR. MC CALL: Yes.

21 QUESTION: Do you have the page by chance? I
22 don't want to detain your argument.

23 QUESTION: Well, it is in the deposition? Is
24 the deposition in the record that has been lodged here?

25 MR. MC CALL: In the Court of Appeals record,

1 which it was my understanding has been lodged.

2 QUESTION: Mr. McCall, I asked you about that
3 earlier. I thought you said earlier that the only
4 injury you are complaining of is the injury that was the
5 result of the emotional disturbance. You are not
6 seeking damages for the pushing and shoving in and of
7 itself.

8 MR. MC CALL: That is correct.

9 QUESTION: That is what I thought you
10 responded.

11 MR. MC CALL: That is correct, Justice
12 Scalia. Perhaps I misunderstood. The common law
13 assault, the touching, the battery, this occurred during
14 the course of conduct leading up to the psychiatric
15 breakdown.

16 QUESTION: But we may ignore that for the
17 purpose of deciding this case. You rely eventually on
18 what the courts below described as emotional injury.

19 MR. MC CALL: Yes, in essence, that is
20 correct. The physical injury that the man suffered, the
21 gastritis, was a product of a psychiatric event of real
22 significance.

23 QUESTION: That is the physical injury you are
24 complaining of.

25 MR. MC CALL: That's correct.

1 QUESTION: Not the pushing and shoving.

2 MR. MC CALL: Right, there are no bruises or
3 contusions.

4 QUESTION: That is an element of the emotional
5 -- it is one of the things that produced the emotional
6 injury along with mocking the man and so forth.

7 MR. MC CALL: Yes, and some courts have been
8 more willing to grant relief for emotional distress or
9 psychiatric injury when there has been accompanying
10 physical harm because of a concern about was there
11 really something happened or something that was really
12 suffered by the plaintiff in Prosser and the other
13 hornbooks.

14 I was pointing out that there are elements of
15 this in the record. They were not produced and
16 marshalled for the purpose of the summary judgment
17 motion because the summary judgment motion was solely
18 based on the idea that the FEHA can have no application
19 here for either physical or mental injuries because it
20 is an RLA matter.

21 QUESTION: Was the burden on you or your
22 opponent at the summary judgment motion stage in this
23 case to produce this evidence?

24 MR. MC CALL: We submit it was on -- it was
25 not on us to produce the evidence. We submit --

1 QUESTION: Did the railroad have that
2 evidence?

3 MR. MC CALL: The railroad had taken the
4 depositions, yes. And they had the letters from the
5 doctors.

6 QUESTION: The burden was on the railroad to
7 prove that there was physical injury?

8 MR. MC CALL: No. No, Your Honor. What the
9 railroads should have done in their motion for summary
10 judgment was to say that Mr. Buell has no cause of
11 action here because he alleges only emotional injury.
12 If that had been the case then Mr. Buell would have
13 responded and brought out that there was more than
14 emotional injury. There was accompanying physical harm,
15 which has been important to some courts, but the
16 railroad did not do that. Santa Fe didn't do that.
17 They just said no --

18 QUESTION: That is not the way I always saw
19 summary judgment operate, but may I ask you another
20 question?

21 MR. MC CALL: Certainly.

22 QUESTION: Do the workmen's compensation laws
23 of the states provide for purely emotional injury?

24 MR. MC CALL: I have not researched that
25 thoroughly, but it is my understanding that many do

1 not.

2 QUESTION: That would be my impression.

3 MR. MC CALL: California does not.

4 QUESTION: The FELA was enacted to provide, as
5 I think you have indicated, special privileges for
6 railway employees. The brotherhoods have always opposed
7 workmen's compensation laws.

8 MR. MC CALL: Yes. One point that I did want
9 to make was the anomalous situation that would occur
10 were this Court to accept the argument of Santa Fe in
11 this case to the effect that Mr. Buell, because he
12 suffered only emotional injury, must grieve his matter
13 and cannot go through the FELA doors to the federal
14 court.

15 As a product of the grievance and arbitration
16 process he could not recover damages for the suffering
17 that he has incurred. He couldn't get damages for his
18 lost future earnings. He would be without a remedy.

19 QUESTION: There may be some state court tort
20 action remedy that survives for outrageous conduct,
21 don't you suppose?

22 MR. MC CALL: There may be some for outrageous
23 conduct but, Your Honor, I submit that the problem with
24 relegating these kinds of injuries to state law would be
25 a lack of uniformity in application to the railroads.

1 We would have a situation where if the state of
2 Nevada -- well, the state of California does acknowledge
3 infliction of emotional distress, and the FELA has been
4 interpreted by the California Supreme Court in 1960 to
5 allow it, as I point out in the brief, for 25 years.

6 If you had workmen in the position of Mr.
7 Buell relegated to state law, then if California allowed
8 intentional infliction of emotional distress but Nevada
9 did not, and you had a situation where a railroad worker
10 was going back and forth between the two states, then
11 you get into some terrible conflicts about it or
12 questions, and it is very, very hard for the railroad to
13 operate, I would think, knowing what it has to counsel
14 its foremen to avoid, just what sort of steps it has to
15 take to see that things don't happen such as happened in
16 this case.

17 So I would think that national uniformity
18 would mean that those state causes of action should be
19 preempted and the FELA should be -- allow for actions
20 purely for solely psychiatric injury.

21 If there are no further questions, I would
22 just once again say that it is our position that the
23 FELA, because of the acknowledged humane and
24 humanitarian and remedial aspects of the statute as
25 recognized by this Court speaks to us today simply

1 because the idea that emotional distress was not
2 cognizable in most states in 1908 should not preclude
3 federal courts from being able to recognize the evolving
4 law of torts and if there is any bright line needed
5 between the RLA and the FELA it is fact of injury.

6 Once that occurs, then the worker has a right
7 to go to federal court in our position. Thank you.

8 QUESTION: Just let me ask you a question
9 before you sit down. The state court actions that you
10 are referring to that allow redress for simply mental
11 injury, they are actions for intentional wrongdoing,
12 right? Those actions in the states do not allow someone
13 to recover simply because someone else negligently
14 causes mental anguish. It is an intentional tort, isn't
15 it?

16 MR. MC CALL: By and large. Some states do
17 allow negligent infliction.

18 QUESTION: But by and large it is
19 intentional.

20 MR. MC CALL: Yes, by and large.

21 QUESTION: And your cause of action here is
22 based on negligence.

23 MR. MC CALL: Yes, it is, Your Honor. I would
24 point out one thing. In the McMillan case in 1960 the
25 California Supreme Court when presented with this

1 specific issue held that suffering purely psychiatric
2 injury as a result of carrying out work orders from a
3 railroad was compensable under FELA, relying very
4 heavily on this Court's decision in Urie, the language
5 in Urie, the language of the FELA, and the legislative
6 history, and in California there has been no evidence
7 that has been brought to anyone's attention that there
8 have been spurious claims or that artful pleading has
9 somehow defeated the will of Congress.

10 QUESTION: Would you have an FELA cause of
11 action if you simply alleged that the foreman harassed
12 this man and caused this injury and the railroad should
13 be liable for the acts of its servants?

14 MR. MC CALL: And there was an injury. Yes, I
15 would, Your Honor.

16 QUESTION: You wouldn't have to say
17 negligence. You would just say here the foremen
18 harassed him, caused him great injury, and the FELA
19 intends employers to be responsible for the acts of
20 their servants. Is that all you need to say?

21 MR. MC CALL: That would seem to me to be
22 adequate. An allegation of negligence which was made in
23 this case does focus on the idea that the railroad did
24 not act reasonably.

25 QUESTION: But is the FELA confined to

1 negligent actions?

2 MR. MC CALL: I think the language of Section
3 51 does indicate that.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
5 McCall.

6 Mr. Lee, do you wish to say something more?
7 You have three minutes remaining.

8 ORAL ARGUMENT OF REX E. LEE, ESQ.,

9 ON BEHALF OF THE PETITIONER

10 MR. LEE: Just two brief points, Mr. Chief
11 Justice. The first is that this has to be regarded as a
12 claim exactly as the respondent presented it to the
13 lower courts involving solely emotional injury.

14 QUESTION: May I ask you on that point, Mr.
15 Lee, about what happened in the trial court? Is your
16 opponent correct, because your joint appendix is so very
17 thin in this case, in saying that the only argument you
18 made in support of the summary judgment motion was one
19 based on the RLA and that you did not separately argue a
20 pure FELA no cause of action?

21 MR. LEE: I think that is probably a fair
22 statement, Justice Stevens, but the point was, they did
23 allege only emotional injury. Under those circumstances
24 of course we argued it is then covered by the RLA. Then
25 once the --

1 QUESTION: Why wouldn't you at that point, if
2 that was that clear at that point, why wouldn't you then
3 also have made your alternative argument that you are
4 advancing in this Court seeking reversal?

5 MR. LEE: Well, perhaps we should have done at
6 that stage. In any event we won on the RLA argument.
7 Then it went to the Ninth Circuit and the Ninth Circuit
8 said beyond any question that the only question they
9 were deciding was whether the railroad employee's wholly
10 mental injury is compensable under the FELA, and they
11 held that it was, and that is the judgment now that we
12 are attacking in this case, and certainly we are
13 entitled to attack the correctness of that determination
14 that a wholly mental injury is compensable under the
15 FELA. And here is why it cannot be.

16 Congress has made a determination that the
17 tens of thousands, hundreds of thousands of work place
18 disputes are to be resolved nonjudicially. Andrew said
19 that that is exclusive and mandatory. There is the
20 potential to artfully plead into a safe harbor, into a
21 judicial safe harbor by simply alleging an FELA
22 complaint, so that the key to pleading out of the RLA is
23 how broadly you construe the FELA.

24 Only three courts in the history of -- in the
25 80-year history of the FELA have held that it applies to

1 nonphysical injuries. They are the McMillan Court, the
2 California Supreme Court in McMillan, the Ninth Circuit
3 in this case, and the Seventh Circuit in Lancaster.

4 QUESTION: When you exclude physical injury
5 from this case you mean to exclude not merely the
6 pushing and shoving but also the gastritis. Is that
7 right?

8 MR. LEE: No, Justice Scalia, I am saying that
9 the gastritis really doesn't count under the facts of
10 this -- that really isn't what he is talking about. It
11 wasn't what he alleged below. But more than that you
12 have to look and see what is the real gravamen of what
13 he is talking about.

14 QUESTION: What you are seeking from this
15 Court is a narrow holding that just says, assuming there
16 wasn't any gastritis resulting, any physical injury
17 resulting from this emotional state there is no cause of
18 action under the FEHA, and we will reserve for another
19 day whether if this emotional injury had caused
20 gastritis or some physical injury that would entitle the
21 plaintiff to a cause of action. Is that what you are
22 asking us to hold?

23 MR. LEE: That is my argument. I would also
24 say, I would also say that even in that harder case you
25 have to ask what is the real thrust of what he is asking

1 for here? Is he really complaining about gastritis or
2 is he really complaining about his foreman's supervision
3 of the workplace?

4 Thank you very much.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lee.
6 The case is submitted.

7 (Whereupon, at 11:00 o'clock a.m., the case in
8 the above-entitled matter was submitted.)
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATION

Alderson 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:
#85-1140 - ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Petitioner V.

JIM BUELL

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

BY Paul A. Richardson

(REPORTER)