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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1530

TITLE WILLIAM E. BROCK, SECRETARY OF LABOR AND ALAN C. McMILLAN, REGIONAL ADMINISTRATOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, Appellants V. ROADWAY EXPRESS, INC.

PLACE Washington, D. C.

DATE December 3, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM E. BROCK, SECRETARY OF :
LABOR AND ALAN C. McMILLAN, :
REGIONAL ADMINISTRATOR, :
OCCUPATIONAL SAFETY AND HEALTH :
ADMINISTRATION, :
Appellants :
v. : No. 85-1530
ROADWAY EXPRESS, INC. :

- x

Washington, D.C.

Wednesday, December 3, 1986

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

APPEARANCES:

ANDREW J. PINCUS, ESQ., Washington, D.C.;
on behalf of Appellants.

MICHAEL C. TOWERS, ESQ., Atlanta, Ga.;
on behalf of Appellee.

C C N T E N T S

P R O C E E D I N G S

(1:56 p.m.)

CHIEF JUSTICE REHNQUIST: Mr. Pincus, you may proceed whenever you are ready.

ORAL ARGUMENT OF

ANDREW J. PINCUS, ESQ.,

ON BEHALF OF APPELLANTS

MR. PINCUS: Thank you, Mr. Chief Justice, and may it please the Court:

The statute at the center of this case, Section 405 of the Surface Transportation Assistance Act of 1982, prohibits an employer in the motor transportation industry from retaliating against an employee who asserts his right to safe working conditions.

The statute authorizes the Secretary of Labor to investigate an employee's complaint that the statute has been violated, and when the Secretary finds reasonable cause to believe that the employer's action violated the statute he must issue a preliminary order directing the reinstatement of the employee and awarding other appropriate relief.

If the employer objects to the Secretary's order, he is entitled to an evidentiary hearing before an administrative law judge regarding the reasons for

the discharge. The Secretary issues a final decision on the basis of the facts developed at the evidentiary hearing and the Secretary's decision is subject to judicial review.

The particular feature of Section 405 that is in dispute here is Congress' determination that employees should be provided with preliminary as well as permanent relief. The statute states that an employee must be reinstated on an interim basis if the Secretary finds reasonable cause to believe that his discharge was in violation of the statute.

This interim reinstatement remains in effect during the subsequent evidentiary hearing and through the resolution of the case on the merits. The question presented here --

QUESTION: May I ask you, Mr. Pincus, because I'll tell you, I'm concerned about the timeliness of some of these things that happen in this case. Do you think the statute requires that the reasonable cause investigation be completed within 60 days?

MR. PINCUS: Well, the statute does indicate that, set a 60 day limit. But the Secretary interprets that limitation as directory, rather than --

QUESTION: What is the -- where did the Secretary get the authority to just in effect ignore

that 60 day requirement?

MR. PINCUS: Well, Your Honor, I don't think that the Secretary ignores that requirement, just in some cases it happens that the investigation, the questions are complex or witnesses are difficult to locate.

QUESTION: Was this a complex case?

MR. PINCUS: This particular case involved many different claims by Mr. Hufstetler that he'd engaged in a variety of safety-related activities.

QUESTION: He may have gotten the authority from the same place that the last case we have from the Secretary of Labor got the authority, which as I recall was very belated processing.

MR. PINCUS: Well, yes, Your Honor. I was going to mention that, that case, Brock against Pierce County, which involved a similar statutory time limit, which the Court interpreted as directory and non-mandatory.

QUESTION: But there was a good deal of legislative history that supported the Secretary's argument there that that was directed to a different purpose. But there's no such history in this case, is there?

MR. PINCUS: Well, Your Honor, we think that

the statutory scheme would be -- indicates itself that the same rules should apply. If the time limit was interpreted to divest the Secretary of jurisdiction, then the Secretary's failure to act would cut off the employee's rights, and it couldn't be that Congress intended that a statute that was intended to help employees would fail if the Secretary, because of lack of administrative resources or just the complexity of the particular investigation, wasn't able to complete the investigation within that time period.

Congress obviously wanted to protect employees.

QUESTION: And whenever the Secretary does complete it -- here I guess it was about eleven months -- then the back pay obligation attaches, too, doesn't it, if he finds reasonable cause.

MR. PINCUS: Yes, but the back pay obligation runs from the discharge. It doesn't have anything to do with the length of the investigation.

QUESTION: Well, it's a little more serious if an employer has to wait a year or so and then finds he's got a year's back pay to pay, which I suppose he'll never see again once he pays it.

MR. PINCUS: Well, he doesn't owe the back pay until after the entire -- there's been a final

adjudication on the merits.

QUESTION: Oh, he doesn't have to pay it at the time of the reasonable cause determination?

MR. PINCUS: No, the only part of the order that goes into effect immediately on the reasonable cause finding is the reinstatement.

QUESTION: I see.

MR. PINCUS: The other remedies don't go into effect until the order becomes final.

QUESTION: Still, it might be considered a quid pro quo for the employers who are subject to this Act that what's taken away is that they have to reinstate; on the other hand, what they get is a pretty good estimation of whether they're going to have to pay back pay ultimately.

That is to say, if the Secretary finds against them on that initial determination I expect a lot of employers would simply throw in the towel and reinstate and not be subject to any more back pay liability. And by delaying that for a long time, the Secretary has taken away a lot of the quid pro quo.

MR. PINCUS: Well, on the other hand, Your Honor, the employers are protected by the thoroughness of the investigation, because the Secretary's determination becomes that much more accurate, and so

his reasonable cause finding --

QUESTION: That's fair.

MR. FINCUS: -- is that much more accurate.

Just to briefly consider stating the facts in this case, the proceeding began on November 22nd, 1983, when Appellee discharged Jerry Hufstetler, who was one of its truck drivers, on the ground that he had intentionally disabled his truck to obtain extra pay. Hufstetler filed a grievance under his collective bargaining agreement, asserting that he had been discharged in retaliation for his safety activities, and after his grievance was rejected he filed a complaint with the Secretary under Section 405.

The Secretary conducted his investigation, which took eleven months, and in the course of that investigation Appellee was informed of the charges and the complaint and given an opportunity to present its side of the story.

The Secretary issued a reasonable cause finding and directed that Hufstetler be reinstated on a temporary basis pending the completion of the proceedings. Eleven days after the issuance of the preliminary order, Appellee commenced this action in federal district court.

It sought an injunction against enforcement of

the temporary reinstatement order on the ground that the order violated Appellee's due process rights. The district court issued the injunction and held that the due process clause requires the Secretary to hold an evidentiary hearing before issuance of the temporary reinstatement order, and that Section 405 was unconstitutional to the extent that it permitted the issuance of such an order without the prior hearing.

Now, both sides in this case agree that an employer is entitled to an evidentiary hearing prior to a final determination of the lawfulness of the discharge. The only question is whether the hearing must be held before the discharged employee is temporarily reinstated or afterward, and in our view the due process clause as it has been interpreted in this Court's cases does not preclude Congress from authorizing a temporary reinstatement prior to an evidentiary hearing.

Now, this constitutional question is not new to the Court. In a line of recent cases, the Court has considered the question of the timing of an evidentiary hearing in connection with an interim or temporary deprivation of liberty.

QUESTION: Mr. Pincus, do I understand the Government concedes that there is a property interest on

the part of the employer here?

MR. PINCUS: Yes, Your Honor, we do, although let me add that we think the nature of the property interest is quite insubstantial as compared to the property interests that the Court has considered in its prior cases.

QUESTION: Well, what precisely is the property interest?

MR. PINCUS: Well, the interest as we see it is the employer's right to discharge an employee that it has under its contract.

QUESTION: And is there some case from this Court that you regard as peculiarly apposite in making that concession?

MR. PINCUS: No, Your Honor, we don't rely on any particular case. Let me add that if there were no reinstatement, obviously if the employer was just required to pay money in the interim, then that payment of money itself would be a loss of property.

In this case, since there is reinstatement the employer gets a day's work for a day's pay, and so really the only diminution in his rights is this question of being able to control the workplace, which, as we discuss in our brief, is already subject to quite a lot of federal regulation.

QUESTION: Well, the order to reinstate would require back pay?

MR. PINCUS: The order -- the back pay obligation does not become effective until the order is finally upheld. But eventually, if the discharge were found to be unlawful, he would be required to pay back pay.

QUESTION: You don't think it's a deprivation of property if somebody requires me to hire somebody that I don't want to hire?

MR. PINCUS: Well, yes, Your Honor. That's why we --

QUESTION: I thought you just said that there would have been a clear -- the mere payment of the money would have been a property interest if all the Secretary did was require the back pay, without requiring the man to be re-employed.

But you seem to suggest that, since you're not just requiring the money to be paid, you're also requiring the individual to work, that somehow it's different. but it seems to me that requiring you to hire somebody you don't want to hire and to pay them when you don't want to pay them is clearly property.

MR. PINCUS: Well, Your Honor, that's why we think there's a property interest here. But we think

that in assessing the weight of that interest it's necessary to see exactly what the employer is losing, and we think it's --

QUESTION: And you're saying he's not losing much because he's getting the labor of a person whose labor he doesn't want, and you don't think that's very much?

MR. PINCUS: Well, we think it's something, but we don't think it's anything like a person who needs disability not getting disability benefits or an employee being discharged or someone who is dependent on money for their livelihood losing that very money.

The employer is losing something, but in comparison to the other property interests that the Court has considered it's not that much.

QUESTION: But doesn't the employer also lose a contract right under the collective bargaining agreement to have an arbitration award enforced? Here there was arbitration, as I understand it, and apparently the ALJ had a different view of the matter.

But under the contract he had a right, a contract right, to terminate this employee, didn't he, apart from the statute?

MR. PINCUS: Yes, he did, Your Honor. But we don't think that adds anything more to the analysis. I

mean, that's the same right that he has not to pay someone he doesn't want to pay. If he had lost the arbitration proceeding, he wouldn't have that right. So the fact that he won it doesn't give him anything more. It just means that he has that right.

In contrast to what we see as this property interest, although a less substantial property interest, of the employee, there is the quite weighty interest of the Government here. Section 405 is based on what the Court has characterized as the Government's paramount interest in highway safety.

When the statute was enacted, Congress had before it evidence of massive noncompliance by the motor transportation industry with the federal safety standards that apply in that area, and Congress concluded that if employees were protected from retaliatory discharges and thus able to act to enforce safety standards that compliance with safety standards would be encouraged.

And therefore, it adopted Section 405 to provide employees with this protection. And it seems clear that the interim reinstatement protection that's at issue here is essential to Congress' employee protection plan.

An employee has to pay his monthly bills for

food and shelter on an ongoing basis as they come due, and so an award of back pay several years down the line does not give the employee the protection that he really needs if the protection that Congress designed is to become real.

QUESTION: I suppose that's part of the 60 day requirement, too. Eleven months he had to go without food and drink, for eleven months, didn't he?

MR. PINCUS: Well, Your Honor, the Secretary is cognizant of the need for expedition. And as we discuss in our reply brief, he is endeavoring to speed up the investigation period and they have gotten somewhat speedier.

QUESTION: I can't resist also asking you about your interpretation of the sentence: "Upon the conclusion of such hearing, the Secretary shall issue a final order within 120 days." And you read that, as I understand it, to say after, 120 days after the ALJ issues his order, but the ALJ can take forever to issue his order?

MR. PINCUS: Well, the statute doesn't provide a deadline for the ALJ, although the regulations that the Secretary --

QUESTION: Unless you read it into this 120 day -- unless you read the plain language of the

sentence I just read to you, because that certainly sounds as though the Secretary has to get through with the matter within 120 days.

But you don't read it that way, do you?

MR. PINCUS: No, Your Honor, the Secretary hasn't interpreted the statute that way. But he has issued regulations that do set time limits on the ALJ's action. And again, we wouldn't read -- even if the 120 day period had a different interpretation, we wouldn't read it as cutting off the Secretary's jurisdiction.

But again, the Secretary is cognizant of his obligations to move speedily, but especially in an investigatory period he has to balance the employer's rights and the employee's rights in wanting to reach a fair determination, and also in the subsequent period the employer may need extra time to get his case together and in that case it wouldn't be fair to press ahead if the employer is the one that's asking for the time.

QUESTION: Is there anything in the record to suggest that the process that he actually follows is any more expeditious than convening a very, on short notice, an adversary hearing like you might have on a motion for a temporary restraining order in a court?

I don't understand why you have to proceed

without having an adversary proceeding promptly held. What is the need for this particular procedure? Can you tell us?

MR. PINCUS: Well, the fair reading of the statute, I think, is that Congress intended the Secretary to conduct an investigation and for reinstatement to happen on the conclusion of that investigation, and for adversary proceedings to follow.

Now, the Secretary's investigation has to be comprehensive and is as fast as possible. And we think there is no way for the Secretary to conduct a less comprehensive investigation and still meet his obligations under the statute.

So the effect of an evidentiary hearing before reinstatement --

QUESTION: You're going to have a hard time convincing me that they spend eleven months working on this case and nothing else. I imagine they have a whole lot of cases and this case took its turn with a very busy administrative office.

Or do you suggest that this amount of time is necessary on every case that comes?

MR. PINCUS: No, Your Honor, we don't suggest that, and as the times that we've submitted in our reply brief show, that's not what the Secretary actually does

in every case. In this case it happened to take a long time.

There was quite a controversy about the facts, and the complainant alleged that he had engaged in a variety of safety-related activities that all had to be checked out. In addition, these people are truck drivers and so sometimes it's hard to locate the relevant people in order to talk to them because they are on the road.

But I'm not suggesting that this case is typical, and we don't think that the Court should base its due process decision on this, the facts of this particular case. The Court said a number of times that due process decisions are based on the generality of cases and, although the time happened to be long in this case, we think it generally isn't.

And we think that the time that the Secretary takes for an investigation is what he think is required to meet his statutory obligations, and if a hearing is required before reinstatement that that is just going to be an additional time piled on top of the investigation, and so it will delay reinstatement.

QUESTION: Well, I'm not sure that follows. I'm not sure if you didn't subpoena everybody in at once, as you do in emergency proceedings often, you

couldn't get to the truth a lot faster than by separately investigating without everybody else knowing what's going on.

But I suppose there's some merit.

QUESTION: I would think in eleven months you could have had your evidentiary hearing.

MR. PINCUS: Well, Your Honor, that might be true in this particular case, but it may not be true in many, many cases. And especially where --

QUESTION: Well, it might be so, as Justice Stevens says, if you really lived up to the 60 day requirement, why, you could order reinstatement and then maybe take some time to have an evidentiary hearing. If you're going to skip that time limit, you better hold your requirement hearing.

MR. PINCUS: Well, Your Honor, we don't think that that's what the Court's cases have required. In Loudermill, for example, the Court indicated that a nine month delay before temporary -- between the temporary action and final action was not anything that approached a due process violation.

And the time period was even longer in Mathews against Eldridge. So --

QUESTION: I'm not sure that I'm following this discussion. It seems to me that the longer it goes

on, as far as the employer's due process complaint is concerned, the longer it goes on the better off he is, isn't that right?

The employer doesn't have any incentive to get it decided quickly. The more quickly it's decided, the sooner he has to re-employ this fellow.

MR. PINCUS: Well, Your Honor, I think that's exactly right.

QUESTION: I mean, it may be a terrible way to administer the Act, but as far as the employer is concerned the longer these things take the better, right?

MR. PINCUS: I think that's --

QUESTION: 20 months is great for him.

MR. PINCUS: Well, the Secretary --

QUESTION: Because he doen't have to rehire this fellow.

MR. PINCUS: I think that's certainly true from the employer's point of view, and in addition the --

QUESTION: Well, certainly that's not true. Between the date of the temporary order saying, you reinstate now, and the conclusion of the proceedings, when he must be employed during that interval, and he doesn't want this man working there and he may

eventually win --

MR. PINCUS: Well, Your Honor --

QUESTION: Especially if he thinks he's a dangerous employee.

MR. PINCUS: Well, Your Honor --

QUESTION: And he isn't a good truck driver.

MR. PINCUS: There are two different time limits at issue here. There is the time limit for the time of the investigation leading up to the reinstatement and then there is the time between the temporary reinstatement and an evidentiary hearing.

And Justice Scalia was referring to that first time limit, which doesn't -- in which the Secretary endeavors to act speedily, because the rights of the employee are at issue. But the length of that investigation, actually the more thorough it is the better it is for the employer.

QUESTION: No, but if the man doesn't work for eleven months and yet gets eleven months pay, that's worse than not working 30 days and getting 30 days back pay, because part of your argument was that part of the quid pro quo is he gets services for the back pay, but he doesn't get any services for the back pay during the period between the discharge and the temporary order.

MR. PINCUS: Well, Your Honor, except that I

don't think that the length of time has anything to do with the back pay question. If it's found that the employer has violated the statute, then he is obligated to pay back pay, however long the period is. That's a separate question from the question of temporary --

QUESTION: But the back pay is going to depend on how long it takes to complete the final hearing, not this preliminary determination.

MR. PINCUS: Yes, although the preliminary -- well, the back pay obligation runs from the date of the discharge. So it's all -- I mean, the whole period is relevant, but I don't think --

QUESTION: Oh, that's right. He'll be working for some of it if he's put in earlier.

MR. PINCUS: But I don't think that that question has anything to do with the due process issue here. The Court has recognized in a line of cases starting with Mathews against Eldridge through Barry/Barchi, Barry against Barchi, Mackey, and Loudermill, that the kind of procedure that the Secretary uses here is precisely what the due process clause requires, that before a temporary action is taken there must be notice and an opportunity to be heard and some kind of a reasonable check on the accuracy of the decisionmaking process, exactly what the Secretary does

here.

QUESTION: Well, Mr. Pincus, once the initial order has been entered by the Secretary of Labor insisting on reinstatement of an employee the employer doesn't want to have, then it becomes crucial to the employer, does it not, to have a prompt hearing, assuming that's constitutional?

MR. PINCUS: Yes, a prompt post-action hearing.

QUESTION: At that point the post-order hearing becomes vital, does it not?

MR. PINCUS: Yes, it does, Your Honor.

QUESTION: And yet, there's no time limit in the statute at all.

MR. PINCUS: Well, the statute requires that the post-reinstatement hearing be expeditiously conducted, and the Secretary has issued regulations that do set down time limits on when that will happen -- for every process, every stage along the process culminating in the Secretary's final decision, which amount to seven months, which is less than the period that the Court has recognized in both Mathews and Loudermill as appropriate.

In Loudermill, the Court said that there was no problem with nine months.

QUESTION: Are the time limits in the Secretary's regulations jurisdictional or directory?

MR. PINCUS: Well, Your Honor, the time limits are directory, and if in a particular case, as in Loudermill, the Court indicated that there was a two-step inquiry. The first question is whether the scheme that the Government follows provides for an expeditious hearing. The second inquiry is whether in the particular case those limits were met and, if they were not met, were they exceeded by such a degree that it amounted to a due process violation.

So we think that's the inquiry here. The Secretary set up a scheme that complies with what the due process clause requires. In a particular case it might be that those time limits might be exceeded and it might be open for an employer to argue that he's been subject to a due process violation.

But that doesn't mean that the scheme is invalid, and the only question here is whether the scheme should be upheld and we submit that it should.

I'd like to briefly discuss another way of looking at the case that we think confirms the constitutionality of what Congress has done here. The interim reinstatement remedy could also be viewed as at accommodation of conflicting interests, similar to

preliminary relief in a judicial proceeding.

Here the conflicting interests are the interests of the employer and the interests of the employee. On the one hand, the employee has an interest guaranteed by Section 405 in not being discharged in retaliation for safety activities. On the other hand, the employer has an interest in protecting his authority to discharge employees.

And in drafting Section 405, Congress had to decide where the interim burden was going to fall in a dispute over the discharge. And as I've discussed, the absence of interim relief would threaten the employee with the prolonged loss of his means of livelihood and adversely affect employees' willingness to engage in conduct protected under the statute.

On the other hand, permitting interim reinstatement does not unduly burden employers because they suffer no economic loss in the sense that they get a day's work for a day's pay.

So in these circumstances, Congress made a reasonable determination that it was the employer that could best bear the burden of the dispute over the discharge where there has been a showing, based on an investigation, that there was reasonable cause to believe that the discharge was unlawful.

QUESTION: And that's the basis of the preliminary order, is based on that?

MR. PINCUS: It's a reasonable -- it was a finding of reasonable cause, yes, Your Honor.

QUESTION: And the employer in this case sought and obtained the injunction after the preliminary order had been issued, is that correct?

MR. PINCUS: Yes, but before it went into effect. The employer here was never required to reinstate the employee.

QUESTION: But the only reason he wasn't required was because the district court enjoined the application of the preliminary order?

MR. PINCUS: Yes, Your Honor.

QUESTION: What does "reasonable cause to believe" mean? Is the Secretary making the determination at this preliminary stage that, on the basis of a rough ride through the material, he thinks it's more likely than not that this person had been discharged for this reason?

Or is it just that there is some -- that there is what, a real possibility?

MR. PINCUS: Well, Your Honor, we don't think it's a 51 percent determination, a more probably than not determination. We think it's a determination akin

to probable cause or maybe a little bit more than probable cause.

In fact, "reasonable cause" is exactly the term that the Court used in its decision in Loudermill as the finding that would provide the preliminary check upon the accuracy of the Government determination.

QUESTION: What did we mean by it there?

MR. PINCUS: Well, as I said, we think that it's a finding that the complaint has merit, not necessarily a finding of 51 percent. But it's a finding -- in defining "probable cause," the Court has characterized it as a probability or a substantial chance, and we think that that's the same kind of finding that the Secretary is making here.

QUESTION: Probability is 51 percent, isn't it, or a substantial chance.

MR. PINCUS: I think that the Court indicated in Illinois against Cape that probable cause is not a 51 percent determination; it's something less than 51 percent. And that's the same kind of determination that the Secretary makes here.

QUESTION: After doing eleven months worth of work, why wouldn't it be more sensible in deciding where the burden ought to fall to have it fall on the person who's more likely to be the one at fault? I mean, why

shouldn't it be a probability call?

MR. PINCUS: Well, Your Honor, in every case, again, there isn't an eleven month investigation. And it may be that the evidence before the Secretary when he made this determination allowed him to make a much more substantial finding.

But all that Congress required was a reasonable cause finding, and again that's all the Court has required in its decisions.

QUESTION: It makes it all the more amazing why it would take eleven months then, if all he looks to see is whether there is any merit.

MR. PINCUS: And Your Honor, the Secretary in subsequent investigations has moved more expeditiously and is moving more expeditiously now. But he recognizes his obligations to both employers and employees to give people a fair hearing about these complaints.

Unless the Court has any further questions, I reserve the balance of my time.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Pincus.

We'll hear now from you, Mr. Towers.

ORAL ARGUMENT OF

MICHAEL C. TOWERS, ESQ.,

ON BEHALF OF APPELLEE

MR. TOWERS: Thank you, Mr. Chief Justice. May it please the Court:

Section 405 of the Surface Transportation Assistance Act is unconstitutional to the extent that it mandates preliminary reinstatement of a terminated employee without first affording the employer a rudimentary evidentiary hearing opportunity to defend itself.

Without a prior evidentiary hearing, there is a substantial risk of error, and an erroneous reinstatement is not inconsequential. It may be in duration anywhere from --

QUESTION: There's going to be a substantial risk of error anyway. We have just heard that all the Secretary's trying to find is a substantial possibility, which is maybe, I don't know, 33 percent.

MR. TOWERS: I'm not sure --

QUESTION: So there's a two to one chance that it's wrong on the face of the statute.

MR. TOWERS: I'm not sure what the technical definition of "reasonable cause" is. It is a lower standard of proof than preponderance of the evidence, I would accept that.

But what the statute has done for the preliminary reinstatement order is set a standard. The

standard doesn't change the constitutional mandate that we be given an opportunity to test whether that standard has been met, and that's the thrust of our --

QUESTION: Well, I don't know. It's a strange argument. You're saying that there is a substantial probability. You want to have a very careful hearing to be sure that the chances are two to one that you're right, but you're nevertheless going to have to pay the employee in the interim, right?

MR. TOWERS: I don't follow the last part, Your Honor. But yes, we do want to --

QUESTION: You want the Secretary to be very careful in determining that you probably were right to fire this fellow, but you nonetheless should keep him on.

MR. TOWERS: We want --

QUESTION: It seems to me that if less -- if you acknowledge that less than a probability is an adequate standard, it seems very strange to say that in order to meet that standard we need the full panoply of adversary proceedings, cross-examination and everything else.

MR. TOWERS: I want to make clear, we're not asking for the full panoply of a full evidentiary hearing. We are asking for a rudimentary evidentiary

hearing to give us an opportunity to know the evidence being ccnsidered by the fact finder, the Secretary of Labor's representative, so that we can present our defense to that and establish that there is not reasonable cause to believe that the Act has been violated.

Under the current practice, we are advised of a charge and we're given an opportunity to submit a position statement. We are not given an opportunity to mold our defense or shape our defense to the evidence being considered by the Secretary of Labor. And in a case under Section 405, that is a particularly important point.

405(a) prohibits an employer discharging an employee because he has engaged in safety-related activity or made safety complaints. 405(b) prohibits the employer from discharging an employee because he refuses to work in an unsafe working condition, a condition that he believes to be unsafe and that a reasonable man would believe to be unsafe.

Those are so fundamentally subjective questions of motive, dual motive -- would this individual have been terminated but for his safety-related activity, was he a reasonable man under the circumstances, what was the intent of the employee?

All of those are such subjective factors that the employer has no opportunity to rebut, because we don't know what the Secretary of Labor has on which he's relying in his belief that we violated the law.

We're told that X employee says we fired him because of his safety-related activities, period. The guidelines used by the Secretary of Labor's field operators simply call on the investigator -- this is at page Roman numeral V-V of the directory of field operations that was lodged with the Court by the Secretary of Labor.

The investigator is simply required to notify the respondents of the substance of the complaint, and that notification is set forth in an appendix to these guidelines, a form letter. And the form letter merely says:

"We hereby serve you notice that a complaint has been filed with this office by complainant alleging a violation of Section 405 of the Surface Transportation Assistance Act. We would appreciate receiving from you promptly a full and complete written account of the facts and a statement of your position with respect to the allegation that you have discriminated against the complainant in violation of the act."

The Secretary of Labor has just issued

proposed regulations, just last November 21st, that say the same thing essentially: "Upon receipt of a complaint, the Assistant Secretary" -- "a copy of" -- I'm sorry.

"Upon receipt of a valid complaint, OSHA shall notify the named person" -- which is defined as the charged employer -- "shall notify the named person of the filing of the complaint and his or her rights under" other sections of the regs, and those rights are to submit a position statement within 20 days and any witnesses we want to bring forward.

How do we know what witnesses to bring forward? We don't know what motive we're being charged with, what evidence they're relying on to say we've had bad motives.

QUESTION: You know, the argument that judges usually here is that it's impossible to prove a negative. And you're complaining about the inability to introduce evidence on the negative.

It seems to me once you have your notice, all the affirmative -- all the evidence on the affirmative that you have you know to introduce. I assume when you get the notice you will come forward with the reasons why you did fire the person.

MR. TOWERS: Exactly, and --

QUESTION: All the rest is an attempt to prove the negative, which is very difficult to do anyway.

MR. TOWERS: It is difficult to do. It is an attempt to prove that we didn't have bad motive. But we can't offer evidence to either rebut the credibility of the individuals who claim they have concrete evidence of our retaliatory motive.

Nor can we bring forward evidence to establish that we did not have retaliatory motive and that these people are liars, are vindictive, or that they weren't in town when they allegedly heard these things, whatever it may be.

We don't know what they're relying on on the motive question. Of course we know why we fired the individual, our non-discriminatory reason that we articulate. And that's the best we can do in a position statement.

In the situation that we had in this particular case, we already tested this case before a grievance resolution panel and won. We knew what we had done. We knew what the individual said he had done. And the panel went with us.

That's what we submitted in our position statement. Here are the statements of the individuals. We didn't know until we got to the final hearing, I

don't remember how many months later it was -- eleven, twelve months, because there was an interim from the order to the hearing -- that three of the Teamster witnesses who had given statements to the arbitration panel concerning relevant facts in this case had changed their witness.

We didn't know that the manager who fired this individual, as opposed to the manager who reported his misconduct, was being charged with retaliatory motive and that they had alleged evidence in support of that. We couldn't counter that. We didn't know about it.

We didn't know that the Secretary of Labor was going to come to the hearing and claim that the Teamsters Union failed to adequately represent this individual in the arbitration process. We were apprised of none of that.

And that's why we contend that it's constitutionally infirm to conduct an investigation with such subjective facts to be resolved without first giving us an opportunity to test those facts, the facts on which the decisionmaker is going to rely in depriving us of our property, that is the right to keep this person out of the workplace.

And I'd like to speak a moment in response to the question, Your Honor, of what is the property

interest. The property interest is significantly more than a simple right to terminate an individual, either the contract right or under the collective bargaining agreement or the common law right to terminate at will if there is no collective bargaining agreement, or perhaps the at-will employment agreement.

We lose the bargained for arbitration right. Now, if we were wrong, as the Solicitor General suggests, and the man should have been put back to work, then that can be established in a hearing, a preliminary hearing during the investigative stage. But if the investigator is wrong, we have lost that right.

Most importantly is the coerced employment relationship, particularly in the trucking industry. We are being asked to take an individual in whom we have lost all confidence, put him back in a 40 ton piece of equipment out on the open highway, transporting millions of dollars worth of our customers' product and goods, including toxic wastes, chemicals, nuclear wastes, explosives, and general commodities, put him on the highway with our name on the side of the truck as our representative.

That's the coerced employment relationship. That's the nature of the property interest that's at stake in this case.

QUESTION: Well, does the mere fact that the employer strongly and quite reasonably objects to being made to do this, does that convert the situation into a property right?

MR. TOWERS: It converts it to a property right. It is a property right and it is a property right that can be abridged by Congress or by the courts. Reinstatement orders issue in any number of statutes: Title 7, National Labor Relations Act, any number of statutes.

But it is a property right that can be abridged as long as there is -- the standards set by Congress have been met. We don't have a chance to test whether those standards have been met.

So yes, it's a property right and it's a property right wrongfully taken if we haven't been given an opportunity to establish that we didn't do what we were charged with doing and that there's not reasonable cause to believe we've done what we're charged with doing.

QUESTION: Has there been an evidentiary hearing?

MR. TOWERS: Yes, there has been an evidentiary hearing. There was a full hearing after the injunction entered.

QUESTION: Any decision?

MR. TOWERS: A decision of the Secretary of Labor April 21st this year, yes, Your Honor, finding that the individual should be reinstated, put back to work with back pay.

QUESTION: August.

MR. TOWERS: I'm sorry?

QUESTION: August.

MR. TOWERS: August 21st of this year.

QUESTION: And is that subject to some judicial review?

MR. TOWERS: That is subject to judicial review in the Eleventh Circuit, and in fact an appeal is pending in the Eleventh Circuit at this time.

We are not asking for that final hearing before the reinstatement order enters, and I want to make that clear. The Solicitor General referred to the hearing. We are suggesting that during the investigative process which the statute calls for in 60 days, during that 60 day period or however long the Secretary decides to take in the investigative process, we should be given a rudimentary evidentiary hearing, an opportunity to test the evidence on which the Secretary is relying in his initial belief that there may be a violation of the Act.

QUESTION: What relief are you going to get if you win this case?

MR. TOWERS: If we win this case -- well, the case is not moot because this is the type of case that is subject to repetition with no opportunity for quick review. We couldn't have gotten here any quicker than we did. We have a direct appeal by the Secretary of Labor in this particular case, although there has been a final order.

QUESTION: The short answer is that if you win this case you're not going to get anything except some protection in the event you allegedly violate the Act again?

MR. TOWERS: That's correct. But as the record shows --

QUESTION: Well, isn't that pretty speculative, whether you're going to commit another violation of the law?

MR. TOWERS: We aren't going to, Your Honor. But we may well be charged with committing other violations of the law. Roadway Express is, if not the largest, one of the three largest trucking companies in the United States, with 15,000 plus employees, and so there's a substantial likelihood that there will be other charges filed some time in the future.

QUESTION: And a big likelihood that he'll take eleven months?

MR. TOWERS: Some have taken longer, Your Honor.

QUESTION: But of course, you don't -- you say whether it's 60 days or however long, that there should be an evidentiary hearing?

MR. TOWERS: Yes.

QUESTION: Before an order to reinstate.

MR. TOWERS: We want the an evidentiary hearing during the investigative period. We don't want an eleven month interim for the investigation either, because back pay is running. We have hired an individual to replace this individual.

And if we were wrong, we have to put this individual back to work and pay him back pay for the time he was out. Of course, we've already paid an individual to perform that work during that period. We'd like a 60 day investigative period.

QUESTION: And the shorter it takes, the less likely you are to get here in time?

MR. TOWERS: I don't believe so, Your Honor. The Secretary of Labor --

QUESTION: I'm trying to help you.

MR. TOWERS: -- administers any number of

whistle blower statutes. The other whistle blower statutes all contemplate an investigation, a full final hearing, and a decision within approximately 62 to 70 days.

QUESTION: Mr. Towers, you say you do not want a full evidentiary hearing, but would you like -- do you think you're entitled to the right to cross-examine the Secretary's witnesses?

MR. TOWERS: Yes, Your Honor.

QUESTION: Prior to the final?

MR. TOWERS: Yes, Your Honor, absolutely. In a case of this nature, in order to test the evidence, the reliability of the evidence, and to establish whether or not there are other motives on the part of this individual, whether the individual is mistaken, the context within which he heard what he states he has heard.

I think we need, definitely need that opportunity.

QUESTION: What would be the difference between that and the final hearing?

MR. TOWERS: The final hearing would be -- first of all, the Secretary of Labor would be putting on his case first, and he would be able to put on everything at that time that he feels supports a case to

meet the preponderance of the evidence test.

He would not necessarily have to do that in a preliminary hearing. He could put on his best shot. It could be an abbreviated hearing. We'd come in and examine those witnesses, put on our best shot, and let the fact finder make his determination: Is there reasonable cause or not?

Is there enough reasonable cause to deprive us of our property, that is to reinstate this individual?

QUESTION: Well, you'd want him to put on all the witnesses that he has.

QUESTION: Perhaps if you were supplied with the statements of witnesses that were presented to the Secretary of Labor, you would have an opportunity to respond to those. But you didn't have even the names of the witnesses relied on, did you?

MR. TOWERS: We didn't have the names of the witnesses under the asserted confidentiality rights that the Secretary of Labor asserts.

QUESTION: So you had no idea what the Secretary of Labor had?

MR. TOWERS: Not really. We certainly found out there was a lot that he was asserting when we got to the final hearing that we didn't know about during the investigation, nor did we know about during the

arbitration. It was a new game.

QUESTION: A question of the status of this case now. Is it on appeal before CA 11?

MR. TOWERS: Yes, it is, Your Honor. The Secretary of Labor's final decision that Roadway violated the Act in relation to Jerry Hufstetler is on appeal.

QUESTION: Mr. Towers, do I understand you think that you're entitled to that preliminary hearing within the 60 days?

MR. TOWERS: Within the investigative period. The statute calls for --

QUESTION: Even though that's beyond 60 days?

MR. TOWERS: Even if it goes beyond 60 days. Right now the average is, I believe, 101, 102 days. Somewhere during the investigative period, we should be given an evidentiary hearing opportunity, that's our contention.

That would not be the final hearing. It would just simply be a check, a test against error. And it would not adversely impact the purpose of the Act. That's a significant point.

The Government's interest is the purpose of the Act, that is to encourage whistle blowing, encourage employees to refuse to work in unsafe situations, by

giving them an element of comfort that if they're wrongfully fired they can get back to work quickly.

QUESTION: Could we find out more about the content of this hearing that you're asking for? Now, you said the Secretary doesn't have to put on anything; he can just take his best shot.

MR. TOWERS: It would be up to the Secretary as the proponent to put on --

QUESTION: Well, could he withhold any of the witnesses that he has? You'd certainly want to cross-examine all the witnesses that he's relying on at that point?

MR. TOWERS: I would want to cross-examine all of the witnesses that he would be presenting to a neutral fact finder. I don't know -- it wouldn't be the investigator himself making the decision, because that would be combining the prosecutor with the decisionmaker.

I assume the Solicitor's office would put on his case before an administrative law judge, and I assume it would be their strongest witnesses and their best evidence. If they wanted to put on a full hearing, that would be their prerogative.

QUESTION: And then what would you put on? You'd put on as much as you want?

MR. TOWERS: We would put on rebuttal to what they had put on.

QUESTION: Well, but rebuttal would include anything. I mean, anything that would show that you were not guilty.

MR. TOWERS: I think that --

QUESTION: I just don't see how it differs from the final hearing and what is saved by having this expedited process if we have this. Wherein does it differ from the full dress hearing?

MR. TOWERS: The full dress hearing would perhaps include witnesses testifying that this individual is a credible character, that individual is a credible character, corroborating evidence and so forth.

Since it would be a minimal hearing, a rudimentary hearing, the hearing officer could control it, move the witnesses along, move the attorneys along: You've plowed that ground, Mr. Towers; move on to this, that's --

QUESTION: I assume an ALJ does that in the final hearing, too.

MR. TOWERS: He can. But certainly a final hearing could be much more complete, with corroborative evidence, evidence going to the credibility of the

witnesses that have --

QUESTION: And you would restrain yourself during that hearing and not put on all the evidence that you possibly have? Is that likely?

MR. TOWERS: I would be putting on the evidence in response to what --

QUESTION: You'd put on every bit of evidence you possibly could, wouldn't you, as much as the ALJ would possibly let in?

MR. TOWERS: I think I would realistically put on my non-discriminatory reason. I know why I fired the man and I'd do everything I could to convince the ALJ that that was a legitimate termination.

Then I'd have to respond to whatever the Secretary of Labor is putting on to suggest that there was an illegal motive or a dual motive, and so forth. But I don't know what that would be until I got to the hearing.

QUESTION: Mr. Towers, what other agency does what you want done?

MR. TOWERS: Gives preliminary hearings?

QUESTION: Uh-hmm.

MR. TOWERS: The Secretary of Labor does under the Mine Safety Act, in exactly the same situation. Under Southern Chio Coal, under the Mine Safety Act

there was a provision in the Act that if an individual is terminated, files a complaint, the Secretary of Labor can order immediate reinstatement.

That was challenged and the Sixth Circuit held it to be unconstitutional. The Secretary of Labor devised procedures to give the employer a rudimentary evidentiary hearing before that reinstatement order takes effect.

QUESTION: Well, in this I understand you want a preliminary hearing before the hearing?

MR. TOWERS: I want a preliminary hearing before the order --

QUESTION: Well, that's two hearings.

MR. TOWERS: Yes, Your Honor.

QUESTION: That's two hearings.

MR. TOWERS: Yes, if it went to --

QUESTION: Is that normal?

MR. TOWERS: Well, it's available under the Mine Safety Act regulations.

QUESTION: Well, it doesn't have to be available under another Act. You've got -- is that the only one you know of?

MR. TOWERS: That's the only one I know of. I would point out that the Secretary of Labor in all of the other statutes --

QUESTION: It seems that there is a difference between the investigatory process, and I always understood that you weren't entitled to get in at that stage, the investigatory stage.

MR. TOWERS: We're entitled to get in at this investigatory stage because the results of this investigatory stage result in the deprivation of property.

QUESTION: Well, are you entitled to get in at the investigatory stage in a criminal case?

MR. TOWERS: Not that I know of, Your Honor.

QUESTION: Well, that ends up with jail.

QUESTION: Now, an analagous situation would be you would be entitled to get in at the investigatory or the preliminary stage of a parole revocation. Those cases are analogous. Wolff v. McDonnell I believe is one of the cases --

QUESTION: You mean when the prosecuting authority is assembling its evidence you're entitled to be there?

MR. TOWERS: When the prosecuting authority is incarcerating an individual because he believes there is reasonable cause to establish that the individual has violated his parole, that individual is entitled to a hearing at that time and to know what evidence the

prosecuting authority is relying on during that preliminary interim, before there's a final hearing.

QUESTION: Before the hearing?

MR. TOWERS: Yes.

QUESTION: The preliminary is merely to find if there is probable cause.

MR. TOWERS: And the individual --

QUESTION: And you say you're entitled to be there at go?

MR. TOWERS: In a parole revocation case, yes.

QUESTION: When it starts, you're entitled to be there?

MR. TOWERS: We're entitled to be there when a decision is being made as to whether or not the parolee will be incarcerated pending a full hearing on the question of whether or not he violated parole, yes, that is the case.

QUESTION: Mr. Towers, may I ask you two questions. First, what about your opponent's argument that if you try to hold a hearing in this short period of time, assume the fact that everybody could meet the deadlines in the statute, the 60 days and so forth, in the trucking industry particularly a driver is all over the country and it's hard to get the witnesses together

on short notice in a particular place.

Is that -- is it feasible to think in terms of an actual adversary hearing on that short notice?

MR. TOWERS: I think it is, Your Honor. The other statutes administered by the Secretary of Labor provide, I think in the Mine Safety, a ten day period before the hearing is held.

We could accumulate our people during that period of time.

QUESTION: But your people are apt to be all over the country, whereas the miners I suppose all work in --

MR. TOWERS: Not actually all over the country. In most trucking situations now, they make 500 mile runs and return. There are some long haul drivers that do go cross-country, and that could present a problem, yes.

But I don't think that the fact that there could be a problem in having a hearing should diminish our opportunity --

QUESTION: My second question is at the time you get the finding of reasonable cause, does the Secretary also give you some kind of a summary of findings, identifying the people on whom he relied?

MR. TOWERS: No, Your Honor.

QUESTION: You still get nothing more than the basic notice in the first instance?

MR. TOWERS: That's correct. In this particular case, in the face of having won this in an arbitration, a finding by the grievance panel that this man committed an act of dishonesty and was wrongfully discharged, we got a finding back from the Secretary of Labor that said: The contention of the employer that this man committed an act of dishonesty is conjecture. That's all we got.

Now, there is APA discovery available during the 30 days that passes from the time that you file exceptions to the decision of the Secretary of Labor until you get to hearing. So you can get 30 days of expedited discovery before the final hearing. But you certainly don't have any of that information available to you during the investigatory interim.

And you really don't even get the witnesses during discovery, because the Secretary of Labor takes the position he does not have to disclose the names of those individuals under the informant's privilege until they have testified at the hearing, the final full hearing.

QUESTION: Perhaps I should ask you opponent, but what is the reason for not disclosing the names of

witnesses if they're going to have to testify anyway? I mean, what is he protecting them against if you're going to have to rely on them later?

MR. TOWERS: They invoke the informant's privilege and say that these people might be retaliated against by a hostile employer.

QUESTION: Before they have a chance to testify?

MR. TOWERS: Before they have a chance to testify.

QUESTION: In which event they'd have the same statutory protection that this man has.

MR. TOWERS: They would have the same statutory protection.

QUESTION: Yes.

MR. TOWERS: An additional point that I would like to make in connection with the risk of error is the dual role of the investigator. He functions as both a prosecutor or an agent of the prosecutor and as a decisionmaker or as an advisor of the decisionmaker.

The guidelines used by the Secretary of Labor's investigator are the same guidelines used under the Occupational Safety and Health Act, Section 11(c), which is substantially the same as 405 except in the remedy.

It prohibits the same activity. 405 was passed simply to extend the 11(c) protection to truck drivers who were covered by DOT and exempt from OSHA. However, under Section 11(c) once the investigator concludes that there is reasonable cause to believe that the Act has been violated, that is 11(c), the Solicitor goes into federal district court and files suit and the employer gets a hearing.

Using that same procedure, investigative procedure which focuses toward prosecution, the investigator conducts an investigation in which he attempts to resolve credibility issues, resolve fact issues, make a recommendation to his regional supervisor as to whether or not he believes the Act has been violated.

So we have a situation in which the investigator functions as the prosecutor. And I would point out by analogy that this is prohibited under the Administrative Procedure Act, 5 U.S.C. 554(d), in which the investigator is specifically directed not to participate or advise in the decisionmaking process.

This goes to the question of is there a risk of error, and --

QUESTION: You don't assert that that's applicable here, 554?

MR. TOWERS: I don't suggest that the APA is applicable.

QUESTION: You're saying by analogy.

MR. TOWERS: I'm offering it by analogy, and the analogy is offered to point out that Congress has recognized that there is a substantial risk of error in combining those functions.

There is a substantial risk of error evidenced by the fact that the investigator and then the supervisor and the regional administrator make decision which is contrary to a prior arbitration award which is based on an adversarial hearing. That certainly raises significant questions as to whether or not there is error in the investigator and regional administrator's decision if there is reasonable cause when it upsets a prior arbitration award.

This statute need not, however, be declared unconstitutional by this Court. The statute is hearing neutral during the investigative stage. There is no provision in the statute which provides that the employer may not have a hearing during the investigative stage and before the order of preliminary reinstatement.

There is nothing in the statute that says he must, either. The court below recognized this and said

that the statute is only unconstitutional to the extent that it mandates preliminary reinstatement without a prior evidentiary hearing.

This Court in Califano versus Yamasaki recognized that a hearing neutral statute can have read into it a hearing requirement. It had a similar fact situation to the extent that the issues to be resolved in the hearing or resolved by the decisionmaker were inherently subjective, were inherently controversial, and therefore an evidentiary hearing was necessary.

QUESTION: But the Secretary -- the statute would not prevent the Secretary from providing hearings before?

MR. TOWERS: No, it would not.

QUESTION: So the only issue is whether the statute as applied in this case is unconstitutional.

MR. TOWERS: The Secretary in his new regulations has not called for any kind of a hearing. He's continuing on the same guidelines and procedures.

QUESTION: Well, I know, but he could under the statute.

MR. TOWERS: He could under the statute. And in fact, under a similar statute, the Mine Safety Act, when it was declared unconstitutional for the same reason, the Secretary instituted hearing procedures. It

was a hearing neutral statute as well.

So I suggest to the Court that this case can be resolved without declaring the statute unconstitutional by simply finding and ruling that the Secretary must institute procedures which meet the minimum requirements of procedural due process.

For all of these reasons, I suggest to the Court that the decision of the court below was correct and ask that it be affirmed.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Towers.

Mr. Pincus, do you have something more?

REBUTTAL ARGUMENT OF

ANDREW J. PINCUS, ESQ.,

ON BHALF OF APPELLANTS

MR. PINCUS: A few points, Your Honor.

I first want to address the question of the information that's available to the employer during the investigatory process. Although the statute doesn't require it, there is nothing -- first of all, there is nothing in the record to indicate what happened here.

But the Department informs us that its practice is to provide employers with the substance of the information that the Secretary is relying on for his reasonable cause finding, so that they have a chance to

respond to it. We don't take a position that -- so we agree that that information can be provided.

With respect to the names of the witnesses, however, we think it's important that those names not be disclosed until the time of testimony, because there is a genuine danger that those people will be intimidated and that they will not testify, and we think that they should be protected until -- under the rationale that the Court has used in its FOIA cases, until the time comes when they take the stand, so that the employer won't have an opportunity to tamper with the proceeding.

Now, about the question of when the hearing is required, Roadway relies on some other statutes that don't require -- that don't have preliminary remedies, for the proposition that there is no need for a prior hearing here.

But the Congress has made a different choice. Congress has created a preliminary remedy here, and that's the reason why there's no -- that's the reason why this case is different and the reason why this Court's decisions in cases like Loudermill are applicable here, because Congress has made a decision that a hearing should be held afterward, and the due process clause does not invalidate that decision because

the employer is provided with notice and an opportunity to respond, a reasonable cause finding, and the subsequent evidentiary hearing.

QUESTION: Well, don't hang too much on Congress. Congress just said a hearing. Congress didn't say what kind of a hearing, did it? Congress no more said your kind than it said the kind that your opponent proposes.?

MR. PINCUS: Congress devised the procedure whereby the hearing is held after the reinstatement of the employee.

QUESTION: That's right.

MR. PINCUS: It didn't specified an evidentiary hearing at that time.

QUESTION: It didn't specify it, but it didn't say not, either. I mean, really you can't say that Congress -- this is much more the Secretary's decision than Congress' decision, isn't it, that we're disputing here?

MR. PINCUS: Well, Your Honor, no, we interpret the statute as being quite clear that at the conclusion of the investigatory process that's when reinstatement occurs, and that the adversary process starts afterwards, while the employee is back at work. And we think that that's the determination that Congress

made.

QUESTION: Is that in the statute, the Secretary is going to be giving hearings before reinstatement?

MR. PINCUS: We think that Congress' determination was that the hearing should be post-reinstatement, not pre-reinstatement.

QUESTION: So the answer is yes to my question?

MR. PINCUS: Yes.

QUESTION: And why is this case not moot?

MR. PINCUS: Your Honor, we think that it falls within the capable of repetition, yet evading review exception we discuss in our reply brief. Roadway is a big trucking company.

QUESTION: Yes.

MR. PINCUS: And just with respect to Appellee's investigatory-adjudicatory argument, we think the Court's decision in Withrow against Larkin makes clear that there's no due process problem in this case.

That's all I have, Your Honors.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Pincus.

The case is submitted.

(Whereupon, at 2:54 p.m., oral argument in the

above-entitled case was submitted.)

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:

#85-1530 - WILLIAM E. BROCK, SECRETARY OF LABOR AND ALAN C. McMILLAN, REGIONAL ADMINISTRATOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,

Appellants V. ROADWAY EXPRESS, INC.

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

BY Paul A. Richardson

(REPORTER)