ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: PITTSBURG & LAKE ERIE RAILROAD COMPANY, Petitioner, V. RAILWAY LABOR EXECUTIVES' ASSOCIATION,; and PITTSBURG & LAKE ERIE RAILROAD COMPANY, Petitioner, V. RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

CASE NO: 87-1589 and 87-1888

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ALDERSON REPORTING COMPANY
20 F Street, N.W.
Washington, D. C. 20001
(202) 628-9300

IN THE SUPREME COURT OF THE UNITED STATES

PITTSBURGH & LAKE ERIE RAILROAD COMPANY, Petitioner, v. RAILWAY LABOR EXECUTIVES' ASSOCIATION, Respondent;	No. 87-1589
and	
PITTSBURGH & LAKE ERIE RAILROAD COMPANY, Petitioner, v. RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL., RespondentS.	No. 87-1888

Washington, D.C.
Wednesday, March 29, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

RICHARD L. WYATT, JR., Washington, D.C.; on behalf of Petitioner.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

JEFFREY P. MINEAR, Asst. to the Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae

JOHN O'B. CLARKE, JR., Washington, D.C.; on behalf of Respondents.

C O N T E N T S

P R O C E E D I N G S

11:48 a.m.

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-1589, Pittsburgh & Lake Erie Railroad Company v. Railway Labor Executives' Association, and No. 87-1888, Pittsburgh & Lake Erie Railroad Company v. Railway Labor Executives' Association.

ORAL ARGUMENT OF RICHARD L. WYATT, JR.

ON BEHALF OF PETITIONER

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

Seventeen months ago the Pittsburgh & Lake Erie Railroad decided to go out of the railroad business. The simple undeniable fact in this case is that after years of losses and a fruitless search for a buyer, it finally found a buyer willing to buy its assets.

Deciding to exercise its fundamental right to go out of business, it entered into an agreement to sell certain of its assets to Railco. Now, 17 months later, much against its will, the railroad is still in business and it's still losing enormous amounts of money. Over one --

QUESTION: Excuse me.

MR. WYATT: -- million dollars each month.

QUESTION: How fundamental is that right now,

to go out of business? Can the Interstate Commerce Commission prevent a railroad from going -- it can certainly prevent a railroad that stays in business from abandoning certain parts of its operations. Can the Interstate Commerce Commission compel a railroad to continue to serve if it really wants to go entirely out of business?

MR. WYATT: Your Honor, they cannot require them to serve indefinitely, as we indicate in the Fifth Amendment cases. I believe the Brooks-Scanlon case was a railroad case where the Interstate Commerce Commission tried to prolong the railroad from going out of business. There is a point at which a losing railroad has a right, even as against the ICC, to go completely out of business.

But Mr. Justice Scalia is correct, the ICC does have the authority to require that railroad to delay its exit from the industry. And that is exclusively the ICC's authority.

QUESTION: And that's theoretically all we're talking about here. A delay of exit, I suppose.

MR. WYATT: Well, at this point we are now talking about a 17-month delay in exit, which appears to stretch on endlessly. We are now talking about an interminable delay and we're talking about a specific

ICC order in this case, Mr. Justice Scalia, which said the immediate consummation of that transaction to Railco was in the public interest and it should have been done immediately.

Instead, what we have in this case now are two companion rulings from the Third Circuit Court of Appeals that hold that the company, while it was free to decide to go out of business, it could not do so until it completed the bargaining processes of the Act. And it also held that RLEA's strike, launched, as the district court said, to deliberately frustrate the terms of the ICC-approved sale, and for that purpose alone, that that strike could not be enjoined as a violation of the Interstate Commerce Act.

But, really, we believe three issues critical to the resolution of the issues this Court granted certiorari on. Those three issues are, first, the Interstate Commerce Act, the nature and scope of the Interstate Commerce Commission's exclusive and plenary jurisdiction in these transactions.

The second is the nature and scope of the Railway Labor Act's bargaining command, and it's command -- and its prohibition on unilateral action. Do those bargaining commands and do those prohibitions apply to ICC-regulated transactions?

We think there's a third critical issue. Depending on the resolution of the Interstate Commerce Act issue and the Railway Labor Act issue, it may not be necessary to reach it. But the third issue would be the accommodation issue. And that is if these two conflicting laws do -- if these two laws do apply in a way where there is a conflict, what is the appropriate accommodation of the two laws.

Turning first to the Interstate Commerce Commission issue, we think it's clear, and it's always been clear, that in the case of fundamental corporate transactions involving rail carriers the Interstate Commerce Commission has exclusive and plenary jurisdiction to approve or disapprove those transactions.

For instance, the exit of the Pittsburgh & Lake Erie Railroad from the industry. That was governed under Section 10901 or 10903 of the Interstate Commerce Commission. The purchase of assets by Railco, or the potential purchase of assets, that was governed under Section 10901 in this case.

Exit, entrance, sale of assets, in most cases are subject to the extensive regulatory framework of the ICC, and that's because Congress has repeatedly recognized that railroads are infused with the public

interest. And it's given the ICC a broad mandate to regulate railroads. It regulates the railroad system of this country in the public interest and under a standard of public convenience and necessity.

This transaction was regulated, as I've indicated, under Section 10901 in the ICC's order in Ex Parte 392.

But more than just regulating corporate transactions or the sale of assets, entrance and exit of new companies, the ICC has very large discretionary jurisdiction over labor interests. The interests of the Railway Labor Executives' Association in this case. Their interest comes from Section 10101(a), subsection 12, where they're charged by Congress with providing fair wages and suitable working conditions for the employees in the nation's rail industry.

And their interests and their discretion comes from further than that. Their discretion also goes back as far as the case of United States v. Lowden, this Court's decision in a discretionary transaction, this Court holding that the ICC had the discretionary authority to protect the interests of labor in the transaction to further labor peace and to improve the morale of the employees of the nation's railroads.

For 50 years beginning before the Lowden case

and continuing after the Lowden case, rail labor has regularly gone to the ICC and they've regularly gone to Congress and they've implored both, and usually been successful, to impose labor protective conditions in ICC-regulated transactions.

In this particular case, this transaction was governed under the ICC's order in Ex Parte 392. Rail labor participated fully and completely in the formulation of the policy of Ex Parte 392. They participated actively. They opposed what the ICC did in Ex Parte 392, but they were participants.

What they received from Ex Parte 392 was the right to petition the ICC in exceptional cases where they could demonstrate extraordinary circumstances in under 10901 and could show that their interests were truly being harmed by the transaction.

In this particular case, the Pittsburgh & Lake Erie transaction, rail labor never went to the ICC under Ex Parte 392 and tried to invoke its discretionary jurisdiction. Instead, rail labor went to the ICC and they went and said to the ICC, you should stay this transaction.

Why? Not stay it to look at the impact on labor, but stay it to give us, the employees, an opportunity to make a competing offer for this

railroad. We don't like the purchaser. We don't like Railco. We want to make our own offer. And we have an investment advisor, in fact, and he's going to offer an affidavit. And the affidavit of the investment advisor is in the record.

But from the very outset of this proceeding rail labor was insistent that they had a right, through the ICC process originally, to make an offer themselves to purchase the railroad. So, they invoked all sorts of ICC jurisdiction under Ex Parte 392.

But the primary reason for the invocation, as the filings indicate, was not labor protections, to protect these employees from the effects of the transaction. But, instead, was to say, "Give us an opportunity to buy the railroad."

The ICC in an order in this particular case denied rail labor's motion for a stay. They looked at the situation with the P&LE, understanding the economic realities of a sale transaction, the fact that the financing wouldn't last forever for the purchaser. They looked at the entire situation and said the P&LE is very weak, the P&LE is very sick. They are also essential to the national transportation interests. This transaction needs to be consummated immediately, and we will not stay it.

They did suggest to the RLEA that RLEA could come before them after the fact -- which is exactly what the 10505 exemption procedure requires -- and orally they could come before them and raise all claims. They could even raise their claim to have the transaction reversed. And they ordered P&LE to maintain its corporate existence.

QUESTION: Well, Mr. Wyatt, the Solicitor General, of course, takes a view somewhat different from yours and says it's true that we should not interpret the Acts here to preclude the railroad from going out of business but that the RLA can be reconciled with the statues governing the ICC by requiring some limited effects bargaining.

Are you going to address yourself to that argument?

MR. WYATT: Yes, your Honor. I was going to address that now. I do think, though, that the statutory scheme of the Interstate Commerce Commission comes into play in evaluating any duty to bargain over effects that might arise in a transaction. And I think it's important for the Court to realize and focus on, contrary to the Solicitor's approach, how extensive those protections are and how powerful the ICC is and how vigilant it has been to protect the interests of

rail labor employees from just the effects of these corporate transactions.

That has been their primary role with respect to rail labor for 50 years. And Congress has recognized it.

QUESTION: Does the ICC, in your view, clearly have power to cover all the effects, if you will, of the termination? Severance pay and so forth?

MR. WYATT: Justice O'Connor, I think the ICC has far more power -- they certainly have the power to cover severance pay and traditional effects. They even have the power, we would submit, to effectively compel us to look at RLEA's purchase offer. They even have the power to impose the successorship obligation.

They have a very broad conditioning power that is a fundamental power, and they can simply impose upon us whatever conditions as a condition of our exit from the industry.

QUESTION: Mr. Wyatt, do I understand your position to be that you -- given the fact that under your view the ICC has such extensive power and has historically imposed labor conditions and all the rest, did you have no duty to bargain over the protective provisions that the RLEA asked for?

MR. WYATT: That's correct. In the case of an

ICC-approved transaction, Justice Stevens, once that transaction process goes forward or is initiated, the effects -- whatever RLEA wants by way of effects, it has to present that petition to the ICC.

QUESTION: Through the ICC.

MR. WYATT: To the ICC. We have to know -- in this case P&LE intended to honor its labor agreements as it understood them to exist. There is no question that we were intent on honoring the terms of the labor agreements.

But we have to know with some certainty when we enter into these corporate transactions, when we go to a buyer and say, would you like to buy us, would you like to buy our assets -- we have to be able to tell them what our liabilities are at that point in time.

QUESTION: You do acknowledge that -- and I don't see that this is entirely consistent. You do acknowledge that if anything you were doing in connection with the sale violated your labor agreement, then the provisions of the Rail Labor Act would apply and it would be a major dispute and would have to go through that mechanism.

MR. WYATT: Mr. Justice Scalia, I do not acknowledge that.

QUESTION: You don't?

MR. WYATT: That fact is just not present in this case.

QUESTION: Okay.

MR. WYATT: Everyone has agreed from the outset in this case that there is no violation of the labor agreements as they exist.

QUESTION: Suppose there were, suppose your contract said the company will not go out of business for 20 years. That's what your collective bargaining agreement says. And then you try to sell within the 20 years. What -- what would be -- do you think that the ICC's approval would be an end of the matter?

MR. WYATT: I think the ICC -- I think the ICC would have jurisdiction and would have discretion. Now, how the reconciliation of a -- how the ICC would reconcile an explicitly guaranteed contractual right and what they view to be the needs of this country in the national transportation system, I'm not sure. They've suggested -- and, in fact, they've said -- in the FRVR case --

CHIEF JUSTICE REHNQUIST: We'll resume at 1:00 o'clock.

(Recess.)

CHIEF JUSTICE REHNQUIST: We'll resume the argument where we left off, Mr. Wyatt.

MR. WYATT: Thank you, Mr. Chief Justice and may it please this court:

QUESTION: Let me ask you, if I may. Is it your contention that the decision -- P&LE's decision to sell was not what in the words of the RLA is some respecting rates of pay, rules or working conditions that shouldn't be altered by the carrier?

MR. WYATT: Yes, that's our position. Our position is that the decision to sell itself is a non-bargainable subject, it's not included within the statutory definition of rates, pay, rules or working conditions.

And we rely there, Mr. Chief Justice, on this Court's reasoning in First National Maintenance where this Court faced a similar claim under the National Labor Relations Act that a decision to partially close a business was part of the phrase "terms and conditions" of employment. A much broader phrase, a bargaining command.

And this Court held, after a lengthy analysis in First National Maintenance that indeed the decision was not part of terms and conditions of employment.

QUESTION: Well, the court of appeals agreed with you.

MR. WYATT: Well, the court of appeals appeared

to agree with us.

QUESTION: Yes, well --

MR. WYATT: The court of appeals --

QUESTION: -- the court of appeals said that the decision to sell wasn't bargainable.

MR. WYATT: The court of appeals isolated the decision from any -- the court of appeals left us with the right to make the decision in the boardroom but not the right to go forward with the decision.

We think what First National Maintenance fairly read says is that not only do you have the right to make the decision and the decision is not bargainable, but that you have a right to implement the decision and that you don't have to exhaust a bargaining duty as to effects, even if you could define -- if you define what the effects are, that that duty does not have to be exhausted.

QUESTION: Therefore there should have been no status quo. There should have been no injunction for bidding the sale.

MR. WYATT: It's exactly correct. I read --

QUESTION: Although perhaps you did have a duty to bargain about the effects.

MR. WYATT: Well, we -- of course, our first position here is that the effects were within the

exclusive jurisdiction of the Interstate Commerce Commission in this case.

Our second position is that these particular effects notices -- and I would invite the Court to focus on these notices -- that under this Court's authority and under the authority of the lower courts these notices themselves, we had no duty as to them since they were attempts to undo the transaction. That the duty to bargain as to the effects depends on the nature of the effect over which bargaining is sought.

In this case, what RLEA wanted was this carrier to agree to renegotiate the sale transaction with Railco to provide for a successorship agreement. So we take the second position that these notices themselves were non-bargainable in this case.

QUESTION: But how about the necessary consequences of your decision to sell? Didn't that mean a change in working conditions or rates of pay or rules for some of the employees under the successor?

MR. WYATT: Mr. Chief Justice, it absolutely meant no change for those employees as long as they were in our employ. We were honoring all contractually agreed upon rates of pay, rules, and working conditions.

These contracts, as they existed the day we decided to go out of business, provided no guaranteed

level of employment. They provided no job guarantees at all. They merely provided that when an employee came to work, if there was work -- when an employee came to work, these were the rates of pay, rules, and actual agreements that covered that work.

So, we weren't changing -- P&LE was not changing any term of the agreement, they weren't violating any term of the agreement, by simply going out of business. And whatever the successor's obligations are as to RLEA and those P&LE employees the successor hired are governed, we believe, under this Court's decisions in Burns Detective and Fall River Dyeing.

I suppose that even if the United States is right that you had to bargain over effects, I take it that the United States would say that you may effectuate the transaction as soon as you want.

MR. WYATT: I believe that is --

QUESTION: And then surely any bargaining over effects is gone.

MR. WYATT: That would be the case in a company going out of business. Once we effectuate the decision, as a practical matter, P&LE has no operating business.

But that is not to say in this particular case that bargaining -- for instance, bargaining could not have been meaningfully conducted. There was a

three-month gap -- if in fact this Court found in effect bargaining obligation. Typically between the time a decision is made, a sale contract entered, there is a period of time before the transaction closes, during which bargaining could occur.

And in this case, P&LE would have continued its bargaining obligation after the sale because P&LE intended to operate, albeit not as a railroad, but as a company leasing rail cars and as a company managing real estate assets. And it would have had some employees covered under the old Brack agreement in this case who would have worked as clericals.

QUESTION: Would the new company have a successor obligation to bargain?

MR. WYATT: As I indicated, Justice Kennedy, I think that's covered by this Court's decisions in the Burns case. I believe the successor obligation would depend on how many of the P&LE employees it hired. And if it hired a majority of its employees from the P&LE work force, it would have a successor obligation. And, in fact, in this case it contemplated doing that and had already started negotiations with rail labor for new collective bargaining agreements covering those employees that it would hire.

QUESTION: Would that consider -- would that

include some matters that were covered by bargaining over effects?

MR. WYATT: The successor employer's obligations?

QUESTION: Yes.

MR. WYATT: No, your Honor. The successor really has no obligation to bargain over the effects. The seller -- something going out of business has the effects obligation. The successor enters the world, as any new employer. Only in this case he has a union and he has a statutory bargaining obligation. But that's by virtue of how he hires and the fact that the entity -- employing enterprise is basically a railroad going forward only with new employees.

QUESTION: Well, they could make the same claims that they were making against your company -- made against your company. They would be effects claims. They could make the very same claims against the new company, they just wouldn't be effects claims.

MR. WYATT: That's absolutely correct, Justice Scalia. They could simply go to the new company and say, "Here is the contract like we want. We want to -- you have hired the majority of our employees and we want a new contract, and we want all these provisions in our new contract to protect us from the employer you sell

to."

But the simple fact of the matter is we had no bargaining duty under this Court's decision in First National Maintenance. We don't believe we had an effects duty at all because of the unique presence of the Interstate Commerce Act.

But regardless of whether we had an effects duty or not, we did not violate the status quo in this case, as the status quo has come to be known, by going out of business. Simply put, we were not changing rates of pay, rules, or working conditions. And it would be -- I think it would create an unworkable situation if every time a management transaction were going forward, as in this case, a non-bargainable decision, if RLEA could serve a vast panoply of notices allegedly addressed to effects or even directly addressed to effects --

QUESTION: Mr. Wyatt, I guess it is conceivable that the collective bargaining agreement might have contained some provisions dealing with the effects of going out of business.

MR. WYATT: Justice O'Connor, the collective bargaining agreement had provisions dealing, as do most, dealing with furlough and dealing with pay when one is on furlough status.

QUESTION: Well, the point I'm trying to make is it is theoretically possible that a collective bargaining agreement could cover some aspects of the effects of going out of business.

MR. WYATT: Yes, it is. I think --

QUESTION: And the collective bargaining agreement in this case is not part of the record I understand.

MR. WYATT: The collective bargaining agreement, you're correct, is not part of the record.

QUESTION: So no matter whether we agree with you or not, it has to go back below to determine whether the collective bargaining agreement has something to say about this?

MR. WYATT: Not at all, Justice O'Connor. It has been stipulated through and agreed throughout -- and I believe even the Third Circuit found -- that what P&LE was proposing to do did not in any way violate the collective bargaining agreement.

P&LE doesn't have to look to the collective bargaining agreement in this case for its right to go out of business. P&LE's right to go out of business is a fundamental management right, as we argue in our brief. RLEA --

QUESTION: Yes, but if your bargaining

agreement said that if we go out of business here's some things we have to do, why, you would have to do them.

MR. WYATT: That's correct. But RLEA's remedy is --

QUESTION: But it's stipulated that that isn't the case here?

MR. WYATT: It's stipulated throughout that there is no violation of the agreement --

QUESTION: Yes?

MR. WYATT: -- by P&LE going out of business.

QUESTION: Okay.

MR. WYATT: If RLEA believed the agreements were violated by P&LE going out of business in the way it had chosen to do so, or if they agreed -- they believed that P&LE had ever agreed not to go out of business, their remedy would have been to file a grievance saying P&LE is breaching --

QUESTION: Then have it decided by a board.

MR. WYATT: That's correct. Then say P&LE is breaching its collective bargaining agreement. In this case RLEA says the statute, the Railway Labor Act -- not the contracts -- the Railway Labor Act itself operates to keep P&LE from going out of business and that is just totally inconsistent with this court's rationale in Darlington and First National Maintenance.

If there are no further questions, I'd reserve the remainder of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wyatt.

Mr. Minear.

ORAL ARGUMENT OF JEFFREY P. MINEAR

AS AMICUS CURIAE

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

P&LE and its unions are in sharp disagreement about virtually every aspect of this dispute. And perhaps for that reason this case seems somewhat more complicated than it needs to be.

The United States submits that neither party is completely correct and that this case turns on three critical questions.

QUESTION: That makes it even more complicated.

(Laughter.)

MR. MINEAR: Perhaps, your Honor. The questions we think that are at the bottom of this dispute, however, are, first, does the RLA control the bargaining rights and obligations of these parties. And we submit the answer to that is yes.

Second, does that statute require P&LE to bargain with its employees upon request about the effects of its decision to go out of business? Here

too, the answer is yes.

And, third, does P&LE's obligation under the RLA to maintain rates of pay, rules, and working conditions during the bargaining process automatically require the railroad to preserve its employee's jobs until bargaining is completed? We submit that the answer to that question is no.

QUESTION: What is the government's position, Mr. Minear, with respect to whether or not the district court should have entered a status quo injunction in this case?

MR. MINEAR: The problem here, your Honor, is --

QUESTION: Does it have a position?

MR. MINEAR: I believe it does have a position, but it's complicated --

QUESTION: What is that -- what is the position?

MR. MINEAR: When this case arrived at the district court, there was a request for a status quo injunction, but it wasn't clear what exactly the status quo was. We believe that the RLA -- or, the unions in this case, could legitimately ask that the rates of pay, rules and working conditions shall not be altered by the carrier during the effects of bargaining process.

However, I think the unions sought something broader than that. They wished the absolute

preservation of their jobs. We believe the district court erred in requiring absolute preservation of its jobs but could have entered an injunction to preserve the status quo which would include any terms or conditions of the employment.

QUESTION: Could the district court have, as it did here, forbade P&LE from going ahead with the sale?

MR. MINEAR: I think only in one circumstance, your Honor. And that is if the collective bargaining agreements themselves clearly prohibited the sale from going forward.

QUESTION: And if the collective bargaining agreements didn't prohibit that, then it should not have prohibited the sale?

MR. MINEAR: We think not.

QUESTION: So the judgment here in your mind should be reversed, at least to that extent?

MR. MINEAR: At least to that extent it should be reversed. Yes, your Honor.

QUESTION: And I take it that if they have to bargain over effects, if as soon as they close the transaction, the bargaining duty is over?

MR. MINEAR: Yes, that's right, your Honor. But I think there's two factors to bear in mind with respect to that. First of all, there is, as P&LE

pointed out, a lag period between the time of announcement of the closure and the actual closure. And, secondly, the fact that the unions are disadvantaged by this simply reflects the fact -- the rather late in the day come to seek to change their agreements to reflect additional job security.

All of these things are matters that could have been negotiated months or even years ago. And so, in fact, although the unions might have little bargaining power here, it simply reflects the fact they've not raised these issues before.

QUESTION: Well, the railroad just has to bargain in good faith. But it doesn't have to wait on -- it doesn't have to delay the closing.

MR. MINEAR: That's correct, your Honor. As I said, there are three questions here. I'd like to turn to the first of those at this point.

We think it is apparent that the RLA, rather than the Interstate Commerce Act determines the bargaining rights and obligations of these parties. Since 1926 the RLA has been the basic source for defining the bargaining obligations of railway management and labor.

Section 2 of that statute provides that both labor and management must exert every reasonable effort

to make and maintain agreements with respect to rates of pay, rules and working conditions. Section 2 further provides that no carrier shall change the rates of pay rules or working conditions as embodied in the agreements except in the manner prescribed in Section 6.

Section 6, which controls the resolution of these so-called major disputes, requires that a party seeking to change a collective bargaining agreement must give 30 days notice of the intended change, and further provides that rates of pay, rules and working conditions shall not be altered during the bargaining process.

QUESTION: Do you think the notice that was served by the unions in this case was proper in all respects and just covered effects bargaining as you see it, or did it go beyond that?

MR. MINEAR: Well, that's a difficulty here that I don't think the United States is in the best position to address. What the Section 6 notice has included in this case was a request for perpetual employment in that sense. This --

QUESTION: Is that proper?

MR. MINEAR: We believe that this could well constitute bargaining over the decision itself rather than simply effects decisionmaking. In a case where the railroad were a term that sought to be bargained --

would in effect prevent the transaction from going forward, it may extend beyond effects bargaining.

QUESTION: Mr. Minear, you may be right about which of these two statutes triumphs here but it seems to me a closed question. You're essentially making the argument that the specific governs the general. That --

MR. MINEAR: That's correct.

QUESTION: -- I think the Railway Labor Act deals with labor relations. But it depends on how you slice -- how you slice the cake. You could say that the Interstate Commerce Act deals more specifically with the consequences of going out of business. If you choose to look at this as a going out of business problem, the Interstate Commerce Act is the more specific statute and should govern. If you choose to look at it as a labor problem, the Railway Labor Act is the more specific and should govern.

I don't -- I don't have any clue as to why you should look at it as the one rather than as the other.

MR. MINEAR: Your Honor, I think there's a couple of points I'd like to say in response to that. First, we're talking about a particular type of transaction here. A Section 10901 transaction. Now, there are other types of transactions covered by the ICA where the result could conceivably be different. But in

this we're only looking at a 10901 transaction.

Secondly, this is a case where the transaction itself has been exempted from ICA regulation. What Section 10505 of the ICA gives the ICC is the power to exempt a transaction from its scrutiny on the basis that there is no need for the application of a particular provision of the ICA.

Now, if they've made that determination, then it seems somewhat difficult for us to argue that the ICA would in fact supersede another statute on the books. So --

QUESTION: Well, what if the ICC had imposed specific requirements in connection with the transaction?

MR. MINEAR: That is a more difficult question. I would point out that question is not here, but there's certain matters that the court may consider.

QUESTION: Well, what would your position be then?

MR. MINEAR: I'm not sure I'm authorized to take a position for the Solicitor General on that particular point. But I would point out that first of all there is no express textual basis for --

QUESTION: But it comes close to that if the ICC thinks about whether they should impose conditions and determines that in this case they shouldn't. Then

you think, in those circumstances, the RLA trumps.

MR. MINEAR: Your Honor, I think certainly there's a strong basis for that inference, based primarily on the fact that Section 10901 doesn't have any express preemptive language. You can compare that to Section 11341 which does have an express preemptive provision in the case of mergers and consolidations.

In those cases, given the difference between those two statutes, that might well reflect a Congressional intent to treat these two types of transactions differently. Again, since this is an accepted -- exempted transaction, we think that the case is somewhat easier here.

In this case, the railroad announced its decision to go out of business and its unions sought to modify their labor contracts to soften the blow. They invoked the RLA's collective bargaining mechanism for that purpose. We believe that the unions could properly invoke the RLA bargaining rights in these circumstances and that the railroad could not enjoin them from doing so. But that does not mean that RLA had a duty to bargain about any and all aspects of the transaction.

As the court of appeals correctly recognized and the unions apparently conceded below, the unions have no right to bargain about the actual decision to go

out of business. The RLA, which specifies and specifically identifies the subjects of bargaining, does not require the railroad to bargain about business decisions which have always been treated as matters of managerial prerogative. But bargaining about the effects of the business decision is a different matter.

The RLA, by its terms, requires the railroad to bargain about rates of pay, rules and working conditions, and nothing in the RLA prohibits the union from proposing changes with respect to those matters in response to a railroad's business decision.

Two points, however, deserve special emphasis here. And I think I've touched on them both already. First, the RLA's limitation on subjects of bargaining reflects Congress' judgment that management must be free from the constraints of the bargaining process to the extent necessary to exercise business judgment. But it follows that a union is not entitled to engage in effects of bargaining for the improper purpose of thwarting an employer's exercise of that judgment.

And, second, the carrier's duty to bargain --

QUESTION: Excuse me. Would your -- your principle that the employer can go out of business despite the bargaining obligation, would that extend to the proposition that the employer can sign a sales

contract despite the existence of the bargaining obligation? Specifically, the union hears that there's a deal in the works. So, it comes in and says we want to bargain about post-effects. Okay?

The deal hasn't yet been signed. Would the -- Would the railroad violate its good faith obligation to bargain about after-deal effects if it went ahead and signed the agreement that in fact did not impose these protections?

MR. MINEAR: I think not, your Honor, although that is a tougher case. Typically effects bargaining extends to questions of severance pay, job security, and the like. Now, obviously your question contemplates the possibility of a term of proposal that would in fact provide that protection as a part of the transaction. Although I think that's a closer question, I still think that would fall within the traditional business judgment of the railroad and it would not be a rate of pay rule or working condition as that term is used in the RLA.

QUESTION: It's sort of hard to consider it good faith bargaining if even at the moment that you're talking to the unions about whether these protections should be there you're signing a deal that doesn't contain them.

MR. MINEAR: Well, it's a question of whether

or not this is a mandatory subject of bargaining. And if it's not a mandatory subject of bargaining, then, of course, the railroad can go forward and take the action. I admit that that is a closer question, but the government would believe that that would not be a mandatory subject of bargaining.

This brings us to the most important issue in this case, and that is P&LE's status quo obligations. The court of appeals broadly held that if a union serves a Section 6 notice that proposes changes in the collective bargaining agreement, Section 6 prohibits the railroad from taking actions adverse to labor even though such actions would be permissible or authorized under the existing employer/employee relationship. We believe that that is incorrect.

The RLA is concerned, as I said before, with the formation and maintenance of agreements concerning rates of pay, rules and working conditions. And Section 6, which sets forth the process for the change in such agreements, provides the railroad must continue to honor its existing obligations with respect to those subjects during the bargaining process. But it does not prevent the railroad from taking actions that are authorized under existing collective agreements or through the understanding of the parties, as reflected in

established work practices.

Indeed, if a railroad were precluded from taking such actions, then many existing agreements and implicit understandings would be meaningless. For example, a union could always thwart a railroad's exercise of a contractual right to take future action by simply filing a Section 6 notice before the action is taking and invoking Section 6 status quo requirement. Plainly, the RLA was not intended to produce that result.

Instead, existing terms and conditions of employment are part of the status quo. We believe that this is the only position that is consistent with Section 6's language and the legislative history.

We believe that this position is also consistent with this Court's decision in Shoreline. The question there was whether the collective bargaining agreements were the sole source for determining working conditions. The Court held that one must look as well to implicit understandings, as expressed in the actual on-the-job practices.

The Court did not hold that the railroad must preserve jobs apart from the express or implicit understandings that define and condition the employment relationship. It viewed those as a part of the status quo.

Our interpretation, in addition to being consistent with the RLA's language and legislative history and this Court's precedence, also furthers the RLA's fundamental policy of encouraging the formation of agreements that specify in advance the rights of management and labor in the face of future contingencies.

Furthermore, it avoids the possibility of an erosive taking of an insolvent railroad who would be forced to continue its operations against its will.

In this case, as P&LE indicated, the collective bargaining agreements are not before the court, and the parties have not established the past practices with respect to reductions in work force. If P&LE's unions have already negotiated applicable job security arrangements or certain severance benefits are an established work practice in these circumstances, then the unions are permitted the continuation of those arrangements or benefits during the bargaining process.

But, if, on the other hand, the agreements and practices authorize work force reductions without such protections, then that is the status quo.

And if the parties have differing interpretations of the agreements and past practices, then their disagreement is subject to resolution under the RLA's so-called minor dispute provisions which call

for binding arbitration of such questions.

I think it's important to note that binding arbitration can even go to the question of whether there is or is not a major or minor dispute. This is something that is indicated in Section 3 Second. So, in fact, the adjustment board can provide complete relief in these circumstances and also can make some of these determinations that advance to the courts.

At this point the -- our brief, of course, was filed before the unions filed theirs. And we, of course, left open the question that there was a dispute over the collective bargaining agreement. P&LE now suggests that perhaps they agree on what the terms of the collective bargaining agreement are.

QUESTION: Well, at least no one has claimed that they're violated. They haven't gone to an adjustment board.

MR. MINEAR: That's right. What the unions seem to be arguing is that there is a change in the nature of the agreements. I'm not sure what that term means. Perhaps that's another way of saying that there is a violation of the agreement. But if there is no violation of the agreement, it's hard to see how there would be either a major or a minor dispute in these circumstances.

QUESTION: Mr. Minear, can I ask you a question that is related to that? I'm sorry the ICC is not here. They would assert that whatever they said would govern, correct? Contrary to the position that you've taken.

MR. MINEAR: That's correct.

QUESTION: If the ICC -- which you say shouldn't even be here anyway -- had their way, if they said that a railroad can get out of business, it can get out of business and all the labor consequences are resolved in its judgment.

Do you know if they would take the position that -- well, let me -- do the labor protective provisions that the ICC is allowed to include, do they embrace labor protective provisions that merely consist of the obligations that the company has under its existing contract? That is, suppose this contract said that if I go out of business I will retain the employment of everybody who -- my successor will retain the employment of everybody who is here, would the ICC feel authorized to insert that as one of the labor protective provisions?

MR. MINEAR: Their labor protective provisions are defined in Section 11347 which have a long history and they incorporate some of the notions and past

understandings in the railroad business. One of the things that 11347 says is that it looks to a separate section, the Rail Passenger Act, to define in part what the collective provisions are.

That statute in turn says that collective bargaining rights are preserved. It doesn't say "agreements" as I recall, but it talks about rights. So I think there is some ambiguity of whether the ICC would believe that the collective bargaining agreements themselves are preserved or only the collective bargaining in --

QUESTION: Well, what if the collective bargaining agreement would give the employees no rights upon the sale? May the -- I thought the ICC could nevertheless impose labor protective --

MR. MINEAR: That is correct. They can do so in this transaction.

QUESTION: Even though the collective bargaining agreement isn't violated at all.

MR. MINEAR: Yes, that is right. The ICC does have the power to impose collective bargaining -- or, to impose labor protective provisions. That was something this court said in its Lowden decision, and it's something that's covered in Section 10901 transactions. The ICC's authority, however, is discretionary. It's a

matter of --

QUESTION: Well, the ICC isn't here, but the company certainly is and it is pressing the ICC position. And I haven't heard a whole lot from you -- you won't -- you won't express an opinion about some of the questions that --

MR. MINEAR: Well, I --

QUESTION: -- that I would think is necessary to decide whether the ICC position is correct or not.

MR. MINEAR: Well, I'd be happy to answer --

QUESTION: Well, suppose you -- well, you wouldn't -- suppose the ICC imposes some labor protective provisions, all that it thinks are necessary. Must a company then bargain with the union over other and different ones?

MR. MINEAR: I indicated before I think that's an unsettled question, and that's a question where I can give you the views of myself standing at the podium here, although I don't believe the Solicitor General has taken a position on that --

QUESTION: Well, then --

MR. MINEAR: -- specific matter.

QUESTION: That seems to me a rather critical question if you're going to resolve this claim, that the ICC -- that the Interstate Commerce Act preempts the RLA

in these sale cases.

MR. MINEAR: Well, in this particular case, as I pointed out before, the Court doesn't need to reach that particular issue because it's an exempted transaction.

QUESTION: Well, I know, but that's a -- I think, as Justice O'Connor indicated, if you're going to exempt it, it seems to me that they've said no labor protective provisions are necessary.

MR. MINEAR: Yes, that's right.

QUESTION: Let's assume they just said, we've considered everything we think is relevant, no labor protective positions will be imposed.

MR. MINEAR: But that can also --

QUESTION: Now, then you think the company nevertheless has to bargain with the union?

MR. MINEAR: Their exemption can also reflect the view that there is no need for them to impose labor protective provisions. It's something that can be left to the RLA. Our concern here is that there is

QUESTION: Well, that isn't -- I can't believe that's the inference you would draw. I would think they would think that we're approving this transaction for the benefit of the public.

MR. MINEAR: Yes, your Honor.

QUESTION: And we just don't think that any labor protective provisions are appropriate.

MR. MINEAR: But, your Honor, the decision whether or not to provide labor protection under the ICA goes primarily to whether or not this is providing fair wages for employees and safe working conditions. The ICC might conclude, on the one hand, that the provision of the protective conditions is not necessary in this case because there is an alternative mechanism.

I suggest that they probably did not have that view here. In fact, felt that it was in the public interest not to provide such a protection.

QUESTION: How do we know that?

MR. MINEAR: Well --

QUESTION: How do we know that?

MR. MINEAR: Probably the best source for that would be the ICC's exemption provision itself, the Ex Parte 392 provision.

QUESTION: Well, I guess we have to read --

MR. MINEAR: But, again, the difficulty here is that Section 10901 does not have any affirmative textual basis for superseding otherwise applicable law. And that's what gives us some pause in this situation.

QUESTION: This is one of the problems, at least for me, that historically, before the recent

amendments to the Commerce Act, wherever there were protective provisions they were the result of an ICC order. Were they not? They didn't typically bargain about this. Or, am I wrong as a matter of history?

MR. MINEAR: I think that that is generally true, your Honor.

QUESTION: So that it was not, at least historically, a matter of collective bargaining. And then when the ICC changes its practice and says no more protective provisions, it's sort of totally changing the conditions under which bargaining might have taken place in the past.

MR. MINEAR: Yes. But that certainly would be appropriate at that point for the labor unions to approach their employers and to indicate that they would like to bargain for protective conditions that the ICC is no longer providing. That would be a legitimate Section 6 request that could be forwarded to any of --

QUESTION: But if they had done so, and if there were protective provisions in the collective bargaining agreement, could the ICC supersede those and say we are going to approve this on the condition that there would be no -- could it alter the protective provisions that might have been agreed upon between the parties?

MR. MINEAR: I think that raises a fairly serious question of the ICC's authority, whether it would have the authority to in fact preempt existing contracts. The places where the ICC is given the authority to supersede loss usually uses the term law. It indicates, for instance in Section 11341, that a transaction approved by the ICC is exempt from any other laws necessary to carry forward the transaction.

I'm not aware of anything in the ICA that gives the ICC the power to in fact undo contractual provisions that might already be present.

QUESTION: Well, sure. It can undo it to the detriment of whoever is asking the permission. It can undo contractual provisions to the detriment of the railroad who is requesting the permission. When it imposes labor protective provisions it's essentially imposing labor obligations that they don't have. Isn't that right?

MR. MINEAR: Yes. Well, it's imposing additional obligations by law. It's not undoing an obligation that it already has by contract. And I think there's a distinction there.

QUESTION: Yeah, I suppose. You make a big point of the fact that 10901 does not contain any provision superseding otherwise applicable law, as you

put it.

MR. MINEAR: Yes.

QUESTION: Does the Railway Labor Act have a provision explicitly superseding otherwise applicable law?

MR. MINEAR: No, it doesn't.

QUESTION: So, it's a standoff as far as that goes, isn't it?

MR. MINEAR: Yes.

QUESTION: I mean, you just have to decide what's the applicable law.

MR. MINEAR: That is correct, your Honor. But in terms of supersession, it usually requires an affirmative showing of an intent to supersede another statute. That has been the rule this Court has adopted and the rule that presumably Congress acts upon when it passes legislation.

QUESTION: Well, but the if there is no preemption provision -- they come across the finish line equal, don't they?

MR. MINEAR: The question is whether or not they can reconciled, whether or not they can both be applied in a coherent way. And, again, here we have a case where the ICC has exempted the party from the relevant provision of the statute. And so, again, it's

difficult to see how there is a direct conflict between those two statutes.

QUESTION: Well, on that basis the company has to obey whatever are the most rigorous conditions that are imposed. Either the ICC or what the union wants.

MR. MINEAR: Well, if both statutes impose conditions upon the employer, then I suppose that would be the logical result of choosing one or the other, is that one of the two would apply.

QUESTION: I guess you do have to be -- said for you that although Section 113 does contain provisions explicitly overriding other law -- right?

MR. MINEAR: It's 11341.

QUESTION: 11341 is the section.

MR. MINEAR: If there are no further questions, thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Minear.

Mr. Clarke, we'll hear from you now.

ORAL ARGUMENT OF JOHN O'B. CLARKE, JR.

ON BEHALF OF RESPONDENTS

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

This case actually involves a misunderstanding of two statutes that has now led to the apparent conflict between the two statutes. But when you go back

to the actual manner in which the statutes were implemented, for the 60-some odd years that they existed side-by-side before you had this conflict, there was no conflict between the two statutes.

And the reason for that is that corporate decisions of a carrier that do not affect rates of pay, rules or working conditions, do not change rates of pay, rules or working conditions do not require notice and were not -- there is no status quo that prohibits the implementation of such a corporate decision.

The only time that you have a conflict between the two statutes is where the parties, the carriers, tend to use the Interstate Commerce Act to justify changes in existing collectively-established rates of pay, rules or working conditions.

QUESTION: Do you think that going out of business necessarily involves changing of rates of pay and rules and working conditions?

MR. CLARKE: As that term is used in the statue -- in the Railway Labor Act, yes, your Honor. But this is not a going out of business case.

QUESTION: Even though the railroad agrees to until it makes the sale maintain the status quo?

MR. CLARKE: Yes, your Honor, because what is going to happen as a result of that sale is that P&LE

will continue -- under the terms of this sale P&LE Railco would operate the railroad. It would take the lines, it would take the equipment, and it would take some of the employees. But what it would do, it would impose entirely new rates of pay, rules or working conditions.

QUESTION: If they just went out of business and sold it to nobody, then it would be different?

MR. CLARKE: Your Honor --

QUESTION: Because then there would be no work, no working conditions.

MR. CLARKE: Your Honor, at that point it would still be a change in the collective agreements, as that term is used in the statute.

QUESTION: Yeah, but not a change in working conditions.

MR. CLARKE: It is, your Honor. We would submit it would still be a change and it would require notice. But that's not the fact because in this case, first of all, --

QUESTION: Well, you --

MR. CLARKE: -- the P&LE is not going out of business.

MR. WYATT: -- take the result of that issue -- take the position that the union can in effect require

bargaining over the decision to go out of business or sale?

MR. CLARKE: Your Honor, we draw a distinction between a question of whether you can bargain over the decision itself and over the effects.

QUESTION: Well, that's not a meaningful distinction though, I don't think. If you're saying that the P&LE is perfectly free to decide to go out of business or decide to sell but it can't proceed to go ahead and consummate the transaction unless it goes through this bargaining --

MR. CLARKE: That's not the position we're taking, your Honor. The injunction that was issued in this case sets forth the position quite clearly. And that injunction says the P&LE is enjoined from selling in a way that it changes it rates of pay, rules and working conditions.

It may sell so long as there is no change. Namely, that Railco assumes the collective bargaining agreements and continues to operate. That's the way in which the Railway Labor Act and the Interstate Commerce Act have existed side-by-side for 60-some odd years.

When you look at the Republic Airlines case which we cited to the court in one of the footnotes, the National Mediation Board pointed out that what has

happened in the railroad industry as a result of mergers, purchases, and uncontrolled transactions that have occurred is that you have a proliferation of agreements on the PMR/Kent merger in the '40s, the PMR/Kent rules still apply on the C&O part.

What has happened is when a railroad takes over another railroad's operations, it takes over the contracts. The only difference is that there's now a new name on the paycheck as to who the employer is. But as far as the employees are concerned, there is no change in the actual rates of pay, rules or work conditions that are established by the contract.

QUESTION: Well, why would the district court -- could the district court properly have done on the hypothesis that P&LE simply says we are going out of business, period?

MR. CLARKE: Your Honor, first of all it would have been a question of whether or not they had the ICC approval to do so.

QUESTION: Okay. Supposing they did?

MR. CLARKE: If they had the ICC approval to do so, we would submit, your Honor, that the Railway Labor Act would still prohibit that form of a change because it is a change as that term was used --

QUESTION: Well, nobody would be picking up --

nobody then would be picking up the paychecks?

MR. CLARKE: Yes, your Honor, there would be someone picking up the paycheck because the railroad will still continue operating. There's no --

QUESTION: Oh, I see. Yeah. So, in effect, you say if they aren't going to sell to somebody but just go out of business, they can't do that.

MR. CLARKE: The Railway Labor Act would prohibit them from doing that. But that's not this case.

QUESTION: How does the Railway Labor Act prohibit them from doing that?

MR. CLARKE: Because, your Honor, it says that any time a carrier -- in Section 27 -- any time a carrier -- no change shall be made in rates of pay, rules or working conditions as a class as embodied in the agreements except in the manner prescribed in the agreements or in Section 6 of the Act.

QUESTION: But that assumes the point we're talking about, I thought, whether this is a change.

MR. CLARKE: That's correct, your Honor. And this is where we get back to the legislative history.

At the time the Railway Labor Act was enacted, it was enacted for an industry that was heavily regulated, an industry where it was a startling innovation to believe that a railroad could go out of

business any time it wanted. Railroads couldn't even become debtors under the Bankruptcy Act as it existed at that time. And it wasn't until 1933 that they were allowed to even become -- in the reorganization under the Bankruptcy Act. The only way they could restructure financially was through the equity receiverships.

This was the understanding that Congress had and that the parties had. And what the labor representatives who drafted the bill that was modified in some forms but not in Section 2 First or Section 6 that are applicable here, indicated to Congress the intent of that statute was to do. It was to implement the bargaining obligation. It was to implement the requirement that the Railroad Labor Board in 1920 -- 1921 -- had promulgated, that any time management makes a decision that would affect rates of pay, rules or working conditions, it must give notice and it must bargain with the employees.

So, what the drafters of that legislation did -- and they specifically sighted Wilson v. Nu, which this Court had decided in 1917, which dealt with Congress' power to regulate railroads and to impose obligations on railroads -- and they said we're relying upon that power to impose an obligation.

The obligation that was imposed, because of the

great transportation needs of railroads at that time, which we submit still exist to a degree today, was that Congress was not going to allow the rail industry to become disrupted by labor disputes. But, rather, would adopt the solution that management and labor had devised, which provided that any time there is to be a change in working conditions -- not a violation of the agreement, but a change -- and the expiration of a contract is a change.

QUESTION: Yes, but there's a whole law as to what's working conditions, just as to there's a whole law as to what are terms and conditions of employment under the National Labor Relations Act.

MR. CLARKE: But that's not this Act, your Honor.

QUESTION: Well, I understand that. But, still, you will acknowledge that not everything is a working condition.

MR. CLARKE: That's right.

QUESTION: Whether I choose to subcontract some of my work, for example, --

MR. CLARKE: That's correct, your Honor.

QUESTION: -- there are management prerogatives. And why isn't going out of business a management prerogative?

MR. CLARKE: Because -- the going out of business is a management prerogative. But if the way in which they will go out of business will affect rates of pay, rules and working conditions, that management prerogative is limited by the statute which says there has to be bargaining about it first.

The example that your Honor raised in an earlier case, the Conrail case, is a perfect example of what I'm talking about here where there is a reporting requirement. Assume employees had to report to work at 7:45 in the morning and the railroad wanted to change it to 8:00 in the morning. Would they have to give notice? Would that be a change in working conditions?

It's obviously a change in working conditions if you're moving your reporting requirement 15 minutes. But the question as to whether or not notice was required was is it a working condition that is embodied in collectively established agreements, implied and explicit or written agreements?

If it is, even though it might not be prohibited by the agreements, it is still the type of thing that requires advance notice before the carrier does it. Now, on the other hand, if it's not, as would typically be the case, what then comes into play is the carrier could make that change unless the union believes

that it is important to its people that that change not be made.

In which case, it has the right under Section 6 to serve what's known as the Section 6 notice to request bargaining about that particular change. If it does, then an entirely different concept -- and this is the concept that is really involved here. Not so much whether it is an obligation to bargain over the impact of this decision on employees, but what are the ramifications of the statute during that bargaining process. And that's the status quo obligation.

And if you look at 5 First, Section 6 of the Act, and Section 10 of the Act, as this Court did in Detroit Toledo, and as the language clearly shows, in 2 Seventh and 6 -- in the first part of Section 6 it talks about changes affecting agreements establishing rates of pay, rules or working conditions. And then, in 5 First, it says that during that bargaining process no change shall be made in agreements affecting rates of pay, rules or working conditions or established practices. And in Section 10 of the Act it says that during the dispute process no change shall be made in the conditions out of which the dispute arose.

And the legislative history, as this Court pointed out just 20 years ago in Detroit Toledo, was

that the language was broad. It was intended to be broad because the concept was that while bargaining was going on, whether it's mandatory bargaining in the sense that the carrier has to give the notice or bargaining because the union gave the notice, no change shall be made in the actual objective working conditions broadly conceived which are involved in or related to the dispute because --

QUESTION: What if the ICC enters specific orders covering what's going to happen to the labor --

MR. CLARKE: Your Honor, that phrases the question as to whether or not the ICC is a labor board. What role does the ICC play --

QUESTION: Well, suppose --

MR. CLARKE: -- in the labor --

QUESTION: -- they issue such orders, covering exactly the things the union claims it wants to bargain about --

MR. CLARKE: Such as in the Cady case, your Honor, where they allowed the use of the employees. We would submit that that is the type of case where the ICC would exceed its jurisdiction. It has no right to determine the labor relations aspects.

What the ICC's role in labor relations in that sense -- and it's not even labor relations -- the ICC's

role on labor matters is a minimum standards type of role. It provides simply what is the public interest minimum requirement as to what is fair and equitable.

It does not -- and this goes back to the early days of the relationship between the Acts --

QUESTION: What do you mean by the public interest standard as to what's fair and equitable? It's always just the employee's interests you're talking about.

MR. CLARKE: That's correct, your Honor. But this court said in Lowden that the fair and equitable treatment of railroad employees is essential to the maintenance of an uninterrupted and efficient rail service.

Well, railroad employees are just treated shabbily. When their interests are ignored, two things happen. One, the railroad employees naturally react by using their economic muscle. The second thing that happens is the efficiency of the service. That a high efficient morale factor would improve is lost.

And what Congress has recognized from back in the '20s -- and, in fact, even prior to that, back in the 1800's, 1880's -- 1887 when the Interstate Commerce Act was enacted -- there are also labor problems. The two were different; economic regulations are different

than labor relations regulations.

There is an overlap in this one sense. The Interstate Commerce Act is concerned with the underlying public interest in an efficient rail service. The Railway Labor Act is concerned with preventing disputes over labor matters from reaching the level of interruption to commerce.

The difference between the two Acts is this. The Railway Labor Act, as this Court said in the Terminal Railroad case, is not concerned whatsoever with the fairness or the equities of whatever bargaining agreement might be reached. The Interstate Commerce Act, on the other hand, is.

So what Congress has said -- and this is right in the 1940 legislation where for the first time Congress required imposed protection. The reason -- prior to that, four years earlier, rail labor had gotten together with the railroads and had entered into the Washington Job Protection Agreement which formed a form of protection for railroad employees.

When Congress was considering in 1940 what became the 1940 Transportation Act where employee protection was imposed as a mandatory requirement, the position that rail labor took was they were asking for the mandatory protection. And it was asked, why? If

you already have it by this agreement, why do we have to make it mandatory?

And the answer for that was this. Only 85 percent of the mileage in the country was under the Washington Job Protection Agreement. There were others who refused to come under it. There were other employees who were not covered by it.

And that's what Congress is concerned about. The Interstate Commerce Act makes no differentiation at all between represented and non-represented employees. It applies equally to all. It applies equally to all regardless of what form of protection they might have gained by bargaining.

Now, what happened in the history of the Act and the relationship between the two is that from 1940 to -- in the middle 40's the Interstate Commerce Act Commission was developing the formal protections. Then when the Interstate Commerce Commission protections didn't keep up with the trend and the development of the Washington Job Protection in the industry, and, in fact, was actually below the Washington Job, the unions went to the collective bargaining table and negotiated collective bargaining agreements.

We've cited in our brief several cases. And if you look at the major merger cases in the '50s and the

'60s, they were all negotiated agreements.

Now, the ICC and the P&LE say, well, they were all negotiated under the auspices of the Interstate Commerce Act. Well, the Interstate Commerce Act doesn't give rail labor a right to negotiate anything on behalf of anybody. The Railway Labor Act does.

The negotiation that reached the agreement could only be binding on the employees because it was negotiation under the Railway Labor Act. And when you look at the two Acts what you see -- in a sense it's like history. Then this isn't a matter of interpretation of law. What happened in the past 60 years? Why wasn't there a conflict between the two?

And the reason there was no conflict was because the two Acts work hand in hand as part of a single form of regulation of the rail industry. The Interstate Commerce Act with its mandatory minimums, the Railway Labor Act with an ability on rail labor's part to either accept, as they did in many cases, the mandatory minimums, or to negotiate what they believed was fair and equitable.

QUESTION: Mr. Clarke, in those examples you described in the '50s and '60s did the negotiations generally precede the submission to the ICC for approval so that the ICC would then put into effect the

conditions the parties already agreed upon? Is that how it worked?

MR. CLARKE: It would be a combination, your Honor. Normally the agreements were reached beforehand. But, for instance in the 70s, in the Northern Lines merger case, the ICC first turned it down when there was no agreement. And then an agreement was reached and the ICC approved it.

In some of the other cases, the ICG cases which were cited in P&LE's brief, the agreements were entered into after the merger actually took place. The Milwaukee case is an example. After the merger occurred, the ICC imposed conditions. An agreement was then entered into which modified those conditions and that became the form of protection.

Now, in 1971 -- 1972 -- this Court decided the Nemitz case, Norfolk and Western Railroad v. Nemitz. And in that case it said that even though you have this negotiated form of protection and the ICC's role up to that point was that it's policy was you have a negotiated agreement, fine, we don't look at it. This Court said that that was wrong and that that was actually a part of the order of the commission and rail labor could not substantially abrogate whatever had in fact been negotiated or imposed by the ICC.

So, there is a relationship in this way. The rail labor can negotiate an agreement. But if that agreement doesn't meet the minimum standards, the floor that the statute imposes, then the ICC still has to impose that floor. If the agreement exceeds the floor and it is adopted as the protection, then that becomes part of the ICC order. But the parties cannot substantially abrogate below the floor.

Now, when you look at the Acts in this light and you remember the fact that notice is only required where there is a change in working conditions caused by the agreement, there is no conflict between the Interstate Commerce Act and the Railway Labor Act.

The only time you get a conflict between the two Acts is what has occurred in this case where the carrier's relying upon the ICC's belief that it is this labor board now say, well, wait a minute, we can sell, we can abrogate your contracts and you can't bargain about it, and you can't insist that we bargain about it. And that is where the conflict occurs.

Now, on this one point, I point out that the policy that we're talking about, the Ex Parte 392 policy, is a creation not of Congress but of the Interstate Commerce Commission itself. Where Congress has considered and developed programs such as the feeder

line programs, it specifically provided various forms of protection that would apply and how employees would be treated as a minimum level.

But this is one that the chairman of the ICC has stated was an unpleasant surprise, an unexpected gain out of the regulation. This encouragement of short-line programs. And the only reason it has been so popular is because for the first time the railroads are using the Interstate Commerce Commission's authority as a means to abrogate existing agreements, to change the agreements and not bargain about it.

And we submit that that's not in any way near the intent of the relationship between the two Acts.

QUESTION: Mr. Clarke --

MR. CLARKE: Yes, sir.

QUESTION: -- what do we know from the record about how P&LE operations will compare after the sale and before the sale?

MR. CLARKE: Your Honor, there is some indication, if I'm not mistaken, in the ICC's decision, talking about the P&LE's Railco, the new company's proposed rules. The one thing that is clear from the record is that P&LE at that time had approximately 600 organized employees, agreement employees, as the term is used. The Railco, P&LE Railco, the new company,

intended to use only approximately 220 to perform that same type of operation.

QUESTION: Before the sale P&LE was running trains?

MR. CLARKE: Yes, your Honor. P&LE fully --

QUESTION: Freight trains?

MR. CLARKE: Excuse me, your Honor?

QUESTION: Only freight trains?

MR. CLARKE: Yes, your Honor. There is no passenger service. There's a 182 mile-system with around 200 and some odd miles from --

QUESTION: From Pittsburgh to Cleveland?

MR. CLARKE: Yes, your Honor. Not quite Cleveland, but Youngstown and that area. And then there's some track that's --

QUESTION: After the sale, were the trains still going to be running?

MR. CLARKE: Yes, your Honor. Mr. Neuenschwander testified -- he's the President of the P&LE -- that -- and this is in the transcript and part of the Joint Appendix -- that the P&LE Railco intended to operate in the same manner, the same lines, the same equipment, and service the same customers, and even adopt the contracts that dealt with those customers. The only contract that would not be assumed and honored

were the collective bargaining agreements. And that's what would allow the reduction in operations.

Now, I might add because I realize my time -- my time is fleeting on this -- the status quo that is required to be maintained by the Act is not as the government submits and as the P&LE submits, simply the agreements or contractual rights -- contractual limitations and contractual authorizations. Rather, the status quo, as this Court pointed out in the Detroit Toledo case, is much broader. It extends to the actual objective working conditions broadly conceived. Also --

QUESTION: But you could read Detroit just the way you say it should be read and the way it's spoke. And saying it didn't have to be something in writing and still not feel that it goes to -- you know, who is the corporate owner.

MR. CLARKE: Your Honor, we're not saying and the injunction did not prohibit P&LE from selling. The corporate owner is immaterial to the status quo. The court did not enjoin the sale.

QUESTION: But the status quo is violated, you say, by the plan of the successor to use only one-third of the employees?

MR. CLARKE: That's correct, your Honor, and not to honor the agreements that were in place. And

those agreements, I might add -- contrary to what P&LE has informed the court -- did contain employee protections that required a guaranteed form of employment. But we acknowledge that once the sale occurs and the carrier no longer operates, unless there's a carryover of agreements by the new carrier, those agreements would terminate.

And I might add there is no need for any remand to determine what the collective bargaining agreements provide because the record is quite clear in this case that the collective bargaining agreements provide that the employees are the ones who operate the P&LE trains. And in the 1926 Act when Mr. Richburg was asked what is meant by the conditions out of which a dispute arose, he specifically stated that the conditions out of which the dispute arose include, at the very least, the basic employment relationship itself.

And that's the point that we're getting at. What will happen by this sale is that the P&LE as far as the public is concerned -- as far as the public interests are concerned -- will continue to operate. The only people who will be affected by this sale are the employees who have the contractual right to perform that work.

Rail labor agreements are unlike other

agreements in that they do not have specific termination dates. They do not run from September 1st of one year to, say, August 31st of another year. Rather, they're indefinite. They have no termination dates. And that's the result of the status quo provision and the carryover.

But the point is these agreements are in effect right now and they require that these people do the operation.

QUESTION: Did the successor company ever explain how it was going to do the same work with only 200 of the 600 employees?

MR. CLARKE: Yes, your Honor. It would do what was known as a short-line operation. The P&LE is a traditional operation that has craft lines. A short-line operation, as that term is coming to be used in the industry today, is one that blends craft lines. So, you have an electrician do a sheet metal worker's work.

But the point that I wish to emphasize -- and I realize my time is fleeting -- is that the status quo injunction of the court does not prohibit layoffs of employees.

QUESTION: Where do we find the injunction?

MR. CLARKE: Your Honor, it's in the petition

--

QUESTION: In the petition? All right.

MR. CLARKE: -- at page 85 -- 84(a) and 85(a). And the last paragraph is the important one. "It is further ordered that the sale of defendant's assets is enjoined to the extent that such sale does not include provisions for the maintenance of the status quo. That is, provisions prohibiting the alteration of rates of pay, rules and working conditions existing at the time Section 6 notices were given. The injunction hereby ordered shall remain in effect until the time the dispute resolution procedure set forth in the Railway Labor Act have been completed."

And that brings me to the final point on this. And that is that the one thing that is being ignored in this -- the ICC is considered to be the protector of the public interest. It is the protector of the public interest in rail economic transportation matters. But the protector of the public interest in labor matters is the National Mediation Board. And the National Mediation Board is the agency which now has jurisdiction over this labor dispute.

QUESTION: The amendments to the Interstate Commerce Act which intended to allow railroads to go out of business, to merge, to do all sorts of things, and to

do so promptly, are really frustrated if they are going to be interpreted the way you are. So that it's not only effects that must be bargained but even the making of the new contract.

MR. CLARKE: Your Honor, we submit it is not. The carrier can enter into any sale contract it wants. But the point is that it cannot change as a result of that sale contract.

QUESTION: It just can't cut its costs. That's all.

MR. CLARKE: Your Honor, it can cut its costs through the legitimate process of the Railway Labor Act in bargaining. That is what's going on right now with the P&LE. They're using the bargaining process to address the cost factors.

But the railroad cannot use the Interstate Commerce Act to cut its labor costs. That's where we have the distinction. Congress and the Interstate Commerce Act and the deregulation affected by the Interstate Commerce Act only deregulated rail economic relations. It did not deregulate labor relations. It didn't touch the Railway Labor Act.

And the exemption in this case is, as 10505 indicates, is an exemption from the requirements of the Interstate Commerce Act. In no way can that be read, we

submit, to give an exemption from the Railway Labor Act as well. The only way you could read it that way is to say that the Interstate Commerce Act carries with it a right to regulate rail labor relations matters, rail collective bargaining agreements in both the floor and the top. And we submit it does not.

And that brings up -- yes, sir.

QUESTION: I wasn't going to say a word.

MR. CLARKE: Okay. That brings up the final question as to --

QUESTION: Well, but what can happen after all of this occurs and it goes to -- you go through the lengthy process, the union can strike against the sale of the railroad ultimately. Or even against the railroad's going out of business.

MR. CLARKE: That's correct, your Honor.

QUESTION: And you think that's what was envisioned by the Interstate Commerce Act amendments?

MR. CLARKE: Your Honor, if employees are treated fairly and the collective bargaining agreements are not abrogate, there will be no strike. But what you have to remember in comparing the two is the Interstate Commerce Act is a permissive legislation. Congress specifically refused to adopt a compulsive form of legislation.

QUESTION: Well, they also thought there was going to be a lot of fluidity in the rail industry with mergers and all sorts of things, which I doubt would happen very readily if they could be halted by strikes.

MR. CLARKE: Your Honor, it has in the past. There was a tremendous nixing of the industry in the past. We've gone down from hundreds of carriers to about 11 trunk line carriers. But we've gone down in that sort of thing by each carrier being absorbed, being continued in the same form it was before. And then if you -- you can immediately implement your corporate transaction and if you want to consummate any -- effectuate any change in working conditions, you use the Railway Labor Act's bargaining processes to negotiate that.

QUESTION: What you mean is that the railroad may not implement its deal unless it imposes on the successor the same agreement.

MR. CLARKE: That's correct.

QUESTION: -- are not going to be any of these mergers. None of these short-line operations.

MR. CLARKE: Your Honor, there could be if it is done properly. And if it's done through the bargaining process, you can -- because the bargaining process is not an end. It's just simply the beginning

of the process that has an end in sight. But to short-change it, to short-shift it, what it comes down to is this.

If the Interstate Commerce Act has the effect that the P&LE says it has, what that means is that the Commission can impose an order which gives the railroad the right to make a contract in secret with another party and that that contract can abrogate the existing agreements. The railroad can accept it or reject it and the unions have no say whatsoever.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Clarke.

Mr. Wyatt, you have eight minutes remaining.

REBUTTAL ARGUMENT OF RICHARD L. WYATT, JR.

ON BEHALF OF PETITIONER

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

QUESTION: Could I just ask you a question? Does the union have a -- can't the union appear before the ICC?

MR. WYATT: Oh, absolutely. And in this particular case, as we pointed out, they appeared --

QUESTION: Yes.

MR. WYATT: -- the ICC in the P&LE proceeding to ask the ICC to allow them to buy the railroad.

QUESTION: But did they ever ask that the exemption be revoked?

MR. WYATT: They asked the exemption be revoked. They asked for everything except labor protections. They did not go to the ICC, even though, as RLEA points out, Railco did not intend to hire the full P&LE complement --

QUESTION: And if they had asked for labor protection and it had been turned down, I suppose that was subject to judicial review?

MR. WYATT: That would have been subject to judicial review. But that was never asked of the ICC in this particular occasion.

QUESTION: Judicial review under an arbitrary and capricious standard?

MR. CLARKE: I believe that's correct but I can't be certain. But it would have been subject to review in the court of appeals.

QUESTION: That was Judge Hutchinson's point in his dissent in the Third Circuit too, wasn't it?

MR. WYATT: I'm sorry, your Honor.

QUESTION: Wasn't that part of Judge Hutchinson's point in his dissent in the Third Circuit?

MR. WYATT: That was exactly his point. And he specifically noted that RLEA had made no attempt to

invoke labor protections but that if they did, they had a right of recourse to the court of appeals should their request for labor protections be denied.

What RLEA has here today, and their theory here today is an elaborate theory that says ultimately any time in any corporate transaction, ICC approved or not, if there is an effect, any effect, that they can find on their employees, their membership, no matter what the cause of that effect, that they can serve notices and that whatever exists that day has to remain in existence. In this particular case, for 17 long months.

I specifically heard RLEA's counsel say that there couldn't be an abandonment filing, that P&LE couldn't go to the ICC and say, "We quit. We give up. We can't find a buyer. We're just going to abandon." They could serve a notice there and say, well, they can't abandon. They're going to have to preserve in place the rates of pay, rules and working conditions until we finish the bargaining process of the Railway Labor Act.

QUESTION: Well, actually, on their theory they don't -- they wouldn't have to serve a notice. They would just go to court and say you're threatening to change the agreement and they want an injunction.

MR. WYATT: That's right. Their initial theory

is that any threatened action that would affect, I believe, the agreement, would be subject to a bargaining notice by us to them.

QUESTION: I know you have some things you want to say but what about -- isn't there another case before us?

MR. WYATT: Yes, your Honor. There's the injunction case. And I did want to say something about the injunction case.

QUESTION: All right.

MR. WYATT: We believe that Judge Block's injunction -- original injunction was properly entered. We believe, as I indicated to you in my earlier presentation about the Interstate Commerce Act, that the Interstate Commerce Commission does have very broad discretion to address the effects of these transactions and that once they enter that order, that order is properly reviewable in the court of appeals.

But that a strike -- and the district court expressly found here -- that the strike was designed not to compel Railway Labor Act bargaining but to frustrate this transaction. The strike should have been enjoined in that the Norris-LaGuardia Act can be and should be accommodated to the orders of the Interstate Commerce Commission. And, moreover, we believe, as does the

Solicitor -- we believe there was absolutely no bargaining duty.

And where there is no duty to engage in collective bargaining, we believe that an injunction will rely under the Railway Labor Act, Section 2 First. We think that where we have no duty to bargain and where we aren't violating the status quo, that a Railway Labor Act injunction will lie to prohibit a strike and 2 First would be the proper foundation for that injunction.

So, we believe that the injunction was properly entered, improperly reversed. We think the Third Circuit was just wrong when it said Norris-LaGuardia shouldn't be accommodated with the Interstate Commerce Act.

QUESTION: You say the union has an obligation not to strike until and unless or even if it does exhaust the remedies it has before the ICC?

MR. WYATT: I think Congress provided -- yes, your Honor, I think Congress provided an exclusive set of remedies for the union and I think it deliberately intended to take away from the union the strike weapon. I think it provides an elaborate mechanism. It gives the ICC tremendous discretion to impose labor protective conditions. It gives the union rights to review in the court of appeals. It gives -- if labor protections are

imposed -- and these are, by the way, generally far more than contractual, mere preservation of contracts. They are additional protections over and above.

But if they're imposed, the ICC can appoint ICC arbitrators to hear disputes about their -- about the use. I think that's a classic boy's market situation, an accommodation to an administrative scheme of -- there is an administrative scheme in the ICA and I think Norris-LaGuardia has to be accommodated to it and the unions should use it.

QUESTION: The government does not agree with you on this point, I gather, since they agreed that there would be a duty to bargain on the effects until such time as the sale was concluded.

MR. WYATT: Yes, your Honor, that has been the government's position. I don't think the government has directly addressed the question with the Court today of whether they -- of the scope and power of the Interstate Commerce Commission. I think --

QUESTION: Although they --

QUESTION: Well, they don't seem to want to do it.

QUESTION: The government might have agreed with this particular injunction because there might have been no right to strike even at this point, even if

there was a -- under the Railway Labor Act even if there was a duty to bargain.

MR. WYATT: I believe the government -- and I don't want to speak for the government, but I believe under their analytical framework, even had there been an effects bargaining obligation, proper notice is served. And those are all major assumptions. Had P&LE engaged in that bargaining but nonetheless completed the transactions, which is consistent with the government's theory, a Railway Labor Act injunction would lie to prohibit the strike.

I did want to address my closing remarks to the status quo argument that's been made here today by RLEA and their reading of Detroit and Toledo Shoreline.

I think to understand Detroit and Toledo Shoreline one has to go back to what is the Railway Labor Act's prohibition on unilateral action. And the Railway Labor Act prohibits in Section 2 Seven unilateral action that would change rates of pay, rules, or working conditions as embodied in agreements.

Now, RLEA is correct. There are other places where the "as embodied in the agreement's" language doesn't necessarily appear. But I think Detroit and Toledo Shoreline properly read says that a working practice may become an implied agreement between the

parties.

In that case, there was a question about where people reported to work and there was a unilateral change. I don't think Detroit and Toledo Shoreline can be read any broader than to say the status quo is composed of explicit agreements and what can fairly be said to be an implicit agreement. And I think the notion that the status quo is composed of whatever existed on the property on the day the notice was served is ludicrous because what that does is simply take away from management whatever preexisting rights it had that day, rights that hadn't been exercised. It simply freezes them in time. And that's clearly the Act and its bargaining obligations and it's status quo obligation.

We're not intending to freeze people in time as they existed on day one or day two. But all they're meant to do -- I'm sorry, my time is up.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wyatt.

The case is submitted.

(Whereupon, at 2:12 o'clock p.m., the case in the above-entitled matter was submitted.)

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lderson Reporting Company, Inc., hereby certifies that the ttached pages represents an accurate transcription of lectronic sound recording of the oral argument before the upreme Court of The United States in the Matter of:

PITTSBURG & LAKE ERIE RAILROAD COMPANY, Petitioner, V. RAILWAY LABOR EXECUTIVES' ASSOCIATION. Cases No 87-1589 and 87-1888

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BY Judy Freilicher

(REPORTER)