

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: NORFOLK AND WESTERN RAILWAY COMPANY,  
ET AL., Petitioners v. AMERICAN TRAIN  
DISPATCHERS ASSOCIATION, ET AL.; and  
CSX TRANSPORTATION, INC., Petitioner v.  
BROTHERHOOD OF RAILWAY CARMEN; ET AL.

CASE NO: 89-1027; 89-1028  
PLACE: Washington, D.C.  
DATE: December 3, 1990  
PAGES: 1 - 55

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 NORFOLK AND WESTERN RAILWAY :

4 COMPANY, ET AL., :

5 Petitioners :

6 v. : No. 89-1027

7 AMERICAN TRAIN DISPATCHERS :

8 ASSOCIATION, ET AL.; :

9 and :

10 CSX TRANSPORTATION, INC., :

11 Petitioner :

12 v. : NO. 89-1028

13 BROTHERHOOD OF RAILWAY CARMEN, :

14 ET AL. :

15 - - - - - X

16 Washington, D.C.

17 Monday, December 3, 1990

18 The above-entitled matter came on for oral

19 argument before the Supreme Court of the United States at

20 1:12 p.m.

1 APPEARANCES:  
2 JEFFREY S. BERLIN, ESQ., Washington, D.C.; on behalf of  
3 the  
4 Petitioners.  
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8 the Federal Respondents supporting the Petitioners.  
9 WILLIAM G. MAHONEY, ESQ., Washington, D.C.; on behalf of  
10 the private Respondents.

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C O N T E N T S

1		
2	<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
3	JEFFREY S. BERLIN, ESQ.	
4	On behalf of the Petitioners	4
5	JEFFREY S. MINEAR, ESQ.	
6	On behalf of the Federal Respondents	
7	supporting the Petitioners	20
8	WILLIAM G. MAHONEY, ESQ.	
9	On behalf of the Private Respondents	29
10	<u>REBUTTAL ARGUMENT OF</u>	
11	JEFFREY S. MINEAR, ESQ.	
12	On behalf of the Federal Respondents	
13	supporting the Petitioners	54
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		



PROCEEDINGS

(1:12 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 89-1027, Norfolk and Western Railway Company v. American Train Dispatchers Association and a companion case.

Mr. Berlin, please proceed. It is BERL-in and not Ber-LIN I take it?

MR. BERLIN: Either way is fine, Mr. Chief Justice.

QUESTION: Well, good. Okay.

(Laughter.)

ORAL ARGUMENT OF JEFFREY S. BERLIN

ON BEHALF OF THE PETITIONER

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

This case presents an important question of Federal law. The provision in issue is a section of the Interstate Commerce Act, 49 U.S.C., section 11341(a). That section applies to a railroad participating in a consolidation that has been approved by the Interstate Commerce Commission. It provides that such a railroad is exempt from all other law to the extent necessary to let the railroad carry out its consolidation.

The question before this Court is whether this

1 exemption protects the railroad from claims that are based  
2 on the railroad's contracts and are asserted exclusively  
3 under Federal law. The particular contracts involved here  
4 are labor agreements, and the particular law is the  
5 Railway Labor Act.

6 Since 1920 in a series of statutes, Congress has  
7 encouraged the nation's railroads to merge and consolidate  
8 under the supervision of the Interstate Commerce  
9 Commission. To this end, Congress has given the ICC  
10 exclusive jurisdiction over matters with in its authority  
11 and given to railroads participating in approved  
12 consolidations a broad exemption from other legal  
13 restraints. This exemption originated in the  
14 Transportation Act of 1920, was reenacted in 1933,  
15 reenacted in 1940, and took its present form in 1978 when  
16 it was recodified without substantive change.

17 CSX Transportation and Norfolk Southern are two  
18 of today's large railroad systems. Each system was formed  
19 when two previously separate railroad systems were placed  
20 under common control with ICC approval. On receipt of  
21 that approval, these railroads set out to achieve the  
22 traditional purposes of mergers and consolidations, which  
23 include the realization of greater economies and  
24 efficiencies through the combination of facilities, the  
25 elimination of redundant facilities, the bringing control

1 of various operations into single locations, and otherwise  
2 taking advantage of economies of scale that the  
3 consolidations make possible.

4 Now as part of carrying out their  
5 consolidations, CSX Transportation and Norfolk Southern  
6 each sought to transfer work from one of their previously  
7 separate properties to the other. CSX Transportation had  
8 a freight car heavy repair shop at Way Cross, Georgia and  
9 another, same kind of shop, at Raceland, Kentucky. CSXT  
10 didn't need to retain both shops, and the facility at  
11 Raceland was larger and more modern and it had substantial  
12 excess capacity. Therefore, CSXT proposed to bring to  
13 Raceland the freight heavy repair work that was previously  
14 done at Way Cross.

15 Norfolk Southern proposed to make a slightly  
16 different kind of operational change. Norfolk Southern  
17 operates more than 2,000 locomotives. Previously the  
18 distribution of locomotives -- their assignment to  
19 specific trains and facilities -- was handled separately  
20 on each of Norfolk Southern's two constituent railroads.  
21 Now, Norfolk Southern proposed to bring all of this work  
22 to one location where one of the railroads would  
23 administer the work for the whole Norfolk Southern system.

24  
25 The unions in each case resisted the railroad's

1 proposed changes contending that these changes were  
2 inconsistent with provisions of their existing labor  
3 agreements and also that the Railway Labor Act gave the  
4 unions the right to insist that the changes not be made  
5 until either the unions had agreed to them or the  
6 railroads had exhausted the Railway Labor Act's virtually  
7 endless process for the negotiation of changes to existing  
8 agreements.

9 The ICC held that the railroad's proposed  
10 changes were exempt by virtue of section 11341(a) from  
11 claims asserted under the Railway Labor Act, including  
12 claims based on labor agreements. The Commission found  
13 that the railroad's actions were subject to the processes  
14 of the ICC's employee protective conditions, which had  
15 been imposed on both consolidations as required by a  
16 different section of the Interstate Commerce Act, section  
17 11347.

18 The protective conditions confer on employee a  
19 generous array of compensatory benefits including a  
20 guarantee of wage protection for as long as 6 years if  
21 they are affected by the consolidation. And the  
22 protective conditions also establish a procedure for the  
23 negotiation and, if necessary, arbitration of an agreement  
24 to govern the manner in which a railroad may implement its  
25 approved consolidation if the implementation will cause



1 employees to be dismissed or displaced or will require a  
2 rearrangement of the work force. And it was that  
3 procedure that was followed in these cases and which led  
4 to the ICC's decision.

5 The court of appeals reversed. It held that the  
6 exemption from all other law reaches only positive  
7 legislative enactments and is ineffective against claims  
8 asserted under contracts. The court reasoned that because  
9 labor agreements are a form of contract, the statutory  
10 exemption does not apply to them and to the claims  
11 asserted by the unions in these cases.

12 Now that decision of the court of appeals was  
13 surely incorrect. Contractual obligations are binding  
14 only because of the law and an exemption from law bars  
15 enforcement of those obligations. This Court held in 1948  
16 in Schwabacher that the statutory exemption covers claims  
17 based on contracts.

18 QUESTION: Mr. Berlin, can interrupt to ask you  
19 a question about the statutory language? The exemption is  
20 necessary to let that person carry out the transaction;  
21 hold, maintain, and operate property; and exercise control  
22 and so forth. Which of the predicates are you relying on?  
23 Is it necessary to carry out the transaction, the  
24 necessary to operate their property, or the necessary to  
25 exercise control?

1 MR. BERLIN: Both transfers of work, Justice  
2 Stevens, were part of -- first part of carrying out the  
3 approved transaction. So the person carrying out the  
4 transaction in each case was the railroads. An exemption  
5 from claims that --

6 QUESTION: You say that the merger of the repair  
7 facilities 4 or 5 years later was essential to the merger  
8 of the two railroads?

9 MR. BERLIN: That's not how we put it, Justice  
10 Stevens. The statute requires that the railroad be  
11 carrying out its approved transaction -- that is, the  
12 consolidation of the railroads -- and that the exemption  
13 then be necessary to let that carrying out proceed, so  
14 that it is the --

15 QUESTION: So that any amalgamation of  
16 facilities anytime in the future would be exempt from all  
17 law?

18 MR. BERLIN: No, Justice Stevens, the exemption  
19 does not reach to any conceivable amalgamation in the  
20 future. The --

21 QUESTION: Then why does it reach to this one?

22 MR. BERLIN: In this case, the railroads were  
23 carrying out the traditional purposes, that is, the  
24 combining of extra facilities or the centralization of  
25 control. The court recognized many years ago in Texas v.

1 United States in 1934 that the broad congressional purpose  
2 in giving exclusive authority to the ICC over  
3 consolidations requires that the scope of the exemption be  
4 interpreted broadly as that purpose.

5 Now, here the railroads were doing what are  
6 paradigmatic changes in their work force. The combination  
7 of two facilities --

8 QUESTION: Do they have to be paradigmatic  
9 changes? Why doesn't it cover any change that will  
10 increase the efficiency of the combined operation as  
11 opposed to two separate operations?

12 MR. BERLIN: It covers a great many such  
13 changes.

14 QUESTION: How do we know which ones it covers?  
15 That's the heart of my question.

16 MR. BERLIN: These are the easy cases, Justice  
17 Stevens. I don't mean to duck the question, but I want to  
18 start with my --

19 QUESTION: Well, the easiest case is legal  
20 objections to the transaction itself. That's the easiest  
21 one, which even the court of appeals would recognize.

22 MR. BERLIN: Certainly.

23 QUESTION: But this is -- theoretically you  
24 could have merged the two legal entities and continued to  
25 operate the two separate car facilities -- repair

1 facilities.

2 MR. BERLIN: Oh, certainly, and that situation  
3 occurred for some years, but it was -- it is always  
4 anticipated when complex entities such as these railroad  
5 systems engage in mergers and other consolidations that  
6 there will over time be operational changes to realize the  
7 efficiencies and economies that Congress wants the  
8 railroads to achieve under the --

9 QUESTION: What if an executive of one of the  
10 corporations had a contract with tenure to it that he was  
11 no longer needed because you've already got one chief  
12 executive officer. Could you fire him without worrying  
13 about the contract? Not a collective bargaining agreement  
14 -- ordinary private contract. You don't need this guy  
15 anymore.

16 MR. BERLIN: Such a situation could certainly be  
17 within the reach of the exemption.

18 QUESTION: I know it could be, but do you think  
19 it is?

20 MR. BERLIN: Yes.

21 But let me say that the working out of this  
22 exemption before we can get to a situation where we say  
23 everything may be -- the exemption may sweep so broadly  
24 that virtually all contracts could be covered by it.  
25 Surely that is too broad a statement of what this



1 exemption does. Before an action of a railroad --  
2 combined railroad -- is going to enjoy the protection of  
3 the exemption, that action first must be a part of -- they  
4 must encompassed within the approved consolidation in the  
5 first instance.

6 Second, the railroad must be carrying out what  
7 was approved, and third, the exemption must be necessary  
8 to the carrying out. Now, one qualification that whenever  
9 we talk about hypotheticals involving employees is that  
10 the labor protective conditions provide compensation for  
11 employees who are affected. Chief executive officer would  
12 not enjoy that.

13 QUESTION: The case would be equally strong  
14 without the labor protective provisions, wouldn't it?

15 MR. BERLIN: Yes, it would. But Congress has  
16 shown by providing a compensatory mechanism in the labor  
17 protective conditions which it requires the ICC to impose  
18 on these transactions that the statutory exemption is  
19 going to affect employees. The court recognized in Lowden  
20 in 1939 that consolidations inevitably will cause  
21 employees to lose their jobs, suffer reductions in their  
22 wages, and lose their seniority rights which are defined  
23 by contracts. And when that happens the employees are  
24 going to be compensated.

25 Now, the enactment of the protective conditions

1 legislation for the first time in 1940 was part of a major  
2 legislative review of the ICC's authority and the scope of  
3 the exemption in the Transportation Act of 1940.

4           When Congress first put that statutory  
5 foundation under labor protection which the ICC had just  
6 begun -- recently begun at that time -- putting into  
7 effect on its own, Congress looked at the entire range of  
8 questions that bear on this issue. For example, Congress  
9 had to decide whether to reenact the general exemption  
10 from all other legal restraints, as it was then phrased in  
11 the law. And Congress did so.

12           Congress passed up at the time the opportunity  
13 that was suggested to it to reenact a temporary measure  
14 that had been in effect in Title I of the Emergency  
15 Railroad Transportation Act of 1933 that prevented these  
16 things.

17           QUESTION: Mr. Berlin, looking at that same  
18 statutory language that Justice Stevens was asking you  
19 about, at what stage and by whom is a finding of necessity  
20 made?

21           MR. BERLIN: The -- Justice Stevens in his  
22 concurrence in the BLE case in 1986 suggested that any  
23 tribunal that is called upon to assess whether a competing  
24 claim may be asserted may be the one called upon, may have  
25 to determine whether the exemption is necessary to the

1 carrying out of the transaction.

2 In this case, however, it comes up, Mr. Chief  
3 Justice, through the actual procedures of the protective  
4 conditions which Congress has directed be put into place.

5 QUESTION: Well, did the court of appeals in  
6 this case rest any of its decision on the conclusion that  
7 this was not necessary?

8 MR. BERLIN: No, it did not, Mr. Chief Justice.  
9 The court of appeals didn't reach the issue of carrying  
10 out and it didn't reach the issue of necessity. All the  
11 court of appeals held is that claims based on labor  
12 agreements may never come within the scope of the  
13 statutory exemption. That's the --

14 QUESTION: Even though everyone would concede  
15 that the action overriding those kinds was necessary?

16 MR. BERLIN: Even assuming that were the case,  
17 that's right.

18 What the court of appeals did was rely on its  
19 conclusion that the exemption from all other law pertained  
20 only to positive statutory enactments. The court cut a  
21 wedge through the middle of the Railway Labor Act and  
22 distinguished between contract claims, which is what it --  
23 what the court perceived to be asserted in this case and  
24 other types of claims that might be brought under the  
25 Railway Labor Act or rest on the Railway Labor Act.

1           We submit and have discussed our briefs that  
2   that distinction is illusory, that claims arising under  
3   labor agreements are only assertable because of the  
4   Railway Labor Act as labor agreements in the railroad  
5   industry are creatures of the Railway Labor Act. The  
6   contracts carry out the RLA commands, and it's only the  
7   RLA that makes them enforceable. And so we think that one  
8   thing this Court should do as it visits the issue is hold  
9   that the exemption reaches claims assert -- that it may  
10  reach claims asserted under labor agreements, and as part  
11  of that, that it reaches claims asserted under the Railway  
12  Labor Act. That is, there's no way to just sever this out  
13  and say that's as far as the case should go.

14           QUESTION: What claims under the collective  
15  bargaining agreements had to be overridden here?

16           MR. BERLIN: Well, Justice White, one of the  
17  difficulties is in pinning down precisely what the  
18  specific claims were in both cases. In the CSX case, the  
19  employees on the Seaboard property, the property in which  
20  that Way Cross shop was located, had what is called the  
21  Orange Book collective bargaining agreement which had been  
22  negotiated in connection with an earlier merger that  
23  resulted in that Seaboard Railroad.

24           They contended that the Orange Book  
25  contractually barred the merged railroad from moving work



1 -- their work -- from Raceland -- from Way Cross, Georgia,  
2 where it was covered by the Orange Book to the property at  
3 Raceland, Kentucky, which was not in that original Orange  
4 Book merger. So they said that the Orange Book was a bar  
5 itself, a contractual bar.

6 By way of example in the Norfolk Southern case  
7 involving the transfer of employees who perform work known  
8 as distribution of locomotive power, the employees were to  
9 be moved -- or the work was to be moved and employees  
10 given an opportunity to follow it from a property where  
11 one union had a contract that covered that work to the  
12 other property where the work was done by management  
13 officers of the other company. And the employees in that  
14 case contended that their agreement barred the transfer,  
15 although the specifics were always unclear to us, and also  
16 that before the transfer could be accomplished, the  
17 railroad had to negotiate with the union over the terms of  
18 the transfer. That is that the Railway Labor Act  
19 conferred on their employees through their union the right  
20 to insist on negotiation before such a change could be  
21 made.

22 Below, the railroads thought they were at issue  
23 over the question of claims based on the Railway Labor  
24 Act, encompassing but broader than claims simply asserted  
25 on specific labor agreements.

1 QUESTION: Was this a -- if the unions had had  
2 their way, would this have been a major dispute or minor  
3 dispute?

4 MR. BERLIN: The unions contended that the minor  
5 -- the major dispute rules applied. That is that a change  
6 -- a unilateral change in working conditions was under way  
7 and that they had the right to insist on the bargaining  
8 process be followed.

9 QUESTION: Okay.

10 MR. BERLIN: Again --

11 QUESTION: Mr. Berlin, as I recall your brief,  
12 you're not arguing, although I guess you'll settle for  
13 purposes of this case, that it's only RLA contracts that  
14 are superseded by this legislation. You believe that any  
15 contractual commitment is.

16 MR. BERLIN: Justice Scalia, the question that  
17 the court took on certiorari is whether the exemption  
18 applies to claims based on agreements that are asserted  
19 under Federal law. Now we would be quite content, I  
20 assure you --

21 QUESTION: Well, some of your argumentation --  
22 well, I forget which brief and which of your co-petitioner  
23 -- which brief is which -- but one of them makes the  
24 argument that of course if there is a commitment to  
25 bondholders that would stand in the way of a merger, that

1 would be overridden by the ICC's action. Is that your  
2 position?

3 MR. BERLIN: Yes, such a claim, Justice Scalia,  
4 is surely within the scope of the exemption. The court as  
5 much as said so in Schwabacher.

6 QUESTION: And that's not an RLA agreement?

7 MR. BERLIN: No, that's right.

8 With the Court's permission I'd like to save the  
9 rest of time for rebuttal.

10 QUESTION: Very well, Mr. --

11 QUESTION: Counselor, I would like to ask you  
12 one question. I take it the necessity clause of 13 -- of  
13 341 has to comply with the minimum requirements of 347 --  
14 of 11347?

15 MR. BERLIN: Justice Kennedy, any action that  
16 the -- the answer is yes. If employees are to be  
17 affected, that is, displaced or dismissed or somehow have  
18 their work arrangements changed, even if the statutory  
19 exemption does apply as we say it does, those employees  
20 receive the compensatory and procedural protections of the  
21 protective conditions that are imposed by the ICC under  
22 section 11347.

23 QUESTION: Is that of relevance in our  
24 interpreting the scope and effect of -- 11341?

25 MR. BERLIN: We do not depend on the protective

1 conditions to sustain our reading of the exemption.

2 QUESTION: Don't we have to interpret the act  
3 according to its whole design, all of its sections? And  
4 what I'm getting at is whether or not we shouldn't really  
5 have the Commission's interpretation of 11347 in front of  
6 us in order to make this determination.

7 MR. BERLIN: Well, Justice Kennedy, the  
8 Commission -- well, first the statutory exemption predates  
9 the protective conditions by almost 4 years -- 40 years --  
10 statutorially and almost that much before the ICC began  
11 imposing them on its own authority. The -- but the ICC  
12 said when it heard these cases on remand from the court of  
13 appeals and rendered a decision under the protective  
14 conditions that its decision was -- in deciding it was  
15 bound to apply the reading that the court of appeals gave  
16 to 11341(a)'s exemption provision. And in a later  
17 decision last summer, the ICC has made clear that if this  
18 Court reverses the court of appeals on the exemption, the  
19 ICC will have to revisit its decision on the protective  
20 conditions.

21 So the ICC sees 11347's scope as dependent, at  
22 least in part, on whether there is an exemption out there.  
23 And we say that the -- that that's clearly right, that the  
24 congressional action most recently in 1976 relating to  
25 employee protection, was done against the background of 56



1 years of this preexisting exemption and it bears that way,  
2 rather than the other. The availability of the protective  
3 conditions and their compensation and procedural  
4 protection is important in that recognizes the  
5 congressional attention to the interests of employees but  
6 by no means necessary to the existence of the exemption.

7 QUESTION: Mr. Berlin, I have to interrupt, too.  
8 You're saying, if I understand you, if you say you must  
9 comply with 11347, that that statute is not an other law  
10 within the meaning of 11341.

11 MR. BERLIN: (Inaudible.)

12 QUESTION: Because otherwise you'd be exempt  
13 from it.

14 MR. BERLIN: That -- that's right. I think it's  
15 part of the same statute and Congress expects the ICC and  
16 the railroads to comply with it even in exempt situations.

17 QUESTION: 347 is not another law?

18 MR. BERLIN: I think it's not, but even it were,  
19 an exemption from it would never be necessary because  
20 Congress has said that.

21 QUESTION: Thank you, Mr. Berlin.

22 Mr. Minear, we'll hear now from you.

23 ORAL ARGUMENT OF JEFFREY S. MINEAR  
24 ON BEHALF OF THE FEDERAL RESPONDENTS  
25 SUPPORTING THE PETITIONERS

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

3 The issue in this case is whether section  
4 11341(a) of the Interstate Commerce Act exempts a  
5 participant in a Commission-approved transaction from its  
6 contractual obligations. We submit that section 11341(a)  
7 does exactly that.

8 We based our conclusion squarely on the language  
9 of the statute. Section 11341(a) states that a carrier  
10 participating in an approved transaction is exempt from  
11 the antitrust laws and from all other law as necessary to  
12 carry out the transaction. That exemption is easily  
13 sufficient to embrace those laws governing contractual  
14 obligations.

15 QUESTION: Well, one wouldn't have to read it  
16 that way as an original proposition had it not been for  
17 Schwabacher. At least that's my view that you could say  
18 law means governing law, not contracts which come into --  
19 into existence as a result of that law.

20 MR. MINEAR: Well, with all respect, Your Honor,  
21 I think that that would be a difficult proposition. The  
22 reason is this. Contracts derive their force only from  
23 the fact that they're enforceable through law. What is  
24 actually being exempted here is the enforcement of those  
25 laws. A naked promise without the background of law

1 behind it would not be subject to this provision. But  
2 there would be no need for the exemption as well.

3 Now, this Court recognized as you note that  
4 principle in Schwabacher, that in fact contractual  
5 obligations are subject to the 11341(a) exemption. In  
6 that case the court held that the Commission's approval of  
7 a railroad merger could deprive dissenting shareholders of  
8 their contract rights under State law.

9 The same is true in this case. Section 11341(a)  
10 preempts the union's rights --

11 QUESTION: One of the issues in that case was  
12 what did the State law require.

13 MR. MINEAR: Not exactly, Your Honor. I think  
14 the question there -- to give you the background on this  
15 case. The dissenting shareholders argued that they're  
16 entitled to accrued dividends under the corporate charter  
17 and that that was enforceable through Michigan law.

18 The Commission --

19 QUESTION: Even if the amount were greater than  
20 the reasonable value of the shares in the exchange.

21 MR. MINEAR: That is correct.

22 QUESTION: And there had been no determination  
23 of whether they would be entitled to it or not.

24 MR. MINEAR: That is correct. And the court  
25 held that the Commission should rule on that issue and its

1 ruling would be dispositive. And it's noted, for example,  
2 that first the Commission must consider the public  
3 interest in approving that transaction --

4 QUESTION: It would be dispositive of the State  
5 law question of whether they're entitled to 100 cents on  
6 the dollar on the accrued dividends.

7 MR. MINEAR: What it would effectively do is  
8 prevent them from enforcing their contractual rights under  
9 State law. That is the effect of the exemption. It  
10 prevents enforcement of law.

11 But the same is true in this case. As I said,  
12 section 11341(a) preempts the union's rights under the  
13 collective bargaining agreements to the extent that  
14 enforcement of those rights would prevent the railroad  
15 from carrying out the approved transaction. Indeed if it  
16 were otherwise many of these transactions could simply not  
17 take place.

18 Now, the unions do not quarrel with our basic  
19 position as section 11341(a) can preempt the enforcement  
20 of contractual rights. Nor do they quarrel with the  
21 result in Schwabacher. Instead the unions argued the  
22 contract in this case should be treated differently,  
23 because the Commission, in their view, has no authority or  
24 control over labor matters.

25 Now there are two fundamental problems with this



1 position. First, the union's argument is to whether the  
2 Commission has authority, control, or jurisdiction over  
3 labor matters are beside the point. Section 11341(a) by  
4 its terms exempts a participant in a Commission-approved  
5 transaction from all law to the extent necessary to carry  
6 out the transaction. The exemption does not depend on  
7 whether the Commission has jurisdiction over the subject  
8 matter of that law.

9 Second, the union's assertion is simply not  
10 correct. The I -- the Interstate Commerce Act requires  
11 the Commission to consider and address labor matters when  
12 approving a proposed merger. Indeed, as this Court  
13 recognized in *Lowden v. The United States*, mergers almost  
14 invariably affect collective bargaining agreements, and  
15 the Commission must consider those effects when evaluating  
16 the proposed transaction.

17 Moreover, there is no need to read into section  
18 11341(a) an implied exception for labor contracts, because  
19 the Interstate Commerce Act contains other provisions.  
20 They are designed specifically to protect rail labor from  
21 hardships that might result from a merger.

22 First, as I've mentioned, the Commission must  
23 consider the interests of rail labor when deciding whether  
24 the proposed transaction is in the public interest.  
25 Second, the Commission must address the terms of the

1 merger transaction --

2 QUESTION: May I ask you a question similar to  
3 the one I asked the -- Mr. Berlin?

4 MR. MINEAR: Yes, sir.

5 QUESTION: Supposing one of the two railroads  
6 had long-terms leases on its executive offices and they  
7 wanted to consolidate their executive offices, could they  
8 cancel the lease?

9 MR. MINEAR: It depends -- the Commission looks  
10 at this in two parts.

11 QUESTION: Well, what does the statute provide?

12 MR. MINEAR: Well, the Commission -- the statute  
13 provides that they would be exempt from their enforcement  
14 of those contracts to the extent necessary to carry out  
15 the transaction.

16 QUESTION: Well, let's assume it's necessary and  
17 just the same number of dollar savings that you get out of  
18 consolidating two car repair facilities.

19 MR. MINEAR: Well, the Commission will look at  
20 this in two steps. First, it will ask whether this  
21 proposed activity of the railroad is a part of the  
22 approved transaction. This is essentially a matter of  
23 interpreting the transaction itself.

24 QUESTION: Not interpreting the contract -- how  
25 do you interpret the transact without interpreting the

1 contract?

2 MR. MINEAR: Well, the contract -- you're  
3 talking about --

4 QUESTION: In other words, the contract doesn't  
5 provide for the cancellation on my executive office leases  
6 and this contract doesn't provide for the consolidation of  
7 the car repair facilities, does it?

8 MR. MINEAR: The -- it was a finding by the  
9 arbitrator that in fact the transaction did contemplate --

10 QUESTION: Well, I understand it contemplated  
11 it. But was there a contractual requirement that these -  
12 -

13 MR. MINEAR: As part of the transaction, no, but  
14 I do not believe that's necessary and the Commission does  
15 not believe that that's necessary. Rather they look to  
16 whether this was a contemplated activity under the  
17 transaction. Once it makes that --

18 QUESTION: Supposing they could prove that they  
19 contemplated merging the office space in the two  
20 headquarters' offices?

21 MR. MINEAR: Well, that's --

22 QUESTION: But there's nothing said about it in  
23 the contract.

24 MR. MINEAR: There's nothing -- this again is a  
25 matter that the arbitrator decided in this case. It's not

1 that the question's presented squarely here.

2 QUESTION: Well, what's your view about my  
3 hypothetical?

4 MR. MINEAR: My view of your hypothetical is  
5 that this would be submitted to the appropriate tribunal.  
6 They would determine first whether it was a part of the  
7 approved transaction. If so, the next question would be -  
8 -

9 QUESTION: Well, what if appropriate tribunal  
10 decides whether the lease on some property on Wall Street  
11 is part of the transaction?

12 MR. MINEAR: Well, the -- tribunal is going to  
13 make that determination by looking at the terms of the  
14 transaction, implied and in fact.

15 QUESTION: What tribunal? I'm asking what  
16 tribunal makes that determination?

17 MR. MINEAR: It will be the tribunal that has  
18 been asked to enforce the contract lease most likely. The  
19 parties --

20 QUESTION: Like the New York State Court would  
21 do.

22 MR. MINEAR: New York State Court, for example.  
23 They would examine the transaction and make a  
24 determination whether this was contemplated under the  
25 transaction, whether it was implied in fact in the



1 transaction, and they'd make the second determination of  
2 whether this interferes with carrying out whether the  
3 enforcement of the lease interferes with the carrying out  
4 of that particular activity under the transaction.

5 QUESTION: Well, didn't the arbitration  
6 committee decide that this shop consolidation was actually  
7 authorized by the Commission's 1980 order?

8 MR. MINEAR: Yes, they did imply they found it  
9 implied in the terms of the transaction. It was not like  
10 the --

11 QUESTION: Well, then the Commission affirmed  
12 that.

13 MR. MINEAR: And the Commission did affirm that  
14 as well.

15 QUESTION: So this was actually contemplated or  
16 authorized by our 1980 order.

17 MR. MINEAR: Yes, and the court of appeals did  
18 not reach that issue, so it's not part of this case. The  
19 issue before this case is the interpretation --

20 QUESTION: Well, so as it comes to us, it was  
21 authorized?

22 MR. MINEAR: Yes, that is correct.

23 MR. MINEAR: Now, as I was saying the -- not  
24 only is the public interest considered in the course --  
25 the labor interests considered in the course of the public

1 interest evaluation of the Commission. In addition, the  
2 Commission must add to the terms of the merger special  
3 provisions that are specifically designed to protect rail  
4 labor for dislocations that might result from carrying out  
5 the merger.

6 And then finally, as we've talking about,  
7 section 11341's exemption applies only to the extent that  
8 is necessary to permit implementation for the transaction.  
9 In some the expressed terms of the act provide ample  
10 protection for rail labor. There's simply no need for  
11 this Court to create additional protections that are not  
12 part of the legislative scheme.

13 I'd like to reserve the remainder of my time for  
14 petitioners' rebuttal.

15 QUESTION: Thank you, Mr. Minear.

16 Mr. Mahoney?

17 ORAL ARGUMENT OF WILLIAM G. MAHONEY

18 ON BEHALF OF THE PRIVATE RESPONDENTS

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

21 The union respondents agree that the sole issue  
22 before this Court is whether section 11341(a) standing  
23 alone overrides contracts including collective bargaining  
24 agreements. But the petitioners and the Federal  
25 respondents acknowledge that, regardless of how this Court

1 rules on that specific question, the disputes between the  
2 parties will not be resolved.

3 In its reply brief at page 3, Norfolk Southern  
4 states that the decision here will be useful as a guide to  
5 the ICC for, quote, "it will matter in the application of  
6 the ICC's authority to administer employee protective  
7 conditions under section 11347 whether the railroads are  
8 already exempt from the Railway Labor Act and labor  
9 agreements to the extent necessary to permit them to carry  
10 out the approved consolidation." And Norfolk Southern  
11 continues, "The Interstate Commerce Commission has made  
12 clear that it will have to reconsider its remand decision  
13 if this Court agrees with the petitioners and the Federal  
14 respondents as to the extent of the section 11341  
15 exemption."

16 In short, it is Norfolk Southern's position that  
17 should this Court agree with it, 11341(a) will preempt  
18 11347. It is our position that section 11341(a) standing  
19 alone should not be read as overriding collectively  
20 bargaining agreements. But if such an interpretation is  
21 applied to it, section 11347 must then be considered  
22 because the exemption of 11341 extends only to railroads  
23 that are prevented from carrying out a merger or a control  
24 transaction as approved and conditioned, and section 11347  
25 supplies the conditions.

1           In Texas against The United States this Court  
2 held that the scope of the immunity is measured by the  
3 purpose which Congress had in view --

4           QUESTION: I think the railroad said that the --  
5 is it their position that the protective provisions don't  
6 apply at all if they win? I thought they -- the  
7 protective provisions will at least guarantee 6 months --  
8 6 years of pay --

9           MR. MAHONEY: They will, but strip them of their  
10 contract rights --

11          QUESTION: Isn't the real issue whether they not  
12 only can transfer the work, but transfer the employees to  
13 the new location?

14          MR. MAHONEY: No, I don't think that's the  
15 issue, Your Honor. The issue is whether --

16          QUESTION: Well, it was, though. There was an  
17 issue that was --

18          MR. MAHONEY: No, the issue about the transfer,  
19 which was tried before the arbitrators in both cases, and  
20 in both cases the arbitrators found that these transfers  
21 were authorized by the Commission, because the Commission  
22 said they were authorized by the Commission and the  
23 arbitrators considered themselves an agent.

24          QUESTION: The first part of my question was do  
25 you understand the railroads to contend that the



1 protective provisions do not apply in the sense that they  
2 object to 6 months -- 6 years' worth of pay?

3 MR. MAHONEY: No, Your Honor.

4 QUESTION: No, they do not.

5 MR. MAHONEY: No. They don't object to that,  
6 but what they want to do is --

7 QUESTION: No, but they want to transfer -- they  
8 want to transfer the employees to the new location so they  
9 can work.

10 MR. MAHONEY: Well, they want to absolve  
11 themselves of the contractual obligations they have under  
12 such as the Orange Book, which the arbitrator found they  
13 did not have to move. The arbitrator found that the  
14 Orange Book, for example, restricted the -- prohibited the  
15 transfer of work and prohibited transfer of employees  
16 beyond the old SCL property. And he said, well, the  
17 Commission says this is necessary in order to carry out  
18 this transaction, and this is an approved transaction so  
19 we'll move the work, but we don't have to move the  
20 employees.

21 And the Commission turns right around and says,  
22 oh, that's egregious error, because that places this in  
23 conflict with our order, our 5-year-old merger order which  
24 didn't say anything about the Raceland, Way Cross shops at  
25 all and couldn't have. Nobody knew it was going to happen

1 in those days. What they have done is they have extended  
2 the term transaction -- approved transaction -- to every  
3 single thing that the carrier wants to carry out as a  
4 result of the transaction. And that's what the protection  
5 is there for: to protect employees --

6 QUESTION: If you have a labor contract that --  
7 would -- with the rail unions that say there will be no  
8 consolidations of facilities.

9 MR. MAHONEY: Yes, Your Honor.

10 QUESTION: Then the ICC could decree mergers  
11 until the cows come home and nothing would happen except  
12 that technically there would be one company operating  
13 inefficiently instead of two.

14 MR. MAHONEY: No, under the Railway Labor Act,  
15 Your Honor, there would -- something would happen and what  
16 would happen --

17 QUESTION: What would happen?

18 MR. MAHONEY: Well, it might take awhile but it  
19 would happen, and that would be that at the end of the  
20 procedures of the Railway Labor Act they could put  
21 whatever they wanted into effect.

22 QUESTION: At the end of the procedures of the  
23 Railway Labor Act?

24 MR. MAHONEY: They could put whatever they  
25 wanted into effect. And right now the emergency board is

1 hearing cases which contains the railroad's position that  
2 they want this authority to make these moves. They don't  
3 have it. They want it. They've placed it before the  
4 emergency board as their bargaining proposition under  
5 section 6. Their --

6 QUESTION: But it is your position that all a  
7 railway labor union has to do is put in its contract with  
8 management that there shall be no consolidation of  
9 facilities without the consent of the union and, in  
10 effect, whatever the ICC decrees, no matter how specific  
11 it gets for that matter about a merger or a consolidation,  
12 it will not be effective because it cannot override that  
13 contractual obligation.

14 MR. MAHONEY: Your Honor, in the first place, I  
15 think --

16 QUESTION: I think it can take a yes or no. Is  
17 that your position or not?

18 MR. MAHONEY: No, it is not.

19 QUESTION: All right. Why not?

20 MR. MAHONEY: It's not my position because if  
21 you had a contract, I would judge, that was directly  
22 opposed to an order of the Commission, you could override  
23 the contract as the court said the Congress could do in  
24 L&N against Motley when they outlawed passes. But you  
25 can't -- you wouldn't outlaw the obligation -- there is in

1 our contractual obligation that obviously the other party  
2 paid for. The railroad is not going to give that sort of  
3 a benefit away.

4 QUESTION: I don't understand. I don't  
5 understand what you're saying.

6 MR. MAHONEY: Well, there's an obligation -- a  
7 contract obligation as this Court said in L&N against  
8 Motley -- that they might not -- they might take away  
9 specific performance, but they just can't wipe out all --

10  
11 QUESTION: Oh, I see, so what you're saying is,  
12 well, the new company would be permitted to merge  
13 facilities as the ICC has said but they will have to pay  
14 compensation to the union for that.

15 MR. MAHONEY: They would have to go back and  
16 make that determination --

17 QUESTION: Which would probably be compensation  
18 in the amount of the efficiency that they were trying to  
19 eliminate, right? I mean the wages of all of the people  
20 who would have otherwise been eliminated.

21 MR. MAHONEY: Well, you have to look at -- 11347  
22 requires two things it seems to me. It requires the  
23 things that Mr. Berlin was saying -- the compensation, the  
24 6 years' protection and money -- but it also expressly  
25 says preservation of wages, rules, and working conditions.



1 Preservation of collective bargaining and collective  
2 bargaining agreement rights.

3 QUESTION: Well, to the extent that that  
4 governs, I don't think the railroads are arguing that they  
5 aren't bound by that. They're just arguing about whether  
6 41 permits them to, apart from the guarantees that are  
7 made in the legislation, override a contract. And your  
8 position is that if the labor union has an inefficiency  
9 built into a contract, it cannot be eliminated by the ICC.

10 MR. MAHONEY: It can. It can.

11 QUESTION: Well, not without compensation. I --

12 MR. MAHONEY: Not without compensation, correct.  
13 Yes, Your Honor.

14 QUESTION: Okay, you want to say it can be  
15 eliminated with compensation. I regard that as not being  
16 eliminable.

17 MR. MAHONEY: I think there's a constitutional  
18 difference --

19 QUESTION: I mean, you could buy back anything  
20 from the unions. I mean, management can go in and say,  
21 let's eliminate this if (inaudible) this much money.

22 MR. MAHONEY: If it will sell (inaudible) so  
23 sure. That's true.

24 QUESTION: ICC for that.

25 MR. MAHONEY: It is our position rather that it

1 is the overall view of Congress in regulating rail  
2 transportation was to ensure the adequate, safe,  
3 efficient, and uninterrupted flow of interstate commerce  
4 by rail and to accomplish that, the Congress enacted three  
5 basic statutes and a number of ancillary statutes. The  
6 Interstate Commerce Act, the Railway Labor Act, and the  
7 Federal Railroad Safety Act. And the -- as this Court  
8 said in Schwabacher, the Interstate Commerce Act governs  
9 issuance of securities, car supply, joint use of  
10 terminals, abandonments, and so forth, and also governs  
11 all financial transactions governing combinations of  
12 railroads.

13 Its only relationship to employees is to  
14 consider their interests in reaching public interest  
15 findings and to impose minimum standards to protect  
16 employees against the effects of its orders.

17 The second element, the Railway Labor Act, as  
18 this Court noted, was a complementary regime to the  
19 Interstate Commerce Act. You noted that in Pittsburgh and  
20 Lake Erie. And this act governs labor relations. It  
21 governs the making and maintaining of agreements effecting  
22 rates of pay, rules, and working conditions. And section  
23 7 first to the Railway Labor Act provides that if there is  
24 a controversy regarding those matters and a party refuses  
25 to submit that to arbitration, he shall not be construed -

1 - it shall not be construed as a violation of any legal  
2 obligation imposed upon such party by the terms of this  
3 act or otherwise.

4 And that is precisely what the Commission says  
5 the employees must do now. They must submit their  
6 contracts to arbitration, changes in their contracts to  
7 arbitration. Elimination of their contracts and their  
8 right to representation to arbitration.

9 The third part of these -- of this tripartite  
10 statutory arrangement is the Safety Act, administered by  
11 the Federal Railroad Administration. Now, the petitioners  
12 and the Federal respondents stressed the exclusive and  
13 plenary nature of the Interstate Commerce Act, that it is  
14 the supreme law of the land. And so it is, but so is the  
15 Railway Labor Act and so is the Safety Act in their  
16 specific spheres of governance. And there's no doubt that  
17 any State law that intrudes upon that exclusive sphere of  
18 the Interstate Commerce Act is preempted by the supremacy  
19 clause as implemented by 11341.

20 And that was the situation in Schwabacher, where  
21 this Court held the State law chartering the railroad and  
22 was preempted to the extent it conflicted with the  
23 Interstate Commerce Act because Congress had occupied the  
24 field by giving complete control of the capital structure  
25 of railroads to the Interstate Commerce Commission, just

1 as the Railway Labor Act is supreme, plenary, and  
2 exclusive in the governance of the making and maintaining  
3 of agreements affecting rates of pay, rules, and working  
4 conditions.

5 Now the impact of these statutes do overlap, and  
6 when they do they must be accommodated, giving as full  
7 effect as possible to the meaning and purpose of each.  
8 For example, the safety laws certainly impact. They're  
9 expensive. They impact upon the efficiency of railroads,  
10 the flexibility of railroads. The Railway Labor Act does  
11 the same thing. But Congress says each of those things --  
12 each of those statutes are necessary in a public interest.

13 There has never been before 1983 a court or of  
14 the Commission or an arbitrator ever to hold that any  
15 provision of the Railway Labor Act or a collective  
16 bargaining agreement to be in conflict with any provision  
17 of the Interstate Commerce Act or an ICC order. It's  
18 never happened, but in 1983, the Commission, in the R.G.W.  
19 case, held that conflict existed, and in 1985 it held  
20 that, by virtue of 11341, its orders and not the Railway  
21 Labor Act or labor contracts governed employee/management  
22 relations in connection with an approved transaction.

23 And by an approved transaction the Commission  
24 meant that any action made operationally or economically  
25 feasible or desirable by the merger. In other words, any



1 result of the merger. The Commission made no attempt at  
2 accommodation of the two statutes at all or the separate  
3 complementary purposes, not did it even acknowledge that  
4 prior to 1983, no conflict had ever been held to exist.  
5 The Commission just invaded the Railway Labor Act's sphere  
6 of governance, declared the existence of a conflict, and  
7 proclaimed itself the winner.

8 QUESTION: Mr. Mahoney, can I ask you something  
9 about section 11347?

10 MR. MAHONEY: Yes, sir.

11 QUESTION: I had assumed that the reason it  
12 provides that the arrangement and the order approving the  
13 transaction must require that the employees of the  
14 affected rail carrier will not be in a worse position  
15 related to their employment as a result of the transaction  
16 during the 4 years following the effective date.

17 I assumed when I read it that the reason for  
18 that was without it, their employment rights could be  
19 altered. Are they not talking about contractual rights of  
20 employment there?

21 MR. MAHONEY: We're not and they never were and  
22 they never had been, Your Honor.

23 QUESTION: What -- what --

24 MR. MAHONEY: What they meant was they could  
25 abolish jobs, could always abolish jobs, cut back your

1 work forces --

2 QUESTION: Even if you had a contractual -- I  
3 mean, if there were a commitment to have so many jobs on a  
4 particular run?

5 MR. MAHONEY: Oh, no, Your Honor.

6 QUESTION: No?

7 MR. MAHONEY: No. No, those were never changed  
8 by these agreements. But they were changed by agreement.  
9 They were never changed by statute -- by requirement of  
10 the Commission. As a matter of fact, prior to 1983, we  
11 didn't even reach the question of contracts. The  
12 protective arrangements, if you look at the protective  
13 arrangements in all the agreements, they don't provide for  
14 any compensation for loss of contracts rights. They  
15 provide for compensation for loss of jobs, for being  
16 required to transfer, and so forth. And this was all done  
17 by agreement.

18 And agreements were always made. I don't recall  
19 in 40 years of practice before the Interstate Commerce  
20 Commission under the Railway Labor Act that there was ever  
21 not an agreement as a result of a merger. There were a  
22 number of agreements -- a number of mergers that took  
23 place and are still in existence in which there are  
24 different agreements on different sections of the  
25 railroad, like the Burlington Northern, because they never

1 got together and put all of the agreements together, but  
2 they set it up as divisions.

3 But I don't recall anytime --

4 QUESTION: I see. So you think what this means  
5 is that if there were a, let's say, a station master who  
6 would have served at a particular location, even though he  
7 could contractually have been transferred but in fact he  
8 was serving where he lived, this provision means that even  
9 though you had a contractual right to transfer him, you  
10 won't -- you won't transfer him for 4 years?

11 MR. MAHONEY: No, it doesn't mean that. If you  
12 have a contractual right to transfer him, you can transfer  
13 him, give him seniority anywhere, and he's got to exercise  
14 that seniority or he gets no protection.

15 QUESTION: Is the reading of the section that  
16 the railroad and the union can reach an agreement with  
17 respect to the effects of the merger on the employees, but  
18 that this is a minimum standard that the ICC must insist  
19 upon.

20 MR. MAHONEY: Yes, Your Honor.

21 QUESTION: Is that what you're saying?

22 MR. MAHONEY: That's exactly right. As in the  
23 original language of 52(f), the third sentence says,  
24 notwithstanding the foregoing, the parties may reach  
25 whatever reasonable agreement they wish. And that has

1 always been the case.

2 Now the -- because they have taken over an area  
3 -- this is a little unusual. It's not like Schwabacher,  
4 it's not like any of the cases that I've read -- Daniel --  
5 the Daniel case, Seaboard case or any of those, because  
6 here there is a direct invasion of another complementary  
7 regime which Congress designed to govern rail  
8 transportation in the United States. It's a direct  
9 invasion of that. There's never been any conflict before.

10 The Commission declared the conflict, created  
11 the conflict, and then said, we win.

12 QUESTION: Well, Mr. Mahoney, certainly the  
13 antitrust laws are set aside.

14 MR. MAHONEY: Oh, yes, Your Honor. And that's  
15 done explicitly.

16 QUESTION: Well, so why shouldn't all -- well,  
17 why shouldn't all other law after the antitrust laws  
18 include other Federal laws?

19 MR. MAHONEY: I think all -- you can set aside  
20 all other law, but this you had to find first of all it  
21 seems to me an explicit conflict. There has to be some --  
22 -- no chance at accommodation. Here, there is  
23 accommodation.

24 QUESTION: Do you think -- do you think in  
25 Schwabacher there was a conflict?



1 MR. MAHONEY: Not with any Federal law, Your  
2 Honor. No, it was a conflict with State law.

3 QUESTION: Well, was there a conflict with State  
4 law?

5 MR. MAHONEY: It preempted that, yes.

6 QUESTION: Well, why shouldn't Federal law be  
7 equally preempted?

8 MR. MAHONEY: Because where Congress has enacted  
9 complementary regimes of law to govern the same subject  
10 matter, such as rail transportation in the United States,  
11 it seems to me that before one of those can be interpreted  
12 to supersede or preempt the other, there should be -- it  
13 should be a very clear conflict and no possible way of  
14 accommodating and allowing both of those laws to proceed.

15 QUESTION: I can certainly understand the merit  
16 of that argument if neither law said anything with respect  
17 to the other. But here the ICA says that people -- a  
18 participant in this transaction are exempt from the -- I  
19 mean, it deals with conflict and says that this law  
20 prevails, as I read it.

21 MR. MAHONEY: That's true, Your Honor, but the  
22 -- it's only exempt insofar as necessary to carry out an  
23 order as conditioned. And the condition is 11347 and  
24 11347 says preserve all collective bargaining agreements  
25 and collective bargaining rights. I don't see how anyone

1 can get out of that circle. It's there. You can't ignore  
2 it. If you're going to determine --

3 QUESTION: But now you're not arguing the  
4 Railway Labor Act as having to be adjusted and compromised  
5 along with the ICA. You're saying that this act itself.

6 MR. MAHONEY: That's correct, Your Honor.

7 QUESTION: Those are two different arguments  
8 really.

9 MR. MAHONEY: Well, the railway -- I'm saying  
10 that the Railway Labor Act as a separate regime is not  
11 invaded -- cannot be invaded or should not be invaded by  
12 11341 unless there's an absolute conflict that can't be  
13 avoided.

14 QUESTION: Okay.

15 MR. MAHONEY: But at the same time if you're  
16 going to say that, yes, you can read 11341 that way, then  
17 you have to go to 11347 because 11340 exempts only those  
18 carriers in carrying out transactions as conditioned.  
19 They have to carrying them out as conditioned. And one of  
20 the conditions is a minimum level of preserving all  
21 collective bargaining agreements.

22 QUESTION: But 11347 doesn't say that? Does it,  
23 or am I wrong?

24 MR. MAHONEY: 11347 says --

25 QUESTION: What is the language that you -- you

1 told the Chief Justice that 11347 says that all existing  
2 and collective bargaining contracts have to be preserved,  
3 and I just don't see that in the section, unless I'm  
4 missing something.

5 MR. MAHONEY: Section 11347, Your Honor, says  
6 that they must -- that the Commission must impose as a  
7 minimum level of protection the protections that were  
8 imposed by the Secretary of Labor for the protection of  
9 employees in the Amtrak case, when Amtrak was created.  
10 And you go to that statute and you find in that statute  
11 the precise sections 2 and 3 of the New York Dock  
12 Conditions, which the Commission just adopted, not  
13 adapted, by adopted from the Secretary and put them in,  
14 and those become the requirements of law.

15 QUESTION: But do those refer to the collective  
16 bargaining contracts?

17 MR. MAHONEY: They say -- section 2 says they  
18 must be -- preserve all collective bargaining and  
19 collective bargaining rights, privileges and benefits.  
20 And section 3 says you must preserve -- no employee shall  
21 lose any protective agreement like the Orange Book, and he  
22 has the right to elect between his protective agreement  
23 and the conditions imposed by the Commission. And that if  
24 he picks one, when that one expires he can then go to  
25 other one. That's what section 3 says. The Commission

1 doesn't even mention that and wipes out the Orange Book.

2 So it's a -- it does -- we respectfully submit,  
3 Your Honor, as we've pointed out at -- I think you'll find  
4 that on -- 11347 is on 5a and then the New York Dock  
5 Conditions is sections 2 and 3 -- or (inaudible).

6 QUESTION: 11347 just covers the period for 4  
7 years after the date of the final action of the  
8 Commission, doesn't it?

9 MR. MAHONEY: No. No, Your Honor, that covers  
10 the period for 6 years from the date the employee is  
11 affected. The employee could be affected 3, 4, 5, 6 years  
12 later. And from the date of his adverse effect, then he  
13 is protected for 6 years forward of that date.

14 QUESTION: Well -- didn't I -- it must say that  
15 in something that's not before me, because although the  
16 first part certainly says 4 years.

17 MR. MAHONEY: The first part of what, Your  
18 Honor?

19 QUESTION: The first part of 11 -- unless I'm  
20 simply dealing with a typographical -- 11347.

21 MR. MAHONEY: 11347 is -- we've printed it out  
22 on page 4a of our appendix. On a rail carrier involved in  
23 a transaction which -- for approval, which is sought under  
24 11344, the ICC shall require the carrier to provide a fair  
25 arrangement at least as protective of the interest of



1 employees who are affected by the transaction as the terms  
2 imposed under this section before February 5, 1976. That  
3 was the old New Orleans conditions which were the  
4 Washington Agreement upon which it was superimposed for  
5 the first 4 years Oklahoma conditions, and that was  
6 because the Oklahoma --

7 QUESTION: Yes, but then go on to the last  
8 sentence of 11347 at the top of page 5a of your appendix.  
9 There it does say, will not be in a worse position related  
10 to employment as a result of transaction during the 4  
11 years following the effective date of the following action  
12 of the Commission.

13 MR. MAHONEY: That's correct, Your Honor. But  
14 --

15 QUESTION: How long ago did the Commission act  
16 in this case?

17 MR. MAHONEY: The problem is -- the Commission  
18 acted in this case in 1980, but here it says you not only  
19 have to impose -- the conditions that were imposed before  
20 February 5, but the terms established under 405 of the  
21 Rail Passenger Service Act. And that's what we were  
22 talking about a moment ago. The terms established under  
23 405 of the Rail Passenger Service Act are -- as set forth  
24 in sections 2 and 3 of the New York Dock condition. I  
25 mean, that's what this entire case is about, that --

1           One of the conditions is preserve collective  
2 bargaining right and collective bargaining agreement  
3 rights, and that's what they didn't do here. That's what  
4 they -- that's what they simply -- they simply wiped out.  
5 The employees, for example, the ATDA -- the employees  
6 represented by the ATDA, the American Train Dispatchers  
7 Association, on the Norfolk and Western Railroad, they  
8 were required to go to another railroad controlled by  
9 Norfolk Southern, which was the Southern Railroad. And  
10 when they went to the Southern Railroad, when they got  
11 there, they no longer had representation under their --  
12 under the law -- under the statute, and they no longer had  
13 a contract. No contract protection.

14           Now, they may think -- someone might say, well,  
15 they were much better off. Well, maybe they were and  
16 maybe they weren't. That isn't the point. The point is  
17 that they didn't have any contract protection anymore and  
18 they didn't have any representation anymore.

19           And the fellows at Way Cross they were sent from  
20 the old SCL railroad in Way Cross, Georgia, up to  
21 Raceland, a commonly controlled CSX-controlled railroad,  
22 another railroad. These aren't the same railroads. These  
23 are separate railroads under common control. CSX  
24 controlled both railroads that -- you go there. When they  
25 go there, they were under a different contract with

1 different rules and different working conditions. And  
2 half of them have this contract right which the arbitrator  
3 found required them to stay in -- on SCL property for  
4 life, lifetime employment or lifetime full compensation in  
5 lieu of employment.

6 QUESTION: Not required them to stay, but  
7 required the railroad to keep them if they'd wanted.

8 MR. MAHONEY: Or prohibited them from moving.  
9 I'm sorry. I misspoke myself. Prohibit them from moving.  
10 They could stay there with lifetime employment or lifetime  
11 protection, compensation -- full compensation in lieu of  
12 employment, and the Commission now says to them, not any  
13 more.

14 If you stay there, you're going to get nothing.  
15 If you want that lifetime protection, move to Raceland.  
16 You've got to get off the SCL property. That's the  
17 contract violation and for which they would get nothing.  
18 And the Commission has said --

19 QUESTION: Didn't the Commission say that the  
20 promise of lifetime employment was also abrogated, or not?

21 MR. MAHONEY: Well, only if -- no, if they  
22 moved. The Commission said that if they moved, the  
23 carriers said that they would give them a lifetime  
24 protection if they moved. But of course they could say  
25 next week, let's move again. It became sort of worthless.

1 But nevertheless, if they stayed, which they had the right  
2 to do according to the arbitrator, who interpreted the  
3 agreement. If they stayed there, then they got no  
4 protection at all of any kind.

5 QUESTION: Mr. Gallagher, why isn't that one in  
6 that a separate section? I thought this case just  
7 involved 11341, and I thought the court below held that  
8 there simply is no power under that to alter the  
9 contractual arrangements.

10 MR. MAHONEY: That's correct.

11 QUESTION: You're making the argument that under  
12 11347, there is a specific preservation of those  
13 contractual arrangements. That may be, but that wasn't  
14 what the court below --

15 MR. MAHONEY: That's correct, Your Honor. He  
16 never reached --

17 QUESTION: -- had before it.

18 MR. MAHONEY: But all -- my point is here that  
19 if you say that 11341, or lean to the proposition that  
20 11341 supersedes contracts or overrides contracts, then  
21 you have to look at 11347, because 11347 -- 11341 only  
22 extends protections or exemptions to those carriers.

23 QUESTION: So we could tell the court of appeals  
24 below you're wrong about 22341, remand, and tell them to  
25 consider 11347, if we think that 11341 says nothing about



1 not impairing --

2 MR. MAHONEY: Well, that's correct, Your Honor,  
3 you could do that, Your Honor.

4 QUESTION: We could do that.

5 MR. MAHONEY: And unfortunately that, we think,  
6 would be a terribly unjust thing to do in these cases,  
7 simply because these people have been deprived of these  
8 rights for 5 years, 8 years, 10 years. The Commission is  
9 -- the Commission is now interpreting contracts,  
10 interpreting collective bargaining agreements. I cited a  
11 couple in a couple of footnotes. Where they're now  
12 interpreting agreements to see if they violate the  
13 Commission orders or whether the orders violate the  
14 contract. That's unheard of. They are now doing what the  
15 National Railroad Adjustment Board has exclusive authority  
16 to do. They've never done that before. It's never -- no  
17 contract has ever been held or eliminated or modified by  
18 any order including the only three cases they ever cite,  
19 which is a '63 Eighth Circuit case which upheld a  
20 contract; a Burlington Northern case in '75 with their  
21 supervisors, which also upheld the contract; and the  
22 statement that the ICC made in 1974 when the trustee of  
23 the Erie-Lackawanna wanted to get out from under a  
24 contract. He wanted to get out from under the contract.  
25 He wanted to get out from under a contract. He went back

1 to the Commission and said, we want out from under this  
2 attrition agreement, and we came in and opposed it on two  
3 grounds and fortunately I raised the question.

4 One was that you don't have authority to do  
5 that, ICC, and the other was you shouldn't do it anyway  
6 because they haven't approved their case. And the ICC  
7 said, well, yeah, we got the authority because our '63  
8 court of appeals said we did. But we're not going to  
9 exercise that authority because they didn't make their  
10 case.

11 So there's never been a contract upset until  
12 now, until the Commission, who has found this conflict and  
13 who started upsetting contracts. And, Your Honors, we  
14 don't want to go back and start all over again on this on  
15 another 4 years. There might not be enough of the  
16 employees left to bother with. And besides that, the  
17 Commission has recognized -- in this remand decision, they  
18 recognized that since their decision this has caused such  
19 enormous deterioration in the labor/management relations  
20 in this industry and it has.

21 And that is one of things that they're supposed  
22 to avoid and this Court said in Lowden that you should  
23 avoid if possible. And they have created this terrible  
24 upset among these employees and management. Because  
25 management likes it. There's no bargaining anymore. Why

1 should they bargain with us anymore? All they have to do  
2 is say, the Commission says this consolidation 10 years  
3 down the road has been authorized. And if you have a  
4 consolidation you've got to move from A to B, naturally.  
5 That's by definition. So it's necessary. It's an  
6 authorized, necessary consolidation. The contracts go out  
7 the window and everything is moved. There's no way to  
8 prove that isn't necessary. It is by definition necessary  
9 to go from A to B if you're going to consolidate A with B.

10  
11 And that's the great problem that we face, and  
12 we think that what they have done is they've taken 11347,  
13 which is clearly -- no question it was designed as a  
14 shield to protect employee rights against ICC orders,  
15 convert it into a sword, and cut out their contract  
16 rights.

17 If there are no other questions, Your Honors, I  
18 conclude my argument. Thank you very much.

19 QUESTION: Thank you, Mr. Mahoney.

20 Mr. Minear, I believe you reserved 2 minutes for  
21 rebuttal.

22 REBUTTAL ARGUMENT OF JEFFREY S. MINEAR

23 ON BEHALF OF THE FEDERAL RESPONDENTS

24 SUPPORTING THE PETITIONERS

25 MR. MINEAR: Thank you, Mr. Chief Justice.

1           I think it's important to emphasize the that  
2       issue in this case is the construction of 11341(a) and in  
3       particular the meaning of the phrase, "the antitrust laws  
4       and any other law." The unions have raised at great  
5       length the question of the meaning of section 11347. That  
6       is an issue that is presently before the Commission on  
7       remand in this case. It is an issue that will be  
8       addressed after this Court addresses this issue of 11341.  
9       We do not think it's necessary for the Court to interpret  
10      11347 in this proceeding. In fact, it would be quite  
11      improvident to do so.

12           Beyond that the unions have not raised any issue  
13      beyond the -- that reaches the plain language of the  
14      statute here. We think that the plain language controls  
15      11341(a) covers all law including all laws related to  
16      enforcement of contract.

17           Thank you.

18           CHIEF JUSTICE REHNQUIST: Thank you, Mr. Minear.  
19           The case is submitted.

20           (Whereupon, at 2:11 p.m., the case in the above-  
21      entitled matter was submitted.)

22  
23  
24  
25



**CERTIFICATION**

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

#89-1027 - NORFOLK AND WESTERN RAILWAY COMPANY, ET AL., Petitioners v. AMERICAN TRAIN DISPATCHERS ASSOCIATION, ET AL.; and

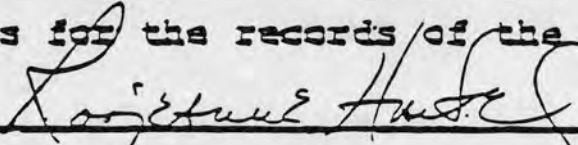
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#89-1028 - CSX TRANSPORTATION, INC., Petitioner V. BROTHERHOOD OF RAILWAY CARMEN, ET AL.

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