

OFFICIAL TRANSCRIPT

ORIGINAL

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: NATIONAL RAILROAD PASSENGER

CORPORATION, ET AL., Petitioners v.

BOSTON AND MAINE CORPORATION, INC.; and

INTERSTATE COMMERCE COMMISSION AND UNITED

STATES, Petitioners V. BOSTON AND MAINE

CORPORATION, ET AL.

CASE NO: 90-1419; 90-1769

PLACE: Washington, D.C.

DATE: January 13, 1992

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----X
3 NATIONAL RAILROAD PASSENGER :
4 CORPORATION, ET AL., :
5 Petitioners :
6 v. : No. 90-1419
7 BOSTON AND MAINE CORPORATION, :
8 INC.; :
9 and :
10 INTERSTATE COMMERCE COMMISSION :
11 AND UNITED STATES, :
12 Petitioners :
13 v. : No. 90-1769
14 BOSTON AND MAINE CORPORATION, :
15 ET AL. :
16 -----X

17 Washington, D.C.

18 Monday, January 13, 1991

19 The above-entitled matter came on for oral
20 argument before the Supreme Court of the United States at
21 2:00 p.m.

22 APPEARANCES:

23 JOHN G. ROBERTS, JR., ESQ., Acting Solicitor General,
24 Department of Justice, Washington, D.C.; on behalf of
25 the Petitioners.

1 APPEARANCES: (continued)

2 IRWIN GOLDBLOOM, ESQ., Washington, D.C.; on behalf of the
3 Respondents.

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1 P R O C E E D I N G S

2 (2:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in 90-1419, National Railroad Passenger Corporation,
5 et al. v. Boston and Maine Corporation, Inc., and 90-
6 1769, Interstate Commerce Commission and United States v.
7 Boston and Maine Corporation, et al.

8 Mr. Roberts, you may proceed.

9 ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

10 ON BEHALF OF THE PETITIONERS

11 MR. ROBERTS: Thank you, Mr. Chief Justice and
12 may it please the Court:

13 This case is here from the United States Court
14 of Appeals for the District of Columbia Circuit. That
15 court overturned the Interstate Commerce Commission's
16 construction of a statute entrusted to the Commission to
17 administer. Congress acted promptly to overturn the court
18 of appeals' decision, amending the statute while the case
19 was still pending on rehearing. The court of appeals
20 nonetheless stuck to its guns and denied rehearing. This
21 Court should reverse.

22 Twenty years ago --

23 QUESTION: Does everybody agree that the
24 congressional amendment applies to this case?

25 MR. ROBERTS: Yes, Your Honor, it was made

1 explicitly applicable to any case pending before, during,
2 or after enactment of the act.

3 Twenty years ago Amtrak inaugurated its
4 Montrealer service between Washington's Union Station and
5 Montreal. The train traveled through Vermont and New
6 Hampshire over the Connecticut River Line, a line owned
7 over some portions by the Boston and Maine and over other
8 portions by the Central Vermont.

9 Things ran smoothly until the mid-1980's, when
10 Guilford Transportation acquired both Boston and Maine and
11 the Delaware and Hudson Railway. Now, the Delaware and
12 Hudson owned a north-south line of track parallel to the
13 Conn River Line west of Lake Champlain in New York State.
14 As a result, the Conn River Line diminished in importance
15 to Boston and Maine and to its parent Guilford, to the
16 point that in 1987 Boston and Maine listed its portion of
17 the Conn River Line as track it anticipated abandoning.
18 Conditions on the line deteriorated, the Montrealer slowed
19 to a crawl over the Boston and Maine segment, and in 1987
20 Amtrak cancelled Montrealer service.

21 To restore that service, Amtrak determined that
22 it needed to rehabilitate the Conn River Line, and
23 Congress appropriated money for the purpose. Amtrak was
24 unable to agree with Boston and Maine on terms under which
25 it felt it could responsibly invest the necessary funds,

1 and it turned to the Interstate Commerce Commission for
2 relief.

3 It sought two things from the Commission:
4 first, an order authorizing it to condemn the Boston and
5 Maine segment for just compensation, and second an order
6 authorizing it to then reconvey the line to the Central
7 Vermont, which had agreed to pay for the line, to
8 rehabilitate it in part with funds provided by Amtrak, to
9 maintain it in a condition suitable for Amtrak's passenger
10 service for 20 years, to grant Amtrak trackage rights for
11 that period, and also to grant the Boston and Maine
12 trackage rights so that it could serve its existing
13 customers on the line.

14 Both steps in this transaction -- the
15 condemnation and the reconveyance -- required ICC
16 approval. Amtrak sought approval for the condemnation
17 under section 402(d) of the Rail Passenger Service Act.
18 That statute specifies that if Amtrak and the railroad are
19 unable to agree on the sale of property owned by the
20 railroad and required for inter-city rail passenger
21 service, that Amtrak may seek an order establishing its
22 need for the property and requiring its conveyance on
23 reasonable terms and conditions, including just
24 compensation.

25 QUESTION: Mr. Roberts, does the ICC have to

1 make a determination as to whether the property is
2 required for inner-city rail passenger service? They have
3 to look at that question and decide it?

4 MR. ROBERTS: We believe that it does, Your
5 Honor. Of course, there's quite a dispute over what that
6 passage means. The court of appeals determined that
7 required for inter-city rail passenger service meant
8 basically that Amtrak could not get by with anything else,
9 and what it reasoned was that since Amtrak didn't retain
10 the fee interest in the Boston and Maine Line, that it
11 didn't require it. Since it didn't require it, it
12 couldn't condemn it in the first place.

13 QUESTION: Does the ICC have to decide whether a
14 less than a fee interest would meet the so-called
15 requirement, or that what is required is less than a fee
16 interest?

17 MR. ROBERTS: No, Your Honor.

18 QUESTION: It's a fee or nothing?

19 MR. ROBERTS: The ICC reads that language --
20 required for inter-city rail passenger service -- to mean
21 simply that the property that's involved must be put to
22 use by Amtrak in providing that service, as opposed to
23 being used for something else.

24 The language doesn't necessarily have to mean
25 indispensable, as the court of appeals read it, as the

1 Boston and Maine reads it. This is a familiar usage of
2 the word required.

3 QUESTION: But who decides whether an easement
4 will suffice as opposed to taking the fee interest in the
5 property?

6 MR. ROBERTS: Amtrak decides in the first
7 instance whether it will put this property to use in
8 providing inter-city rail passenger service, and if that
9 is in fact what the property is to be used for, that
10 statutory mandate is satisfied. The Commission looks to
11 make sure that it's being used for inter-city rail
12 passenger service, and then that is sufficient. Nothing
13 in the statute suggests that the ICC is to engage in a
14 process of tearing down the property interest to the least
15 restrictive alternative, and in fact the amendment, of
16 course, makes clear that that is not the case.

17 QUESTION: Is there any contention that the
18 review that is required of the FCC was not undertaken in
19 this case, as you define it?

20 MR. ROBERTS: As I define it, I don't believe
21 so. It is true that there is not a precise finding that
22 this requirement was met, but there's certainly a precise
23 finding in the opinion of the Commission that the Boston
24 and Maine interpretation of the provision is not the
25 correct one. There is also certainly findings that the

1 reason Amtrak is proceeding is to restore the Montrealer
2 service to put this line of track to use in providing
3 inter-city rail passenger service, and that is a
4 sufficient finding on the record.

5 What the amendment said in 1990 was that Amtrak
6 may reconvey property it has condemned to a third party if
7 the Commission finds that the reconveyance furthers the
8 purposes of the act. Now, the amendment simply makes no
9 sense unless it is read to authorize precisely what Amtrak
10 did here. The reasoning of the court of appeals was that
11 Amtrak -- if Amtrak intended to reconvey property, it
12 couldn't condemn it. The amendment says Amtrak can
13 reconvey property it has condemned, so it simply cannot be
14 the case that the reconveyance dooms the condemnation in
15 the first place.

16 In our opening brief we challenge the respondent
17 to come up with an explanation of what the amendment
18 means, if not that this type of a transaction is
19 authorized. It came up with no explanation in its brief,
20 and it will not be able to come up with an explanation
21 here this afternoon.

22 QUESTION: Challenge you to come up with an
23 explanation as to how this amendment goes to the word
24 required, which is the basis for the decision below. I
25 think it's a dead stand-off on that one. Neither one of

1 you can explain the amendment.

2 MR. ROBERTS: Well, if it's a dead stand-off
3 then the Commission under Chevron is entitled to deference
4 in its construction.

5 QUESTION: Not on the basis of the amendment.

6 MR. ROBERTS: What the amendment said -- what
7 the court of appeals -- the amendment needs to be
8 understood in light of the court of appeals' decision.
9 The court of appeals said you can't condemn property that
10 you're going to reconvey because the reconveyance proves
11 you didn't require it. What the amendment says is, you
12 may condemn -- you may reconvey property that you have
13 condemned.

14 QUESTION: The amendment has to be understood
15 primarily on the basis of its language, and nothing in its
16 language whatever goes to the word required, which was the
17 basis for the court of appeals' decision.

18 MR. ROBERTS: Well, with respect, I disagree.
19 The language of the amendment makes clear that it is not
20 an answer to the Commission's order to say that you
21 reconveyed that, therefore the condemnation was no good in
22 the beginning, because the amendment makes clear that
23 Amtrak may reconvey property it has condemned. If it may
24 reconvey property it has condemned, it simply cannot be
25 the case that the reconveyance dooms the condemnation in

1 the first place.

2 QUESTION: Reconveyance is only one manner of
3 proving that you don't need the property. The principle
4 at issue, the principle that underlay the court of
5 appeals' decision, was that Amtrak did not need the
6 property. Nothing in the amendment goes to whether you
7 have to show a requirement for the property.

8 MR. ROBERTS: Well, what the court of appeals
9 said is we can tell that Amtrak did not need the property
10 because it reconveyed it, and the amendment at least
11 undermines that holding of the court of appeals. Now, the
12 -- going back --

13 QUESTION: So then we'd have to remand to the
14 court of appeals to say, you should not consider the
15 reconveyance automatically to show that they didn't need
16 the property, but you can still consider whether they
17 needed the property or not.

18 MR. ROBERTS: Well, then let me turn to the --

19 QUESTION: You don't want to waste all that
20 time, do you?

21 MR. ROBERTS: No, I --

22 QUESTION: It will only come out the same way.

23 MR. ROBERTS: I don't think a remand's necessary
24 for that purpose, because under Chevron the decision was
25 wrong even before the amendment. The statutory phrase

1 required for inter-city rail passenger service was read by
2 the court of appeals and is read by Boston and Maine to
3 mean that nothing less will do, but that is not the
4 only --

5 QUESTION: Same way Thomas Jefferson read the
6 necessary and proper clause.

7 MR. ROBERTS: Well, and quite different from the
8 way Chief Justice Marshall read it in McCullough against
9 Maryland. It's a familiar usage of the word in the law.
10 Necessary is a synonym for required. Chief Justice
11 Marshall told us it means convenient or useful. We've
12 cited in our opening brief the dictionary definition that
13 require means to call for as suitable or appropriate in a
14 particular case, as in it's cold outside. If you go out
15 you'll require an overcoat. It doesn't mean that you
16 can't go outside if you don't have an overcoat. It means
17 that you'll find one suitable and appropriate if you do go
18 outside.

19 The error in the court of appeals' reading of
20 required for inter-city rail passenger service I think is
21 clearest if you look at section 402(d) as a whole. Boston
22 and Maine and the court of appeals say that the purpose of
23 this provision, required for inter-city rail passenger
24 service, is to make sure that Amtrak really needs what
25 it's taking, but that's exactly what the next sentence of

1 the statute is addressed to in very specific terms. The
2 next sentence says --

3 QUESTION: What section are you reading now,
4 Mr. Roberts?

5 MR. ROBERTS: I'm referring to section 402(d),
6 which is set forth in the appendix to our brief, page 1a.
7 The first sentence contains this required for inter-city
8 rail passenger service language, but the next sentence in
9 the statute goes on to say that Amtrak's need for the
10 property shall be deemed to be established unless the
11 Commission makes two contrary findings.

12 In other words, the question of whether Amtrak
13 really needs this property as opposed to some other
14 property is addressed in the second sentence, the one that
15 begins, unless the Commission finds. It would be a very
16 strange statute that had the same question addressed in
17 the immediately previous sentence under the vaguer
18 required for inter-city rail passenger service provision.

19 The Boston and Maine reading of the phrase,
20 required for inter-city rail passenger service, would
21 probably never be satisfied. Nothing is ever really
22 indispensable. Amtrak can get from Washington to Montreal
23 via Detroit if it had to, and in any even the phrase
24 required for inter-city rail passenger service is at least
25 susceptible to more than one meaning. That being the

1 case, the court of appeals should have deferred to the
2 Commission's reasonable interpretation, an interpretation
3 manifested in the upholding of this transaction.

4 The court of appeals also cited the structure of
5 section 402 in reaching its conclusion. It noted that
6 section 402(a) of the act provides the right of Amtrak to
7 seek trackage rights, it surmised that that was all that
8 Amtrak needed in this case, and therefore it concluded
9 that Amtrak had to proceed under that provision and not
10 under section 402(d).

11 Again, the ICC, the agency entrusted with
12 administration of this statute, read the statute
13 differently. It determined that Amtrak had an election of
14 remedies. Certainly nothing in the statute imposes an
15 exhaustion requirement whereby Amtrak must proceed under
16 402(a) before looking at 402(d), in fact, quite the
17 opposite. Section 402(d) sets forth very precise
18 prerequisites --

19 QUESTION: You're talking about 402(a) and
20 402(b).

21 MR. ROBERTS: (d), I'm sorry if I --

22 QUESTION: (d)? And the basic statute is 45
23 U.S.C. section 545 that's set out at page 136a of the
24 petition for the writ?

25 MR. ROBERTS: No. The basic statute, 402(d), is

1 codified at 45 U.S.C. 562(d). It is -- the appendix to
2 our brief, page 1a, sets forth 402(d).

3 QUESTION: The appendix to the Government's
4 brief?

5 MR. ROBERTS: Right. 402(d) sets forth the very
6 precise prerequisites that Amtrak must meet before
7 invoking condemnation authority. An exhaustion of 402(a)
8 or any of the other provisions in section 402 is not
9 listed among the prerequisites.

10 QUESTION: Mr. Roberts, I -- of course required
11 can be read the way the Commission wanted to, in
12 isolation, but isn't it unreasonable to read it that way
13 when, if you do not read it to impose a requirement of
14 necessity in the narrow sense, the only thing Amtrak has
15 to do in order to condemn property is to show either --
16 either -- that taking it away will not impair the ability
17 of the railroad it's taking it from to function, or that
18 it can't do without the property itself.

19 MR. ROBERTS: Congress determined that Amtrak
20 was entitled to those powers on that basis. It set forth
21 a very explicit presumption in the statute. It addressed
22 that question when it determined to give Amtrak eminent
23 domain power, and it said that Amtrak's need for the
24 property shall be deemed to be established unless both of
25 the contrary findings that you mentioned are made.

1 QUESTION: You really think they gave Amtrak the
2 power to take any property from any railroad in the
3 country, so long as taking that property didn't impair the
4 ability of that railroad to operate. That's how you're
5 reading it -- so long as they using it -- use it for the
6 railroad.

7 MR. ROBERTS: So long as they use it, so long as
8 they're unable to agree, and so long, of course, as the
9 railroad receives just compensation for its property.
10 That -- Amtrak is put in a very disadvantageous bargaining
11 position in dealing with railroads. This case
12 demonstrates that.

13 The Boston and Maine owned the only line over
14 which Amtrak wanted to run its Montrealer service to serve
15 the States of Vermont and New Hampshire. Boston and Maine
16 held all the cards. Congress gave it this broad eminent
17 domain power precisely to address that inequity in
18 bargaining position.

19 QUESTION: Would you take the position that any
20 instance in which the exercise of the eminent domain
21 power, followed by a reconveyance, would in effect give
22 Amtrak a cheaper way of using a particular line, that
23 Amtrak therefore has met the significantly impair
24 requirement?

25 MR. ROBERTS: The significantly --

1 QUESTION: So that whenever -- well, let's say
2 whenever one of B&M's competitors comes along and says
3 well, if you condemn it and give it to us, we will
4 maintain the track for you cheaper than you would have to
5 chip in for the B&M to maintain it for you. Is that
6 always going to be sufficient to satisfy the significantly
7 impair requirement?

8 MR. ROBERTS: Well, I think it may well always
9 be sufficient under the statute. The significant
10 impairment question goes to what's happening to the
11 railroad from whom -- from which the property is being
12 taken, so that wouldn't be the pertinent inquiry, but
13 certainly Amtrak is required by statute to take steps to
14 minimize Federal subsidies. It is required by statute to
15 take steps to encourage private parties to subsidize
16 inter-city passenger rail service. I don't think --

17 QUESTION: Does that mean, then, that whenever a
18 competitor of the condemnee would make a favorable
19 agreement with Amtrak to maintain the line at a cheaper
20 maintenance or operating cost that it will always be
21 lawful under the statute for Amtrak to -- or for the
22 Commission to allow Amtrak to condemn?

23 MR. ROBERTS: Well, no, and the reason is that
24 the reconveyance from Amtrak to the competitor also must
25 be approved by the ICC under section 11343, and in that --

1 on that question the Commission looks at normal
2 competitive concerns: what is reconveyance from one rail
3 carrier, Amtrak, to another going to do to competition in
4 the rail market, and if the Commission refuses to approve
5 the reconveyance the transaction cannot go forward.

6 Here, the Commission expressly examined the
7 reconveyance and found that competition would not be
8 diminished in the market, that in fact Boston and Maine
9 would benefit from the improved tracks. But looked at
10 solely from --

11 QUESTION: How is Boston and Maine going to
12 benefit having its competitor on this line have an
13 upgraded track in part with the subsidy of the Federal
14 Government?

15 MR. ROBERTS: Because Boston and Maine retains
16 trackage rights to serve its customers on the line.

17 QUESTION: It doesn't need it.

18 MR. ROBERTS: Pardon me?

19 QUESTION: It doesn't need it.

20 MR. ROBERTS: It does need -- it doesn't own the
21 track any more so it needs trackage rights to serve
22 customers it already has on the line, and it was granted
23 those trackage rights in this transaction. It gets to run
24 over vastly improved track, track that the Commission
25 prior to this transaction found was desperately in need of

1 maintenance. It gets to use that track now in serving its
2 customers, and it has received just compensation for its
3 lines.

4 QUESTION: It's such a good deal for them, you'd
5 think they would have entered into that deal with Amtrak.
6 And that leads me to a question, doesn't the statute
7 require that the condemnation can only occur if
8 negotiations have failed? What is the language?

9 MR. ROBERTS: No. The language is the railroad
10 and Amtrak are unable to agree --

11 QUESTION: Are unable to agree.

12 MR. ROBERTS: -- upon terms for the sale. The
13 Commission --

14 QUESTION: Now, you think that means nothing
15 more -- what was the actual condemnation price here,
16 \$2.5 million?

17 MR. ROBERTS: It's still subject to challenge.
18 That's an issue.

19 QUESTION: Give or take a little --

20 MR. ROBERTS: The Commission found \$2.3 million.

21 QUESTION: \$2.3 million, and Amtrak came in, and
22 how much did Amtrak offer?

23 MR. ROBERTS: A million. A million.

24 QUESTION: Amtrak offered a million and said
25 gee, we can't agree, you won't a million. Is that all the

1 statute means? You come in and pick a ridiculously low
2 number, offer it to the other side and say, well, we can't
3 agree, and then I can condemn it.

4 MR. ROBERTS: No, and what the Commission
5 expressly found in this case was that the parties were
6 unable to agree.

7 QUESTION: Of course. I don't deny that. They
8 weren't able to agree in that sense, but is that really
9 what the -- don't you there's a good-faith negotiation
10 requirement there?

11 MR. ROBERTS: If there is, it was satisfied in
12 this case. I -- what the --

13 QUESTION: Was that a finding below?

14 MR. ROBERTS: What the Commission found -- I'm
15 reading from page 130a of the appendix to the petition.
16 The Commission found that Amtrak has set forth a detailed
17 history of its dealings and negotiations with the Boston
18 and Maine. Amtrak made a valid offer to purchase, and in
19 response Boston and Maine said it found no need to pursue
20 the very complex offer to purchase.

21 QUESTION: I'm waiting for your good-faith
22 effort.

23 MR. ROBERTS: It was when I quoted the part
24 about a valid purchase -- a valid offer to purchase the
25 line.

1 QUESTION: Oh, I'm sure it was a valid offer to
2 purchase. It was a valid offer to purchase. If they'd
3 accepted it at \$1 million, it would have been accepted and
4 that would have been a contract. That's a valid offer to
5 purchase.

6 MR. ROBERTS: In the context -- as the
7 Commission stated, in the context of the long and
8 laborious dealings between Amtrak and Boston and Maine,
9 the Commission found that the parties were unable to
10 agree.

11 QUESTION: There were long and laborious
12 dealings about other matters, but this was the only
13 dealing about a purchase. Amtrak came in and said, give
14 me -- I'll give you \$1 million, and they said don't be
15 silly, that's ridiculous, which of course it was.

16 QUESTION: Well, any condemning authority is
17 always going to offer a good deal less than they think the
18 property is worth as a first step of the negotiation.

19 MR. ROBERTS: Well, this wasn't a -- and this --
20 that's true, and this wasn't a first step. It was, as the
21 Commission found the result, the culmination of long -- a
22 long and laborious history.

23 QUESTION: Every negotiating authority doesn't
24 have a provision like this that says, if the parties are
25 unable to agree. I mean, other people can just walk in

1 and say, we're condemning it.

2 MR. ROBERTS: The requirement can't be that the
3 party offer a fair market price for the property
4 objectively determined, because then there'd be no need
5 for the condemnation authority in the first place. It
6 doesn't say, for that matter -- as the point we've been
7 discussing, it doesn't say good faith efforts. I'm not
8 going to be able to agree with a Rolls Royce dealer on a
9 price for his car. If Amtrak only has \$500,000 in the
10 bank and offers \$500,000 and it's inadequate, the parties
11 are unable to agree and Amtrak can proceed through some
12 other route, and that's all the statute requires. The
13 Commission made that finding and affirmed it repeatedly.

14 QUESTION: It's a rather silly requirement if
15 that's all it means. Absolutely pointless.

16 QUESTION: Well, isn't it also relevant -- maybe
17 I don't have the facts well in mind, but didn't B&M
18 respond by saying in effect we're not willing to sell but
19 what we'd like to do is negotiate a different trackage
20 arrangement --

21 MR. ROBERTS: Well, they wanted --

22 QUESTION: -- and they thought that would be --

23 MR. ROBERTS: They wanted a different trackage
24 arrangement. They wanted Amtrak to pick up the tab for
25 maintenance of the line, which Amtrak thought had been

1 agreed to under a 1977 agreement, and at the same time, of
2 course, they were listing a line for abandonment, so a
3 trackage rights agreement from Amtrak's point of view
4 wouldn't have been of much use.

5 Amtrak made what the -- what the ICC found to be
6 a valid offer. The court of appeals didn't disturb that
7 finding. It was rejected. B&M didn't just say, come back
8 with a higher price, it said we see no reason to pursue
9 this purchase offer because, as you've mentioned, they
10 thought Amtrak should go about this through an entirely
11 different route.

12 Amtrak met the plain statutory requirements.
13 The parties were unable to agree. The property is going
14 to be put to use -- is being put to use today in Amtrak's
15 provision of inter-city rail passenger service, and the
16 Commission rejected the two findings that had to be made
17 to rebut the presumption of need. That is an alternative
18 holding of the court of appeals that was also in error.

19 The court of appeals turned the statute on its
20 head when it said the Commission failed to make adequate
21 findings to support Amtrak's need. The statute presumes
22 need.

23 QUESTION: Now, the dissent in the court of
24 appeals would have remanded for a determination of the
25 extent to which the full fee was needed.

1 MR. ROBERTS: Yes, but the -- I guess it was a
2 concurring opinion by -- yes. We don't think that the
3 statute calls for any such findings. Section 402(d) is
4 quite precise in what's required. Findings of that sort
5 are not at all called for by the statute.

6 QUESTION: Well, I note that it does say the
7 Commission has to find the obligations can adequately be
8 met by the acquisition of alternative property, including
9 the interest in property. Maybe it has to determine what
10 interest in this property was required.

11 MR. ROBERTS: First of all, we only reach that
12 question if the common carrier -- the ability to discharge
13 the common carrier obligations of the railroad are going
14 to be impaired. You need to make both the (a) finding and
15 the (b) finding before rebutting a presumption of need.

16 The Commission here said that Boston and Maine's
17 abilities were not going to be significantly impaired,
18 primarily because they received trackage rights in return
19 and just compensation. Turning to that, though, the
20 Commission reads that phrase as meaning property in some
21 other place. Can Amtrak serve its need by alternative
22 property, or interest in property -- in other words
23 interest in that alternative property, not the property
24 that's subject to the condemnation.

25 If there are no further questions, I'd like to

1 reserve the balance of my time.

2 QUESTION: Very well, Mr. Roberts.

3 Mr. Goldbloom, we'll hear from you.

4 ORAL ARGUMENT OF IRWIN GOLDBLOOM

5 ON BEHALF OF THE RESPONDENTS

6 MR. GOLDBLOOM: Thank you, Mr. Chief Justice,
7 and may it please the Court:

8 This is a case about a condemnation statute
9 which allows the taking of private property. Simply
10 stated, our position is that section 402(d), the statute
11 that's implicated directly in this case, cannot be used by
12 Amtrak to condemn more property than is required for
13 inter-city rail passenger service.

14 In this case, the Commission failed to make a
15 relevant inquiry into what property was required for
16 inter-city rail passenger service. It erroneously assumed
17 that whatever Amtrak wanted it was entitled to take and
18 proceeded with a case in which it ultimately approved the
19 conveyance. In our view, that's an erroneous construction
20 of the statute.

21 QUESTION: Well, Mr. Goldbloom, is it not
22 correct that the statute says that unless the Commission
23 finds (a) and (b) under section 1, then the need of the
24 corporation for the property shall be deemed to be
25 established?

1 MR. GOLDBLOOM: Yes, Chief Justice, it does say
2 that, but that is a second level of inquiry that the
3 Commission must make. The predicate for the invocation of
4 the statute appears right out in the first sentence of the
5 statute, and in this particular statute we have a series
6 of limitations written into the statute which provide in
7 the first instance that the parties are unable to agree.
8 There is a definition in the statute that the property
9 that is -- that is being sought is required for inter-
10 city rail passenger service. And there's a third
11 limitation because there's a description of the term
12 property with a parenthetical including interests in
13 property.

14 QUESTION: So you say the term need of the
15 corporation as used after subsections (a) and (b) does not
16 include the requirement for inter-state -- inter-city rail
17 service and it doesn't suffice to dispense with the
18 negotiation requirement?

19 MR. GOLDBLOOM: Yes, Chief Justice, that is our
20 answer, and let me amplify, if I may, on that.

21 When Congress enacted this particular section in
22 1973 they also enacted a similar provision, section 305(d)
23 of the Rail Passenger Service Act, which provides Amtrak
24 with the authority to condemn nonrailroad-owned
25 property -- that is, property that might be owned by any

1 other private party. And that statutory provision has a
2 similar language in it, which says that the property,
3 again, must be required for inter-city rail passenger
4 service.

5 Now, the reason why the requirement for inter-
6 city rail passenger service has to be met in the first
7 instance is that the second level of determination of need
8 applies only if it will substantially impair the
9 obligations of the -- of the railroad to function as a
10 common carrier.

11 Now, let us assume as a hypothetical that
12 Conrail owes -- owns a building over here on Pennsylvania
13 Avenue. That building could conceivably be taken by
14 Amtrak for whatever purposes if it can be shown that the
15 taking of the building doesn't impair Conrail's ability to
16 act as a common carrier. If you don't go through the
17 first level of limitation that is required for inter-city
18 rail passenger service, you never get to the consideration
19 of why they're taking the property in the first instance,
20 and this is consistent with the nature of this very type
21 of statute.

22 QUESTION: I don't think you're disagreeing with
23 the Government on that point. I think the Government
24 concedes that you have to go through two inquiries as
25 well. The only difference is that the Government thinks

1 that required -- the first inquiry, the required inquiry,
2 is just, you know, are you going to use it for your rail
3 service, whereas you say it means it's essential for your
4 rail service.

5 MR. GOLDBLOOM: I don't believe it goes as far
6 as the word essential. I think the word required has a
7 meaning which has context in the statute.

8 Let me deal with the Government's argument
9 first. They say required means useful, appropriate;
10 Amtrak, the petitioner, says in connection with, but the
11 statute has a language -- Congress used a very stringent
12 verb in connection with this particular statute, and that
13 verb required informs a court, or the Commission, how
14 Amtrak intends to be using the property that it intends to
15 take.

16 Now, it is not a question that it is absolutely
17 essential or indispensable. The question is required, and
18 in the context of this statute, where Congress speaks in
19 terms of property, including interests in property, there
20 is a whole history of statutory construction of the
21 concept of eminent domain in private hands, that the least
22 interest that is intrusive should be taken in the
23 circumstances of an eminent domain statute.

24 QUESTION: Let me just interrupt, because I
25 think I'm following but I want to be sure I'm right. Is

1 the gist of your argument that the fee interest wasn't
2 required since a leasehold or an easement was sufficient,
3 or are you also arguing that they did not require the use
4 of this particular trackage?

5 MR. GOLDBLOOM: No, we're not arguing -- Justice
6 Stevens, we're not arguing that they did not require the
7 use of this trackage.

8 QUESTION: I see. You're arguing they didn't
9 need a fee.

10 MR. GOLDBLOOM: They didn't need the fee. And
11 to take that a step further, when the Commission is
12 confronted with an application under section 402(d) it
13 should look to see what is it that Amtrak requires, and if
14 they can determine that Amtrak requires something less
15 than a fee, then that is what Amtrak should be entitled to
16 get.

17 QUESTION: Won't it always require less than a
18 fee when it's trackage rights? I mean, the only thing it
19 needs is the right to go over track, so when we're talking
20 about trackage won't the result of your analysis always be
21 that something less than a fee will suffice?

22 MR. GOLDBLOOM: No, Justice Souter. There may
23 be circumstances where what they require is property, and
24 property --

25 QUESTION: Well, I'm assuming that they're

1 taking it from another railroad.

2 MR. GOLDBLOOM: It may be property. It may be
3 just real estate, taking it from another railroad.

4 QUESTION: When, for the -- can you give me an
5 example of a case in which they would need to take the fee
6 in trackage release?

7 MR. GOLDBLOOM: I cannot -- there is a
8 suggestion in the concurring opinion by Judge Ginsburg in
9 the court below that in a circumstance where Amtrak was
10 dealing with another railroad and where, under the facts
11 in that particular hypothetical, Amtrak was unable to get
12 the type of trackage rights interest or the cooperation of
13 the other railroad in running its trains over those
14 tracks, in those circumstances, Judge Ginsburg suggests
15 that perhaps 402(a) could be used to obtain trackage
16 rights.

17 But then she goes on to say, this case doesn't
18 establish that, and on the facts in this case it is clear
19 that something less than the fee would be what Amtrak
20 should be entitled to get. And if I may amplify further,
21 section 402(a) has a provision for granting trackage
22 rights to Amtrak when they are unable to agree with a
23 railroad over the use of the tracks, and in those
24 circumstances the Commission has the authority to impose a
25 trackage rights agreement on a railroad and to impose

1 conditions for not only trackage rights, the furnishing of
2 services and facilities.

3 QUESTION: Well, Mr. Goldbloom, I thought the
4 problem here was that the Amtrak could get a trackage
5 right but it needed a trackage right over a rail line that
6 was maintained adequately to enable it to run its
7 passenger trains at the appropriate speed, and that what
8 it would get here with a trackage right was simply a right
9 to run its railroads over very poorly maintained rails at
10 speeds that wouldn't meet its need. So it needed
11 something that was going to be maintained at a higher
12 level than B&M would maintain it, and Boston and Maine had
13 made a determination that for its purposes it didn't need
14 to maintain the tracks at this higher level degree of
15 maintenance. Now, isn't that right?

16 MR. GOLDBLOOM: Well, Justice O'Connor, under
17 402(a) the Commission can impose conditions upon the
18 railroad in providing the trackage rights. It can -- it
19 could require Boston and Maine to upgrade the tracks and
20 to maintain them, and in so doing it would look to the
21 provisions that Congress imposed in 402(a), which requires
22 that there be no cross-subsidization by the freight
23 railroad of the rail passenger service, and the
24 incremental costs for the quality and nature of the
25 service being provided to Amtrak are to be provided -- are

1 to be paid for by Amtrak, and that's what was at the core
2 problem of the controversy between Amtrak --

3 QUESTION: Well, in an order under (a) it would
4 be -- the Commission would have to order Amtrak to pay the
5 costs.

6 MR. GOLDBLOOM: That's because the statute
7 requires that.

8 QUESTION: Amtrak doesn't have the money and has
9 found a mechanism whereby it can get a third party to
10 provide that cost, apparently.

11 MR. GOLDBLOOM: By brokering its condemnation
12 authority to a third railroad, and in so doing it has
13 gotten around the provisions of 402(a) which expresses the
14 congressional policy to prevent cross-subsidization, to
15 require that Amtrak bear the incremental costs of the rail
16 passenger services.

17 QUESTION: Mr. Goldbloom, it occurs to me -- I'm
18 not sure you're making Thomas Jefferson's argument. I
19 think you may be using required in the same sense that
20 Marshall used necessary. I wonder why you don't place
21 more stress on the parenthetical in subsection (d) of 562.
22 It reads: Upon terms for the sale to the corporation of
23 property, parenthesis, including interests in property
24 required for inter-city rail passenger service.

25 It goes out of its way to put in the

1 parenthetical including interests in property. And the
2 general condemnation section -- section, what is it,
3 545 -- doesn't -- never includes any such parenthetical.
4 It says the corporation is authorized to acquire any
5 property, and it doesn't say, parenthesis, including
6 interests in property, which the Secretary acting in
7 further blah, blah, blah, blah, blah. Why don't you place
8 more stress on that?

9 MR. GOLDBLOOM: Well, I do place stress on it,
10 because I believe the reference to including interests in
11 property is a congressional recognition that something
12 less than the fee might be called for when Amtrak seeks to
13 condemn --

14 QUESTION: So the required modifies the interest
15 in property, and the interest in property has to be used
16 by the corporation -- not necessary to the corporation,
17 but used, and you're saying it's not being used here, the
18 fee.

19 MR. GOLDBLOOM: It's not being used because, as
20 the court of appeals found and as there is no dispute in
21 this case, Amtrak did not want to own the property, did
22 not need to own the property, and had no interest in
23 owning it, ever, and so if it was capable of being
24 satisfied by an interest in property less than the fee,
25 then the fee by definition could not be required.

1 QUESTION: Yes, but that -- you're making two
2 different arguments, one, you're arguing they should have
3 proceeded under 402(a) to require trackage rights. Now
4 you're saying they should have proceeded under 402(d)(1)
5 to condemn trackage rights?

6 MR. GOLDBLOOM: What I'm saying, Justice
7 Stevens, is that when the Commission is confronted with an
8 application under 402(d) it should examine to see what it
9 is that Amtrak is required -- Amtrak requires. If it
10 looks at what Amtrak requires and sees that what it really
11 needs is a trackage rights agreement with imposition of
12 conditions and maintenance requirements, then it should
13 say to Amtrak your proper relief and remedy is a petition
14 under 402(a). That's what you should do.

15 If, on the other hand, it determines that a
16 trackage rights agreement will not suffice, but something
17 more, let's say -- and it's been suggested in this record
18 by one of the vice chairmen of the Commission -- that
19 perhaps an easement to go onto the tracks and to perform
20 maintenance services of that character, then perhaps
21 trackage rights agreements and an easement might be
22 sufficient to fulfill Amtrak's requirements.

23 QUESTION: Do you think you could logically make
24 the same argument in the face of the statute as now
25 amended?

1 MR. GOLDBLOOM: Yes, Justice Stevens --

2 QUESTION: You do.

3 MR. GOLDBLOOM: -- because we don't believe the
4 statute as amended affects the result in this case.

5 QUESTION: Well, the statute as amended assumes
6 that there would be situations in which the condemnation
7 would require a greater property interest than the
8 Commission absolutely needs because it can reconvey the
9 property and obviously take back something less than the
10 fee.

11 MR. GOLDBLOOM: That may very well be, and we've
12 suggested that there might be circumstances where it might
13 be necessary under -- under the facts of a particular case
14 to take a larger interest than Amtrak actually needs, such
15 as a -- take a large building and to raze it and put up a
16 small structure.

17 But in this particular case, the court of
18 appeals had more than one finding. There is a finding --
19 there is a conclusion or a holding in the court of appeals
20 that says that Amtrak may not take property that it does
21 not itself intend to own, and as to that holding, the
22 court of appeals -- the court of appeals' decision has
23 been overruled by the 1990 amendment.

24 The court of appeals went on and had other
25 holdings. It said that when the Commission is faced with

1 a 402(d) application it must make a determination as to
2 what is required for inter-city rail passenger service.
3 It found -- and this is a unanimous ruling by the court of
4 appeals because Judge Ginsburg also agreed with this --
5 that the Commission had not made that determination --
6 what is required. And as I read the Government's brief,
7 they admit, or concede that the Commission did not make a
8 determination as to what is required. They say that some
9 kind of an abstract, perhaps, decision was made.

10 The fact of the matter is that it came up this
11 way. At the very outset of the proceedings, early on,
12 right after Amtrak filed its petition, Boston and Maine
13 came in with a petition to convert the 402(d) proceeding
14 to a 402(a) proceeding, and it said to the Commission this
15 is really a dispute between us over the upgrading and the
16 maintenance of these tracks, and we're having a fight over
17 who is supposed to pay for this, and we think that Amtrak
18 should pay for it because after all it's one train that
19 goes back and forth once a day and it's going to cost
20 \$400,000 a year or so, and it should be Amtrak's
21 responsibility. Nevertheless, we're willing to put this
22 before the Commission and have the Commission decide who
23 is to pay for the upgrading and maintenance of this
24 tracks.

25 The Commission -- and they did this before

1 holding any kind of an evidentiary proceeding, before
2 looking at any evidence, simply on the basis of the
3 filings that the -- that Amtrak had made and that Boston
4 and Maine had made, said we reject this petition to
5 convert. Amtrak has an election of remedies. It has
6 asked for relief under 402(d). That's all we need to look
7 into. They're entitled to a conveyance if they have -- if
8 they made that application, and then we're going to go on
9 with our proceeding.

10 Now, they did so without an evidentiary
11 proceeding, and they were applying, in a sense, the same
12 statutory phrase that any Federal district judge would
13 have to apply faced with an attempted taking by Amtrak of
14 nonrailroad property, and they did it almost -- to draw an
15 analogy, if there was a complaint and an answer and a
16 district judge looked at the complaint and answer and made
17 a determination without doing anything further. And in
18 this case the Commission did not make a finding under the
19 required phrase of the statute.

20 Now, the court of appeals said that. They also
21 said that the Commission's ruling did violence to the
22 provisions of 402(a), because they overlooked the
23 requirements of 402(a) that require Amtrak to pay the
24 incremental costs of rail passenger service, and by
25 allowing Amtrak to evade those requirements the Commission

1 failed to adhere to the statutory requirements. Now --

2 QUESTION: May I just ask you a question that
3 goes to that point? You mentioned earlier that under
4 subsection (d) there might be a need to condemn together
5 with an easement allowing Amtrak to come in and do its own
6 maintenance. Given the fact that under (a) the Commission
7 can always require Amtrak to pay the incremental cost of
8 maintenance to get it up to Amtrak's standard, there never
9 would be a possible showing of need under (d), would
10 there?

11 MR. GOLDBLOOM: Well, I think it would be a very
12 hard case to make. I'm not saying that it couldn't be
13 made under any circumstance, but it would be a hard case
14 to make, particularly since the Commission has the
15 authority to impose these requirements on freight
16 railroads, to allow Amtrak to use their tracks and to
17 provide services and facilities. And so armed with the
18 authority of the Commission Amtrak can clearly go to a
19 railroad and say this is what we want and this is what we
20 need when it comes to providing services for us.

21 And since Congress has set out a very
22 particularized scheme under which Amtrak is entitled to
23 get those services, facilities, and use of tracks, we
24 don't think that the use of a condemnation power, which
25 traditionally has been construed by the courts,

1 particularly in the hands of a private party, as being
2 limited, restricted, narrowly construed, to give Amtrak
3 the right to use it to the extent that they've seen fit to
4 use it here. The statutory scheme is such that Congress
5 very clearly imposed limitations on the authority of
6 Amtrak to obtain property.

7 Now, the Government makes a further argument.
8 They say that Chevron controls the determination of the
9 Commission, but for a number of reasons Chevron is not
10 applicable.

11 To begin with, the statute is not really
12 ambiguous. Chevron applies where you have to grope and
13 figure out what the statute really means. The statute has
14 plain language. It's to be construed by the Commission
15 under some circumstances by a whole host of Federal
16 district judges, under other -- where the property is
17 being sought to be taken from private parties that are not
18 railroads.

19 Certainly the Chevron decision wouldn't apply to
20 the rulings of 600 or so Federal district judges. But
21 there are limitations in this statute, and we don't
22 believe that the Chevron case applies where there are
23 limitations. In this particular setting, the Commission
24 has construed away the limitations that are in the
25 statute. It never really applied them, and therefore we

1 can't see how Chevron would be applicable.

2 And thirdly we don't believe it's a permissible
3 construction of the statute because, as I've indicated,
4 there are circumstances where, using the Commission's
5 construction, Amtrak could take an office building, a
6 property of -- that is owned by another railroad, without
7 ever showing that that property is required for inter-
8 city rail passenger service, and the only mean -- the only
9 restriction would be whether the taking of that property
10 impaired the functions of the condemnee's ability to
11 perform as a common carrier.

12 And finally, we don't think that Chevron applies
13 because there just simply is a nonfinding here. The
14 Commission did not make a finding, as we read the
15 Government's brief at page 16. They concede that the
16 Commission did not and does not need to make a
17 determination of what the lesser interests that are
18 required in the circumstances of Amtrak's petition for the
19 taking in this case. So where the Commission does not
20 make a finding we don't see how Chevron can have any
21 application.

22 This case --

23 QUESTION: What precisely is the statutory
24 language which you rely upon to require the finding you
25 just referred to?

1 MR. GOLDBLOOM: The precise statutory language
2 appears as -- in the opening sentence of section 402(d).
3 It says: If the corporation and a railroad are unable to
4 agree upon terms for the sale to the corporation of
5 property, paren, including interests in property owned by
6 the railroad and required for inter-city rail passenger
7 service, the corporation may apply to the Commission.

8 We view those phrases at the beginning of this
9 statutory provision as being statutory predicates to the
10 invocation of the taking power.

11 QUESTION: Inability to agree is one of them,
12 you would say?

13 MR. GOLDBLOOM: Unable to agree --

14 QUESTION: Yes.

15 MR. GOLDBLOOM: -- is one.

16 QUESTION: And required for inter-city rail
17 passenger service is another.

18 MR. GOLDBLOOM: Yes, Your -- yes, Chief Justice.

19 And a third limitation, although it's not
20 written in as a finding but it's certainly clearly
21 implicated in the statute is, that it be property,
22 including interests in the property, which is a clear
23 recognition by Congress that perhaps in these
24 circumstances something less than the fee would suffice.

25 QUESTION: You read the word property in the

1 third line there as property interest, for sale to the
2 corporation of the particular property interest owned by
3 the railroad and required for interstate -- that's the way
4 you read it. I mean, it's certainly a permissible
5 reading, right?

6 MR. GOLDBLOOM: Well, of property -- I read
7 property as being the fee.

8 QUESTION: Well, but I thought -- well, I
9 thought you read it as that they had to demonstrate that
10 the particular property interest which they needed and
11 which is owned by the railroad is the one that they need
12 to condemn -- they want to condemn. I guess it comes down
13 to the same thing.

14 MR. GOLDBLOOM: Yes. This is what they're
15 seeking to condemn. The -- this is the subject of the
16 condemnation.

17 QUESTION: I take it that there's no contest in
18 this record that the trackage was needed and needed in an
19 upgraded condition.

20 MR. GOLDBLOOM: That is no -- we do not dispute
21 that. The question is, who's going to pay for it, and
22 this is at the bottom of this test.

23 QUESTION: And I take it there's no disagreement
24 that negotiations broke down. We can argue about whether
25 or not there was a good-faith offer, and so forth.

1 MR. GOLDBLOOM: There were negotiations with --
2 between Amtrak and Boston and Maine --

3 QUESTION: And they were unsuccessful.

4 MR. GOLDBLOOM: They were unsuccessful, and they
5 were always about who was going to pay for the maintenance
6 and the upgrading of the tracks, and when Amtrak made its
7 \$1 million take-it-or-leave-it offer, it did so on the
8 assumption that Amtrak -- that Boston and Maine was not
9 going to accept it, and as soon as it received whatever
10 response it got, and the response was, we're ready to
11 negotiate, we're talking about good-faith negotiations
12 about the problem that we have with the upgrading and
13 maintenance of these tracks, they treated it as a
14 rejection and they filed with the Commission.

15 QUESTION: Did the court of appeals go into this
16 particular aspect of the case at all?

17 MR. GOLDBLOOM: The court of appeals did not
18 reach that, Chief Justice Rehnquist. They --

19 QUESTION: Are you really going to win very much
20 if you win here on your argument?

21 MR. GOLDBLOOM: Yes.

22 QUESTION: Don't you just have to -- it's going
23 to go back to the Commission, isn't it?

24 MR. GOLDBLOOM: It's going to go back to the
25 Commission, but if the Commission properly construes the

1 statute it will see on the record in this case that Amtrak
2 does not require the fee --

3 QUESTION: Well, unless they find that Boston
4 and Maine is so intransigent nobody should deal with them.

5 MR. GOLDBLOOM: Well, if they're properly
6 applying the statute, as the court of appeals held and as
7 we would urge this court to affirm, the Commission should
8 look to see what it is that Amtrak requires, and if Amtrak
9 requires really nothing more than a trackage rights
10 agreement, which incidentally is all that it ultimately
11 got after the conveyance to Central Vermont, then that's
12 what the Commission should impose upon Boston and Maine.

13 QUESTION: Well, in determining what is required
14 can the ICC look at the cost to Amtrak as part of that
15 determination? I mean, Amtrak would assert, I require the
16 use of the tracks at a reasonable cost, or at a cost that
17 we can afford to pay.

18 MR. GOLDBLOOM: The underlying basis of the Rail
19 Passenger Service Act was to make Amtrak pay its fair
20 share of the cost of rail passenger service and not have
21 the freight railroads subsidize this operation.

22 QUESTION: But if it can do that through
23 condemnation and conveyance to a third person, why isn't
24 that a fulfillment of its statutory duties under the
25 policy of the act?

1 MR. GOLDBLOOM: Because it ends up by taking
2 property -- and this comes to our third argument. It ends
3 up by taking property from A and giving it to B with no
4 real change in the public use.

5 QUESTION: But there's been payment of fair
6 compensation, of course, by definition.

7 MR. GOLDBLOOM: But that has just simply -- the
8 simple payment of just compensation without a
9 corresponding change in public use has never been
10 considered to meet the public use test of the Fifth
11 Amendment.

12 QUESTION: Mr. Goldbloom, you make briefly in
13 your brief the unable to agree argument, but you don't go
14 into much detail on it. Do you think these negotiations
15 were -- as the Government said, went as far as they could
16 go?

17 MR. GOLDBLOOM: No, Your --

18 QUESTION: What more should have been done?

19 MR. GOLDBLOOM: What happened with the
20 negotiations were that they weren't going in the same
21 direction, because a take-it-or-leave-it offer of a
22 ridiculously low price is not a fair proposal. Boston and
23 Maine --

24 QUESTION: Is your client willing to sell at any
25 price?

1 MR. GOLDBLOOM: Our client offered -- our client
2 discussed the possibility -- and this is disclosed in the
3 record -- of selling the Connecticut River line to Amtrak.
4 If it did so for a fair price and under the proper
5 circumstances it would continue to have the same kind of
6 rights that it has to deal with its shippers and its
7 customers.

8 QUESTION: But did it make that discussion about
9 sale before or after the \$1 million offer?

10 MR. GOLDBLOOM: It was long before that.

11 QUESTION: But after that, in their responsive
12 letter, they didn't discuss sale.

13 MR. GOLDBLOOM: In their responsive letter they
14 did not.

15 QUESTION: They suggested negotiating a trackage
16 --

17 MR. GOLDBLOOM: They suggested negotiating.

18 QUESTION: Thank you, Mr. Goldbloom.

19 Mr. Roberts, you have 5 minutes remaining.

20 REBUTTAL ARGUMENT OF JOHN G. ROBERTS, JR.

21 ON BEHALF OF THE PETITIONERS

22 MR. ROBERTS: On the unable-to-agree point,
23 petition appendix 131a, the Commission went further and
24 said nothing in this record provides any indication that
25 Amtrak and B&M will ever reach agreement on terms of a

1 sale, and I think that's because they were proceeding in
2 different directions. Boston and Maine wanted to talk
3 about trackage rights. Amtrak wanted to talk about the
4 fee.

5 QUESTION: Is that part of your case that Amtrak
6 needed the fee?

7 MR. ROBERTS: Amtrak met the statutory
8 requirement of need because its need was presumed.

9 QUESTION: That hardly answers my question.

10 MR. ROBERTS: Yes, Amtrak did need the fee. One
11 reason it needed the fee --

12 QUESTION: Because Boston -- they could not get
13 out of just a trackage rights arrangement with Boston and
14 Maine, what they had to have; is that right?

15 MR. ROBERTS: Even under a very strict reading
16 of the required phrase they needed the fee because they
17 needed to have it to reconvey it to a railroad that had an
18 incentive to maintain the track at their speed conditions.
19 Boston and Maine itself argues --

20 QUESTION: Well, now, who -- the Commission
21 never made that finding --

22 MR. ROBERTS: Well, there --

23 QUESTION: Did it?

24 MR. ROBERTS: It did make a need finding, yes.

25 QUESTION: Well, did it make the kind of a

1 finding I just described?

2 MR. ROBERTS: It said that Amtrak had carried
3 its burden of establishing its need.

4 QUESTION: Well, did it -- did they say they
5 needed it in order to convey to somebody that was more
6 reliable than Boston and Maine?

7 MR. ROBERTS: That was the transaction that was
8 before the Commission, and that was the context in which
9 the Commission made that finding.

10 QUESTION: Well, I guess I'll just have to read
11 the -- look at the --

12 MR. ROBERTS: The Commission --

13 QUESTION: They didn't say that, did they?

14 MR. ROBERTS: The Commission did not make the
15 findings about Boston and --

16 QUESTION: Well, that's what -- the court of
17 appeals didn't think it made that finding.

18 MR. ROBERTS: It did not, and our position is
19 that it doesn't have to. Nothing --

20 QUESTION: And Judge Ginsburg didn't make that
21 finding.

22 MR. ROBERTS: She would have sent back for
23 further --

24 QUESTION: You don't disagree with that, do you?

25 MR. ROBERTS: I don't disagree that they made no

1 findings adopting Amtrak's version of events. I do think
2 that Amtrak's version of events is supported in the
3 record, and that supports the agency action, and I also
4 think that nothing in section 402(d) requires the
5 Commission to make those sorts of findings. That would be
6 judicially imposing an additional requirement in the
7 statute that's not found there. What the statute --

8 QUESTION: Well, need -- you could say, well,
9 maybe they found need but they didn't give an adequate
10 explanation of it.

11 MR. ROBERTS: The statute says that need is
12 presumed unless the Commission makes contrary findings,
13 and the Commission rejected each of the two contrary
14 findings in the statute.

15 QUESTION: So you are identifying what is
16 required with presumed need. You're saying there is not a
17 two-tier analysis, there's a one-tier analysis.

18 MR. ROBERTS: No, I think it's a two-tier
19 analysis, but required simply means it's going to be
20 useful and appropriate and put to use in providing inter-
21 city rail passenger service.

22 QUESTION: And you would satisfy that level of
23 analysis at this point simply because the ultimate expense
24 to Amtrak of maintaining the track would be less under
25 this arrangement. That's the way you satisfy that.

1 MR. ROBERTS: Well, we don't have to go that
2 far. It's satisfied because this property is used in
3 providing inter-city rail passenger service. The
4 Montrealer runs over what used to be the Boston and Maine
5 line.

6 QUESTION: All right. Well, again, I guess your
7 argument again assumes that you have an absolute election
8 as to whether to proceed under subsection (a) or
9 subsection (d). If you don't make that assumption, then
10 your first-tier analysis of what is required depends upon
11 assuming that a lower maintenance cost is sufficient to
12 satisfy the standard requirement.

13 MR. ROBERTS: That may well be, but I'll
14 reiterate what I said earlier, that there's nothing in
15 section 402(d) or (a) that imposes such an exhaustion
16 requirement.

17 QUESTION: Well, but if the question is need,
18 why did Amtrak need the fee when in the long run it gave
19 it back to somebody?

20 MR. ROBERTS: It needed the fee in part to be
21 able to convey it to a railroad that would maintain the
22 line.

23 QUESTION: I know. I know --

24 MR. ROBERTS: Boston and Maine --

25 QUESTION: But they didn't need to own the fee

1 for any more than a day, I guess.

2 MR. ROBERTS: Well, if they didn't have the fee
3 they wouldn't have been able to engage in the transaction.

4 QUESTION: Why wouldn't they -- why did they
5 have to take the fee away from the Boston and Maine?

6 MR. ROBERTS: Because the Boston and Maine, as
7 it itself emphasized, had no incentive to maintain these
8 tracks in a condition suitable for Amtrak service. That's
9 their basic point. We don't -- 17 miles an hour is fine
10 for our trains.

11 QUESTION: Well, the court of appeals said we
12 don't make these determinations on this record. The court
13 -- ICC should have done it's work, and we think counsel is
14 very persuasive. The only thing is, counsel hasn't got
15 the authority to present this kind of an issue to us.

16 MR. ROBERTS: Well, the court of appeals could
17 only have reasoned that if it were imposing a requirement
18 that you will not find in section 402(d). The Commission
19 made each of the findings in section 402(d). They do not
20 require findings that particular railroad's not living up
21 to its obligations. That's not something set forth in the
22 statute.

23 QUESTION: You say, need is presumed.

24 MR. ROBERTS: Need is presumed. That's exactly
25 what the statute says.

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Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you,
Mr. Roberts.

The case is submitted.

(Whereupon, at 3:00 p.m., the case in the above-
entitled matter was submitted.)

CERTIFICATION

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

NO. 90-1419 - NATIONAL RAILROAD PASSENGER CORPORATION
ET AL., Petitioners v. BOSTON AND MAINE CORPORATION, INC.,

and;

NO. 90-1769 - INTERSTATE COMMERCE COMMISSION AND
UNITED STATES, Petitioners v. BOSTON AND MAINE
CORPORATION, ET AL.

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

BY Michelle Sanders

(REPORTER)