OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: HAWAIIAN AIRLINES, INC., ET AL., Petitioners v. GRANT T. NORRIS

CASE NO: 92-2058

PLACE: Washington, D.C.

DATE: Thursday, April 28, 1994

PAGES: 1-51

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -X

3 HAWAIIAN AIRLINES, INC., :

4 ET AL., :

5 Petitioners :

6 v. : No. 92-2058

7 GRANT T. NORRIS :

8 -X

9 Washington, D.C.

10 Thursday, April 28, 1994

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States at

13 11:03 a.m.

14 APPEARANCES:

15 KENNETH B. HIPP, ESQ., Honolulu, Hawaii; on behalf of

16 the Petitioners.

17 SUSAN OKI MOLLWAY, ESQ., Honolulu, Hawaii; on behalf of

18 the Respondent.

19 RICHARD H. SEAMON, ESQ., Assistant to the Solicitor

20 General, Department of Justice, Washington, D.C.; on

21 behalf of the United States, as amicus curiae,

22 supporting the Respondent.

23

24

25

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE

3 KENNETH B. HIPP, ESQ.

4 On behalf of the Petitioners 3

5 ORAL ARGUMENT OF

6 SUSAN OKI MOLLWAY, ESQ.

7 On behalf of the Respondent 29

8 ORAL ARGUMENT OF

9 RICHARD H. SEAMON, ESQ.

10 On behalf of the United States, as amicus curiae,

11 supporting the Respondent 44

12

13

14

15

16

17

18

19

20

21

22

23

24

25

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

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 next in Number 92-2058, Hawaiian Airlines v. Grant Norris.

5 Mr. Hipp.

6 ORAL ARGUMENT OF KENNETH B. HIPP

7 ON BEHALF OF THE PETITIONERS

8 MR. HIPP: Mr. Chief Justice and may it please

9 the Court:

10 This case is about the scope of the minor

11 dispute resolution procedure of the Railway Labor Act, and

12 whether an airline employee can abandon that procedure and

13 go to State court with a State tort claim of wrongful

14 discharge.

15 This Court has repeatedly recognized that

16 Congress, in establishing the Railway Labor Act, set up a

17 comprehensive, indeed, pioneering alternative dispute

18 resolution procedure for adjusting minor disputes between

19 employees and employers without lawsuits and without

20 strikes.

21 Furthermore, as all the parties in this case

22 accept, the minor dispute resolution procedure within the

23 Railway Labor Act, section 204, must go through the

24 mandatory arbitration procedures of the adjustment board

25 in the absence of concurrent jurisdiction pursuant to

1 congressional act.

2 Where we part company with the Hawaii court,

3 with the respondent, and with the Solicitor General is in

4 defining the scope of the jurisdictional language of

5 section 204. In our view, and as we have argued at length

6 in our brief, our opponent's positions concerning the

7 scope of section 204 are flawed because they attempt to

8 rewrite the plain language of section 204 and other

9 provisions of the Railway Labor Act, and they misconstrue

10 the Railway Labor Act's legislative history and this

11 Court's decisions interpreting the RLA.

12 If this Court were to accept our opponent's

13 views, the result would greatly undermine Congress' scheme

14 for resolving employment disputes, and it would do that by

15 undercutting the historic legislative tradeoff that took

16 place in 1934, whereby unions and employees achieved the

17 mandatory arbitration procedures of the Railway Labor Act

18 in return for giving up their right to go to court and

19 their right to strike.

20 As this Court recognized in the Chicago River

21 and Indiana Railroad case, that tradeoff was fundamental

22 to the 1934 amendments to the RLA prior to the enactment

23 in 1936 of section 204.

24 QUESTION: Mr. Hipp, you seem to be arguing for

25 a different standard under the RLA than that under Lingle

1 and under the National Labor Relations Act. I'm not
2 sure -- how do you justify application of such a different
3 standard?
4 MR. HIPP: Your Honor, the touchstone for
5 preemption, as in fact the Court recognized in Lingle, is
6 not to apply some procrustean approach, but instead to
7 look at the purposes of Congress in each scheme.
8 What was the purpose of Congress in section 301?
9 The purpose of Congress was to assure common
10 interpretation of collective bargaining agreements
11 pursuant to Federal common law. There's no mention of
12 alternative dispute resolution there. There's no mention
13 of any arbitral forum there.
14 What is the purpose of the Railway Labor Act?
15 The purpose of the Railway Labor Act is to provide a
16 method, a comprehensive method for resolving disputes
17 between employers and employees. If you look at section
18 2 First of the Railway Labor act, Congress has made the
19 determination that it is these kinds of disputes between
20 employers and employees that leads to disruption of
21 interstate commerce, therefore Congress set up, in section
22 3 First (i) for the railroad industry and in section 204
23 for the airline industry, a method for resolving those
24 disputes.
25 The method is an arbitral or adjustment board

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 method, and a scope of jurisdiction is stated there. It
2 is a congressional scope of jurisdiction. Therefore,
3 unlike Lingle, which addresses Congress' concerns related
4 to interpretation of the collective bargaining agreements,
5 Congress had a different agenda in 204 and 3 First (i).
6 QUESTION: But I suppose Congress didn't intend
7 to entirely preempt ordinary State laws, even in the
8 transportation industry, having -- I guess we've upheld
9 State requirements that the train have a caboose, and one
10 thing and another, and so obviously we have said there is
11 room for application of State law --
12 MR. HIPP: That's correct.
13 QUESTION: -- even under the RLA.
14 MR. HIPP: That's correct, Your Honor, and that
15 is because you must address the congressional purposes of
16 the RLA.
17 The RLA was designed to deal with disputes
18 between employees and employers. It was not designed to
19 deal with whether or not a State established a minimum
20 substantive standard such as a caboose.
21 If you have a regulatory agency in a State that
22 says -- and the State makes the determination through its
23 legislative process that State may have a caboose law, it
24 doesn't have anything to do with the Railway Labor Act.
25 QUESTION: Well, the State perhaps could

1 arguably have made a conscious decision, by the passage of
2 whistleblower statutes, that this is a means of assuring
3 public safety.
4 MR. HIPP: They can make that determination, but
5 what they cannot do, Your Honor -- and this is what the
6 Andrews case in essence holds -- is that they cannot take
7 a dispute between an employee and an employer in the
8 airline or railroad industry and convert that dispute into
9 a State law claim, taking it out of the adjustment board
10 process.
11 Why not? Why can't they do that? Because
12 Congress recognized --
13 QUESTION: Well, they haven't taken it out.
14 They've added, perhaps.
15 MR. HIPP: Well, this raises the specter, again,
16 of what happened when this Court in the Moore case years
17 ago established this concurrent jurisdiction concept,
18 whereby you could go both to State court, and you could go
19 to the adjustment board procedure.
20 QUESTION: Mr. Buell, as I understand your
21 argument, you're not arguing that the RLA preempts State
22 law at all. It's not a preemption claim you're making at
23 all. It's an exclusive jurisdiction claim. You're saying
24 State law applies, but it has to be applied through the
25 arbitration procedure of the RLA, isn't that correct?

1 MR. HIPP: No, Your Honor, that's not correct.

2 QUESTION: That's not correct. You're saying

3 State law is preempted, so the State law does not exist.

4 MR. HIPP: The State law does not exist in the

5 situation where there's a dispute between the employer and

6 the employee covered by these mandatory adjustment

7 board --

8 QUESTION: Where the dispute concerns an issue

9 of State law, there no longer is a dispute, so you don't

10 have to go to arbitration, then. You say the State law is

11 ineffective, is that what you're saying?

12 MR. HIPP: No, I'm not saying that, Your Honor.

13 QUESTION: It is effective.

14 MR. HIPP: It is effective, correct.

15 QUESTION: Then it's not preempted.

16 MR. HIPP: No, I'm sorry, Your Honor. It is

17 preempted. If your question, Your Honor, is directed at

18 the question of what the adjustment board looks at, the

19 substance --

20 QUESTION: Does State law apply? Is the State

21 law applicable --

22 MR. HIPP: The State law --

23 QUESTION: -- to the employment relationship?

24 Can the State law govern it?

25 MR. HIPP: Yes, Your Honor, it can, depending

1 upon whether or not it is regulating a dispute between the
2 employer and the employee, on the one hand, or if it is
3 establishing substantive minimum standards.
4 Perhaps I can give you an example that would
5 clear this up.
6 QUESTION: I'm really confused. I had thought
7 you were making an exclusive jurisdiction claim, that you
8 apply the State law but it's to be applied by the board
9 through the arbitration. Now you're telling me no, that
10 the State law is preempted. That's a quite different --
11 MR. HIPP: Well, Your Honor, let's make this
12 clear, because it is --
13 QUESTION: Maybe you can make your example
14 specific to this case, and this would be my question:
15 suppose the board finds that Norris was indeed improperly
16 discharged. At that point, what remedy could the board
17 give? Would there be any room for the State
18 whistleblower's statute in the remedy that the board could
19 give?
20 MR. HIPP: The board would be free to fashion a
21 remedy to deal with the finding that it made.
22 QUESTION: The finding is that a discharge was
23 improper. This person did just what an employee should
24 do, detecting a condition that might make flights unsafe
25 for passengers, so it's a complete exoneration of what he

1 did. Indeed, the board concludes, instead of being
2 disciplined, he should have gotten a medal. Therefore,
3 the remedy is -- and what could the remedy be, and how
4 would it differ from a State law remedy under the
5 whistleblower act?
6 MR. HIPP: The remedy would be left open to the
7 adjustment board to establish, and that remedy would take
8 into account the State public policies in establishing
9 whatever remedy the adjustment board wanted.
10 QUESTION: But as a practical matter, could
11 the -- in the absence of a State law, couldn't the board
12 do exactly the same thing? It would simply not look to
13 State law for the source of its public policy, but it
14 could come up with basically the same standard, couldn't
15 it?
16 MR. HIPP: That's exactly correct, Your Honor,
17 and in fact that is a --
18 QUESTION: Why, then, did Congress add -- if I'm
19 correct, why did Congress add a whistleblower provision to
20 the substantive law governing rail employees but not
21 airline employees?
22 MR. HIPP: Well, it was only addressing the
23 railroad side of the equation in the --
24 QUESTION: On your theory, wasn't it equally
25 redundant, equally unnecessary with respect to the rail

1 employees?

2 MR. HIPP: Yes, Your Honor, except for one

3 thing. What is clear under the Federal Rail Safety Act is

4 a specific punitive damage remedy is included under that

5 of $20,000.

6 Therefore, there is a direction by Congress as

7 to how you should be formulating your remedy, and it's

8 important that you understand, particularly in dealing

9 with the arguments by my opponents here, that under the

10 Federal Rail Safety Act, nonunion employees are committed

11 to adjustment board jurisdiction.

12 So that even in the absence of a collective

13 bargaining agreement, those employees go through the

14 adjustment board procedure for resolution of their claim,

15 and this is why I need to address, if you don't mind,

16 Justice Scalia's point, because I think it's a fundamental

17 point here, and that is, what is the source of the law,

18 the substantive law that an adjustment board looks at?

19 What did Congress intend about that, because it deals with

20 the complex questions, including the Seventh Amendment

21 question that is presented here.

22 If all Congress had said was, you take State law

23 claims, and you move them over to an adjustment board

24 process, then you would have a problem with regard to a

25 right to jury trial, but that is not what Congress said.

1 Congress said, we want disputes, grievances, if you will,
2 which are identified to include discharges, to be resolved
3 by an adjustment board, and the adjustment board -- and
4 this Court recognized this in Burley, by the way, and I
5 will refer to footnote 36 of Burley, for exactly the
6 problem that you presented, Justice Scalia, and that is --
7 QUESTION: There's no grievance, it seems to me,
8 unless State law applies.
9 Let's assume that there's no Federal
10 whistleblower statute. There is a State whistleblower
11 statute. The employee is dismissed, claims it's in
12 violation of the State statute, so he brings a grievance.
13 Why is there a grievance, if State law does not govern?
14 What does he have to grieve about? You're telling me
15 State law does not apply.
16 MR. HIPP: Okay, in that particular grievance he
17 has been disciplined in some way, as you've just
18 described.
19 QUESTION: Yes, and he says, this disciplining
20 is in violation of State law, isn't he saying?
21 MR. HIPP: Correct, and now --
22 QUESTION: If it's not in violation of State
23 law, it's okay.
24 MR. HIPP: So now the question is that there's a
25 dispute between the employee and the employer. That's

1 covered by the Railway Labor Act, and the question is,
2 what is the substantive law that is going to be applied by
3 the adjustment board in that --
4 QUESTION: There is no dispute, unless you posit
5 the applicability of State law. There is no dispute. The
6 only basis for his claim is that State law governs. If
7 you tell me State law doesn't govern, there's no dispute.
8 MR. HIPP: State law --
9 QUESTION: He's not claiming that he has a
10 Federal right to whistleblower relief.
11 MR. HIPP: Well, State law provides the floor
12 upon which the adjustment board has to function.
13 There's a difference, of course, between taking
14 into account State law policy and requirements and not
15 rejecting those. That's in essence what you've looked at
16 in the Misco case.
17 QUESTION: That's a really gossamer distinction,
18 it seems to me. Are you saying that -- supposing this
19 case -- we have this case coming up in Hawaii, which has a
20 whistleblower protection statute. Supposing you have an
21 identical facts case coming up from, let's say, Nevada,
22 which doesn't have a State whistleblower protection
23 statute. Now, must the adjustment board handle these two
24 cases differently?
25 MR. HIPP: No, Your Honor, and in fact this is

1 exactly -- this is my point, and that is, the adjustment
2 board was established by Congress, and you'll see this in
3 Representative Crosser's statements at the time of the
4 passage of the act: to act like a court, to make the
5 kinds of judgments based upon a range of policy
6 considerations.

7 QUESTION: Well, and I take it from what you've
8 just said that among those policy considerations is not
9 the State law.

10 MR. HIPP: The State law may be taken into
11 account.

12 QUESTION: Is it just totally arbitrary, then,
13 on the part of the adjustment board? It may, it may not,
14 it could do lots of different things, but it doesn't have
15 to do any?

16 MR. HIPP: It is not arbitrary, Your Honor.

17 QUESTION: Well then -- but -- it seems to me
18 every time you've been asked you've said, well, it could
19 be, but it doesn't have to.

20 MR. HIPP: Well, and the --

21 QUESTION: How -- why would the Nevada and
22 Hawaii cases be treated either (a) differently, or (b) the
23 same?

24 MR. HIPP: Well, certainly it would be treated
25 to provide under our contract, because it states that an

1 employee cannot be disciplined for refusal to perform work
2 in violation of Federal or State safety laws, to provide a
3 floor at whatever the State safety law mandated, but it
4 would be up to -- and there could be inconsistencies.
5 Let's give you an example. This was one of the
6 things Congress addressed when it was looking at the right
7 to work laws. What if you have a State law that said, you
8 have to sign off -- you have to become a union member, and
9 then you have another State law that says, no, you have a
10 right to work here, and you cannot require somebody to
11 become a union member. There's a conflict there.
12 Well, Congress dealt with that in an explicit
13 fashion by saying we're not going to apply these
14 particular kinds of laws across State lines, but when you
15 look, and in particular you look at Burley, when it talks
16 about what the nature of the substantive considerations
17 are at the adjustment board level, here's what they say in
18 Burley: depending upon the substantive character of the
19 claim, its foundation in the collective bargaining
20 agreement or otherwise, and other factors, that that will
21 determine how the adjustment board comes out.
22 QUESTION: But that frankly seems to me to be
23 almost so vague that you can't put your finger on
24 anything.
25 Do the cases from Nevada and Hawaii come out

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 differently before the adjustment board, or do they come
2 out the same?
3 MR. HIPP: They would no doubt come out the
4 same.
5 QUESTION: So it doesn't make any difference if
6 Hawaii has a statute and Nevada doesn't.
7 MR. HIPP: That's correct.
8 QUESTION: So then, the State law must be
9 virtually nonexistent. It must be entirely preemptive.
10 MR. HIPP: Well, in the context of a dispute
11 between an employer and an employee, that is absolutely
12 correct.
13 QUESTION: Then you're withdrawing what you said
14 earlier about -- you said State law provides a floor,
15 State law policy would be taken into account by the board,
16 now your response to the Chief Justice is State law is
17 irrelevant. Indeed, not to be -- positively not to be
18 considered.
19 MR. HIPP: No, I'm sorry, Justice Ginsburg, if
20 that's what I suggested. I believe the Chief Justice
21 asked me if those cases would come out the same. I
22 believe that the cases would come out the same, and
23 Congress believed these cases would come out the same,
24 because it recognized specifically with regard to the
25 whistleblowing situation the background in the adjustment

1 boards of dealing with these whistleblower claims.

2 Therefore, since Congress has already recognized

3 that the adjustment boards deal with these whistleblower

4 claims, I am assuming that the employee will get the

5 benefit of the whistleblower protection, and where the --

6 QUESTION: Well, what is the whistleblower

7 protection, and where does it come from -- case law, if it

8 comes from statute or -- you're rejecting the Hawaii

9 whistleblower act as the source of law. What is the

10 source of the whistleblower protection that the employee

11 would get before the board?

12 MR. HIPP: The source comes from four different

13 locations. One source is the collective bargaining

14 agreement. Another source is the practice and procedures

15 of the parties with regard to the collective bargaining

16 agreement. A third source --

17 QUESTION: What does -- well, can you be

18 specific about what the collecting bargaining statute --

19 agreement says about whistleblowers?

20 MR. HIPP: I'm sorry, what the collective

21 bargaining --

22 QUESTION: You said a source is the collective

23 bargaining agreement. Okay, what in the collective

24 bargaining agreement governs whistleblower protection?

25 MR. HIPP: In particular, there's a just cause

1 provision in the contract that prohibits employees from
2 being terminated for just cause. It also protects
3 employees from refusing to sign off on work performed in
4 violation of State or Federal laws, safety laws.
5 That's --
6 QUESTION: Counsel, let me try this one more
7 time, a different way.
8 Suppose that before this employee were
9 discharged the employer came to you, as the employer's
10 counsel, and said, in determining whether or not I may
11 discharge this employee, must I consult and be guided by
12 the Hawaii whistleblower statute? What would be your
13 answer?
14 MR. HIPP: My answer would be that you may not
15 do anything in your adjustment board process that would
16 reject the policies in the Hawaii whistleblower protection
17 statute.
18 QUESTION: I'm not talking about the adjustment
19 board process, I'm asking whether or not I may -- I must
20 take account of that statute in determining whether or not
21 I will discharge the employee.
22 MR. HIPP: My answer would be that you should
23 take into account the policies under that statute and --
24 in deciding whether --
25 QUESTION: I should under a matter of law. Must

1 I, as a matter of law?

2 MR. HIPP: That you must.

3 QUESTION: Then why do the Nevada and Hawaii

4 cases come out the same?

5 MR. HIPP: Because in one you have provided a

6 floor. In the other, you have not -- if the Nevada case

7 had stated, Your Honor, that you are permitted, in fact

8 mandated to terminate people for whistleblowing, then

9 there would be a conflict.

10 If the Nevada case as you posited it says

11 nothing, then the Hawaii case provides the floor.

12 QUESTION: So there are other sources for

13 whistleblower protection other than State law.

14 MR. HIPP: That is correct, Your Honor.

15 QUESTION: And what are they?

16 MR. HIPP: The sources arise in the contract, in

17 the practice and procedures of the party, in the Federal

18 Rail Safety Act -- it is also -- is a source.

19 QUESTION: The board would -- even though the

20 Federal Rail Safety Act applies only to railroads and not

21 to airlines, the board would simply carry it over?

22 MR. HIPP: Well, certainly the policies involved

23 would be carried over.

24 QUESTION: Well, why?

25 QUESTION: Why?

1 QUESTION: That just doesn't make any sense.
2 Congress passes a law saying, here's a -- we want this law
3 to apply to railroads, and the board says well, we'll
4 apply it not only to railroads, we'll apply it to
5 airlines, too.
6 MR. HIPP: My response is that the policies
7 would carry over because Congress, in the legislative
8 history which we cited for you, states very specifically
9 that it understands that this same protection is provided
10 through the adjustment board process.
11 QUESTION: May I ask -- you started to respond
12 to an earlier question by identifying four sources of law.
13 You've got the agreement, the practices, and the Railway
14 Act. What's the fourth?
15 MR. HIPP: And -- the agreement, the practices,
16 the State -- the policies under State and Federal
17 substantive laws, the policies involved, and that's
18 through a Misco analysis --
19 QUESTION: And how do you --
20 MR. HIPP: -- and finally --
21 QUESTION: Oh, go ahead. I'm --
22 MR. HIPP: That was the third one.
23 QUESTION: That's the third.
24 MR. HIPP: And then the finally is the Federal
25 Rail Safety Act provides explicit jurisdiction, even for

1 nonunion employees in the rail line -- railroad industry.

2 QUESTION: Focusing on the third for a moment,

3 how does that reconcile the Chief Justice's hypothetical,

4 if the two States have different policies?

5 MR. HIPP: As long as they don't have

6 conflicting policies, then whatever the adjustment board

7 decides upon, it would take into account the policies

8 involved and establish a floor for the employees.

9 This, of course, is nothing new.

10 QUESTION: But it wouldn't follow from that that

11 they would come out the same. They might come out the

12 same, but I don't see how you can answer the Chief's

13 question by saying they would.

14 MR. HIPP: Well, certainly with regard to the

15 specific whistleblowing question I think we can, by

16 reference to what Congress has said it understands to be

17 done in the adjustment boards already.

18 QUESTION: Where did Congress say that?

19 QUESTION: Well, but that's --

20 QUESTION: Where did Congress say that?

21 MR. HIPP: In -- in the legislative history of

22 the Federal Rail Safety Act.

23 QUESTION: Of a congressional -- of a

24 congressional act applying only to the railroads.

25 MR. HIPP: Yes, that's correct, Your Honor, but

1 it was speaking about adjustment board process, and what
2 they took into account, and the adjustment board scope of
3 jurisdiction in the airline and railroad industries are
4 coextensive.
5 QUESTION: May I give you a hypothetical that
6 does not have a Federal policy counterpart?
7 Supposing in Hawaii you said they had a statute
8 that said, nobody has to work on King Kamehameha's
9 birthday, and it's just Hawaii has such a statute. Could
10 the employer -- and the employer made the man work on that
11 birthday and fired him -- or fired him if he didn't,
12 something like that. What result in that case?
13 MR. HIPP: In that case --
14 QUESTION: And you assume the collective
15 bargaining agreement is silent on this particular holiday.
16 MR. HIPP: All right. In this case, Your Honor,
17 the employee would have to be reinstated. Why -- and let
18 me tell you -- explain why, because that's a good
19 hypothetical.
20 The reason that that would work that way is that
21 you have a State minimum standard that is established,
22 correct, namely, every employee will be off on King
23 Kamehameha day.
24 The employer is, as we know pursuant to the
25 Terminal case, has to abide by the State substantive

1 standards.

2 Now, as to -- after you have that substantive

3 standard, if you terminate an employee in violation of

4 that substantive standard, you will have violated a policy

5 pursuant to State law. That policy is incorporated in the

6 complex that the adjustment board must evaluate in

7 deciding the discharge case.

8 Let's -- your -- let's carry your hypothetical

9 out, because if you go to the adjust --

10 QUESTION: Let me change it just a little.

11 Instead of saying -- instead of discharging him, they just

12 didn't pay him for the day.

13 They docked him for a day's pay, and there's no

14 remedy under the collective bargaining agreement for

15 missing a day's pay. Could he sue in State court and get

16 the day's pay?

17 MR. HIPP: No, he could not, Your Honor.

18 Your assumption here is that -- you assumed the

19 answer in your question, namely that there would be no

20 remedy under the collective bargaining agreement.

21 But Congress dictated that there would be a

22 remedy for that under the collective bargaining agreement,

23 because Congress said there has to be an adjustment board,

24 and Congress said that that adjustment board has to

25 consider grievances, and if you would look at how the

1 development of the Railway Labor Act was in the first 10
2 years, and you look in particular --
3 QUESTION: The term "grievances" is really the
4 heart of the dispute, I suppose, whether grievances
5 include noncontractual disputes as well as contractual
6 disputes.
7 MR. HIPP: That's correct, Your Honor, and I
8 would really ask --
9 QUESTION: You say they must provide relief in
10 that case --
11 MR. HIPP: That they --
12 QUESTION: They must. The adjustment board must
13 provide relief.
14 MR. HIPP: -- and if by that case, it was the
15 wage payment situation --
16 QUESTION: The holiday case, right, but they
17 need not provide it in the whistleblower case. Just, they
18 may. They may take it into account, right?
19 MR. HIPP: No, Your Honor --
20 QUESTION: They must provide it in the
21 whistleblower case, too, right?
22 MR. HIPP: That's correct, Your Honor --
23 QUESTION: The same relief that the State
24 requires.
25 MR. HIPP: They -- not the same remedy.

1 This was the debate between the majority in
2 Andrews and Justice Douglas, because Justice Douglas kept
3 saying, under State law you get this additional remedy.
4 You get all of these good remedies under State law that
5 you're not going to get under the adjustment board, and
6 the answer to that is, that is not what preemption is all
7 about. That preemption allows the adjustment board to
8 fashion the remedy.
9 I would ask the Court to look at Professor
10 Garrison's article, and particularly -- it's cited many
11 times by this Court, because it was written in 1937, after
12 10 years of experience under the Railway Labor Act.
13 At pages 583 and 586 of that article, the --
14 Dean Garrison describes -- he describes how the adjustment
15 boards had been dealing with grievances. He identified
16 grievances as a narrow class of cases that he identified
17 as being discharges or refusals to promote.
18 If you look at the analytical framework that was
19 being used by the adjustment board, he distinguishes how
20 the adjustment board addressed those cases and how it
21 addressed contract interpretation cases. He said that in
22 those cases, the adjustment board looked at the equities.
23 The adjust --
24 QUESTION: Norris, in his State lawsuit, did he
25 ask for punitive damages?

1 MR. HIPP: Yes, he did, Your Honor.

2 QUESTION: Could he get those under the

3 grievance board proceeding, assuming every fact was found

4 in his favor?

5 MR. HIPP: The Hawaii court found that he could

6 not. The arbitrator, who is the only arbitrator who has

7 testified in this case, said that under certain limited

8 circumstances punitive damages would be available.

9 However, I would also hasten to note, Justice

10 Ginsburg, that this again lies at the heart of the debate

11 between Justice Douglas and the rest of the Court in the

12 Andrews case, because he was focusing on the remedy

13 provided by State law, and he was saying, look, you can't

14 get the same remedy over here in this Railway Labor Act

15 proceeding, and that was not a basis for not finding

16 preemption.

17 You have to understand --

18 QUESTION: Review for me your answer of --

19 assuming everything was found in his favor, what could the

20 remedy be from the board and how would it differ from the

21 State law remedy?

22 MR. HIPP: Your Honor, that is addressed at

23 length by the arbitrator in the Joint Appendix. The

24 arbitrator takes one position. The Hawaii courts found

25 that there would not be anything other than back pay and

1 the traditional status quo ante remedy.

2 The Hawaii Whistleblower Protection Act itself

3 provides for the payment of back pay plus actual damages.

4 That's the terminology that's used there.

5 The Hawaii Whistleblower Protection Act,

6 according to the State court judge, does not provide for

7 punitive damages. However, the plaintiff has sued for --

8 in common law and asked for punitive damages.

9 I would like to make two final points here, and

10 I think they are key, and that is that what in essence is

11 being asked of the opponents in this case is for you to do

12 away with the tradeoff that took place in 1934, whereby

13 employees got their mandatory arbitration procedures and

14 they gave up strikes, and going to court.

15 QUESTION: Aren't you doing away with it too,

16 because you are telling us that even in the instances in

17 which there is a preemption, the preemption is somehow

18 softened by this obligation to borrow standards, or to

19 borrow principles? You're interfering with the tradeoff

20 too, aren't you?

21 MR. HIPP: No, Your Honor. I believe this is

22 exactly what was entailed, that --

23 QUESTION: What is the source of --

24 MR. HIPP: -- if you look at the adjustment --

25 QUESTION: I still don't understand the source

1 of the obligation to borrow these standards.

2 MR. HIPP: The source of the obligation is for

3 the court to -- I mean, for the adjustment board to

4 function in the nature of a court, to look at and draw

5 upon the policies --

6 QUESTION: They why isn't -- why wouldn't it be

7 functioning in the nature of the court for the board to

8 say, we think whistleblower legislation is very unwise,

9 and we are not going to recognize any grievance whatsoever

10 that has as its source a whistleblower claim. Is that

11 open to the board?

12 MR. HIPP: If the board -- the board might well

13 say that. That would be subject to review in the courts

14 under this Court's Misco standard.

15 QUESTION: Well, but I want to know how the

16 review turns out. Can the board say that in a grievance

17 arising in Hawaii?

18 MR. HIPP: I would say that it could not say

19 that.

20 QUESTION: Why?

21 MR. HIPP: And the reason I would say that, Your

22 Honor, is that Congress has recognized already that this

23 has to be dealt with through the adjustment board process.

24 QUESTION: Thank you, Mr. Hipp.

25 Ms. Mollway, we'll hear from you.

1 ORAL ARGUMENT OF SUSAN OKI MOLLWAY

2 ON BEHALF OF THE RESPONDENT

3 MS. MOLLWAY: Mr. Chief Justice and may it

4 please the Court:

5 Petitioners have lost sight of what the RLA is.

6 The RLA provides for airlines and railroads to enter into

7 agreements, and provides procedures for enforcing those

8 agreements. The world of the RLA is nothing more.

9 Nothing in the RLA sets terms and conditions of

10 employment.

11 Nothing in the RLA prevents any Government from

12 setting those terms and conditions of employment by

13 providing minimum protections for all workers, including

14 workers covered by the RLA. Only by ignoring decades of

15 law can petitioners argue that the RLA wipes out or forces

16 into an RLA forum these minimum protections.

17 Beginning more than 60 years ago, this Court has

18 had opportunities in which it could have held that the RLA

19 governs such independent laws. This Court has never so

20 held. It did not so hold in 1931 in the Norwood case. It

21 did not so hold 12 years later in Terminal Railroad,

22 which, although petitioners have characterized it as a

23 State-based case, in reality began with a union filing a

24 complaint against a railroad in a State administrative

25 agency.

1 QUESTION: Well, if you were to prevail in this
2 case, Ms. Mollway, we would have to cut back some on the
3 Burley opinion, would we not?
4 MS. MOLLWAY: I believe, Your Honor, that that
5 cutback -- if Your Honor is referring to construction of
6 the omitted case language --
7 QUESTION: Yes.
8 MS. MOLLWAY: Insofar as the omitted case
9 language might have been earlier construed to include
10 independent claims, I believe that cutback has already
11 come. I believe it came in Buell in 1987. That case
12 specifically involved a personal injury brought under the
13 FELA.
14 Personal injuries were the only specific example
15 of omitted case in the Burley decision, and to the extent
16 that that decision was referring to a personal injury
17 covered by the FELA, I believe that omitted case did come,
18 has now been either eliminated or at least rejected
19 insofar as it might earlier have been interpreted in that
20 way.
21 A lot of the problem here I believe has been
22 recognized by the panel in that petitioners are unclear as
23 to what they are really asking for. Are they asking for
24 substantive preemption -- that is, that all of these
25 minimum protections disappear totally -- or are they

1 asking for forum preemption? That is, that these kinds of
2 independent claims are funneled into the RLA forum.
3 They say, in their briefs, that they are arguing
4 for forum preemption, but they shift continually back and
5 forth, as in fact has just occurred in the oral argument,
6 and even in their briefs, in their reply brief in
7 footnote 5, they refer to what is in essence substantive
8 preemption, wiping out these rights.
9 Obviously, the analysis that will be applied to
10 petitioner's case will differ depending on which kind of
11 preemption they are seeking, but in either case, we
12 submit, preemption is inappropriate, and that is because
13 these independent laws were never intended by Congress to
14 be wiped out either in terms of --
15 QUESTION: -- something else between the two,
16 for exclusive jurisdiction but applying both State and
17 Federal law and substantive preemption -- that is, to the
18 extent that there would be questions and comments in a
19 wrongful discharge before the board, that the question
20 whether Norris was wrongfully discharged has to be
21 determined by the board, and then the State forum can take
22 over, so it's kind of a deference until the board decides
23 the preliminary question. How about that? Would that be
24 a way of harmonizing State and Federal law?
25 MS. MOLLWAY: It would not, Your Honor, because

1 Federal law only refers to contract disputes, and in the
2 case of Mr. Norris' common law dispute, that is not based
3 on the contract.

4 We are looking at the distinction as being the
5 source of the right that Mr. Norris is pursuing, so
6 insofar as Mr. Norris is pursuing a right independent of
7 the collective bargaining agreement, even if there were
8 some question that were to arise under a contract because
9 the source of the right is independent of the contract,
10 that particular right remains adjudicable in a court and
11 need not go through the RLA procedure.

12 QUESTION: Well if a State is willing to take
13 the trouble to do it, can a State enact, therefore, an
14 extremely detailed code of labor management relations
15 basically covering everything that is normally covered in
16 CBA's and therefore, in each case, simply be enforcing a
17 substantive State -- the employee who might sue under it
18 would in each case simply be enforcing a substantive State
19 law right and therefore ignore the CBA entirely?

20 MS. MOLLWAY: Well, the State obviously could
21 not come into conflict with direct Federal law, but the
22 RLA does not --

23 QUESTION: Let's assume it basically enacts what
24 as a practical matter is a parallel regime to the most
25 salient provisions of most collective bargaining

1 agreements and one that is entirely in harmony, can it
2 therefore, in effect, provide on each really serious issue
3 an alternate forum if it has a sufficiently detailed law
4 to address each issue?
5 MS. MOLLWAY: I believe, Your Honor, that it
6 could, but it would at that point have to also refer to
7 the collective bargaining agreement if there was one that
8 applied to that particular provision.
9 QUESTION: Why?
10 MS. MOLLWAY: Well, for example, if there were a
11 seniority provision in the collective bargaining
12 agreement, I don't believe that the State could somehow
13 override the agreement that the parties had come into, but
14 if --
15 QUESTION: Well, let's assume that the State
16 statute was simply in harmony with it. Could the employee
17 begin, and if he does not like the way the arbitration is
18 going, basically drop it and then simply walk into a State
19 court?
20 MS. MOLLWAY: Yes. If he is in State court not
21 asserting his rights under the contract but instead
22 asserting his rights under the State law, yes, he could
23 then go into State court and proceed in that way, and
24 that's exactly what Ms. Lingle did in the Lingle case.
25 She went under her contract and she pursued her remedies

1 there and in fact won reinstatement and back pay.

2 She went into court and pursued her wrongful

3 termination claim there, and there was no conflict

4 according to this Court, even though she was proceeding in

5 both the RLA forum and in court, and we would submit that

6 there is no reason that any different approach should be

7 applied under the RLA.

8 In fact, in terms of preemption procedures the

9 cases about preemption have developed in parallel lines

10 under the LMRA context applicable to Lingle and under the

11 RLA context applicable here, and specifically in the

12 Andrews case, which held that for contract disputes only,

13 the exclusive forum was an RLA forum.

14 In that case, this Court referred to LMRA

15 developments in preemption law, such as Republic Steel and

16 Lucas Flour, and that has been the case throughout the

17 history of preemption under both laws.

18 I would like to address some of the matters that

19 came up in my opponent's discussion. There was a great

20 deal of discussion about the Federal Railway Safety Act,

21 and I would like to point out that he has completely

22 overlooked the inclusion by Congress of an election of

23 remedies provision there, so that even though it applies

24 to railroad workers and not to airline workers, there is

25 in fact retained a railroad worker's right to go to court,

1 if in fact he has an independent State right.

2 There is some confusion, the reason being that

3 one of the legislative reports that has been cited says

4 there is an exclusive remedy under the RLA, but that is

5 because the legislative report apparently was from a bill

6 different from the statute that was actually enacted.

7 QUESTION: You've mentioned the prospect of

8 someone pursuing relief in both forums.

9 MS. MOLLWAY: Yes.

10 QUESTION: Suppose in the -- before the board,

11 the board determines that there was no wrongful discharge,

12 would that have preclusive effect on the State court

13 action under the whistleblower's protective act?

14 MS. MOLLWAY: No, it would not, Your Honor,

15 because then, in the separate State court action brought

16 under an independent law, an independent determination

17 would be made whether, under State law, there had been a

18 wrongful discharge or not, and different considerations

19 would come into play irrespective of whatever the

20 collective bargaining agreement might have provided.

21 QUESTION: Well, what if there's a Federal

22 whistleblower law that's applicable to railroad workers?

23 would that be applied by the board?

24 MS. MOLLWAY: It -- I don't believe so, Your

25 Honor, but in case after case what the NRAB has done is

1 said, we are confining our consideration to matters of
2 contract, and they refer to law outside of a collective
3 bargaining agreement only if that law is expressly
4 incorporated into the agreement, or if it serves as a
5 guide, but to my knowledge you have --
6 QUESTION: But suppose the grievance before the
7 board is -- there's a dispute over whether he was fired at
8 all.
9 MS. MOLLWAY: Yes.
10 QUESTION: The employer says, I didn't fire you.
11 You were welcome to come back to work, and he said, oh, no
12 you fired me -- that's the dispute -- and it goes to
13 arbitration before the board, and the board says, he was
14 not fired. You're saying that that is not binding on the
15 State court, when he brings a whistleblower suit in State
16 court?
17 MS. MOLLWAY: Yes, that's correct, because --
18 QUESTION: That's extraordinary, to have no
19 collateral estoppel effect at all.
20 MS. MOLLWAY: There is no effect, we submit, and
21 the reason is because the determination of whether in fact
22 he was discharged that was made by an adjustment board
23 would turn on provisions in the collective bargaining
24 agreement, whereas when he came into court --
25 QUESTION: It's the same fact. The fact is

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 whether he was free to come back to work or not. That
2 very same fact is going to be at issue in the State
3 proceeding.
4 MS. MOLLWAY: Yes.
5 QUESTION: And you're saying, even though it's
6 already been adjudicated in a proceeding between these
7 two, it will be readjudicated by the State differently.
8 MS. MOLLWAY: Yes, because under State law there
9 may be --
10 QUESTION: Do you have any precedent for that in
11 any other area? Do you know any other area where we allow
12 that to happen?
13 MS. MOLLWAY: I am not aware of any case
14 directly like that, where in fact, exactly contrary
15 results were found by an adjustment board and by a court,
16 but the reasoning behind it is that the RLA is confined to
17 that world that we have discussed, which is the world --
18 QUESTION: Yes, but the determination of fact is
19 that he wasn't fired, and if he wasn't fired, a fortiori
20 he wasn't fired for whistleblowing.
21 MS. MOLLWAY: But it would be a determination
22 made under the terms of the collective bargaining
23 agreement based on the collective bargaining agreement's
24 determination of a discharge.
25 QUESTION: You mean fired or discharge might

1 mean something different under State law?

2 MS. MOLLWAY: Yes.

3 QUESTION: If it didn't mean something different

4 under State law, there would be preclusion.

5 MS. MOLLWAY: Presumably the same result would

6 be reached. Not necessarily preclusion, but the same

7 result would be reached if the two --

8 QUESTION: But I thought you said there wasn't

9 preclusion because the standards might be different. If

10 we determine the standards are the same, why wouldn't

11 there be preclusion?

12 MS. MOLLWAY: If this Court were to rule that

13 the standards are exactly the same -- yes, then I believe,

14 if in fact there were that determination, there would be a

15 preclusion. In this case, however --

16 QUESTION: How could this Court ever make that

17 determination with respect to the law of the State of

18 Hawaii?

19 MS. MOLLWAY: I agree with you, Justice

20 Ginsburg, I don't believe that this Court could make that

21 kind of determination.

22 QUESTION: But the supreme court of Hawaii

23 could. The supreme court of Hawaii could say we -- the

24 Supreme Court of the United States has told us what

25 discharge means for Federal purposes and our definition is

1 the same, and if they did that, there would be an
2 obligation to recognize an estoppel, wouldn't there?
3 MS. MOLLWAY: Perhaps there would be, Your
4 Honor, but in this case we don't have that.
5 We don't have a specific whistleblower
6 protection address -- or even on the discharge issue
7 addressing the facts of this particular case, and so we
8 are left with the record as it stands, and on the record
9 as it stands, Mr. Norris has evidentiary differences with
10 the petitioners as to whether or not he was discharged at
11 all, whether or not that discharge was proper, and we
12 submit that the RLA does not require those evidentiary
13 differences to be resolved in an RLA forum, so that he
14 remains free to come into court.
15 I'd like to go back to the procedural that the
16 forum preemption issue is in fact that is what petitioners
17 are arguing for. If they are arguing --
18 QUESTION: I like that one better. I think
19 that's a good forum.
20 MS. MOLLWAY: Thank you.
21 If in fact they are arguing for forum
22 preemption, that Mr. Norris' claim is required to go to an
23 RLA forum, then they run smack up against decisions by
24 this Court.
25 In particular, they run up against Terminal

1 Railroad, which was a case brought by a union against a
2 railroad in a State administrative agency, and if in fact
3 there were forum preemption, then at the outset in the
4 State administrative agency there should have been
5 preemption, and that case should have been funneled to an
6 RLA forum.

7 That didn't happen, the case came to this Court,
8 and the Court did not say that the case should have gone
9 to an RLA forum. Similarly --

10 QUESTION: Was the argument made in Terminal
11 Railroad that it should have, and the Court expressly
12 rejected it?

13 MS. MOLLWAY: Not that I am aware of, Your
14 Honor, but if in fact there were forum preemption at
15 stake, presumably this Court would have recognized what
16 the intent of Con --

17 QUESTION: Well, that gives it the benefit of
18 the doubt.

19 MS. MOLLWAY: Yes, Your Honor. Yes, and also he
20 runs smack up against Buell, which was an independent
21 claim, independent of a collective bargaining agreement
22 that was permitted to go through the judicial procedure.

23 As you know, petitioners have tried to
24 distinguish Buell on the ground that it is a Federal law-
25 based claim, but there is no reason that State and Federal

1 laws for preemption purposes should be treated
2 differently.
3 QUESTION: You would say a fortiori, wouldn't
4 you? If they should be treated differently, you would
5 give more deference to the States.
6 MS. MOLLWAY: Yes. Yes, and in fact this Court
7 has said that they should be treated alike. In
8 Metropolitan LIfe this Court said that, and again in
9 Lingle this Court said that, and in Lingle, in saying
10 that, this Court cited to Buell, an RLA case, even though
11 Lingle was an LMRA case.
12 In addition, petitioners run smack up against,
13 at the very least, a constitutional consideration as to
14 whether or not Congress may constitutionally take away
15 Mr. Norris' right to a jury trial.
16 We will concede that clearly, had he brought a
17 claim under the contract, there would be a public right in
18 having the RLA forum handle contract claims in a uniform
19 manner, so that claim clearly would go, without a jury
20 trial, to the RLA forum, but there is no indication of an
21 equivalent public right that would force an independent
22 State law claim to go into that kind of forum, so at the
23 very least --
24 QUESTION: But --
25 MS. MOLLWAY: Yes, Mr. Chief Justice.

1 QUESTION: What is the constitutional argument
2 you're making?
3 MS. MOLLWAY: A Seventh Amendment argument, Your
4 Honor. I'm not asking this Court to decide that issue,
5 but simply to take into consideration that petitioner's
6 argument, if accepted, would implicate that issue --
7 QUESTION: Seventh Amendment requires jury
8 trials and certain civil actions in the Federal courts. I
9 thought your client was suing in a Hawaii court.
10 MS. MOLLWAY: He was, Your Honor.
11 QUESTION: The Seventh Amendment has never been
12 held applicable to State courts.
13 MS. MOLLWAY: Our position is that in the way
14 that this is working what is happening is, if you take
15 away the jury trial you are funneling all claims,
16 including State and Federal claims, into a Federal forum.
17 That is a nonjury forum into an RLA Federal forum, so to
18 that extent we are talking about creating a nonjury
19 Federal forum that is not a jury forum, when --
20 QUESTION: Well, what constitutional -- it
21 violates the Seventh Amendment to do that --
22 MS. MOLLWAY: Yes --
23 QUESTION: -- because --
24 MS. MOLLWAY: It violates the Seventh Amendment
25 because it takes away the right to jury trial, and that

1 right has been construed as --

2 QUESTION: The right to jury trial, but it

3 certainly doesn't take away the right to jury trial of any

4 Federal courts.

5 MS. MOLLWAY: Our submission is that by

6 channeling his case into a Federal forum you are also

7 implicating Article III, and this Court has construed

8 Seventh Amendment concerns as being on the same standard

9 as Article III concerns.

10 QUESTION: How is one implicating Article III by

11 doing that?

12 MS. MOLLWAY: You are channeling into a non-

13 Article III forum these kinds of claims that traditionally

14 have been deemed to be entitled to be triable in court.

15 If, for example, this were a diversity case, so

16 that it was brought in Federal court, surely Mr. Norris

17 would have been entitled to a jury --

18 QUESTION: But you can make that same argument

19 about a great deal of our National Labor Relations Act

20 preemption cases.

21 MS. MOLLWAY: Our position is that in those

22 cases, if the court is taking about contract rights, then

23 there is an overriding public right that permits the

24 channeling of such cases into an RLA forum, but there is

25 no such overriding public right with respect to State-

1 based rights, differing State by State, and certainly not
2 in the congressional intent.
3 All that petitioners are laying their weighty
4 argument on is in essence the word "or" in the RLA, and we
5 submit that that is too heavy a weight to place. In fact,
6 just 2 days ago, Justice Stevens read the decision in
7 Landgraf, in which this Court said extraordinary weight
8 should not be placed on narrow terms in a long and
9 complicated statute, and we submit that the placement of
10 such weight on the word "or" in the terms arising out of
11 grievances, or out of the interpretation or application of
12 contracts is much too great a weight --
13 QUESTION: Thank you, Ms. Mollway.
14 MS. MOLLWAY: Thank you, Your Honor.
15 QUESTION: Mr. Seamon, we'll hear from you.
16 ORAL ARGUMENT OF RICHARD H. SEAMON
17 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
18 SUPPORTING THE RESPONDENT
19 MR. SEAMON: Thank you, Mr. Chief Justice, and
20 may it please the Court:
21 I would like to begin by addressing some of the
22 issues that came up earlier in the argument. First, we
23 would part company with our colleagues on the issue of
24 preclusion. We would say that when a factual issue is
25 arbitrated and goes through to an award, that under Utah

1 Mining and similar precedent the normal rules of
2 administrative res judicata would apply.
3 The second point I would like to make is related
4 to that, which is, we believe that what an arbitrator, or
5 what the National Railroad Adjustment Board can decide
6 under the RLA are grievances, and we believe that the term
7 grievances, by and large, includes claims based on the
8 collective bargaining agreement.
9 Now, to the extent the collective bargaining
10 agreement actually incorporates State law, then it may
11 well be that the arbitrator can look to State law, but his
12 or her authority to do so is solely bounded by the terms
13 of the contract, and that is because, again, the term
14 grievances really embraces claims based on the employment
15 contract.
16 The third point I would like to make has to do
17 with the hypothetical that arose with respect to whether a
18 State could effectively enact a comprehensive labor code
19 that would address virtually all of the subjects that
20 would be covered under a collective bargaining agreement.
21 We think the answer to that to a large extent
22 depends on whether the State was attempting to regulate
23 the collective bargaining process on the one hand, in
24 which case we think that it would severely limited by
25 doing so, because that is what the RLA deals with. That's

1 on the one hand. The other hand is that a State still
2 remains free to govern -- to regulate about substantive
3 matters of employee safety, to set minimal standards of
4 protection.
5 Again, one of the points that Ms. Mollway made,
6 and this Court has made, is that the RLA governs the
7 process for arriving at an agreement rather than the
8 substantive terms that end up in the agreement that's --
9 QUESTION: Why just safety? Why not wages?
10 MR. SEAMON: It can cover wages as well.
11 QUESTION: Well, all terms of employment.
12 You're saying that States can control the mandatory terms
13 of an employment agreement under the RLA.
14 MR. SEAMON: There may be other Federal statutes
15 and Supremacy Clause problems at the margins, but as far
16 as the RLA is concerned, the answer is yes, substantive
17 matters such as wages.
18 The next point is also related to the question
19 about what a State can regulate without running afoul of
20 the RLA and the process for arbitrating minor grievances,
21 and that is that our opponents try to make a distinction
22 between disputes that arise in the employment setting and
23 safety issues, but in fact the two are often related. In
24 the caboose case, for example, the whole dispute began
25 when employees of a railroad sought to have cabooses added

1 to trains, even though the collective bargaining agreement
2 in that case didn't provide for the cabooses that the
3 State law provided for.
4 In other words, that was a dispute, but it was
5 also a safety issue. In that case, the State had
6 determined that there were a minimal number of cabooses
7 that had to be added to trains even though the collective
8 bargaining agreement in that case provided for a fewer
9 number, so in reality the distinction that our opponents
10 try to draw between safety matters on the one hand and
11 employment disputes on the other hand doesn't really
12 exist.
13 And the last point I'd like to make with respect
14 to issues that arose prior in the argument has to do with
15 the Seventh Amendment, and we would say that ultimately we
16 don't know the answer to the question of whether the
17 Seventh Amendment applies.
18 We think the difficulty of making a Seventh
19 Amendment argument with respect to our colleagues is that
20 this Court has never held that the Seventh Amendment
21 applies to actions in the State court. It only applies to
22 Federal court actions, and for that reason we doubt that a
23 serious Seventh Amendment problem was raised here.
24 QUESTION: Some of these, if you had diversity,
25 you could be in a Federal court.

1 MR. SEAMON: That's right, but a diversity
2 action would go forward in Federal court, and to the
3 extent that the proceeding was in a court of the United
4 States then the Seventh Amendment would clearly apply.
5 QUESTION: Well, that's true, but her point is
6 that by excluding that course, by requiring you to go
7 through the arbitration mechanism, you deprive the
8 plaintiff of that option of getting a jury.
9 MR. SEAMON: That's right, and -- and --
10 QUESTION: So it's a possible argument. You're
11 just not going along with it.
12 MR. SEAMON: I think the more important point,
13 and it is important in interpreting Congress' intent, is
14 that even if a person doesn't have a constitutional right
15 to a jury trial in a State court, it's nonetheless an
16 important and valuable right, and so in interpreting the
17 RLA, the Court should consider whether Congress intended
18 to extinguish this valuable right either by totally
19 extinguishing the State's substantive right, or
20 extinguishing the right to a State forum.
21 QUESTION: Do you recognize any kind of
22 deference, or which one goes first? You've answered the
23 preclusion question differently. If the board goes first,
24 it would bind the State court.
25 But here, it was a person proceeding in both

1 forums at the same time. Does the State have any
2 obligation to defer, to hold its case in abeyance while
3 the board answers the question, was there a wrongful
4 discharge?
5 MR. SEAMON: We don't believe that it has an
6 obligation to do so, although we would certainly think
7 that in certain cases it would be prudent, and that the
8 State court could, without running afoul of either the
9 plaintiff's rights or the RLA, defer to arbitration. In
10 other words --
11 QUESTION: Could the State court be bound by
12 factual findings in the arbitration?
13 MR. SEAMON: Yes.
14 QUESTION: And would the arbitration panel be
15 bound by factual findings in the State proceeding if that
16 terminated first?
17 MR. SEAMON: I believe that's so, and there --
18 and that is where the problem of deferral becomes
19 important, and we think that -- but we don't believe that
20 the RLA itself, of its own force, would require a State
21 court to basically defer or stay proceedings pending the
22 outcome of arbitration, at least as long as the
23 plaintiff's claim does not depend on an interpretation of
24 the collective bargaining agreement.
25 We're basically positing an either-or situation.

1 Either the claim can be brought in State court, and we
2 think that respondent's claim here can be brought in State
3 court because it doesn't depend on an interpretation of
4 the collective bargaining agreement, or it has to be
5 brought in arbitration, and that would be because the
6 claim requires some interpretation of the collective
7 bargaining agreement. That isn't so here.
8 QUESTION: What if the collective bargaining
9 agreement contained a definition of discharge that was not
10 complied with. I mean, so that under an agreement there
11 was no discharge. What do you do in the State court
12 action?
13 MR. SEAMON: Well, in this case that issue
14 doesn't arise because the respondent was very clearly
15 discharged after the step 1 hearing, but in general the
16 question of whether a discharge occurs under -- for Hawaii
17 whistleblower protection purposes is a question of State
18 law. If it's independent --
19 QUESTION: So that would mean that if an
20 arbitrator determined there was a discharge within the
21 meaning of the collective bargaining agreement, that would
22 not necessarily preclude a different holding in the State
23 court on the same issue decided under a different
24 standard.
25 MR. SEAMON: That's correct. The only -- the

1 preclusion would attach only to factual findings,
2 historical matters for example, and I should actually
3 qualify my point about preclusion by saying that
4 certainly, in deciding whether a finding about a
5 historical fact of an arbitrator was entitled to
6 preclusive effect, a court should take into account the
7 procedures that the arbitrator followed.
8 I mean, obviously, again, in accordance with
9 Utah Mining Construction Company principles, the extent to
10 which the arbitral proceeding resembled judicial sorts of
11 proceedings would be important in deciding --
12 QUESTION: Mr. Seamon, are you representing
13 simply the Solicitor General here, or the views of the
14 National -- NRAB?
15 MR. SEAMON: We are representing the views of
16 the United States, not one specific agency such as the
17 NRAB, or the NMB.
18 If there are no further questions, that
19 concludes my presentation.
20 QUESTION: Very well. Thank you, Mr. Seamon.
21 MR. SEAMON: I thank the Court.
22 CHIEF JUSTICE REHNQUIST: The case is submitted.
23 (Whereupon, at 12:02 p.m., the case in the
24 above-entitled matter was submitted.)
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:

HAWAIIAN AIRLINES, INC., ET AL., Petitioners
v.
GRANT T. NORRIS

No. 92-2058

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

BY Ann Mari Federico

(REPORTER)

RECEIVED
SUPREME COURT, U.S
MARSHAL'S OFFICE

'94 MAY -5 A9:58