

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE

**THE SUPREME COURT  
OF THE  
UNITED STATES**

CAPTION: BROTHERHOOD OF LOCOMOTIVE  
ENGINEERS, ET AL., Petitioner v.  
ATCHISON, TOPEKA, AND SANTA FE  
RAILROAD COMPANY, ET AL.

CASE NO: No. 94-1592

PLACE: Washington, D.C.

DATE: Monday, October 30, 1995

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   BROTHERHOOD OF LOCOMOTIVE           :

4       ENGINEERS, ET AL.,               :

5                   Petitioners               :

6                   v.                               :   No. 94-1592

7   ATCHISON, TOPEKA, AND SANTA FE   :

8       RAILROAD COMPANY, ET AL.       :

9   - - - - -X

10   Washington, D.C.

11   Monday, October 30, 1995

12                   The above-entitled matter came on for oral  
13   argument before the Supreme Court of the United States at  
14   11:00 a.m.

15   APPEARANCES:

16   LAWRENCE M. MANN, ESQ., Washington, D.C.; on behalf of  
17       the Petitioners.

18   MALCOLM L. STEWART, ESQ., Assistant to the Solicitor  
19       General, Department of Justice, Washington, D.C.; on  
20       behalf of the Federal Respondent.

21   RONALD M. JOHNSON, ESQ., Washington, D.C.; on behalf of  
22       the Railroad Respondents.

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

2 (11:00 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 94-1592, Brother -- spectators are  
5 admonished to be quiet until you get outside the  
6 courtroom. The Court is still in session.

7 We're going to hear argument next in Number 94-  
8 1592, Brotherhood of Locomotive Engineers v. The Atchison,  
9 Topeka, and the Santa Fe.

10 Mr. Mann, you may proceed whenever you're ready.

11 ORAL ARGUMENT OF LAWRENCE H. MANN

12 ON BEHALF OF THE PETITIONERS

13 MR. MANN: Mr. Chief Justice, and may it please  
14 the Court:

15 The obvious question for you to ask me this  
16 morning is, if Congress intended for waiting time for  
17 deadhead transportation to be time on duty, why didn't it  
18 say so specifically?

19 Well, the answer to that, at least in my mind,  
20 is very simple. We're dealing with a statute that first  
21 of all encompasses many train operations. Even the  
22 petitioners acknowledge that there are thousands of train  
23 operations daily. At the time of the '69 statute, there  
24 were 36,000 train operations each day, so --

25 QUESTION: What do you mean when you say train

1 operations?

2 MR. MANN: Meaning, a crew goes on duty and  
3 performs service for the railroad. That would be one  
4 train operation, Your Honor.

5 And the other answer to that is, and I think  
6 it's the real guts of the case is, there was no need to  
7 specifically state that waiting time was time on duty  
8 because Congress treated that issue in several sections of  
9 the statute, and I refer the Court to section 21103(b),  
10 and I will talk about (1), (2), (3), (4), (5), and (6)  
11 subsections.

12 And in each one of those subsections it's very  
13 clear that Congress was attempting -- and I submit to you  
14 they did close the loopholes, and one basic problem is  
15 that railroad workers at that period of time were sitting  
16 on trains for hours on end waiting for a pickup crew or  
17 another train to come along and take them to their final  
18 release period, and it's -- throughout the entire  
19 amendments the sole purpose was to close those loopholes,  
20 and they did it in several ways.

21 First of all, you don't have to be working at  
22 all to be covered as time on duty under the act, because  
23 it's very clear -- you know, I'm just a country boy, Your  
24 Honors, but English is English. It says, interim periods  
25 available for rest at a place --

1 QUESTION: Where are you reading from, Mr. Mann?

2 MR. MANN: Excuse me, Your Honor.

3 QUESTION: And where will we find it?

4 MR. MANN: This is section 21103 --

5 QUESTION: Page 2 of the petition?

6 MR. MANN: In my brief, Your Honor, it is --  
7 yes, page 2 of the petition. Page 3, number (5),  
8 subsection (5), Your Honor, an interim period available  
9 for rest.

10 Now, what the carriers and the Government is  
11 telling you is that this period of time should not be  
12 considered here. They want to write out and put  
13 conditions on each section, not giving it its broad and  
14 plain meaning. They --

15 QUESTION: Well, are you reading out the word,  
16 interim?

17 MR. MANN: The interim, Justice Souter, means  
18 interim between the time you go on duty and the time that  
19 you're finally released from duty.

20 QUESTION: It doesn't mean interim as between  
21 two periods of active duty?

22 MR. MANN: It does not, Your Honor.

23 QUESTION: Do we have a definition in the  
24 statute?

25 MR. MANN: Well, we have some legislative

1 history.

2 In the hearings, as well as in the Senate  
3 report, it talks about final release of all -- finally  
4 released from all responsibilities. The proof of the  
5 pudding there is --

6 QUESTION: I'm sorry, I'm just not getting it.  
7 I'm sure somewhere they use that phrase, but how are you  
8 connecting that with the meaning of the word?

9 MR. MANN: Well, interim --

10 QUESTION: Interim.

11 MR. MANN: Interim means, as discussed in the  
12 House hearings and the industry spokesman, the Association  
13 of American Railroads, made that point clear, Your Honor,  
14 if I --

15 QUESTION: Well, he may have done it, but is  
16 there a House or a Senate report that defines the term, or  
17 indicates --

18 MR. MANN: It does not define the term.  
19 Congress --

20 QUESTION: If I understand your argument  
21 correctly, your meaning would have been conveyed better if  
22 the word interim were left out, just a period available  
23 for rest.

24 MR. MANN: Well --

25 QUESTION: What does interim add that helps

1 rather than hurts your position?

2 MR. MANN: It -- I submit it doesn't hurt my  
3 position. It includes periods for operations.

4 QUESTION: But you would be stronger, your  
5 argument would be stronger, would it not, if the statute  
6 didn't say, interim?

7 MR. MANN: Somewhat, but I don't think it's  
8 definitive, because as the railroad -- the chief railroad  
9 witness, and I think it's very critical, testified, and I  
10 refer to the House hearings at page 135, where Mr.  
11 Manion -- Mr. Manion was the vice president of the  
12 Association of American Railroads, and he was talking  
13 about the problems of deadheading transportation and what  
14 would happen if the bill as was introduced were adopted,  
15 and after he discussed that part, he said, however, under  
16 another provision of H.R. 8449, which is the section  
17 dealing with interim periods for rest, section 1(b)(3) --  
18 now, that is exactly the same as what was passed,  
19 subsection (5), and I quote:

20 Periods available for rest at other than a  
21 designated terminal will be included as time on duty.  
22 Consequently, if a crew reaches the hours-of-service limit  
23 in the country and is relieved there, it will still be on  
24 duty for purposes of hours-of-service purposes because it  
25 is not relieved at a designated terminal.



1 QUESTION: Who says this?

2 QUESTION: Well, Mr. Mann, even for people  
3 devoted to legislative history, that's a fairly low level,  
4 isn't it, what a witness testified?

5 MR. MANN: Except, Your Honors, this was an  
6 industry spokesman, the Association of American Railroads,  
7 on a bill that only affected them, and what Congress was  
8 attempting to do is to close all these loopholes, and I  
9 submit to you, this statement as far as I am concerned --

10 QUESTION: Well, how do we know that Congress  
11 intended to "close all these loopholes"?

12 MR. MANN: Well, the act solely --

13 QUESTION: It's not called the loophole-closing  
14 act.

15 (Laughter.)

16 MR. MANN: No, Your Honor. The act solely deals  
17 with placing in the act periods of time that not -- that  
18 previously were not time on duty as being time on duty,  
19 with one exception, deadhead transportation to the final  
20 release point.

21 Everything else that they did, the Congress made  
22 it time on duty to eliminate every abuse that was  
23 testified to in these hearings, and this is the industry  
24 spokesman.

25 Now, you can look at the hearings, and I spent

1 some time doing that, to see what all the rest of the  
2 witnesses stated from the industry.

3 QUESTION: But is there something in there that  
4 talks about the definition of deadhead transportation?

5 MR. MANN: Yes, there is.

6 QUESTION: Deadhead transportation, I would  
7 think sometimes when people are transported they include  
8 the time that they're sitting around in the station  
9 waiting room --

10 MR. MANN: Well, that's --

11 QUESTION: -- or the airport --

12 MR. MANN: That's one of the issues.

13 QUESTION: -- and sometimes they don't, so it  
14 all seems quite ambiguous to me, anyway, and if it's  
15 ambiguous, shouldn't you leave this kind of interpretation  
16 to the agency?

17 MR. MANN: Well, two things, Justice Breyer.  
18 One is, of course, the industry, how they dealt with  
19 deadhead transportation, and here's how they define it --  
20 Mr. Manion again. Deadheading may be defined as travel  
21 performed by railroad employees at the direction of a  
22 railroad.

23 Now, he was not the only railroad witness.

24 QUESTION: But that doesn't do it, does it?

25 MR. MANN: Well --

1 QUESTION: I say I'm traveling to Boston. I  
2 might or might not include in my travel time the time  
3 spent at the airport.

4 MR. MANN: That's correct.

5 QUESTION: All right. So is there something  
6 there that says, by the way, we don't mean time spent at  
7 the station, or spent at the airport, or sitting around  
8 waiting for the train to show up? Is there anything like  
9 that? I --

10 MR. MANN: There are three things. One is  
11 commingled service, which is defined in the statute as any  
12 other service for the carrier. You are part of the crew.  
13 You're not free to leave the premises except being under  
14 the control and subject to being called, and you're not  
15 finally released from duty until you get back at the  
16 terminal and do other ministerial duties.

17 QUESTION: Mr. Mann, is it your position that if  
18 you are deadheaded back to your final point of release,  
19 while you're waiting to get the first train, let's say to  
20 Omaha, that is on-duty time?

21 What about -- suppose you have to wait again in  
22 Omaha to get another train to New York City, where you're  
23 going to be released? What about that wait? Is that part  
24 of deadhead --

25 MR. MANN: All time -- all time --

1 QUESTION: So you're not on duty while you go  
2 from Omaha to -- where did -- from wherever you're --  
3 wherever you end your work to Omaha, you're not on duty --

4 MR. MANN: You are on duty.

5 QUESTION: While you're being transported?

6 MR. MANN: You're on duty. That's specifically  
7 in the statute. From the time you mark on duty, and  
8 that's subsection (4) of the --

9 QUESTION: I thought deadheaded transportation  
10 back is not counted.

11 MR. MANN: Deadheaded transportation back, at  
12 the end of your tour of duty, at the end of your tour --

13 QUESTION: Okay --

14 MR. MANN: -- of operations --

15 QUESTION: My tour has ended in San Francisco.

16 MR. MANN: Okay.

17 QUESTION: And I -- they've arranged to get me  
18 back by putting me on a train to Omaha, all right. Now,  
19 you say while I'm waiting in San Francisco, I'm still on  
20 duty, all right. What about while I'm waiting in Omaha?

21 MR. MANN: It's all commingled service, and it's  
22 also time that is free for rest, and under the statute,  
23 that's on-duty time.

24 QUESTION: And what about the transportation  
25 while I'm on the train between San Francisco and Omaha?

1 MR. MANN: That is not, because of the statutory  
2 provision. That's why Congress carved out this one  
3 exception. The only exception is that it will not be  
4 counted as time on duty, nor time off duty. That one  
5 period of actual movement, traveling in -- traveling in is  
6 the key.

7 QUESTION: Why is that magic? I don't  
8 understand that.

9 MR. MANN: Well, because --

10 QUESTION: I mean, if -- it makes no sense at  
11 all.

12 MR. MANN: Well, maybe -- maybe free at rest  
13 makes no sense at all, either, but it would create an  
14 anomaly. The anomaly would be this --

15 QUESTION: You don't think it's an anomaly that  
16 I'm on duty while I'm at rest and back on duty whenever I  
17 start moving again?

18 MR. MANN: Congress said so.

19 QUESTION: And if I have eight stops along the  
20 way, I'm on-off, on-off.

21 MR. MANN: If Congress had not said that rest  
22 time was time on duty, I would agree with you, but  
23 Congress didn't say that.

24 QUESTION: Mr. Mann, what happens if I'm being  
25 transported back in a van and there's a breakdown, and it

1 takes 3 hours to get that van fixed so it can move again  
2 to the place where I'll be released?

3 We know that the time that you're in the van is  
4 deadhead time, and it's not on-duty time. What about when  
5 the car breaks down and I'm waiting to have it fixed?

6 MR. MANN: It's a good question, but I would  
7 submit to you that the way Congress envisioned this, I  
8 would argue to you that any time that you're not  
9 traveling, and it's very clear if you look at the statute  
10 and the meaning of the terms, if you're not traveling in  
11 the deadhead transportation, then it's either commingled  
12 service, you're performing other service --

13 QUESTION: No service. I'm waiting --

14 MR. MANN: When you're waiting --

15 QUESTION: -- for the van to be fixed.

16 MR. MANN: -- that's rest time.

17 QUESTION: Well, why isn't it on duty time, as  
18 it is in Justice Scalia's Omaha wait. Why is he on duty  
19 in Omaha but not on duty sitting on the side of the road?

20 MR. MANN: Congress said that an interim period  
21 available for rest is time on duty. You can be at rest  
22 completely --

23 QUESTION: He's at rest on the side of the road.

24 MR. MANN: Mm-hmm.

25 QUESTION: So he's on duty, so the answer to

1 Justice Ginsburg's question is, he's on duty.

2 MR. MANN: He doesn't have to be performing any  
3 duty. He can simply be doing nothing, just sitting there  
4 waiting, doing absolutely nothing --

5 QUESTION: But it's treated as on-duty time.

6 MR. MANN: Specifically.

7 QUESTION: Yes.

8 QUESTION: Yes.

9 QUESTION: I assume you don't take the position  
10 that when the van stops for a red light he's back on duty,  
11 do you?

12 (Laughter.)

13 QUESTION: Is it a -- it's not an in-motion  
14 theory, not completely that, huh?

15 MR. MANN: Typically, the problem -- we wouldn't  
16 be here if there hasn't been tremendous abuses. What we  
17 have as a typical situation, at the end of the 12 hours a  
18 crew is waiting and waiting and waiting. We have evidence  
19 in the record that up to 10 hours, sometimes, they have to  
20 wait for someone to come and get them --

21 QUESTION: Can I go back -- I'm -- I --

22 MR. MANN: Yes, Your Honor.

23 QUESTION: My question -- and you just didn't  
24 have a chance to get out the other two things --

25 MR. MANN: Oh --

1 QUESTION: -- and what I was curious, remember,  
2 that this word deadhead transportation struck me, at least  
3 in the statute, as ambiguous, that of course deadhead  
4 transportation is limbo time, yes --

5 MR. MANN: Yes.

6 QUESTION: -- but what is deadhead  
7 transportation, and my question was, what evidence is  
8 there that you could not -- not that you -- but you could  
9 not read those words, deadhead transportation, to include  
10 time in the station, time waiting to go on the train  
11 itself, as we do with airplanes and trains normally.

12 MR. MANN: If you're --

13 QUESTION: And what is it in -- and you listed  
14 three things. The first thing was, you said I should look  
15 at the commingled, the definition of commingled --

16 MR. MANN: Commingling --

17 QUESTION: -- and you were going to mention two  
18 others.

19 MR. MANN: That's correct. One is the rest  
20 period, interim period for rest --

21 QUESTION: Where would I -- where do I find --

22 MR. MANN: That is --

23 QUESTION: You mean just in the statute here, or  
24 in --

25 MR. MANN: In the statute.



1 QUESTION: All right. I've looked at that. It  
2 didn't seem --

3 MR. MANN: Oh -- oh, I --

4 QUESTION: -- to me that it was clear.

5 MR. MANN: Well, let me --

6 QUESTION: One is the definition of commingled  
7 in the statute, the other is the definition of rest  
8 period, and what was the third?

9 MR. MANN: The third is, what was Congress  
10 trying to do here?

11 QUESTION: Okay, what?

12 MR. MANN: Congress was trying to eliminate the  
13 abuses, and this was one of the greatest abuses that the  
14 industry was accomplishing. They were leaving these crews  
15 out there an inordinate amount of time, and they're still  
16 doing it today.

17 QUESTION: Well, if, in fact, it is an abuse,  
18 and if, in fact, the agency has significant delegated  
19 power to define deadhead transportation either way or  
20 partial ways, then couldn't you deal with that problem  
21 through the agency dealing with it?

22 MR. MANN: I don't think the agency, Justice  
23 Breyer, has the authority here. This is the one statute,  
24 the only safety statute on the books, in which the Federal  
25 Railroad Administration does not have regulatory

1 authority. They enforce, but they have no regulatory  
2 authority. In fact, Congress took away the authority.

3 In the old statute in 1908, the old statute, the  
4 Interstate Commerce Commission did have that jurisdiction.

5 QUESTION: But they can interpret.

6 MR. MANN: They can interpret, yes.

7 QUESTION: They can interpret, and they did.

8 MR. MANN: They did.

9 QUESTION: And they said, we think that two  
10 things go together. When you're going to the job, then  
11 the waiting time, everything, is on-duty time.

12 MR. MANN: Yes.

13 QUESTION: And when you're going from the job,  
14 then everything is this limbo thing. Why doesn't that  
15 just make entire sense as an interpretation?

16 MR. MANN: It does in one respect, but the other  
17 respect I can just say, the very opposite is true. Going  
18 to deadhead trans -- deadhead to-duty assignment obviously  
19 includes the time you report to duty, and the time you are  
20 actually traveling, because the first subsection states  
21 very clearly that time on duty begins when you report for  
22 duty, so obviously, and I could argue that if that is time  
23 on duty from the point of reporting to duty and actually  
24 moving in transit, then the opposite situation coming back  
25 is the same.

1           QUESTION: But one thing is not the same. You  
2 can't get very far with your release point, because the  
3 statute tells us that the deadhead transportation time  
4 back, before the point at which you're released, that that  
5 time is limbo time.

6           MR. MANN: That's correct, but the statute also  
7 tells you that, unlike what the respondents are saying, it  
8 tells you that you are not -- there's -- the position of  
9 the respondents, simply put, is that the employee is off-  
10 duty, no further obligations, after the 12 hours is  
11 reached. That's just not the fact.

12           QUESTION: Well, that's a factual question. We  
13 didn't take this case to figure out the fact of whether  
14 there are duties, and I at least am going to decide it on  
15 the assumption that there aren't. Now, if you can prove  
16 that there are duties in a particular case, it's a  
17 different case.

18           But let's assume there are no duties, that the  
19 railroad worker is simply waiting to go back to where his  
20 rest time begins.

21           Now, I can see why Congress would want deadhead  
22 time, including the time waiting for the deadhead  
23 transportation to arrive, I can understand why they would  
24 want that to count at the beginning of the work period,  
25 because by the end of the work period, the worker's going

1 to be very tired. You should count that time against  
2 him, right?

3 But at the end of the work period, what  
4 difference does it make?

5 MR. MANN: Well --

6 QUESTION: He's not doing any more work for the  
7 railroad, his rest time for the mandatory period of rest  
8 he has to take doesn't begin -- this is limbo time, right,  
9 it's not rest time.

10 MR. MANN: Correct.

11 QUESTION: So what -- why would Congress want it  
12 to count towards work time?

13 MR. MANN: There are several --

14 QUESTION: I can't understand it.

15 MR. MANN: -- answers to that. Number 1, why  
16 would they want just rest time to be time on duty?  
17 Because there were abuses at that time, and there are  
18 still abuses. That's one reason.

19 QUESTION: Yes, but that's going back to your  
20 claim that in fact they're really being required to do  
21 something. It seems to me that that answer is  
22 inconsistent with the --

23 MR. MANN: They're not required -- Justice  
24 Souter, they're not required to do anything, and they're  
25 off -- I mean, and they're on duty, specifically by the

1 statute, and that was what the industry spokesmen were  
2 telling Congress at the time. Congress, if you adopt  
3 this, we can never let anyone off at an interim point.

4 QUESTION: Yes, but --

5 QUESTION: When they have more duties later.  
6 That was addressing --

7 MR. MANN: They do. They still do.

8 QUESTION: -- the situation when they have more  
9 duties later, so that their total on the job, their total  
10 time on the job will be stretched, and by the end of the  
11 job, they'll be very tired.

12 MR. MANN: Justice Scalia --

13 QUESTION: Here we're talking, by definition,  
14 about a situation where their job is done, and it's not  
15 going to be counted toward their rest time, and it's not  
16 going to make them more tired for any duties that they  
17 perform.

18 MR. MANN: I respectfully differ with you  
19 because, as I've pointed out in my reply brief, the duties  
20 don't end. When you get at the end --

21 QUESTION: You're going to win in front of the  
22 Seventh Circuit.

23 MR. MANN: Sir.

24 QUESTION: If that's true, then under the  
25 Seventh Circuit's opinion, you're going to win,

1 ultimately.

2 MR. MANN: The Seventh Circuit did not consider  
3 anything but that one section of subsection (4), time  
4 spent in deadhead transportation.

5 QUESTION: Yes.

6 MR. MANN: They did not look --

7 QUESTION: If you can go back to the Seventh  
8 Circuit, or the district court under the Seventh Circuit  
9 opinion and say, aha, they have responsibilities, then  
10 you're going to win.

11 MR. MANN: Well, I can only suggest -

12 QUESTION: I mean, the whole point of our taking  
13 this case is not to decide whether you win or not --

14 MR. MANN: Correct.

15 QUESTION: -- on that hypothesis.

16 MR. MANN: Correct, but I think it is  
17 significant in that it counters the argument of the  
18 respondents that all duties end at that 12-hours time, and  
19 it doesn't. I --

20 QUESTION: But your case -- in answer to my  
21 question, you were candid, and I appreciated it. You said  
22 if the van breaks down so that they're not moving, that's  
23 limbo time, and it's clear that in that situation they  
24 have no trains to watch --

25 MR. MANN: Correct.

1 QUESTION: -- no safety hazards to report, they  
2 have nothing to do --

3 MR. MANN: Correct.

4 QUESTION: -- except wait.

5 MR. MANN: And they are not free to go. They  
6 are part of the crew, still, until they finally mark off  
7 at the away-from-home terminal.

8 QUESTION: May I ask you a question about the  
9 1969 hearings, and you quoted Mr. Manion's statement,  
10 which I guess is the same one, at page 20 of your brief.

11 MR. MANN: Yes.

12 QUESTION: And his references to 1(b)(3)(A) in  
13 the bill that was then pending, that's what finally was  
14 enacted as subsection (5), is that correct?

15 MR. MANN: That's correct.

16 QUESTION: And am I correct in understanding  
17 that at that time the subsection (4) with the second  
18 clause in, at least, was not in the bill?

19 MR. MANN: The deadhead transportation?

20 QUESTION: Yes. That was not yet in the bill,  
21 is that correct?

22 MR. MANN: Not in the -- not as it was finally  
23 passed.

24 QUESTION: And so it is fair to infer as part of  
25 your argument, I gather, that in paragraph (4) everything

1 after the word, but, was enacted in response to the  
2 concern expressed by Mr. Manion on page 20 of your brief.

3 MR. MANN: It was -- well, deadhead  
4 transportation in the originally drafted bill stated that  
5 all of the deadhead time was time on duty, so he was  
6 referring to both provisions, except when I read to you on  
7 page 135 of the House hearings, that only related to the  
8 subsection (5).

9 QUESTION: Which was then subsection (3).

10 MR. MANN: Yes.

11 QUESTION: And (4) was amended in response to  
12 this testimony, is your position.

13 MR. MANN: That's correct.

14 QUESTION: And my question is, if you -- and the  
15 question, then, is, what does the word deadhead  
16 transportation mean in that amendment, under your  
17 analysis? The question, does it include the time waiting  
18 for the transportation to begin?

19 MR. MANN: And let me address --

20 QUESTION: Let me finish my question, please.

21 MR. MANN: Oh, I'm sorry.

22 QUESTION: And so that's what we're trying to  
23 decide, as I understand it.

24 Now, if your view is correct that it does not  
25 include the period before they get on the bus, or whatever



1 it is, how did that solve the problem he described on  
2 page 20 of the brief?

3 MR. MANN: It didn't solve that problem. They  
4 are still --

5 QUESTION: Unless you construe it the way the  
6 Government does.

7 MR. MANN: They're still on duty.

8 Now, I want to point out, Justice Stevens, that  
9 another industry spokesman, a Mr. Hilt, who was the  
10 chairman of the National Railway Conference -- this is the  
11 negotiating arm for the railroad industry. He was asked,  
12 what does deadhead mean?

13 He said, on page 220 of the House hearing,  
14 deadheading is being transported from one point to another  
15 at carrier's orders without performing any service, and  
16 then, later in his testimony --

17 QUESTION: But again, he's describing something  
18 before that's in the bill.

19 MR. MANN: Yes, but later he was asked by  
20 Congressman Tiernan, in regards to defining deadhead,  
21 would you say to the committee that the definition covers  
22 the complete description of deadheading, and his answer  
23 was -- he didn't fully answer.

24 He said, deadheading is a widely used term,  
25 except management relationships is more or less the

1 complete definition, and then Congressman Tiernan again  
2 pressed him. He said, you don't want to add anything to  
3 the definition you gave with regards to what deadheading  
4 is, and he said, I don't think so.

5 So he is saying to Congress, it is only  
6 transportation in, and that's all it is, the  
7 transportation.

8 QUESTION: Maybe he was wrong.

9 MR. MANN: But that's what Congress relied on.

10 QUESTION: No, but you still haven't answered --

11 QUESTION: You think -- how do you know that?

12 MR. MANN: Well --

13 QUESTION: You really think --

14 MR. MANN: I really think --

15 QUESTION: Who do you think heard that  
16 testimony?

17 MR. MANN: Who did?

18 QUESTION: Do you think Congress heard that  
19 testimony?

20 MR. MANN: Well, it was their hearings.

21 QUESTION: How many people do you think were  
22 present there?

23 MR. MANN: There were 30-some on that committee.

24 QUESTION: Okay, so you think because 30 Members  
25 of Congress, if they were all present at the hearing,

1 heard him say those words. You want us to assume that  
2 therefore the statute means what he said.

3 MR. MANN: It's what Congress --

4 QUESTION: Does that seem reasonable to you?

5 MR. MANN: I do, because this committee is the  
6 one that drafted the provisions, and they relied on what  
7 the witnesses told them, and it was part of that  
8 testimony --

9 QUESTION: They didn't pass the statute. There  
10 are how many, 432 Members of Congress, 530, 532, something  
11 like that.

12 MR. MANN: Yes.

13 QUESTION: They passed the statute, not the  
14 30 --

15 MR. MANN: They passed it based on the  
16 representations of the chairman of the committee.

17 QUESTION: They did.

18 MR. MANN: Unanimously, I might add.

19 QUESTION: But counsel, even if you confine  
20 yourself to the committee members -- I understand what  
21 you're trying to say. You're not going to convince  
22 Justice Scalia on this, but you might convince me, so give  
23 it a try.

24 (Laughter.)

25 QUESTION: How does the amendment -- what I

1 don't understand under your view, assume that all the  
2 committee members meant the amendment to solve the problem  
3 described there, as I read it, it does not solve the  
4 problem --

5 MR. MANN: It only --

6 QUESTION: -- because the time between they get  
7 off the crew and they wait for the bus could run out to  
8 several hours and still cause the very violation he's  
9 concerned about.

10 MR. MANN: That's correct. Congress didn't buy  
11 that. That's the whole point I'm making. The only thing  
12 they bought from the railroad industry was, we're going to  
13 give you a break on deadheading --

14 QUESTION: I see --

15 MR. MANN: -- not time on duty.

16 QUESTION: Why would they buy that little piece  
17 of the problem?

18 MR. MANN: Because --

19 QUESTION: Why would they say, we're going to  
20 fix this part but you're in trouble for the rest?

21 MR. MANN: Because it's the abuses, Justice  
22 Souter. They had crews sitting out there hours on end,  
23 and they still do, and the problem is, maybe there's no  
24 immediate danger to safety because they're not -- the  
25 crew's not going to operate this particular train any

1 more, but it gets cumulative. Day-in, day-out, you're not  
2 knowing when you're going on duty, 8 hours later today,  
3 6 hours earlier tomorrow, and it cumulates, and as I  
4 quoted --

5 QUESTION: They have guaranteed rest period  
6 whenever they get back, and that is not shortened whether  
7 this limbo time -- I mean, this limbo time doesn't go  
8 toward that.

9 MR. MANN: It doesn't, but you have -- and I  
10 submit that cumulative fatigue is a cause of serious  
11 safety problems, as stated by the National Transportation  
12 Safety Board, which I've quoted, as stated by the General  
13 Accounting Office as well --

14 QUESTION: Do they get paid for the limbo time?

15 MR. MANN: They do.

16 QUESTION: So why do they mind?

17 MR. MANN: It's a safety problem. We're not  
18 talking about wages. We're talking about safety.

19 QUESTION: They still have to have the off duty.  
20 They have to have the off-duty hours after the limbo time  
21 plus the transportation is over. They have to have the  
22 10 off-duty hours anyway.

23 MR. MANN: That's correct.

24 QUESTION: So why does it become -- I mean --

25 MR. MANN: It's not an economic problem. That's

1 the whole point.

2 QUESTION: No, no, but I mean, why is it a  
3 safety problem if when they get back they still have to  
4 have the 10 hours?

5 MR. MANN: Because day in and day out, that time  
6 is not regular, and it cumulates this fatigue, and I --  
7 when you have an opportunity to look at the -- and even  
8 the reports of the Federal Railroad Administration point  
9 out to the -- this problem in the railroad industry, and  
10 it is definitely a cause of accidents.

11 Employee error causes about 30 percent of the  
12 rail accidents in this country, and a significant portion  
13 of those that were addressed by the National  
14 Transportation Safety Board involve fatigue, and both  
15 chairman of the board, as well as the vice chairman, going  
16 to Congress several times trying to get attention to this  
17 problem, and this is what Congress was trying to do, and  
18 that's why they didn't buy the amendment sought by the  
19 railroads.

20 QUESTION: I guess the only difficulty I have  
21 with your response is, I mean, you're relying on  
22 legislative history for part of the answer, but when we  
23 get to drawing the distinction between the waiting time  
24 and the transportation time, and you're saying well,  
25 Congress bought that distinction, there's nothing in the

1 legislative history which you were previously relying on  
2 that supports you.

3 MR. MANN: They didn't change the bill. The  
4 bill is exactly the same as what was complained of.

5 QUESTION: But it seems -- it just strikes me as  
6 odd that when they adopted, in effect, the compromise  
7 which are the -- when they adopted the language following  
8 but, in what is now (4), it just strikes me as odd, if  
9 we're going to rely on legislative history, to find that  
10 there is no explanation of what you're telling us.

11 Why might they not have said, well, we're going  
12 to add these words following but, and we're going to put  
13 them in (4), but that does not affect the question of how  
14 we're going to treat waiting time, because waiting time is  
15 subject to abuse. There's nothing in the legislative  
16 history record that addresses this.

17 MR. MANN: Maybe not specific words, waiting  
18 time, but they addressed it clearly in two ways. One is,  
19 which I've just mentioned, they did not change the wording  
20 at all from the introduced bill and that which was  
21 complained about by the industry. They didn't change it  
22 at all.

23 QUESTION: But they added that part of  
24 subsection (4).

25 QUESTION: Yes.

1 MR. MANN: That's correct.

2 QUESTION: That's a change in response to --  
3 arguably is a change in response to the concern you've  
4 identified.

5 MR. MANN: Not on waiting time.

6 QUESTION: Well, you think it isn't because it  
7 doesn't expressly say that. It's a question of, what did  
8 they mean by deadhead transportation?

9 MR. MANN: That's what --

10 QUESTION: Did they intend to include waiting  
11 time, which would have solved the problem --

12 MR. MANN: But that's --

13 QUESTION: -- if you read it that way.

14 MR. MANN: They solved it by saying you can't  
15 get that relief that you want.

16 QUESTION: Thank you, Mr. Mann.

17 MR. MANN: Thank you, Your Honor.

18 QUESTION: Your time has expired.

19 Mr. Stewart, we'll hear from you.

20 ORAL ARGUMENT OF MALCOLM L. STEWART

21 ON BEHALF OF THE FEDERAL RESPONDENT

22 MR. STEWART: Mr. Chief Justice, and may it  
23 please the Court:

24 In the view of the Federal respondents, time  
25 spent waiting for the arrival of a deadhead vehicle at the



1 conclusion of an employee's duty assignment is neither on  
2 nor off-duty time. That construction is consistent with  
3 the text of the pertinent statutory provision, and with  
4 the policies underlying the Hours of Service Act.

5 As Justice Breyer was saying in one of his  
6 questions, if a person is asked, how much time did it take  
7 you to travel from Washington and Boston, the question is  
8 ambiguous. If the import of the question is, how big a  
9 chunk out of your day did the process of travel take, a  
10 person would normally answer it in a way that included  
11 associated waiting time.

12 If the person were known to find air travel  
13 particularly uncomfortable or unpleasant, the person might  
14 naturally infer that the point of the question was, how  
15 much time were you placed in this uncomfortable position,  
16 and might answer it in a way that included only the time  
17 actually in the air.

18 So to see whether waiting time should be counted  
19 as part of time spent in deadhead transportation, I think  
20 the inquiry should focus on, why did Congress define this  
21 as limbo time in the first place, and do the same concerns  
22 that caused Congress to define a category of limbo time  
23 apply with equal force to the waiting time at issue here,  
24 and for all purposes relevant to the Hours of Service Act,  
25 the time spent waiting for the deadhead vehicle is

1 functionally indistinguishable from time actually riding  
2 in that vehicle.

3 QUESTION: Well, what about the abuse argument?  
4 There's no -- the railroads weren't engaging in abuses  
5 while they were transporting. They were engaging in  
6 abuses by being very unsystematic and uncaring about  
7 getting the -- doing the transportation. I think that's  
8 his argument. What is your response to that?

9 MR. STEWART: Well, a couple of responses. I  
10 think first, as to what complaints of abuse were brought  
11 before the congressional committee that held the hearings,  
12 the union's complaints focused both on the waiting time  
13 and on the length of transportation itself. That is,  
14 there were statements to the effect that --

15 QUESTION: They didn't draw any distinction,  
16 you're saying.

17 MR. STEWART: No, and --

18 QUESTION: So that the problem Congress had was  
19 a unified problem.

20 MR. STEWART: That's correct, and the Senate  
21 committee report stated that part of the problem was that  
22 an employee -- several hours of an employee's off-duty  
23 time might be time deadheading back from his duty  
24 assignment, so clearly -- there's no evidence in the  
25 legislative history that Congress believed that the ride

1 in the deadhead vehicle itself was typically short, but  
2 that the waiting periods were typically lengthy, so I  
3 don't believe that the legislative history provides a  
4 basis for distinguishing between the two.

5 The reason that time spent in deadhead  
6 transportation is limbo time is that it shares some of the  
7 characteristics of both on and off-duty time. That is,  
8 the employee is not free to come and go as he pleases.  
9 The employee is unlikely to have a meaningful opportunity  
10 for rest, and therefore it would be inappropriate to count  
11 this as off-duty time and count it towards the minimum  
12 number of consecutive hours of rest that he has to --

13 QUESTION: May I just get your view on one, kind  
14 of fundamental thing for me? Is it -- do you agree that  
15 the second clause in subparagraph (4) was inserted in  
16 response to the concern expressed by the testimony of  
17 Mr. Manion?

18 MR. STEWART: I don't know if I would say that  
19 Mr. Manion specifically, but yes, I think --

20 QUESTION: Just generally.

21 MR. STEWART: Yes. The original bill, the bill  
22 as originally introduced provided that time deadheading  
23 either to or from a duty assignment would be considered  
24 on-duty time, and this appears to reflect a -- to define  
25 the deadheading from a duty assignment as limbo time

1 appears to reflect a compromise that allayed the concerns  
2 of the railroads while ensuring that this would not be  
3 treated as off-duty time, thereby depriving the employee  
4 of an adequate opportunity for rest.

5 So because the employee is not free to come and  
6 go as he pleases, and is unlikely to have a meaningful  
7 opportunity for rest, it would be inappropriate to  
8 consider this off-duty time.

9 On the other hand, so long as the employee has  
10 no duties to perform, his fatigue can pose no danger to  
11 himself and others, or others, and therefore it would be  
12 inappropriate to treat this as on-duty time, and I think  
13 it's instructive to contrast this with the interim periods  
14 available for rest that Mr. Mann referred to.

15 That is, the reason that the interim periods are  
16 defined as on-duty time is not that the employee poses a  
17 danger during those periods himself. That clearly  
18 wouldn't be the case if the employee is performing no  
19 services.

20 Rather, the reason is that if these periods are  
21 not provided at a place where an employee actually has an  
22 adequate opportunity for rest, the employee is likely to  
23 be tireder at the end of that period than at the  
24 beginning, and therefore they need to be counted as on-  
25 duty time in order to ensure that he's not performing

1 safety-sensitive tasks more than 12 hours after he  
2 initially reported for duty.

3 QUESTION: Do you know how many designated  
4 terminals an employee usually has?

5 MR. STEWART: Well, typically, I think my  
6 understanding is that typically there would be a home  
7 terminal and an away-from-home terminal. This is  
8 generally a subject of collective bargaining, and  
9 Mr. Johnson may have a more precise answer than I do, so  
10 that what is a designated terminal insofar as a particular  
11 employee is concerned is defined not by the act, but by  
12 the collective bargaining agreement.

13 QUESTION: But under your view, if the employee  
14 waits for deadhead transportation after his duty, when  
15 he's off duty, and then goes to a designated terminal  
16 which is available for rest under (5), but then he's also  
17 waiting for further transportation, I take it that this is  
18 on duty, because he has a place to rest, even though he's  
19 also waiting for further deadhead transportation.

20 MR. STEWART: I'm not sure if I understand the  
21 question, but our position is that after the employee has  
22 been released of the obligation to perform any duties, all  
23 of the waiting and the actual riding would be considered  
24 limbo time, and the statute speaks of --

25 QUESTION: No, but it's on-duty time once he

1 gets to a place other than a designated terminal and it's  
2 available for rest, pursuant to (5), or is that not an  
3 interim period?

4 MR. STEWART: That's not an interim period. The  
5 interim periods would be those that are preceded and  
6 followed by periods of service, and again, the reason for  
7 treating those periods differently is, if you're going to  
8 have to perform services when the period is over, we're  
9 concerned about whether you're going to be tired and pose  
10 a safety hazard at that time, but if your tour of duty is  
11 up, if you're simply in the process of getting from your  
12 duty assignment to the place that you'll get your 8 or 10  
13 hours consecutive rest, that concern is not present.

14 QUESTION: I see. So interim is followed and  
15 preceded by on duty.

16 MR. STEWART: That's correct.

17 QUESTION: Mr. Stewart, does the Government  
18 assert any entitlement to deference of its views in this  
19 case?

20 MR. STEWART: Yes, we do. This is -- obviously,  
21 this litigation has taken a strange path in the sense that  
22 the Government is asserting a different reading of the  
23 statute than we asserted in the court of appeals, but the  
24 concerns that caused the FRA to shift its position,  
25 briefly, essentially are inapposite once the case comes

1 before the Court.

2 That is, in the Seventh Circuit the Government  
3 was asserting that the interest in Nation-wide uniformity  
4 was so great as to outweigh the interest in choosing the  
5 better of the two readings as between two that the FRA  
6 considered within the realm of reasonableness. Given that  
7 we're in this Court, and that whatever ruling this Court  
8 hands down obviously will have Nation-wide application,  
9 there's no need to balance any concern for uniformity  
10 against competing interests.

11 QUESTION: What that would mean, of course, if  
12 we agree with you on the deference point, is that although  
13 we -- if we were to find your interpretation reasonable,  
14 you could change the interpretation later. Even if we  
15 though yours was the more reasonable you would still be  
16 able to go to the other one.

17 MR. STEWART: I think that's correct. It would  
18 depend to a certain degree if the Court wrote the opinion.  
19 if the Court went out of its way to say not only is this a  
20 reasonable construction but it's in our view the only one  
21 that could plausibly be asserted --

22 QUESTION: Now, the FRA does not have rule-  
23 making authority explicitly conferred, does it?

24 MR. STEWART: No, that's correct, as to the  
25 Hours of Service Act.

1 QUESTION: And there is a circuit conflict, is  
2 there not, on whether agencies that do not have rule-  
3 making authority are entitled to deference?

4 MR. STEWART: I think there is -- there are --  
5 this Court has accorded --

6 QUESTION: We've reserved the question, haven't  
7 we?

8 MR. STEWART: Right.

9 QUESTION: You don't want us to decide that in  
10 this case, do you?

11 MR. STEWART: I think because our -- clearly, we  
12 believe our reading of the statute is the better of the  
13 two, and if the Court --

14 QUESTION: I think -- do I understand you right  
15 to be saying that you're not talking about the Chevron  
16 kind of deference, because there's no delegated rule-  
17 making authority here, right?

18 MR. STEWART: That's correct. The FRA is  
19 entrusted with the responsibility for assessing civil  
20 penalties, but it is not given substantive rule-making  
21 authority.

22 QUESTION: So you're talking about the Skidmore  
23 kind of deference where the agency, because it's been in  
24 the business, where the Court would look to the  
25 persuasiveness of its reasons that's kind of a --



1 QUESTION: Is that what you were talking about?  
2 I was talking about Chevron deference. I would have to  
3 rephrase my question.

4 MR. STEWART: I under --

5 QUESTION: You understood me to mean Chevron  
6 deference, didn't you?

7 MR. STEWART: Yes, I did.

8 QUESTION: Let me just throw this into the  
9 discussion. Which opinion, Judge Bauer's or Judge  
10 Easterbrook's, do you think better explains your position  
11 on deference?

12 MR. STEWART: Well, part of the problem with  
13 that is that in the --

14 QUESTION: If you have an answer.

15 MR. STEWART: I don't have an answer, because I  
16 think neither really goes to the question. That is, at  
17 this point, in the court of appeals the question of  
18 deference arose in the context of the FRA's argument that  
19 it's concern for Nation-wide uniformity was so great as to  
20 trump its view as to what was the better reading of the  
21 statute, and we -- the FRA in the court of appeals asked  
22 that court to defer to the FRA's view regarding the  
23 importance of Nation-wide uniformity as opposed to the  
24 importance of getting the better of the two answers, so  
25 the two opinions were addressed to that sort of deference.

1           Here, what we're talking about is deference  
2 regarding the FRA's view as to what is the more persuasive  
3 meaning of the statutory language, so the types of things  
4 that Judge Bauer and Judge Easterbrook were debating  
5 really are not particularly germane to this Court's  
6 resolution of the question.

7           QUESTION: They're like ships passing in the  
8 night, I guess.

9           QUESTION: Mr. Stewart, is there anything in the  
10 record that indicates why the Government didn't appeal the  
11 Ninth Circuit and try to reconcile its views of the better  
12 interpretation with national uniformity that way?

13          MR. STEWART: There is nothing in the record. I  
14 think --

15          QUESTION: I don't wish to go outside it. I  
16 just wondered whether there was anything in it.

17          MR. STEWART: I would only remark that it was  
18 the first court of appeals ruling that had addressed the  
19 question, and it would be -- there would be nothing in  
20 this Court's rules, obviously, that would preclude us from  
21 filing a cert petition or the Court from granting it, but  
22 it would not be consistent with the Court's normal  
23 practice.

24          QUESTION: Well, why didn't you then -- I mean,  
25 if you still persisted, I mean, why isn't the answer, that

1 is, if you still persisted in thinking the other view the  
2 better one, why wouldn't it have been worth the  
3 Government's while at least to persist in one other  
4 circuit to get a conflict and get the thing up here?

5 MR. STEWART: Again, these go to questions of  
6 both litigation strategy and also the FRA's view as to the  
7 importance of uniformity as of a particular moment.

8 Certainly a reasonable person could believe that  
9 that would have been the better course. Obviously, the  
10 reasonableness of that decision is not before the Court at  
11 this stage.

12 QUESTION: You do agree that, if there's any  
13 duty assigned, like watch the train to see that there's no  
14 vandalism, that that's full on-duty time.

15 MR. STEWART: That's correct.

16 With respect to the vandalism point, I would  
17 like to distinguish between two types of instructions that  
18 an employee could be given. If the employee were told,  
19 watch for vandalism, be alert, be vigilant, that is  
20 clearly on-duty time. If the employee were told, you can  
21 do whatever you want, read, play cards, sleep, but if you  
22 happen to see vandalism you have an obligation to report  
23 it, we wouldn't regard the reading, sleeping, et cetera  
24 time as on-duty time, but if vandalism happened to catch  
25 the employee's eye, and he reported it pursuant to

1 instructions, that act would be on duty.

2 QUESTION: He could be given those instructions  
3 for rest time, too, I assume.

4 MR. STEWART: That's correct, and even if there  
5 were no identified contingency that would call the  
6 employee back into duty, these people are always in radio  
7 contact with supervisors. The possibility would always  
8 exist that a supervisor would give an instruction to the  
9 employee to do a particular thing, so whenever the  
10 employee is in this waiting period, there always exists  
11 the possibility of being recalled to duty whatever the  
12 instructions he was given at the outset of that period.

13 The only other point I'd like to make is that I  
14 think our reading of the statute is buttressed by the  
15 other point at which time spent in deadhead transportation  
16 is used in the same section of the Hours of Service Act.

17 That is, the act provides that time spent in  
18 deadhead transportation to a duty assignment is considered  
19 time on duty, and I feel quite certain that the union  
20 would state that time spent in deadhead transportation to  
21 a duty assignment includes any waiting period between the  
22 time that the employee reports and the time that the  
23 deadhead vehicle is actually ready to go.

24 That's buttressed by the structure of the  
25 statute and by the legislative history, which the Senate

1 report states that time spent in deadhead transportation  
2 to a duty assignment is to be calculated from the time an  
3 employee reports for duty, so this gives further  
4 confirmation of the fact that the waiting period is  
5 properly included within the phrase, time spent in  
6 deadhead transportation.

7 Thank you.

8 QUESTION: Thank you, Mr. Stewart.

9 Mr. Johnson, we'll hear from you.

10 ORAL ARGUMENT OF RONALD M. JOHNSON

11 ON BEHALF OF THE RAILROAD RESPONDENTS

12 MR. JOHNSON: Mr. Chief Justice, may it please  
13 the Court:

14 Before the Ninth Circuit ruling, there was --  
15 the statutory scheme was administered in a very  
16 straightforward, simple manner, predictable and certainty  
17 for the railroad in how to schedule crews and operate  
18 their trains.

19 The very simple rule that the Hours of Service  
20 Act provided was that you could operate the crew up to  
21 12 hours, but if you realized, if you saw that the train  
22 was not going to make its intended terminal, all you had  
23 to do to avoid a violation of the act was notify the crew  
24 to identify a place where they could pull over, park the  
25 train, and then they were relieved from all other duty.

1           At that point, all they had to do was wait for  
2 transportation to arrive, which typically also brought the  
3 relief crew as well. The relief crew got on the train,  
4 took the train on to its terminal, then the expired or  
5 outlawed crew would be transported to its place of final  
6 release.

7           Now, one thing I'd like to make clear right here  
8 is --

9           QUESTION: What do you call them? You call them  
10 an outlawed crew? Is that the industry terminology?

11          MR. JOHNSON: There's a lot of industry jargon,  
12 Your Honor, and the crew is outlawed at that point in  
13 time. The crew sometimes sent out to pick it up was  
14 called the dog-catcher, to pick up the outlawed train.

15          (Laughter.)

16          MR. JOHNSON: Now, one thing I'd like to point  
17 out here is a difference between us and the unions, one  
18 among many differences, is that they try and argue that  
19 under the statute the crew is on duty until it reaches its  
20 place of final release, which is the terminal that it  
21 didn't make, but that's not the way the statute works.

22          The language is quite clear that on duty runs  
23 from the time you report for duty until you're finally  
24 released from duty, and you're finally released from duty  
25 under the statute when the railroad dispatcher advises the

1 crew you're relieved from duty, don't do anything else.

2 Now, I believe in response to a question from  
3 Justice Breyer was asked, are these crews paid while  
4 they're in limbo time, and the answer is yes, they are  
5 paid all throughout this time. They're paid while they're  
6 waiting for deadhead transportation. They're paid while  
7 they're in the deadhead transportation vehicle. They're  
8 paid until they get to their final terminal.

9 QUESTION: What about the period of time when  
10 the employee reports to go on duty, and is waiting for  
11 transportation to the duty station?

12 MR. JOHNSON: Well, they're paid at that point  
13 in time, too, Justice O'Connor.

14 QUESTION: For the waiting period?

15 MR. JOHNSON: Yes, and actually they're paid a  
16 little extra amount, because --

17 QUESTION: And are they considered on duty  
18 during the waiting period?

19 MR. JOHNSON: Yes, Your Honor. From the time  
20 they report to duty -- I mean, typically there's a  
21 train -- they try and schedule it so the train is there  
22 ready for them to get on board and go on, but if the train  
23 hasn't come in yet, that time period they're waiting to  
24 assume duty and that's counted as on-duty time.

25 But to come back to the point I was going to

1 make about the pay, all that happens at the place of final  
2 release, they don't have any more duties because they've  
3 been relieved from duty on the train, they have no duties  
4 while they're waiting for deadhead transportation, they  
5 have no duties while they're in the taxicab or the van, or  
6 another train, perhaps, but they're being paid, and when  
7 they get to the place of final release, all that is, is  
8 they clock out. That's all final release means.

9           When they get to their terminal, they clock out.  
10 That stops the pay, and it starts their rest period,  
11 because the railroad has to know when the rest period  
12 begins so they can be called again.

13           Now, there aren't any abuses here. I know the  
14 union attorney talks about abuses in the record, but there  
15 really is no record here other than what was put before  
16 the agency by the railroads, because the union did not put  
17 anything in the record other than the stuff they've  
18 attached to their briefs.

19           But even if there were abuses here, the abuses  
20 were whatever they were related to deadhead  
21 transportation, and they've all been addressed by the fact  
22 that waiting for deadhead transportation and the deadhead  
23 transportation itself is not counted towards the rest  
24 period, and therefore, when they get to the end, when they  
25 get to the place of final release, they get their full



1 rest period.

2 Now, it's been very hard for the railroads to  
3 try and comply with this new interpretation, and that is  
4 why the railroads went to court. It is impossible to  
5 always predict, now -- before, you could simply predict  
6 that when the train would be outlawed, you could just tell  
7 the crew to stop. You wouldn't violate the law. The only  
8 variable you had to have was to pick a place where they  
9 could pull the train aside off the main line onto a  
10 siding.

11 Now, you have to try and predict not only where  
12 they're going to reach the 12-hour maximum, you have to  
13 also work in other variables. You have to call  
14 transportation, try to get transportation to meet a place  
15 before the 12 hours -- it just can't be done.

16 QUESTION: What penalties are there for  
17 violating -- I mean, I can imagine you might have a  
18 snowstorm or something, and you can just stop the train,  
19 but if that unforeseen delay causes your crew to be on  
20 duty longer than you had expected, what would the  
21 penalties be?

22 MR. JOHNSON: Well, the penalties, the minimum  
23 penalty to be imposed is \$500 per violation. The maximum  
24 penalty is \$20,000 per violation. The violation, each  
25 crew member is a violation, so if you have three members

1 on the crew, that's three violations. That would be three  
2 times whatever the amount is.

3 Now, the agency has discretion above \$500 how  
4 much to impose. Currently, what they've been imposing is  
5 \$1,000 per violation, so each of these crews typically has  
6 a crew of two or three people, it's \$2,000 or \$3,000 per  
7 violation.

8 Now, the problem here is, it's impossible --

9 QUESTION: Of course, they might make an  
10 exception for snowstorms. You know, even if we adopted  
11 the union's view of the matter, there -- couldn't we count  
12 on the agency's discretion not to impose the penalty when  
13 indeed the reason the excessive time occurred was simply  
14 some unforeseen event such as a snowstorm?

15 MR. JOHNSON: Yes, Your Honor. They have  
16 that -- I think it's a matter of prosecutorial discretion,  
17 and also there's a specific exception in the statute for  
18 emergency situation acts of God.

19 But what's happening right now in the Ninth  
20 Circuit, because they still feel compelled to apply this  
21 interpretation of the Ninth Circuit, in the States within  
22 the Ninth Circuit, the railroads are continuing to be  
23 assessed violations for this waiting time. Even though  
24 the waiting time periods are as little as 5 minutes, we're  
25 still being faced with penalties right now.

1           Now, I'd like to talk briefly about interim rest  
2 periods. It's clear that interim means you're between  
3 points of duty, and all that Congress was trying to get at  
4 when they put interim -- when they defined what interim  
5 periods of rest were in the statute is, the case law  
6 before 1969 was all over the place. You know, some courts  
7 would say 2 hours works, some courts would say 3 hours  
8 works. All Congress did was codified that it has to be at  
9 least 4 hours, and it has to be at a certain place where  
10 accommodations are available for rest.

11           Now --

12           QUESTION: May I ask to whom the penalties are  
13 paid for violations?

14           MR. JOHNSON: The penalties are paid to the  
15 United States Government. I assume they go into the  
16 Treasury, Your Honor.

17           Now, the current interpretation that the union  
18 wants just makes no sense, because the crew has been  
19 relieve from all duties, has no duties, but yet they would  
20 have that crew continue to be counted as on duty even  
21 though they're not physically on the train, even though  
22 they have no further duties. It just doesn't make any  
23 sense.

24           There's no safety problem here because the crew  
25 is not going to be allowed to operate a train again until

1 after they've received their full rest period, and --

2 QUESTION: Well, of course, I mean, you know, an  
3 argument can be made for the other side. The argument  
4 is -- what is the rest period that's -- what's the minimum  
5 rest period?

6 MR. JOHNSON: The minimum rest period is  
7 8 hours. If they work right up to the maximum of  
8 12 hours, it is 10 hours under the statute.

9 QUESTION: Okay.

10 MR. JOHNSON: Now, that rest period doesn't  
11 begin -- what happens when they reach -- you know, there's  
12 all this railroad industry jargon in the statute, but  
13 again, the place of final release simply means the  
14 building that they walk into when they clock out.

15 That means they're going to begin their rest  
16 period, and what they do then is, if they're -- I believe  
17 one of the justices asked how many terminals they have.  
18 They have the home terminal -- the home terminal, of  
19 course, they live at their home, but when they get to  
20 their away-from-home terminal, the railroad has made  
21 arrangements -- it's in the collective bargaining  
22 agreement. This is all treated in the collective  
23 bargaining agreements -- has made arrangements for a hotel  
24 to go to and stuff, and that's where they get their rest.

25 QUESTION: Okay, but doesn't this scheme of the

1 statute show that Congress thought that an 8-hour rest  
2 period is needed for a -- what, 10-hour normal work  
3 period?

4 MR. JOHNSON: Yes, Your Honor.

5 QUESTION: But a 10-hour rest period is needed  
6 for a 12-hour work period, is that right?

7 MR. JOHNSON: Yes.

8 QUESTION: So the law -- you can't say there's  
9 just an absolute rest period which is going to be a balm  
10 for all ills, no matter how long you've been on -- you  
11 know, working before then, and what the union is saying is  
12 look, realistically, traveling, deadheading back is -- it  
13 takes it out of you, and if I should get 10 hours' rest  
14 for 12 hours' duty, I should also get 10 hours' rest for  
15 10 hours of duty plus 2 hours of deadheading back,  
16 including the waiting time for the deadheading. I don't  
17 know that that's an unreasonable argument.

18 I mean, the minimum time is a minimum time that  
19 has been calculated on the basis of what the maximum duty  
20 time was, and if that duty time is stretched out, maybe --  
21 you know, maybe the minimum time should be more.

22 MR. JOHNSON: Your Honor, they have a way to get  
23 that, and the way they get that is expressly addressed in  
24 the statute, and that is through collective bargaining.  
25 Congress specifically says in section 2107 of the Hours of

1 Service Act that these are minimums, and nothing is to  
2 stop the parties from sitting down and collectively  
3 bargaining longer rest periods, and --

4 QUESTION: This is a safety issue, they say, and  
5 Congress -- you know, Congress was concerned with safety.

6 MR. JOHNSON: That's true, Your Honor, and  
7 Congress, though, has made the judgment that safety is  
8 satisfied here.

9 If we limit the crews to 12 hours on duty, if we  
10 make transportation time limbo time, and if we mandate a  
11 minimum rest period of 8 hours, Congress has made a  
12 judgment that that satisfies the safety concern, and if  
13 the parties want to go beyond that minimum they can and,  
14 in fact, they have, and some collective bargaining  
15 agreements provide that the minimum rest period is, in all  
16 instances is 10 hours rather than 8 hours.

17 And the safety issue, though, here that the  
18 unions are complaining about is not the safety issue of  
19 waiting time, it's not the safety issue of how long the  
20 day is. You bread their brief, and over and over and over  
21 again, the safety problem they're worried about is fatigue  
22 from irregular work hours, upsetting Circadian rhythms  
23 because crews are being called at all hours of the day and  
24 night to man trains, and that's true. That's the way the  
25 railroad business works.

1           But that is not a safety issue that's addressed  
2 by this statute, because even if you counted waiting time  
3 as limbo time, that doesn't affect the fact that the crew,  
4 when it gets back and after it's had its rest, could be  
5 called again at any hour of the day or night to man that  
6 train.

7           QUESTION: Indeed, it's purely fortuitous  
8 whether it helps that problem or hurts that problem. It  
9 could help it.

10          MR. JOHNSON: That's correct, Your Honor, and  
11 again, the parties are meeting together in task force to  
12 address the safety issues that may result from these  
13 irregular work schedules, and Congress last year did add  
14 an amendment to the Hours of Service Act that encouraged  
15 the parties to work together to develop a solution, if  
16 there is a problem here, on irregular work hours.

17          But there's not a safety problem here with  
18 treating waiting time as limbo time, and the Government  
19 made a reasonable choice in a somewhat ambiguous term  
20 whether to treat it -- that's one difference we have with  
21 the Government. We believe there are only two options on  
22 how to treat this waiting time. It can either be treated  
23 as off-duty time or limbo time, and the Government made a  
24 reasonable choice to treat it as limbo time. That's the  
25 way this statute has operated for more than 20 years, and

1 we believe that's the correct application of the statute.

2 QUESTION: May I ask one very important  
3 question? The term dog-catcher refers to the crew that  
4 picks up the outlawed crew, or to the crew that  
5 substitutes for it?

6 MR. JOHNSON: That picks -- that refers to the  
7 crew that comes out from the terminal to pick up the train  
8 that got outlawed because it fell short of its final  
9 destination because the first crew outlawed --

10 QUESTION: So they're the substitute crew.

11 MR. JOHNSON: They're the substitute crew, Your  
12 Honor.

13 QUESTION: Thank you.

14 MR. JOHNSON: I thank the Court.

15 CHIEF JUSTICE REHNQUIST: Thank you,  
16 Mr. Johnson.

17 The case is submitted.

18 (Whereupon, at 11:52 a.m., the case in the  
19 above-entitled matter was submitted.)

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# 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:*

*BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.,*  
*Petitioners v. ATCHISON, TOPEKA, AND SANTA FE*  
*RAILROAD COMPANY, ET AL.*

*CASE NO. : 94-1592*

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

BY *Ann Marie Federico*

(REPORTER)