

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: INTER-MODAL RAIL EMPLOYEES ASSOCIATION, ET
AL., Petitioners v. ATCHISON, TOPEKA, AND SANTA
FE RAILWAY COMPANY, ET AL.

CASE NO: 96-491

PLACE: Washington, D.C.

DATE: Monday, March 17, 1997

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Supreme Court U.S.

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 INTER-MODAL RAIL EMPLOYEES :

4 ASSOCIATION, ET AL., :

5 Petitioners :

6 v. : No. 96-491

7 ATCHISON, TOPEKA, AND SANTA FE :

8 RAILWAY COMPANY, ET AL. :

9 - - - - -X

10 Washington, D.C.

11 Monday, March 17, 1997

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:04 a.m.

15 APPEARANCES:

16 RICHARD E. SCHWARTZ, ESQ., St. Louis, Missouri; on behalf
17 of the Petitioners.

18 CORNELIA T. L. PILLARD, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; on
20 behalf of the United States, as amicus curiae,
21 supporting the Petitioners.

22 JAMES D. HOLZHAUER, ESQ., Chicago, Illinois; on behalf of
23 the Respondents.

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

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 96-491, Inter-Modal Rail Employees
5 Association v. The Santa Fe Railway.

6 Mr. Schwartz, you may proceed whenever you're
7 ready.

8 ORAL ARGUMENT OF RICHARD E. SCHWARTZ

9 ON BEHALF OF THE PETITIONERS

10 MR. SCHWARTZ: Mr. Chief Justice, and may it
11 please the Court:

12 The railroad workers who are the petitioner in
13 this case have been denied their day in court by the
14 dismissal of their petition in the district court. This
15 case pleaded -- presented today pleaded a unique,
16 egregious conspiracy to deprive a particular group of
17 employees of their welfare plan benefits. They have
18 pleaded specific intent to commit acts prohibited by
19 section 510 of ERISA.

20 They have pleaded and their case involves the
21 use of deceit leading to coercion used to implement this
22 sham transaction. The conduct pleaded fits squarely
23 within the congressional intent in the enactment of
24 section 510.

25 The railroad workers here have pleaded a

1 conspiracy to interfere with the specificity sufficient to
2 comply even with Rule 9 of the Federal Rules of Civil
3 Procedure.

4 QUESTION: Mr. Schwartz, is it true that this
5 employer could not use the change route that you say could
6 have been used to accomplish this purpose? That is, these
7 benefits do not vest. Therefore, the plan could be
8 amended to reduce them. The benefits could be terminated.

9 MR. SCHWARTZ: Justice Ginsburg, these benefits
10 were contractually vested as part of a Nation-wide
11 multiemployer bargaining pattern with the Teamsters Union.

12 QUESTION: That -- so you are -- the answer to
13 my question is there was no amendment route here --

14 MR. SCHWARTZ: No.

15 QUESTION: -- because it was a multiemployer
16 plan. Therefore, suppose an employer wants to accomplish
17 that objective just as a matter of cutting costs. You're
18 saying it's impossible.

19 MR. SCHWARTZ: It would be possible only if they
20 were willing and able to go back and bargain for a change
21 in the contractually agreed benefits and then, pursuant to
22 that, make the necessary --

23 QUESTION: But the same thing that you are
24 calling a conspiracy and -- could have been done were this
25 only a single employer plan as distinguished from a

1 multiemployer plan.

2 MR. SCHWARTZ: I do not believe that's correct,
3 because we're still dealing with the element of the
4 contractual vesting of the benefits, Justice Ginsburg.

5 QUESTION: Mr. Schwartz, some of us are having
6 difficulty in hearing you. I wonder, could you speak up a
7 little more?

8 MR. SCHWARTZ: Certainly, Mr. Chief Justice, I
9 will attempt to. I --

10 QUESTION: Now, if there were no union agreement
11 the law clearly allows the employer to just get rid of
12 these welfare benefits under the plan. Is that true?

13 MR. SCHWARTZ: Provided that there is
14 appropriate compliance with the amendment procedures, yes.

15 QUESTION: Right, and the problem here is that
16 there is a union agreement under which the -- under the
17 terms of which the employer must provide these benefits.
18 Is that the problem?

19 MR. SCHWARTZ: That's certainly an element in
20 our contention, that they could not legally have gone
21 about doing this had they not resorted to this subterfuge.

22 QUESTION: Well, they could have legally done it
23 for purposes of the ERISA statute, but in so doing, would
24 have violated the union agreement.

25 MR. SCHWARTZ: They would have run afoul --

1 QUESTION: Is that right?

2 MR. SCHWARTZ: Yes.

3 QUESTION: Well, then you're saying in effect
4 that they could do in a -- with a single employer plan,
5 no contrary collective bargaining agreement, they could do
6 in two steps what you're saying they can't do in one step
7 here, because number 1, they could simply eliminate the
8 benefits, and having eliminated the benefits they could
9 then eliminate their division or fire all those employees
10 who had been getting the benefits, and so the different --
11 it seems to me that your argument is a very formalistic
12 argument.

13 MR. SCHWARTZ: Justice Souter, I believe that we
14 need to make a proviso -- and I believe that the
15 Government may talk about this. There is some basis, I
16 believe, for the opinion that even plan amendments can't
17 be made without -- when they're done for a specific
18 discriminatory purpose. I am not prepared to --

19 QUESTION: Well, but why is it a discriminatory
20 purpose simply to say I am -- you know that they can be
21 eliminated, period, can't they?

22 They're costing me too much. There's no
23 collective bargaining agreement that I would violate.
24 There's no multiemployer plan, so I have autonomy here,
25 and I'm simply going to eliminate them. That they can do

1 as a general proposition.

2 MR. SCHWARTZ: As a general proposition, yes.

3 QUESTION: All right. And what, then -- if they
4 can do that, why does it then become discriminatory when,
5 having eliminated those benefits they say, I probably
6 would be better off to have an outside company doing this
7 work, so I will eliminate the employees, too.

8 How does that suddenly turn the prior action
9 into a discriminatory one?

10 MR. SCHWARTZ: We're dealing with a situation
11 here, what is generally called a fire and hire situation.

12 They wanted to keep these employees. They're
13 highly trained and productive. But they wanted to keep
14 them without the benefits, and therefore they had to go
15 through this elaborate --

16 QUESTION: Yes, but they -- on your theory I
17 guess they didn't. All they had to do was to say there
18 won't be any more benefits.

19 MR. SCHWARTZ: Well, I think it's a great deal
20 more complicated than that. They have to make the
21 necessary plan amendments and, making plan amendments,
22 they incur consequences with their own workforce.

23 QUESTION: But if they wanted to go to the --
24 oh, you are quite right there's a countervailing sort of
25 political consideration within the marketplace because you

1 then end up with a bunch of employees who are mad, but if,
2 as a matter of law, they want to accept that burden, they
3 can -- the employer could do that and couldn't have --
4 could have done it here, I take it, is that right?

5 MR. SCHWARTZ: Certainly I do not think it is
6 correct that the employer here could have done it without
7 modification of their contract.

8 QUESTION: All right, because you had a CBA,
9 yes. Yes.

10 MR. SCHWARTZ: That's absolutely correct.

11 QUESTION: May I ask this question? I
12 understood you to say earlier in your presentation that
13 the rights at stake here had already vested, which puzzles
14 me because you're relying on a statute that talks about
15 being -- losing -- being discharged in order to prevent a
16 right from becoming vested, or attainment and so forth.

17 MR. SCHWARTZ: Justice Stevens --

18 QUESTION: Which is your view? Are the rights
19 vested or not?

20 MR. SCHWARTZ: We believe that the rights are
21 contractually vested for the duration of the collective
22 bargaining agreement. This was a --

23 QUESTION: Oh, I see, being vested in an unusual
24 sense.

25 MR. SCHWARTZ: Yes.

1 QUESTION: And if you had a vested right, why
2 don't you just sue to recover that right? You don't need
3 the statute, it seems to me, to recover -- to get
4 compensation for the destruction of a vested right.

5 The statute is designed to prevent, discharged
6 in order to avoid vesting.

7 MR. SMITH: Yes.

8 QUESTION: And I'm not quite clear exactly what
9 your position is on that.

10 MR. SCHWARTZ: The position is that they were
11 vested for a limited period under the terms of the CBA,
12 Justice Stevens.

13 QUESTION: All right. Give me an example of a
14 particular individual who had a vested right and is not
15 able to just sue for that right without relying on the
16 statute. Maybe he'd gone to the dentist and ran up a
17 dental bill or something. He had the right to have it
18 paid. Is it that sort of thing you're saying? Or --

19 MR. SCHWARTZ: Well --

20 QUESTION: -- the right in the future if he
21 wants to go to the dentist it will be paid?

22 MR. SCHWARTZ: It's important to understand that
23 within the context of the CBA, of course, we're dealing
24 with section 301. We're dealing with a lot of elaborate
25 grievance and arbitration machinery, and exclusive

1 remedies. We're also dealing here with a bankrupt
2 Teamsters local that was not able to share those burdens.

3 QUESTION: Well, Mr. Schwartz, the question
4 presented in your petition for certiorari is based
5 entirely, as I would read the question, on section 510 of
6 ERISA, and that certainly was the basis for the Ninth
7 Circuit's decision, and some of my colleagues I think are
8 expressing the view what has the collective bargaining
9 agreement and all that got to do with it if you're
10 claiming under section 510?

11 MR. SCHWARTZ: We are claiming exclusively under
12 section 510. We believe that the collective bargaining
13 agreement, Mr. Chief Justice, is important in terms of
14 understanding the context in which this arose.

15 QUESTION: Those are kind of weasel words.
16 The -- important in understanding the context in which it
17 arose. If it's based on 510, tell me specifically, if you
18 would, what the collective bargaining agreement has to do
19 with it.

20 MR. SCHWARTZ: I believe the collective
21 bargaining agreement has to do with evaluating the
22 respondent's arguments relating to targeting their claim
23 for a judicially crafted exception to section 510.

24 QUESTION: Well, as I read the respondent's
25 brief they no longer support the reasoning of the Ninth

1 Circuit in that respect, or at least they say you don't
2 have to read the Ninth Circuit opinion in that view.

3 MR. SCHWARTZ: Our understanding is that they no
4 longer support the Ninth Circuit's rationale for the
5 decision in the case.

6 QUESTION: You mentioned something about the
7 bankrupt Teamsters Union, and as I understand it both the
8 old employer, the Santa Fe group, and the new employer,
9 the ITS, both were units that had Teamsters representing
10 the workers. Is that not so?

11 MR. SCHWARTZ: These workers in large part were
12 given a last minute opportunity to apply for reemployment
13 with the substitute employer, respondent Internal
14 Services. The Teamsters Union signed them to a contract
15 with greatly reduced benefits.

16 QUESTION: Is it -- was it the same Local in
17 both cases?

18 MR. SCHWARTZ: Yes, Justice Ginsburg, it was.

19 QUESTION: And the union has not taken any
20 position throughout these proceedings, these 510
21 proceedings?

22 MR. SCHWARTZ: None whatsoever.

23 QUESTION: Strange, when you, whether for
24 background or whatever reason, talk about labor law
25 rights, and the union has not been heard from.

1 MR. SCHWARTZ: I believe it has to do with the
2 internal Teamster struggles locally in Los Angeles and
3 nationally, Justice Ginsburg.

4 QUESTION: Well, what health and welfare
5 benefits were actually reduced as a result of the
6 restructuring of the work at Hobart Yard?

7 MR. SCHWARTZ: The health insurance coverage was
8 dramatically reduced.

9 QUESTION: Okay, but not for any coverage for
10 things that had already occurred. We're talking about
11 future benefit opportunities. Is that what we're talking
12 about?

13 MR. SCHWARTZ: It occurred within a matter of a
14 space of less than 2 weeks, Justice O'Connor.

15 QUESTION: But we aren't talking about people
16 who had incurred an injury and wanted medical benefits.
17 We're talking about people who might in the future incur
18 injuries or illness and need medical benefits.

19 MR. SCHWARTZ: We -- Justice O'Connor, we're
20 talking about people who enjoyed for a period of at least
21 1 year longer before the implementation of this
22 transaction an ongoing coverage of entire medical care.

23 QUESTION: Well, they had health insurance, but
24 we're not talking about people who had gotten sick and
25 incurred medical bills already, and then they weren't

1 paid. We're talking about future opportunity to do that.

2 MR. SCHWARTZ: As far as we are aware the
3 multiemployer health plan which was administered
4 principally by the union management group continued to pay
5 properly accrued claims up until --

6 QUESTION: Right.

7 MR. SCHWARTZ: -- the date of implementation.

8 QUESTION: So we are talking about future
9 opportunities for health care.

10 MR. SCHWARTZ: In addition, Justice O'Connor,
11 we're dealing with a loss of vacation pay, a loss of sick
12 pay, and the welfare --

13 QUESTION: But not vacation pay that had
14 already -- there would be an obligation to pay, just
15 future vacation pay. It's a reduction in the amount of
16 vacation pay that would be paid in the future, rather than
17 cutting off some that had already been earned, is that
18 correct?

19 You're kind of vague in your answer. It's
20 helpful to us if we get a categorical --

21 MR. SCHWARTZ: The Teamsters contract is
22 extremely elusive.

23 QUESTION: What is your answer?

24 MR. SCHWARTZ: The Teamsters contract is
25 extremely elusive, because they went from the nationally

1 bargained Teamster contract to what is known as a white
2 paper contract, which was a very short, specifically
3 focused contract --

4 QUESTION: We're trying to talk about section
5 510, though. We're not trying to talk to you about the
6 union contract, because the claim is made under section
7 510 of ERISA, and that's what we're trying to find out
8 from you, how to make it fit under section 510 of ERISA.

9 MR. SCHWARTZ: We think --

10 QUESTION: Your claim, that is.

11 MR. SCHWARTZ: Justice O'Connor, we think it's
12 from the plain language and the underlying legislative
13 history and the purpose of Congress in enacting ERISA that
14 the second clause of section 510 covers this situation
15 precisely. The language, interference with the attainment
16 of a right to which participant may become entitled --

17 QUESTION: Wouldn't you say attainment, though,
18 suggested something that was to be -- to happen in the
19 future?

20 MR. SCHWARTZ: Yes, but it doesn't necessarily
21 imply vesting, and in this particular situation, Mr. Chief
22 Justice, we had a situation where people expected that if
23 their children had doctor appointments in April or May
24 they would be covered under the Teamsters plan. If they
25 needed to go in for a previously scheduled operation in

1 June, that would have been covered prior to March 19, when
2 the people were suddenly informed that they were going to
3 have the opportunity with the new employer on April 1.

4 QUESTION: But I suppose the employer's argument
5 is that if something had not been attained as of the date
6 this action was taken, it didn't violate that section,
7 section 510.

8 MR. SCHWARTZ: I hesitate to speak for Mr.
9 Holzhauer, but it's our understanding with their -- they
10 have -- I believe they have essentially conceded and would
11 no longer take the position that the welfare, health and
12 welfare benefits such as are involved here are not covered
13 by the second clause of 510. I think that's apparent
14 throughout their brief.

15 QUESTION: No, I understood their argument to
16 focus more on the phrase accompanying the word attainment.

17 MR. SCHWARTZ: I -- what we find is the more
18 interesting and perhaps troublesome issues deal more with
19 their argument relating to targeting, Mr. Chief Justice.
20 Clearly, attainment and may become entitled indicate some
21 element of maturity, certainly.

22 QUESTION: I mean, supposing you've been working
23 at a place 11 months and you don't get medical benefits
24 until you've been there for a year. It seems to me that
25 would fit very nicely under the attainment clause. You're

1 fired at the end of 11 months because the employee doesn't
2 want you to get medical benefits. But that really isn't
3 this case, is it?

4 MR. SCHWARTZ: No, it's not, because here -- it
5 might be the case that if you were working at that
6 hypothetical employer under a contract that had another
7 year and -- another 13 months to go, instead of being an
8 at-will employee.

9 QUESTION: Can I ask you one hypothetical
10 question?

11 Supposing there's no union agreement or anything
12 involved, and the employer finds out that a segment of his
13 workforce performing one specific task, they -- they're
14 entitled to welfare -- health and -- health benefits, and
15 they find out that if they subcontracted all that work out
16 to others they would save the cost of those benefits, and
17 they decide that's the reason they want to make that
18 change, and they do it.

19 Have they violated the statute?

20 MR. SCHWARTZ: I believe that's -- they have,
21 Mr. Justice Stevens, and I believe that that's pretty much
22 what occurred here. The railroad targeted the one group
23 in the entire railyard that was dealing with -- that was
24 covered by ERISA-protected benefits rather than living
25 under the -- explicitly under the railroad retirement

1 plans.

2 QUESTION: But you would say, I take it, that if
3 there had been further reasons, in addition merely to the
4 cost of providing these benefits, for wanting to get rid
5 of this division and contract out, that if the existence
6 of those further reasons -- say they were -- they happened
7 to have a bunch of very inefficient employees and so on --
8 the existence of those further reasons would preclude a
9 violation of the statute.

10 MR. SCHWARTZ: I think it's possible to draw a
11 bright line distinction between legitimate efficiencies
12 versus mere benefits -- gains from the avoidance of
13 benefits.

14 QUESTION: Well, it is in theory, although it
15 would be difficult in practice, because if you concede,
16 and if we were to hold that so long as the avoidance of
17 the medical -- the cost of welfare benefits was only one
18 among other reasons that that would be legitimate, then
19 every employer who wanted to do what this employer did
20 would simply claim other reasons, so it would be difficult
21 of proof, even though in theory there would be a bright
22 line.

23 MR. SCHWARTZ: Certainly I believe that the
24 Court needs to be extremely careful not to open the
25 floodgates to circumvention of the statute, yes.

1 QUESTION: No, but I mean -- don't you open -- I
2 don't know whether it's a floodgate or not, but don't you
3 open the gate by conceding that if there are other reasons
4 in addition to the ones given by the employer here, there
5 wouldn't necessarily be any violation of the statute?

6 MR. SCHWARTZ: I suppose we would get into the
7 shifting burden analysis and whether the other reasons
8 given are protectural --

9 QUESTION: No, but I just want to make sure I
10 understand your argument. Maybe I'm wrong, but I thought
11 you had conceded that, that if there is --

12 MR. SCHWARTZ: I hope I --

13 QUESTION: -- a generalized desire to save
14 money, or to get more efficient work -- work done more
15 efficiently, and the desire to save money on the welfare
16 plan is only one component among several others that add
17 up to the reasons for wanting to make this change, I
18 thought you conceded that under those circumstances the
19 employer could do what this employer did, and it would not
20 violate the statute. Am I wrong?

21 MR. SCHWARTZ: Justice Souter, I -- if I gave
22 that impression I regret that I -- I spoke in error. I
23 believe that --

24 QUESTION: Okay. Okay.

25 MR. SCHWARTZ: -- simply the identification of

1 another -- one or more purported efficiencies is not
2 sufficient. I believe that the Court --

3 QUESTION: Well, let's -- but let's assume it's
4 at least real. Forget the question of proof now. Let's
5 just assume that there are these other reasons, but among
6 them, one among them is the desire to save the cost of the
7 welfare plan. Does -- and so the employer eliminates the
8 division and contracts out. Does that violate the
9 statute?

10 MR. SCHWARTZ: We would submit that in that
11 situation the focus must and should be on whether or not
12 the cost-savings reflect substantially more than the
13 gain --

14 QUESTION: Mr. Schwartz, I thought your position
15 was, this is a pleading case and you did allege the
16 employer did this for the specific purpose of, and if
17 that's -- if this is a determination to be made on the
18 face of the complaint, then whether there were other
19 reasons that you might fail as a matter of proof, but at
20 this stage you made the allegation that you say should get
21 you through the door.

22 MR. SCHWARTZ: It is a pleadings case, and we
23 believe it should be sufficient to give these railroad
24 workers their day in court.

25 QUESTION: Thank you, Mr. Schwartz.

1 Ms. Pillard. Am I pronouncing your name
2 correctly?

3 MS. PILLARD: Yes. Thank you.

4 ORAL ARGUMENT OF CORNELIA T. L. PILLARD
5 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
6 SUPPORTING THE PETITIONERS

7 MS. PILLARD: Thank you, Mr. Chief Justice, and
8 may it please the Court:

9 Our position is that section 510 is not limited
10 to pension rights or rights capable of vesting, but also
11 covers rights to welfare benefits. The court of appeals'
12 holding to the contrary cannot be squared with the
13 language of the statute.

14 Section 510 uses the general term, employee
15 benefit plans, which the statute defines to include both
16 pension plans and welfare benefit plans.

17 QUESTION: Well, the respondent seems to pretty
18 well agree with this much of your argument. What do you
19 do with my hypothetical case, just a clean-cut example of
20 trying to cut costs among others by welfare -- you know,
21 by contracting out to save the money there?

22 That's clearly an economic motive, and there
23 were no vested benefits in the sense that there were no
24 unpaid medical bills based on injuries that had already
25 occurred.

1 MS. PILLARD: In our view, generally that
2 situation would not show proof of the prohibited purpose,
3 with one caveat. If the choice of the employees whose
4 jobs were being contracted out were based on the fact that
5 they were a group of employees who were imminently going
6 to vest, or who the employer knew were ill, for example,
7 as a result of --

8 QUESTION: No, I'm assuming none of that -- none
9 of that. Pure economic -- everyone is healthy at the time
10 that the decision is made, but it's just a little cheaper
11 to do it this way.

12 MS. PILLARD: In our view that would not be
13 covered. What is covered, however, and what we believe is
14 a core case is a case of a person who the employer knows
15 has become ill, and who is fired before that person has
16 seen the doctor, and therefore before the right to medical
17 care has actually accrued.

18 QUESTION: This happens all the time?

19 MS. PILLARD: This is a very common scenario,
20 where an employer has offered health care coverage with
21 particular coverage levels, and when an employee becomes
22 ill, although the employer would be free generally to
23 amend the plan to eliminate coverage for an illness that
24 seems too expensive or burdensome, instead, the employee
25 keeps the plan in place with respect to other employees

1 but discharges the employee to interfere with the
2 attainment of the right to claim coverage under the plan.

3 QUESTION: If you told me those are real life
4 situations that happen often, you've answered a question I
5 was about to ask. That is, I was -- I understand that the
6 text covers health plans as well as other plans, but I
7 couldn't really understand what real life situation they
8 were addressing --

9 MS. PILLARD: That --

10 QUESTION: -- because I didn't know -- the Chief
11 Justice gave a hypothetical of a company that has a health
12 plan but you only come under it after 1 year. I'm not --
13 you know, I don't think -- I don't know of any that exist
14 like that. You could create one.

15 But I was trying to figure out what Congress had
16 in mind bringing these other things in, and it's this
17 situation that you've just described.

18 QUESTION: Or, for example, an employee who has
19 a child with a serious heart condition, and the employer
20 knows that to take care of that child is going to cost
21 hundreds and hundreds of thousands of dollars worth of
22 health care. Now, if that happens, does that cause the
23 employer's premiums to go up, basically?

24 MS. PILLARD: It might with an experience-
25 related plan, that's right.

1 QUESTION: And so the employer might have a
2 motive to get rid of the employee who has a child that
3 would cost a lot of health care benefits in the future.

4 MS. PILLARD: That's exactly right.

5 QUESTION: And that does happen.

6 MS. PILLARD: And that motive would arise even
7 with the prospect of the medical care being undergone, and
8 therefore before the right had itself accrued and
9 become --

10 QUESTION: But Ms. Pillard --

11 MS. PILLARD: -- an enforceable right under the
12 plan.

13 QUESTION: It wouldn't be a violation -- if I
14 understand your interpretation correctly, it wouldn't be a
15 violation if you fire the employee after the child has
16 already received some benefits, or if you fire the
17 employee who himself has a serious condition after he's
18 already gotten some of the benefits.

19 MS. PILLARD: That would be a violation --

20 QUESTION: That would be.

21 MS. PILLARD: -- Justice Scalia, under the first
22 clause of section 510 --

23 QUESTION: Ms. Pillard --

24 MS. PILLARD: -- which prohibits discharge for
25 the purpose --

1 QUESTION: Attaining --

2 MS. PILLARD: -- as a result of exercising a
3 right.

4 QUESTION: Of exercising a right.

5 QUESTION: I hope we can get to this case,
6 because the examples you've been given of retaliation, of
7 discharging a particular employee because that employee is
8 going to cost too much, there are a number of court of
9 appeals cases dealing with that discrimination, but here
10 we have something different.

11 We have not, we're going to discharge employee A
12 because we've heard he has a heart disease. It is en
13 masse. It is faceless. It says, all of the workers in
14 this unit go, and then we're going to have a subcontract.

15 That's quite different than what Congress had in
16 mind when it says, don't fire the guy just before his
17 pension vests, and you say that same thinking transposes
18 to health and welfare benefits, but what about the
19 significant difference that this isn't a case about
20 discharging a particular employee.

21 MS. PILLARD: That's right, Justice Ginsburg,
22 and I do want to get to this case, but I would note that
23 as a prudential matter we don't think the Court should
24 reach the alternative grounds, because they were not
25 argued in the court of appeals. They were not decided by

1 that court. They weren't raised in the petition, and they
2 were not briefed in the brief in opposition.

3 QUESTION: But aren't they troubling -- isn't
4 that issue troubling courts all over the land?

5 MS. PILLARD: In fact, there's very little
6 development on the issue in the courts of appeals, and so
7 that's one of the reasons that we think the Court need not
8 read that issue, but I do want to address that --

9 QUESTION: Well, but the question presented
10 certainly covers that issue.

11 MS. PILLARD: As a -- yes, I think you're right
12 that it is encompassed, it's fairly encompassed within the
13 question presented.

14 QUESTION: And if we accept the argument --
15 assuming that, and if we accept the argument or the
16 distinction that I thought you were drawing before, that
17 distinction seemed to be that the -- at least with respect
18 to welfare benefits violation or not turned on whether
19 there was a specific employee in mind, whether there was a
20 specific accrual of benefit in mind, and if that's the
21 case, then I suppose what the employer did here would be
22 perfectly permissible under the statute.

23 MS. PILLARD: Justice Souter, in our view the
24 core case includes the case where the employer has a
25 specific employee in mind, but it also includes our case.

1 It's important to note that the court of
2 appeals --

3 QUESTION: Well, if it includes our case, then
4 why do we bother about the specificity of the employee?

5 MS. PILLARD: It's important to note that the
6 court of appeals held that there was a claim for
7 interference with pension benefits without any additional
8 allegations beyond a general allegation of purpose.

9 QUESTION: Right. Right.

10 MS. PILLARD: And if that's enough on that side
11 without a targeting or identification of an individual
12 employee, we submit that it should be enough on this side.

13 Now, what we have here is a difference --

14 QUESTION: So that the targeting of the
15 individual is not essential to the answer, right?

16 MS. PILLARD: Right. Right.

17 QUESTION: Okay.

18 MS. PILLARD: Although we have here, at the
19 pleading stage we don't have the facts developed and so
20 it's very difficult to say what kind of proof would
21 suffice to be proof of purpose, really a lot of the
22 discussion about whether targeting is required, or a
23 foreseeable rise in cost is required, is a discussion that
24 really goes to what counts as proof of purpose, whereas
25 here we're at the pleading stage.

1 QUESTION: I thought the --

2 MS. PILLARD: Given that --

3 QUESTION: Justice Kennedy I think has a
4 question for you.

5 QUESTION: I thought your answer to Justice
6 Stevens at the outset that if for sheer cost standpoints,
7 because welfare benefits were expensive, these employees
8 were terminated, the work was sent elsewhere, that that
9 would not be a violation, and I want to know what is the
10 test that you have that leads you to give him that answer.

11 MS. PILLARD: Our test is that the purpose has
12 to be a purpose to interfere with the attainment of
13 benefits in the sense that the action has to be taken not
14 just in spite of its impact on benefits but because of the
15 impact on benefits. It has to be a specific focus on
16 benefits.

17 Now, let me focus on this case.

18 QUESTION: Well, but that, it seemed to me
19 Justice Stevens' case covered that.

20 QUESTION: Sure, that's the whole purpose, yes.
21 In my hypothetical that was the whole purpose.

22 MS. PILLARD: Not to focus on benefits as such.
23 Here you have --

24 QUESTION: Well, his hypothetical was the
25 benefits are expensive.

1 MS. PILLARD: Right, and --

2 QUESTION: And they look at these benefits and
3 say, we can't afford these things.

4 MS. PILLARD: That's right, and there's a
5 general desire to save costs, and where the incidental
6 effect of that, where the employer is indifferent as
7 between saving those costs out of benefits or saving those
8 costs in other ways, through greater efficiency or through
9 diminution in salary, or what have you, there's --

10 QUESTION: No, but that's changing Justice
11 Stevens' hypo. He -- Justice Stevens' hypo as I
12 understood it was, the only reason is to save these costs.
13 He may not wish his employees ill, perhaps, but his only
14 reason is to save the costs.

15 MS. PILLARD: Right.

16 QUESTION: Now, you can't split it as fine, it
17 seems to me, in his case as you're trying to do.

18 MS. PILLARD: Here -- here you have more,
19 Justice Souter. Here you have a situation in which the
20 employer had promised to continue to pay benefits at a
21 certain level for a year, and --

22 QUESTION: Under the CBA.

23 MS. PILLARD: -- and it states -- an
24 instruction --

25 QUESTION: Under the CBA. All right.

1 MS. PILLARD: This transaction --

2 QUESTION: What has the CBA got to do with the
3 meaning of 510?

4 MS. PILLARD: It has to do with this.

5 QUESTION: Maybe it's a violation of the CBA.
6 What's it got to do with that?

7 MS. PILLARD: It has to do with this. The
8 section does not cover any conceivable rights to which an
9 employee may become entitled in the future, but it does
10 cover the situation in which the employee has a concrete
11 expectation.

12 In the individual case, that concrete
13 expectation is supplied by the fact that the plan is
14 continuing with respect to the other employees, and that
15 expectation drops out when the plan is legitimately
16 amended.

17 In this case, the concrete expectation is
18 provided by the fact that the employer has bargained with,
19 has promised the employees that it will continue the
20 coverage for an additional year. Where that's the case --

21 QUESTION: Why is the expectation any more
22 concrete simply because there happens also to be a CBA?
23 Why isn't there an equally concrete expectation when he
24 simply establishes the plan and says, you work for me, you
25 get the benefits of the plan?

1 MS. PILLARD: There's not that concrete
2 expectation precisely because where action is taken with
3 respect to the whole workforce the plan could simply be
4 terminated and in fact if the employer wanted to protect
5 itself as a formal matter maybe it would terminate the
6 plan and then fire the employees, or lay the employees
7 off.

8 Here you have a situation that was structured to
9 strip these employees --

10 QUESTION: Thank you, Ms. Pillard. Your --

11 MS. PILLARD: -- of the rights they would have
12 had for the additional year.

13 QUESTION: Ms. Pillard, your time has expired,
14 and I expect you to sit down when I tell you your time has
15 expired.

16 MS. PILLARD: I apologize, Mr. Chief Justice.

17 QUESTION: Mr. Holzhauer, we'll hear from you.

18 ORAL ARGUMENT OF JAMES D. HOLZHAUER

19 ON BEHALF OF THE RESPONDENTS

20 MR. HOLZHAUER: Mr. Chief Justice, and may it
21 please the Court:

22 Petitioners claim that Santa Fe violated section
23 510 of ERISA by contracting out work in order to reduce
24 benefit costs, exactly as Justice Stevens presented in his
25 hypothetical. Assuming for now that those allegations

1 were correct, they do not state a claim under section 510
2 of ERISA.

3 Section 510 should not be interpreted to require
4 employers to ignore a very real element of labor costs
5 when they make fundamental business decisions about the
6 scope and nature of their operation and whether they're
7 going to do work in-house or subcontract work, whether
8 they're going to have something done at all, or decide to
9 close a particular operation.

10 The language of the statute --

11 QUESTION: Well, Mr. Holzhauer, you take the
12 position that the employer may decide that the cost of
13 welfare benefits under the Railway Labor Workers Act is
14 just too expensive, and if we can get rid of that whole
15 requirement, we will be better off economically, and so
16 we'll have this termination here.

17 MR. HOLZHAUER: That's correct, Your Honor.

18 QUESTION: And that that is not prohibited by
19 section 510.

20 MR. HOLZHAUER: That's correct. The employer
21 here, an employer can determine that its obligation to
22 continue its benefit costs, no matter where they're from,
23 are too expensive, and we found out that we can
24 subcontract the work and reduce those costs. That does
25 not violate section 510.

1 QUESTION: So what do we do with the
2 attainment -- for the purpose of interfering with the
3 attainment of any right language in 510?

4 MR. HOLZHAUER: Well, the attainment language,
5 interfering with the attainment of any right to which a
6 participant may become entitled talks about becoming
7 eligible, or in our view refers to becoming eligible,
8 arriving at, or attaining a ripe old age is the way
9 Black's defined it, citing some old cases, reaching or
10 becoming eligible for a benefit.

11 And in section 510, like elsewhere in ERISA,
12 attain and attainment are used regularly to talk about
13 attaining a particular age, attaining years of service,
14 attaining a qualification that's necessary to become
15 eligible for a benefit.

16 QUESTION: So the act has to be specific to the
17 employee? In other words, if it is specific to the
18 employee -- A is about to become 60 years old, B is about
19 to have a tooth extracted, what-not. That is the kinds of
20 attainment that you're talking about here, and therefore
21 the line is drawn between acts intended to -- in effect to
22 preclude benefits to specific individuals as opposed to
23 acts on a more global scale. Is that where you draw the
24 line?

25 MR. HOLZHAUER: I think that's generally

1 correct, although I would say this. First of all, I think
2 the tooth extraction case might come under the exercising
3 part of section 510, but in the Third Circuit case, the
4 Gavelette case, the Court determined that the employer
5 decided that a large group of employees at one plant were
6 about to become vested at one point, or were subject to
7 vesting and were about to reach the vesting point, which
8 is possible, considering that vesting is over time. It
9 might be a plant that was just opened 5 years ago.

10 Under those circumstances I think an argument, a
11 strong argument can be made that section 510 has been
12 violated even though the decision is not on an individual
13 basis.

14 QUESTION: But I don't see how this squares with
15 your attainment argument. You began by saying attain
16 means that you're about to reach something. This is the
17 Black's Law Dictionary.

18 But then you said, now of course this doesn't
19 apply to -- you had a wisdom tooth hypothetical, or
20 Justice O'Connor's hypothetical of a very expensive
21 particular case.

22 Suppose that that employee was receiving
23 benefits. He or she had attained the right in that sense,
24 and the employer terminates in order to avoid the
25 coverage.

1 MR. HOLZHAUER: Well, I think that could quite
2 likely be a violation of the exercising clause of section
3 510. The attainment clause talks about attaining rights
4 to which the participant may become entitled, and I think
5 that's another future-oriented kind of reference in that
6 provision.

7 Clearly, it would violate section 510 to fire
8 someone because they filed a claim, an expensive claim
9 relating to having their wisdom teeth extracted.

10 QUESTION: But isn't it equally clear -- let me
11 just be sure I get one thing clear.

12 MR. HOLZHAUER: Sure.

13 QUESTION: That if you took my hypothetical and
14 said, instead of health benefits, we're concerned that 90
15 percent of these people are about to reach 20 years of
16 service and therefore have vested benefits, and you took
17 out the whole division and substituted with a contract.
18 that would clearly violate it, would it not?

19 MR. HOLZHAUER: That would be correct. I think
20 vesting, the maximum period for vesting now is 10 years in
21 a multiemployer, between 5 and 8 in other plans, but if it
22 was on the cliff for vesting, and you said everybody in
23 that plant -- this plant was just opened 5 years ago, and
24 everybody in that plant is about to vest, and therefore
25 I'm going to close that plant and maybe open it up again

1 next week or subcontract out the work or whatever, I think
2 that would be a section 510 violation.

3 Now, Justice Kennedy, in your question, the
4 person that had the tooth extracted clearly would violate
5 section 510, the exercising clause, to fire him because he
6 filed a claim.

7 I think a strong argument can be made that if
8 the employer sees him coming down the hall with his claim
9 form and a stack of medical bills with it, it might
10 violate 510 then as well, and it might violate 510, the
11 exercising clause, if the employer -- employer knew that
12 that employee has a particular illness or particular
13 condition that is going to require, or has already
14 required large expenditures or benefits.

15 But that's not what we have here. What we have
16 here is something very close, as counsel for petitioners
17 acknowledge, to Justice Stevens' hypothetical, an employer
18 who decides that benefit costs are too high.

19 QUESTION: But why is that any different? I
20 mean, that's just like a lot of individual people who are
21 submitting too many claims --

22 MR. HOLZHAUER: It's not like a lot of --

23 QUESTION: -- and you said earlier that if you
24 have a lot of individual people who are about to vest --

25 MR. HOLZHAUER: Right.

1 QUESTION: -- that would be a violation if you
2 closed down that plant. Why is it any different if you
3 close down a plant because you have a lot of individual
4 people who have already vested and are just sucking the
5 money out of the company with a lot of claims?

6 MR. HOLZHAUER: The reason why I think the
7 Gavelette kind of situation, where people are about to
8 vest, is different is because it focuses on the fact that
9 a large number of people are about to attain eligibility
10 for a benefit. It's not that they're --

11 QUESTION: There's an exercise clause as well,
12 as you've just acknowledged.

13 MR. HOLZHAUER: There is --

14 QUESTION: It's not just that clause. It's also
15 the exercise clause.

16 MR. HOLZHAUER: There is an exercising clause
17 here, and perhaps one could make an argument that if a
18 particular group of employees were exercising their
19 benefits in a way that were different from other groups,
20 or so forth.

21 But here what you have is a group that said,
22 benefits are just too expensive. I'm not going to pay
23 those benefits, or I'm not going to pay that rich a
24 benefit program. I'm going to subcontract out work
25 because subcontracting out work is going to reduce my

1 benefit costs.

2 QUESTION: Suppose Joe Jones is a person who,
3 the employer looks one day and says, I'm afraid that
4 fellow is going to get wisdom teeth pulled out, and before
5 he even thinks about it, I'm going to cancel this benefit
6 in his plan, which is there, before he gets the wisdom
7 tooth problem. Hasn't the employer fired him, or
8 cancelled the benefit, or sent him somewhere else, in
9 order to prevent him from attaining a right that he
10 otherwise would have under the plan?

11 MR. HOLZHAUER: No.

12 QUESTION: Why not?

13 MR. HOLZHAUER: No, he hasn't.

14 QUESTION: Why not?

15 MR. HOLZHAUER: Attainment of a right to which
16 an employee or a participant may become entitled to, that
17 language, and using that language, and considering that
18 language in light of the particular context Congress was
19 concerned with, refers to becoming eligible for a benefit.

20 QUESTION: Is there any reason -- assuming you
21 could read it either way, and -- I mean, I don't think
22 it's contrary to English to say, I have a right to \$2,000
23 of dental expenses if I get wisdom teeth pulled out, and
24 my employer, before I have any toothache, says I'm going
25 to fire him. I don't want him to get that. I think in

1 English you could say he's fired me to prevent me from
2 obtaining -- or attaining -- obtaining -- you can do it.

3 MR. HOLZHAUER: Yes.

4 QUESTION: So I mean, it's more natural to say
5 obtaining a right.

6 MR. HOLZHAUER: Yes.

7 QUESTION: But you can say attaining a right.

8 MR. HOLZHAUER: Well --

9 QUESTION: It's not English, not bad English.
10 So if I think it's fairly good English, or reasonable
11 English, is there any reason Congress wouldn't have wanted
12 to protect me in such a situation?

13 MR. HOLZHAUER: Well, first of all I think that
14 flip from attaining or obtaining is very interesting,
15 because I think that is one of the differences between the
16 kind of language we're using here.

17 Congress was concerned about a particular
18 circumstance, and we know that the language might not be
19 limited to that circumstance, but becoming eligible for
20 pension benefits, and vesting on pension benefits.
21 Whether the exercise clause might help that employee, I'm
22 not sure.

23 QUESTION: No, but I mean, why wouldn't, as long
24 as -- you know, I mean, these things are written in
25 Congress. The lawyers all look at them, and so they might

1 have talked a lot about pensions, but they would have
2 thought, it applies to welfare, too.

3 MR. HOLZHAUER: Well, it applies --

4 QUESTION: And unless there's some reason why --

5 MR. HOLZHAUER: Sure.

6 QUESTION: And it applies in my situation, the
7 toothache situation. Now, unless there's some reason why
8 it wouldn't, why wouldn't it?

9 MR. HOLZHAUER: Well, it applies in welfare
10 situations. There's a very strong reason why it wouldn't
11 apply in your kind of situation, I think the same reason
12 why it wouldn't apply in the situation that's before the
13 Court.

14 Employers are not prohibited by ERISA, should
15 not be prohibited by ERISA from making legitimate, cost-
16 based economic decisions, and that's reflected in ERISA
17 itself, the debates over ERISA, and the Court's decisions
18 over ERISA. ERISA involved a balancing of interests,
19 particularly in the welfare --

20 QUESTION: And then what they've said --

21 MR. HOLZHAUER: Sure.

22 QUESTION: I just would like your response on
23 that point, is sure, you have a point. It was made to
24 Congress, and so Congress passes a statute to say you're
25 worried about money? Cancel the plan. Go through steps

1 A, B, and C.

2 MR. HOLZHAUER: Well --

3 QUESTION: Reduce the benefits. But what we
4 don't want you to do is this other way of trying to
5 achieve a similar result, firing everybody, rehiring them.
6 That's a burden for you. You have some burdens and you
7 have some benefits. It's a compromise.

8 MR. HOLZHAUER: Well, of course, there's nothing
9 in section 510 that talks about employers being required
10 to amend or terminate plans, but in many situations that's
11 not going to be practically possible.

12 We might have a situation, for example, where an
13 employer's obligations under a collective bargaining
14 agreement require the employer to pay benefits and is not
15 going to be able to unilaterally amend or terminate their
16 plan, but that collective bargaining agreement might also
17 provide that the employer is entitled to subcontract work,
18 or the National Labor Relations Act might give them a
19 right to subcontract work. Same thing happens with wages.

20 QUESTION: So if you want to have this right,
21 you work it out with the union. I mean, that's normal.

22 MR. HOLZHAUER: Sure.

23 QUESTION: Well, all right. Bring it up on the
24 table. Say what we can do. Amend the plan. Why -- why
25 is it a problem for the employer?

1 I mean, I understand what they'd like --

2 MR. HOLZHAUER: Sure. Well, in some
3 circumstances the employer might also take this position
4 with regard to wages. The union contract sets a certain
5 wage but allows the employer to subcontract. The
6 employers -- the collective bargaining agreement sets
7 certain benefits, but the employer is allowed to
8 subcontract, or the National Labor Relations Act gives a
9 procedure or mechanism for subcontracting out work.

10 There are other circumstances where it makes no
11 sense to amend or terminate a plan. Often insurance
12 contracts, if it's an insured plan, will provide that we
13 want to cover all your employees. We don't want you to
14 carve out little groups of employees because we're afraid
15 you might do it in a way that's to our disadvantage, or we
16 just want the big business or no business at all. Under
17 those circumstances the employer may not be able to amend
18 or terminate.

19 It also might not solve the situation at all in
20 a variety of circumstances. Suppose an employer had two
21 different plants, and it had to decide which one to close.
22 They both had health insurance benefits, but one was very
23 costly, and one was less costly, perhaps because of the
24 region of the country they were in.

25 Under those circumstances that would be a

1 violation of section 510 to make that decision based on
2 benefit costs if you followed the petitioner's argument,
3 but it would be just a legitimate economic decision based
4 on what's more expensive for the employer.

5 There's no evidence in the legislative history
6 of ERISA, and there's certainly no requirement, even if we
7 can flip from obtain to attain and argue that that clause
8 can be read much more broadly than it is, there's
9 certainly no requirement in section 510, no language that
10 would dictate that we reach a result that would require
11 employers to ignore very real economic costs that they
12 face, and costs that employers base very similar decisions
13 on every day.

14 QUESTION: Mr. Holzhauer, I take it from your
15 argument, and please correct me if I'm wrong, that the
16 reasoning you've just developed, the motive is simply to
17 cut cost, not to retaliate against any employees, would
18 apply to pensions that haven't yet vested as well as
19 health and welfare arrangements, is that right?

20 MR. HOLZHAUER: It would apply to pension
21 benefits generally in the sense that, suppose we had a
22 workforce that had vested pensions, or not vested
23 pensions, but were just accruing pension benefits rateably
24 over time.

25 There was no circumstance where we were focusing

1 on people who were about to vest, but we just decided that
2 the benefit costs of that plan are too expensive, and the
3 benefit costs that we were concerned about in that plan
4 were pension benefits. Under those circumstances I still
5 say that that would not violate section 510.

6 QUESTION: So you're rejecting the Ninth Circuit
7 line in two ways. First you say that there isn't this
8 distinction between pension plans and health and welfare
9 plans.

10 MR. HOLZHAUER: No.

11 QUESTION: No, and that as far as the pension
12 plan goes, the Ninth Circuit was wrong, although you
13 didn't take a cross-appeal.

14 MR. HOLZHAUER: Well, the Ninth Circuit held --
15 again, the Ninth Circuit's treatment of both of these
16 issues was rather cursory, so it's really hard to
17 understand exactly what their reasoning was, but quoting
18 Ingersoll-Rand, the Ninth Circuit held that 510 protects
19 plan participants from termination motivated by an
20 employer's desire to prevent a pension from vesting.

21 Santa Fe saw no need to cross-petition on that
22 issue, because it's quite confident that when it goes back
23 on remand it's going to be able to show that it didn't
24 take any action to prevent pensions from vesting. We
25 thought that that's what the Court talked about as the

1 pension part of 510, on remand we'll be fine. If they're
2 using the term more broadly than they say they were using
3 it, the same argument would apply.

4 Now, section 510 was adopted as a corollary to
5 ERISA's vesting requirement, which was essential to the
6 statutory scheme put in place by Congress, and for the
7 first time Congress required that pension benefits become
8 nonforfeitable after a set period of time.

9 Congress recognized that employers might
10 circumvent that vesting requirement by discharging
11 employees who were about to become vested, and they
12 installed section 510 to deal with that problem.

13 It makes perfect sense in that context to say it
14 protects you, the attainment clause of section 510
15 protects you until you become eligible for the benefits,
16 but doesn't provide you with meaningful protection
17 thereafter, although the exercising clause might.

18 QUESTION: Well, do you say that it covers the
19 individual situation, where the employer foresees that a
20 given employee is going to be very costly in terms of
21 medical care, either the employee or a member of the
22 employee's family?

23 MR. HOLZHAUER: If the employee is already
24 eligible for those benefits, and --

25 QUESTION: Well, the employee is covered by a

1 health plan.

2 MR. HOLZHAUER: Right. Right.

3 QUESTION: The employee has a child, and the
4 child then is diagnosed as having a very serious --

5 MR. HOLZHAUER: Right. Uh-huh.

6 QUESTION: -- medical condition that is going to
7 cost megabucks, and the employer says, I don't want to
8 have that effect on my health costs. You're out of here.

9 MR. HOLZHAUER: I think under those
10 circumstances the employer would already be eligible for
11 those benefits. If there was a violation --

12 QUESTION: Not eligible, will become

13 MR. HOLZHAUER: No --

14 QUESTION: -- eligible when the child goes to
15 the doctor for surgery.

16 MR. HOLZHAUER: I think the attainment clause
17 talks about whether the employer -- the employee will
18 become eligible for health insurance, will become eligible
19 for dental insurance, will become eligible for a pension,
20 or a vested pension.

21 Under the way I interpret section 5 --

22 QUESTION: Just answer my question.

23 MR. HOLZHAUER: Sure.

24 QUESTION: Under that circumstance, is section
25 510 violated if the employer says, you're fired because I

1 don't want that obligation in the --

2 MR. HOLZHAUER: Yes. The exercising clause
3 could be violated by that. The attainment clause, no. I
4 don't believe that would involve the attainment clause,
5 because that would not involve becoming eligible for
6 benefit.

7 I also disagree with --

8 QUESTION: I'm not sure that the exercise clause
9 would kick in either, because the child hasn't gone to the
10 hospital for the surgery yet.

11 MR. HOLZHAUER: Well, I think that a strong
12 argument can be made, and it's not involved in this case
13 at all, but a strong argument can be made certainly
14 that -- well, clearly it would violate section 510 to fire
15 that employee just after they file that claim, because
16 they filed that expensive claim.

17 Can an employer circumvent the exercising clause
18 by doing it just before they file the claim? I think one
19 can make a strong argument that it would.

20 I also strongly disagree with the Government's
21 representation that that hypothetical is in any sense
22 real. The reality of that hypothetical ignores COBRA
23 benefits. An employer, once an employee is terminated,
24 the employee generally is entitled to COBRA benefits which
25 will keep insurance in place --

1 QUESTION: But they're not -- they're often less
2 than what the plan would give.

3 MR. HOLZHAUER: Often -- more often they get
4 exactly what the plan gives. The most common COBRA
5 benefits is exactly the health insurance that they get.
6 They don't get the other kinds of benefits, but they would
7 get the health insurance.

8 QUESTION: Mr. Holzhauser, given your response to
9 Justice O'Connor's question, of what use is the
10 application of the attainment clause to plans other than
11 pension plans?

12 MR. HOLZHAUER: Justice Scalia, earlier you
13 asked whether it was ever -- whether it was common to have
14 plans that allow you to get health insurance after being
15 there for a year, or after passing a probationary period,
16 which might be 90 days. It's very common. That's common
17 throughout industry, and that could very well be the kind
18 of situation.

19 An employee often has to work a certain period
20 of time in the sense of hours per week, or hours over an
21 accumulated period of time, in order to become a full-
22 time employee for benefits purposes. It could violate
23 section 510's attainment clause to stop somebody from
24 working over that threshold.

25 QUESTION: And you think that's what Congress

1 was worried about, that there are a lot of employers who
2 keep --

3 MR. HOLZHAUER: I think --

4 QUESTION: -- 90 days, firing people after 89
5 days?

6 MR. HOLZHAUER: I think Congress was concerned
7 about vesting pension benefits, but Congress talked about
8 employee benefit plans, and I think there could be
9 analogous circumstances under which section 510's
10 attainment clause would apply to welfare benefits as well,
11 and that's one very analogous circumstance.

12 QUESTION: But you insist it applies only to
13 eligibility.

14 QUESTION: But then why, in answer to Justice
15 O'Connor, did you get into the question of circumvention?
16 You've either attained or you haven't attained.

17 MR. HOLZHAUER: I was talking about
18 circumventing the exercise clause.

19 QUESTION: The exercise clause. If we allow
20 that the exercise clause can be circumvented, how do we
21 draw -- that circumvention of the exercise clause would
22 state a violation, how do we draw the line? Why doesn't
23 that swallow the attainment issue?

24 MR. HOLZHAUER: Well, I think the exercising
25 clause was intended to deal with a kind of individual --

1 not global plant closing or plan design situation, but an
2 individual situation where you were focusing and targeting
3 a particular individual and saying, that person's going to
4 be too expensive. I am going to terminate that person
5 because their benefits are too high.

6 Clearly, it does violate the exercising clause
7 by any reading to do that after the employee has started
8 filing those benefits -- oh, he's exercised his right to
9 benefits too much, I'm going to fire him as a consequence
10 of doing that.

11 The question is whether, in the very same
12 circumstances, where you're looking at an individual
13 employee who's about to file a lot of claims because he
14 has bad wisdom teeth, or he has other problems, whether
15 that would violate the exercising clause in section 510,
16 and I think an argument could be made that it would.

17 QUESTION: So do it on the specific employee
18 basis.

19 MR. HOLZHAUER: The specific employee, rather
20 than a global, cost-based organizational change. What has
21 been going on in this case was a fundamental change in the
22 way Santa Fe operated its business. It was no longer
23 going to be using its own employees to do that work. It
24 was subcontracting that work out to other employees.

25 QUESTION: Which clause is it that covers if my

1 pension benefit's vested.

2 MR. HOLZHAUER: Yes.

3 QUESTION: I'm entitled to it.

4 MR. HOLZHAUER: Right.

5 QUESTION: And by the way, if I worked 2 more
6 years and have a promotion, it doubles in amount, so they
7 fire me so I don't get the doubling in amount. Now, which
8 part of the -- is that the fail to exercise clause?

9 MR. HOLZHAUER: Well --

10 QUESTION: Is that failure to attain a benefit,
11 or do you think they could do it?

12 MR. HOLZHAUER: I think that there certainly --
13 there are circumstances -- generally speaking, pension
14 benefits are required under the statute to accrue rateably
15 over time, not to have these kinds of cliffs in which
16 you're entitled under the plan to additional money.

17 QUESTION: You see what I'm driving at.

18 MR. HOLZHAUER: Yes. There are circumstances --
19 for example, I think the Heath case was one of those, in
20 the Seventh Circuit, where an employee was entitled to
21 early retirement, additional benefits if they reached a
22 certain age, and I think that he would become eligible for
23 those benefits if they stayed on the workforce.

24 QUESTION: What you're saying the Court did say
25 there.

1 MR. HOLZHAUER: That's right.

2 QUESTION: It's an attainment matter.

3 MR. HOLZHAUER: That's an attainment matter.

4 QUESTION: And therefore the normal thing in
5 getting an amount of money when a certain event happens
6 under a plan that has vested, at least in the pension
7 area, seems to be to call it an attainment.

8 MR. HOLZHAUER: Right.

9 QUESTION: Well, if you follow the same
10 reasoning here, you're going to say getting that amount of
11 money under a plan that has vested when the toothache
12 occurs --

13 MR. HOLZHAUER: No, no. We're not talking about
14 getting that amount of money. We're talking about
15 becoming eligible for a new benefit.

16 QUESTION: All right. All right.

17 MR. HOLZHAUER: An employee who was not entitled
18 to an early retirement benefit.

19 QUESTION: All right. Did you have something
20 you wanted to say about purpose, because the only reason I
21 ask that is that seems to have come up, and I'm not
22 certain we should reach it here, but I know it's been
23 argued.

24 MR. HOLZHAUER: Yes.

25 QUESTION: And maybe you'd be better to do it

1 with facts, or with amici, or whatever, but if you did
2 make a point about it --

3 MR. HOLZHAUER: Well, I think the purpose of the
4 overall statute was to deal with the vesting circumstance,
5 and then to prevent people from circumventing someone from
6 vesting, and I think when there are analogous
7 circumstances like someone about to become eligible for
8 early retirement benefits, under those circumstances that
9 would be a similar eligibility threshold, and crossing
10 that eligibility threshold would be involved, but nothing
11 like that is going on here. This is a global prospects
12 change.

13 QUESTION: So are you saying that the D.C.
14 Circuit approach in the Andes case, they didn't even need
15 to get to anything like, what does the word discharge
16 mean?

17 MR. HOLZHAUER: Yes, I agree with that. I found
18 that decision puzzling, because the Court said on the one
19 hand these employees weren't discharged and we didn't --
20 Congress didn't use the words layoff and termination in
21 that case, but then it said that well, there might be some
22 circumstances where a particular attribute of that
23 workforce might call it into play.

24 I assume they were referring to the Gavelette
25 case, or that kind of hypothetical in their situation,

1 where it would apply.

2 Well, if it's not a termination to subcontract
3 out work under these circumstances, how would it be a
4 termination or a discharge under those second set of
5 circumstances?

6 I think the D.C. Circuit was struggling with
7 what several other courts have struggled with as how to
8 fit section 510, how to square section 510 with these
9 kinds of fundamental business changes, cost-based changes
10 that employers ordinarily do, and this is very much like
11 the kind of change that Peter Drucker talked about in his
12 Wall Street Journal article some years, Sell the Mailroom.

13 These kinds of changes are not the kind of thing
14 that ERISA was intended to encompass.

15 QUESTION: Would your attainment test have
16 resolved the Andes case in favor of the employer?

17 MR. HOLZHAUER: Yes, it would have. Yes, it
18 would have.

19 QUESTION: I wonder, because in paragraph 30
20 they specifically argue, or allege that benefits -- they
21 suffered a reduction of benefits from their pension plan
22 and health and welfare plans. There's that allegation in
23 the complaint.

24 MR. HOLZHAUER: Yes.

25 QUESTION: And how do you -- I mean, if that's

1 true, that's a vested right that was --

2 MR. HOLZHAUER: Well, they claim that they
3 suffered welfare -- they claim that they were -- that
4 Santa Fe took this action in order to reduce a wide
5 spectrum of benefits, salary, vacation, sick leave
6 benefits, things that are not ERISA-included.

7 QUESTION: It covered at least some hypothetical
8 cases of individual vestings.

9 MR. HOLZHAUER: Well, they -- I don't think it
10 does. I don't think the pleading covers individuals. It
11 talks about terminating welfare and pension --

12 QUESTION: Suffered a reduction of contributions
13 to and benefits from pension plans and health and welfare
14 plans.

15 MR. HOLZHAUER: Right. What they were talking
16 about is the fact that under the new ITS Teamsters
17 contract there was a reduction in contributions.

18 QUESTION: Well, but they say benefits.

19 MR. HOLZHAUER: And a commensurate reduction in
20 benefits, but it was not something that interfered with
21 their attainment of eligibility for a particular category
22 of benefits.

23 QUESTION: Well, that is the difference between
24 you and the Government on how you read that paragraph, I
25 guess.

1 MR. HOLZHAUER: Well, it could be, but I think
2 if you look at the entire complaint, you look at what
3 petitioners have said in their briefs and in this
4 argument, it's clear that basically what this case comes
5 down to is the hypothetical you raised early on in the
6 argument.

7 If there are no further questions.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
9 Holzhauser. The case is submitted.

10 (Whereupon, at 12:01 p.m., the case in the
11 above-entitled matter was submitted.)
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CERTIFICATION

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The United States in the Matter of:

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, ET AL., Petitioners v.
ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, ET AL.
CASE NO. 96-491

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

BY Don Nanni Federico-----

(REPORTER)