

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

GENERAL COMMITTEE OF ADJUSTMENT )	C.A. NO. 00-43 (EGS)
GO-386, ET AL. )	(SEE NEXT PAGE)
)	
vs. )	WASHINGTON, D.C.
)	DECEMBER 8, 2000
THE BURLINGTON NORTHERN AND SANTA )	9:30 A.M.
FE RAILWAY COMPANY, ET AL. )	

TRANSCRIPT OF MOTION HEARING  
 BEFORE THE HONORABLE EMMET G. SULLIVAN  
 UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: JOHN O'B. CLARKE, JR., ESQ.  
 WILLIAM MAHONEY, ESQ.

FOR THE DEFENDANTS: RALPH J. MOORE, JR., ESQ.

COURT REPORTER: FRANK J. RANGUS, OCR  
 U. S. COURTHOUSE, RM. 6822  
 WASHINGTON, D.C. 20001  
 (202) 371-0545

PROCEEDINGS RECORDED BY ELECTRONIC STENOGRAPHY; TRANSCRIPT  
PRODUCED BY COMPUTER.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, ET AL.	)	<u>C.A. NO. 99-3117(EGS)</u>
vs.	)	WASHINGTON, D.C.
	)	DECEMBER 8, 2000
UNITED TRANSPORTATION UNION	)	9:30 A.M.

TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE EMMET G. SULLIVAN  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: DONALD J. MUNRO, ESQ.  
FOR THE DEFENDANT: CLINTON J. MILLER, III, ESQ.  
COURT REPORTER: FRANK J. RANGUS, OCR  
U. S. COURTHOUSE, RM. 6822  
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1 THE DEPUTY CLERK: CIVIL ACTION 00-43, GENERAL  
2 COMMITTEE OF ADJUSTMENT, ET AL. VS. BURLINGTON NORTHERN AND  
3 SANTA FE RAILWAY COMPANY, ET AL., AND CIVIL ACTION 99-3117,  
4 BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, ET AL. VS.  
5 UNITED TRANSPORTATION UNION.

6 WOULD COUNSEL PLEASE IDENTIFY YOURSELVES?

7 MR. CLARKE: MY NAME IS JOHN CLARKE. I'M COUNSEL FOR  
8 THE GENERAL COMMITTEES.

9 THE COURT: MR. CLARKE, GOOD MORNING.

10 MR. CLARKE: AND I HAVE WILLIAM MAHONEY WITH ME.

11 THE COURT: GOOD MORNING.

12 MR. MAHONEY: GOOD MORNING.

13 MR. MILLER: GOOD MORNING, YOUR HONOR.

14 CLINTON J. MILLER, III, GENERAL COUNSEL FOR THE  
15 DEFENDANT, UNITED TRANSPORTATION UNION, IN 99-3117.

16 THE COURT: GOOD MORNING, COUNSEL.

17 MR. MUNRO: DONALD MUNRO FOR THE CARRIERS, YOUR HONOR.

18 THE COURT: MR. MUNRO.

19 MR. MOORE: YOUR HONOR, RALPH MOORE FOR THE RAILROAD.

20 THE COURT: GOOD MORNING.

21 I WANTED TO SPEND A FEW MINUTES FOCUSING ON JUDGE  
22 MURPHY'S OPINION IN THE SOO LINE CASE, NOT THE CIRCUIT'S  
23 OPINION BUT JUDGE MURPHY'S OPINION. HINDSIGHT IS ALWAYS 20/20.  
24 MAYBE I SHOULD HAVE TELEPHONED YOU YESTERDAY TO TELL YOU I  
25 WANTED TO FOCUS A LITTLE BIT ON THAT OPINION.

1 ARE YOU FAMILIAR WITH HER CASE, HER OPINION? IF NOT,  
2 I HAVE COPIES.

3 MR. CLARKE: YOUR HONOR, IT'S BEEN QUITE A FEW YEARS  
4 SINCE I'VE HAD THE CASE, SO.

5 THE COURT: RIGHT. I'M SORRY. YOU KNOW, YOU THINK  
6 ABOUT THINGS ALL THE TIME, BUT I DIDN'T THINK ABOUT THIS  
7 YESTERDAY. I WANT TO SPEND SOME TIME ON THIS. I HAVE COPIES,  
8 THINKING THAT YOU MAY NOT HAVE READ HER OPINION RECENTLY, BUT  
9 JUST FOCUSED ON THE 8TH CIRCUIT OPINION. I MADE SOME COPIES.  
10 I HAVE THREE COPIES, SO WE NEED TWO MORE COPIES.

11 WHY DON'T I JUST TAKE MAYBE TWO OR THREE MINUTES?  
12 ACTUALLY, I CAN FOCUS MY ATTENTION ON SOMETHING ELSE, AND WE'LL  
13 TAKE A RECESS AND I'LL GIVE YOU A CHANCE TO LOOK IT OVER, AND  
14 WE'LL COME BACK. IT SEEMS TO ME JUDGE, IT MAY WELL BE THAT  
15 JUDGE MURPHY'S CASE IS THE CLOSEST CASE TO THIS CASE THAT'S  
16 BEEN DECIDED, AND I JUST WANT TO DISCUSS THE RATIONALE THAT SHE  
17 UTILIZED IN RESOLVING THE ISSUES BEFORE HER.

18 COUNSEL, I'VE READ THE TRANSCRIPT OF THE LAST HEARING.  
19 I DON'T WANT TO REHASH THE MATTERS WE WENT INTO AT THE LAST  
20 HEARING. IT WAS A FAIRLY EXTENSIVE HEARING. A LOT OF  
21 QUESTIONS WERE ASKED. I GOT A LOT OF GOOD ANSWERS. I DON'T  
22 NEED TO REHASH WHAT WE TALKED ABOUT BEFORE. I WANT TO FOCUS  
23 JUST BRIEFLY ON THE MATTERS THAT COUNSEL WISH TO HIGHLIGHT THAT  
24 THEY BELIEVE ARE IMPORTANT ADDITIONS TO THE MATTERS THAT WE  
25 DISCUSSED AT THE LAST HEARING. I DO NOT WANT TO START THIS

1 HEARING ANEW ON ALL THESE ISSUES. I'M FAMILIAR WITH THE  
2 ISSUES.

3 I AM CONCERNED ABOUT TIME. TIME WAS AN ISSUE. WE  
4 TALKED ABOUT IT BRIEFLY AT THE CONCLUSION OF THE LAST HEARING.  
5 HOW DOES THE ISSUE OF TIME FACTOR INTO THE DECISION-MAKING  
6 PROCESS? I MEAN, WHAT'S GOING ON NOW WITH RESPECT TO  
7 BARGAINING? AND I'LL HEAR FROM ANYONE ON THAT.

8 MR. MILLER: YOUR HONOR, THE UTU FORWARDED THE  
9 QUESTIONS AND ANSWERS THAT WE GOT FROM OUR GENERAL COMMITTEES  
10 PURSUANT TO OUR CONSTITUTION IN THE EARLY PART OF NOVEMBER. I  
11 CHECKED WITH MY PRINCIPALS BEFORE I CAME OVER, AND MY  
12 UNDERSTANDING FROM THEM IS THAT THE CARRIERS' CONFERENCE  
13 COMMITTEE HAS NOT YET GOTTEN BACK WITH THE SUBSTANTIVE REPLY  
14 WITH RESPECT TO THOSE QUESTIONS AND ANSWERS. ONCE THOSE  
15 MATTERS ARE ADJUSTED BETWEEN THE CONFERENCE AND THE UTU, IT  
16 WOULD BE READY TO GO OUT FOR RATIFICATION. BUT RIGHT NOW, I  
17 BELIEVE IT'S FAIR TO SAY THAT IT'S AT LEAST SLIGHTLY HUNG UP  
18 WITH REGARD TO WHETHER THE CARRIERS' CONFERENCE IS IN AGREEMENT  
19 WITH THE ANSWERS THAT WE PUT TO THE QUESTIONS THAT THE GENERAL  
20 COMMITTEES HAD.

21 THE COURT : AND IF THEY ARE, THEN THERE'S  
22 CONTROVERSY, IS THERE?

23 MR. MILLER: WELL, IT MIGHT MAKE IT -- THE ANSWER IS,  
24 IT MIGHT PROVIDE GREATER MOTIVATION FOR RATIFICATION, YOUR  
25 HONOR, DEPENDING ON WHAT THEY ARE.

1 THE COURT: RIGHT, RIGHT.

2 MR. MILLER: AND I SPOKE ABOUT IT BRIEFLY WITH MR.  
3 MUNRO. I DON'T KNOW WHETHER HE HAS ANYTHING TO ADD IN THAT  
4 REGARD.

5 THE COURT: MR. MUNRO.

6 MR. MUNRO: NO; I AGREE WITH THAT CHARACTERIZATION.  
7 YOUR HONOR.

8 THE COURT: YOU WANT A DECISION, OBVIOUSLY. I'M NOT  
9 GOING TO RENDER AN ORAL DECISION. IF I HAD TO, I WOULD, BUT I  
10 DON'T HAVE TO. BUT I WANT TO GIVE YOU A DECISION. BY THE END  
11 OF THE YEAR, IS THAT TOO LATE?

12 MR. CLARKE: NO, YOUR HONOR, IT'S NOT.

13 THE COURT: IT'S NOT TOO LATE?

14 MR. MILLER: YOUR HONOR, THAT'S FINE.

15 MR. MUNRO: YES, YOUR HONOR.

16 THE COURT: ALL RIGHT, FINE, I'LL DO THAT.

17 I'M GOING TO BRING YOU BACK TO THE PODIUM, THEN. I  
18 HAVE SOME QUESTIONS TO ASK YOU. THIS IS A FASCINATING CASE,  
19 AND I'VE LEARNED A LOT ABOUT RAILROADS.

20 UTU IS THE DESIGNATED BARGAINING REPRESENTATIVE FOR  
21 THE UNIONS.

22 MR. MILLER: THAT'S CORRECT, YOUR HONOR.

23 THE COURT: PURSUANT TO THE RLA.

24 MR. MILLER: THAT'S RIGHT, YOUR HONOR.

25 THE COURT: JUST WHAT DOES THAT MEAN? FOR ALL

1 PURPOSES? OR UNLESS THE GENERAL COMMITTEES OPT OUT?

2 MR. MILLER: NO, YOUR HONOR. UTU IS A DULY DESIGNATED  
3 REPRESENTATIVE FOR THE CRAFTS AND CLASSES OF FIREMEN,  
4 CONDUCTORS, AND TRAINMEN ON THE PROPERTY OF THE BURLINGTON  
5 NORTHERN AND SANTA FE, BUT IT HAS ITS OWN INTERNAL  
6 ORGANIZATIONAL STRUCTURE.

7 THE COURT: I UNDERSTAND THAT, AND IT HAS ITS OWN  
8 CONSTITUTION THAT ENABLES GENERAL COMMITTEES TO REPRESENT  
9 THEMSELVES?

10 MR. MILLER: YOUR HONOR, THE CHIEF -- UNDER THE UTU  
11 CONSTITUTION, AND SPECIFICALLY IN ARTICLE, AN ARTICLE WE CALL  
12 85, THE GENERAL COMMITTEES OF ADJUSTMENT THAT ARE FORMED BY THE  
13 WORKERS' OWN PARTICULAR LINE OR A PARTICULAR PORTION OF A LINE  
14 HISTORICALLY ARE LUMPED INTO A GENERAL COMMITTEE OF ADJUSTMENT  
15 ORGANIZATIONALLY. THE GENERAL COMMITTEE OF ADJUSTMENT ON ANY  
16 PROPERTY OR A PORTION OF A PROPERTY HAS AUTONOMY WITH RESPECT  
17 TO THE NEGOTIATION INTERPRETATION AND APPLICATION OF AGREEMENTS  
18 THAT APPLY TO THE EMPLOYEES OF CARRIERS UNDER ITS JURISDICTION,  
19 AND THAT'S BEEN THAT WAY GOING BACK TO THE FOUR PREDECESSORS TO  
20 JTU. THAT'S A LONG, TIME-HONORED TRADITION.

21 THE COURT: RIGHT, AND UTU'S REPRESENTATION OF ALL THE  
22 GENERAL COMMITTEES HAS BECOME MORE COMPLICATED AS A RESULT OF  
23 THE MERGERS OVER THE YEARS, I ASSUME.

24 MR. MILLER: YES, SIR. SOME GENERAL COMMITTEES HAVE  
25 GONE OUT OF EXISTENCE AS A RESULT OF THE MERGERS OF VARIOUS

1 RAILROADS.

2 THE COURT: RIGHT, AND BECAUSE OF GEOGRAPHICAL ISSUES,  
3 THE INTERESTS OF SOME GENERAL COMMITTEES ARE DIFFERENT FROM  
4 THOSE OF OTHER GENERAL COMMITTEES, THEN. CORRECT? WITH  
5 RESPECT TO LOCAL MATTERS.

6 MR. MILLER: CERTAINLY, YOUR HONOR, AND I MEAN;  
7 GENERAL COMMITTEES GO OUT OF EXISTENCE WHEN THE AGREEMENT OVER  
8 WHICH THEY HAVE JURISDICTION NO LONGER APPLIES.

9 THE COURT: RIGHT.

10 MR. MILLER: IN SOME MERGERS AND ACQUISITIONS, AS A  
11 RESULT OF CASE LAW THAT WE DON'T HAVE TO TALK ABOUT HERE, SOME  
12 CARRIERS HAVE BROADENED THE APPLICATION OF A PARTICULAR  
13 AGREEMENT ACROSS THOSE BOUNDARIES.

14 THE COURT: RIGHT.

15 MR. MILLER: AND THUS OUR GENERAL COMMITTEES HAVE GONE  
16 OUT OF EXISTENCE. THAT REALLY DIDN'T HAPPEN TO A SIGNIFICANT  
17 DEGREE ON THE BURLINGTON NORTHERN AND SANTA FE. I WOULD SAY,  
18 OF THE MAJOR MERGERS IN THE LAST TEN YEARS, IT PROBABLY  
19 HAPPENED LESS THERE THAN IT DID ANYWHERE ELSE. SO THE  
20 AGREEMENTS THAT THESE GENERAL COMMITTEES HAVE JURISDICTION OVER  
21 AS A PART OF THE UTU AND ITS INTERNAL ORGANIZATIONAL STRUCTURE  
22 REMAIN. THEY ARE, I DON'T WANT TO SAY KINGS OF THE AGREEMENT,  
23 BUT THEY ARE, UNDER OUR CONSTITUTION, CHARGED WITH THE  
24 RESPONSIBILITY OF THE NEGOTIATION AND THE ADMINISTRATION OF THE  
25 COLLECTIVE BARGAINING AGREEMENTS THAT APPLY TO THE EMPLOYEES

1 UNDER ITS JURISDICTION.

2 THE COURT: RIGHT. NOW, WHAT HAS HAPPENED IN THIS  
3 CASE HAS NOT HAPPENED WITH ANY DEGREE OF REGULARITY OVER THE  
4 LAST 60 YEARS AT ALL. I MEAN, IS IT A FAIR STATEMENT THAT  
5 UTU -- HOW LONG HAS UTU BEEN IN EXISTENCE?

6 MR. MILLER: SINCE 1969.

7 THE COURT: ALL RIGHT, SINCE '69. DOES THIS CASE  
8 REPRESENT THE ONLY INSTANCE IN WHICH GENERAL COMMITTEES, SOME  
9 GENERAL COMMITTEES HAVE OPTED NOT TO HAVE UTU BARGAIN ON ITS  
10 BEHALF, ON THEIR BEHALF?

11 MR. MILLER: YOUR HONOR, IN MY 20 YEARS IN THE  
12 BUSINESS AND 16 YEARS WITH UTU, IT'S ONLY THE SECOND TIME THAT  
13 I KNOW OF THAT IT'S HAPPENED. IT DID HAPPEN IN THE 1994 ROUND.

14 THE COURT: 1994. BUT EVERYTHING WAS RESOLVED  
15 AMICABLY?

16 MR. MILLER: THERE WAS A CASE PENDING --

17 THE COURT: RIGHT.

18 MR. MILLER: -- IN FRONT OF JUDGE HOGAN THAT DID  
19 INVOLVE THESE SAME GENERAL COMMITTEES AND SEVERAL OTHERS, BUT  
20 IT WAS MOOTED BECAUSE, EVENTUALLY, THEY CAME INTO NATIONAL  
21 HANDLING AND AGREED ON A METHODOLOGY TO DO THAT AT THE END OF  
22 THE NATIONAL NEGOTIATIONS IN 1995, THE END OF 1995.

23 THE COURT: RIGHT. MY RECOLLECTION IS -- AND MAYBE  
24 YOU AREN'T THE APPROPRIATE ATTORNEY TO RESPOND TO THIS  
25 QUESTION, BUT MAYBE YOU ARE. MY RECOLLECTION IS THAT, WHEN

1 THIS SUIT WAS FILED, THERE WAS AN ADDITIONAL PARTY WHO HAS  
2 SUBSEQUENTLY BEEN DISMISSED AS A DEFENDANT.

3 MR. MILLER: YES, YOUR HONOR.

4 THE COURT: WHAT HAPPENED WITH RESPECT TO THAT UNION?  
5 WAS IT A UNION?

6 MR. MILLER: IT WAS A BOARD OF LOCAL ENGINEERS WHO  
7 REPRESENT PRINCIPALLY LOCAL ENGINEERS ON THE BOARD OF THE  
8 BURLINGTON NORTHERN.

9 THE COURT: ARE THEY BARGAINING NATIONALLY NOW?

10 MR. MILLER: MY UNDERSTANDING IS THAT THEY ARE,  
11 BECAUSE THE CARRIERS DISMISSED THEM OUT OF THE CASE, AND SO THE  
12 CARRIERS' CASE WHICH WAS FIRST BROUGHT NOW IS ONLY AGAINST UTU.

13 THE COURT: RIGHT, AND THEY'RE BARGAINING THROUGH  
14 THEIR REPRESENTATIVE, THEIR ARTICLE 2 FOURTH REPRESENTATIVE?

15 MR. MILLER: YOUR HONOR, THEY'RE NEGOTIATING ON  
16 (PAUSE), WITH THEIR EQUIVALENT TO A NATIONAL NEGOTIATING  
17 COMMITTEE LIKE UTU HAS --

18 THE COURT: ALL RIGHT.

19 MR. MILLER: -- FOR PURPOSES OF NATIONAL HANDLING, BUT  
20 I DO NOT KNOW ENOUGH ABOUT THEIR INTERNAL ORGANIZATIONAL  
21 STRUCTURE TO TELL YOU EXACTLY WHAT THAT BODY IS CALLED. BUT  
22 THEY ARE IN NATIONAL HANDLING.

23 THE COURT: RIGHT, RIGHT. UTU IS THE DESIGNATED  
24 BARGAINING REPRESENTATIVE PURSUANT TO ARTICLE 2 FOURTH, I THINK  
25 IT IS.

1 MR. MILLER: IT'S 2 FOURTH AND 2 NINTH AS WELL.

2 THE COURT: ALL RIGHT, AND IF I UNDERSTAND YOUR  
3 ARGUMENT CORRECTLY, IT'S THE BARGAINING REPRESENTATIVE THAT HAS  
4 THE OPTION OF CHOOSING WHO WILL REPRESENT THE BARGAINING  
5 REPRESENTATIVE. I MEAN, THAT'S WHAT YOU SAID IN YOUR MOST  
6 RECENT SUBMISSION.

7 MR. MILLER YES, YOUR HONOR. IN OTHER WORDS, WE ARE  
8 THE DULY DESIGNATED REPRESENTATIVE FOR THE PEOPLE IN THOSE  
9 CRAFTS AND CLASSES.

10 THE COURT: RIGHT.

11 MR. MILLER: AND THEREFORE WE ARE A PARTY, AND WHEN 2  
12 THIRD --

13 THE COURT: I WAS GOING TO GET TO THAT. WHO WAS THE  
14 REAL PARTY-IN-INTEREST? IS IT UTU OR ARE WE TALKING ABOUT THE  
15 EMPLOYEES, OR IS THERE A DIFFERENCE BETWEEN THE EMPLOYEES AND  
16 THE UNION?

17 MR. MILLER: UTU, BEING THE DULY DESIGNATED  
18 REPRESENTATIVE FOR THOSE CRAFTS AND CLASSES, IS THE PARTY,  
19 QUITE OBVIOUSLY TO ME, THAT'S BEING REFERRED TO IN 2 THIRD, AND  
20 IT'S WHOEVER THAT PARTY DESIGNATES AS ITS REPRESENTATIVE THAT  
21 THE CARRIERS HAVE TO DEAL WITH.

22 YOUR HONOR, IF I MIGHT --

23 THE COURT: ONE WOULD LOGICALLY THINK, THOUGH, IT  
24 WOULD BE THE EMPLOYEES' CALL TO MAKE A DETERMINATION AS TO WHO  
25 WOULD BARGAIN ON BEHALF OF THE EMPLOYEES, SINCE WHAT'S AT ISSUE

1   HERE IS A BARGAINING AGREEMENT BETWEEN CARRIERS AND EMPLOYEES.  
2   CORRECT?

3                   MR. MILLER:   YES, YOUR HONOR, EXCEPT THAT THE  
4   EMPLOYEES HAVE DULY DESIGNATED REPRESENTATIVES TO DO IT FOR  
5   THEM.   IT'S NOT DEMOCRATIC; IT'S A REPUBLICAN FORM.   WE AS THE  
6   REPRESENTATIVES ARE THE ONES THAT ARE CHARGED WITH THE  
7   RESPONSIBILITY OF NEGOTIATING AND ADMINISTERING THE AGREEMENTS  
8   THAT ARE UNDER OUR JURISDICTION THAT APPLY TO THESE EMPLOYEES.  
9   SO THE EMPLOYEES DON'T GET TO -- IT IS A MATTER OF THE UTU  
10  CONSTITUTION.

11                   THE COURT:   EMPLOYEES DON'T GET TO SAY WHO WILL  
12  REPRESENT THE EMPLOYEES.   IT'S THE REPRESENTATIVE WHO GETS TO  
13  SAY WHO WILL REPRESENT THE EMPLOYEES.

14                   MR. MILLER:   CERTAINLY, THEY DO WHEN IT COMES TO  
15  ELECTION TIME, BECAUSE UNDER THE UTU INTERNAL ORGANIZATIONAL  
16  STRUCTURE, IF THE EMPLOYEES WANT TO HAVE A REFERENDUM EVERY  
17  FOUR YEARS, THEY CAN EACH INDIVIDUALLY CAST THEIR VOTES FOR THE  
18  GENERAL CHAIRPERSON.   SO IT'S A DEMOCRATIC STRUCTURE, BUT IT  
19  NONETHELESS IS AN ORGANIZATIONAL STRUCTURE THAT COMES WITH OUR  
20  STATUS AS THE REPRESENTATIVE AND AS THE PARTY TO THESE  
21  NEGOTIATIONS.

22                   THE COURT:   WELL, DOESN'T THAT CREATE SOME FRICTION  
23  BETWEEN THE EMPLOYEES AND UTU?   THE EMPLOYEES HAVE, FOR COGENT  
24  REASONS, I ASSUME, SAID, "WE WANT BARGAINING ON THE SAME LEVEL  
25  THAT THE CARRIERS HAVE BARGAINING.   WE WANT SKILLFUL

1 REPRESENTATIVES. WE'RE GOING TO PUT IN PLACE UTU." I WOULD  
2 IMAGINE. AND THEN EMPLOYEES HAVE SOME CONFIDENCE THAT UTU WILL  
3 BARGAIN IN GOOD FAITH ON THEIR BEHALF AND GET THE BEST DEALS  
4 THAT THE BARGAINING REPRESENTATIVE CAN GET, BECAUSE THAT'S WHAT  
5 YOU DO. YOU'RE A BARGAINING REPRESENTATIVE. YOU BARGAIN WITH  
6 THE CARRIERS ON BEHALF OF THE EMPLOYEES. CORRECT?

7 MR. MILLER: YES, YOUR HONOR, BUT --

8 THE COURT: DOES THAT GO OVER WELL WITH THE EMPLOYEES  
9 WHEN UTU DECIDES ON ITS OWN THAT IT'S NOT GOING TO HAVE, IT'S  
10 NOT GOING TO BE THE BARGAINING REPRESENTATIVE FOR THE  
11 EMPLOYEES, BUT IT'S GOING TO ALLOW GENERAL COMMITTEES TO DO  
12 WHAT UTU, PURSUANT TO 2 FOURTH, HAS A LEGAL OBLIGATION TO DO?

13 MR. CLARKE: YES, YOUR HONOR, BUT IN EXECUTING IT, WE  
14 DO IT WITH A DEMOCRATICALLY MAINTAINED CONSTITUTION. IF THE  
15 MEMBERSHIP --

16 THE COURT: THAT'S BEEN RATIFIED BY THE MEMBERSHIP.

17 MR. MILLER: YES, YOUR HONOR, AND EVERY FOUR YEARS WE  
18 HAVE A QUADRENNIAL CONVENTION, AND ANYONE WHO WANTS TO AMEND IT  
19 CAN DO IT THROUGH THE DELEGATES.

20 THE COURT: SO YOU'RE GOING TO HAVE SOME PEOPLE  
21 DISSATISFIED AT ANY TIME. RIGHT?

22 MR. MILLER: YES, YOUR HONOR. WE HAVE AT LEAST HALF  
23 OF THEM MAD AT ANY ONE TIME.

24 THE COURT: THE SAME WITH FEDERAL JUDGES.

25 MR. MILLER: I REMEMBER TELLING A COURT ONCE IN A FAIR

1 REPRESENTATION CASE, WHICH IS THE MOST COMMON WAY THAT WE GET  
2 TO FEDERAL COURT, THAT UNIONS, IN ADJUSTING SENIORITY, ANYTIME  
3 YOU ADJUST SENIORITY AS A RESULT OF A MERGER, THERE'S GOING TO  
4 BE WINNERS AND LOSERS, AND I SAID THE UNION'S IN THE SAME  
5 POSITION AS THIS COURT, BECAUSE THE COURT MAKES, IF NOT  
6 ENEMIES, AT LEAST LESS THAN FRIENDS WITH APPROXIMATELY HALF THE  
7 LITIGANTS BEFORE IT.

a THE COURT: THAT'S THE BENEFIT OF LIFE TENURE.

9 MR. MILLER: AND I RECALL THE JUDGE SAID HE NEVER DID  
10 HAVE TOO MUCH TROUBLE WITH NATURALIZATIONS, BUT BEYOND THAT, HE  
11 KNEW WHAT I WAS TALKING ABOUT, AND THAT IS THE BALANCING THAT  
12 THE UNION UNDERTAKES IN GOOD FAITH. BUT THE UNION AS A  
13 REPRESENTATIVE COMES TO THE TABLE WITH ALL OF ITS OWN  
14 ORGANIZATIONAL TRAPPINGS, JUST AS THESE RAILROADS DO. JUST AS  
15 THESE RAILROADS HAVE A RIGHT TO DESIGNATE WHO'S GOING TO  
16 BARGAIN FOR THEM AS A PARTY, THE UTU AS A CO-EQUAL PARTY HAS A  
17 RIGHT, AS A MATTER OF ITS OWN INTERNAL ORGANIZATION AND  
18 DEMOCRATICALLY MAINTAINED ORGANIZATION, HAS A RIGHT TO SAY HOW  
19 THAT WILL BE CARRIED OUT.

20 THE COURT: THE DIFFERENCE IS THAT THE CARRIERS AREN'T  
21 BOUND BY THE RLA. THERE'S NO DULY APPOINTED REPRESENTATIVE ON  
22 BEHALF OF THE CARRIERS AS A PART OF THE RLA HIERARCHY OF RULES  
23 AND REGULATIONS.

24 MR. MILLER: THAT IS CORRECT, YOUR HONOR.

25 THE COURT: RIGHT.

1 MR. MILLER: IT'S A MATTER OF THEIR OWN CORPORATE  
2 STATUS AND BYLAWS, BUT NONETHELESS --

3 THE COURT: WELL, IT'S THEIR INDUSTRY. THEY OWN THE  
4 INDUSTRY.

5 MR. MILLER: SURE, BUT --

6 THE COURT: I ASSUME -- WELL, I DON'T KNOW. WHAT IS  
7 THE REASON? WHY AREN'T THE CARRIERS BOUND BY A DULY APPOINTED  
8 BARGAINING REPRESENTATIVE PURSUANT TO THE RLA? AS A MATTER OF  
9 LAW.

10 MR. MILLER: BECAUSE NO ONE ELECTS THEM UNDER THE  
11 AEGIS OF THE FEDERAL GOVERNMENT. THEY'RE ELECTED BY THE  
12 SHAREHOLDERS AND BOARD OF DIRECTORS AND ALL THAT STUFF.

13 THE COURT: EXACTLY. SO THEY CAN PICK WHOEVER THEY  
14 WANT TO, WHICH WAS THE CASE IN SOO LINE. RIGHT? THIS IS THE  
15 FLIP-SIDE VERSION OF SOO LINE, ISN'T IT?

16 MR. MILLER: YES, YOUR HONOR, BUT I THINK THAT WHAT I  
17 SAID ABOUT SYMMETRY REMAINS TRUE. IT'S NOT JUST THAT THEY'RE  
18 IN A CORPORATE FORM OUTSIDE OF THE FEDERAL LAW. IT'S THAT THEY  
19 ARE A PARTY WITH RESPECT TO NEGOTIATIONS THAT THEY HAVE A  
20 RESPONSIBILITY TO UNDERTAKE IN GOOD FAITH, JUST AS WE DO, AND  
21 IT HAS ALWAYS SEEMED ODD TO OUR PEOPLE. I'VE BEEN ASKED ABOUT  
22 IT BEFORE. WHY IS IT THAT THE RAILROADS CAN ALWAYS GET OUT OF  
23 NATIONAL HANDLING IF THEY WANT TO, BUT THE UNIONS HAVEN'T BEEN  
24 ABLE TO? AND THERE'S NO GOOD ANSWER TO THAT, YOUR HONOR.  
25 THERE HAS NOT BEEN -- THE POSITION OF THE BNSF --

1 THE COURT: MOST COURTS HAVE TAKEN THE POSITION THAT  
2 EITHER SIDE CAN OPT OUT OF NATIONAL HANDLING BEFORE IT  
3 COMMENCES. RIGHT?

4 MR. MILLER: THE COURTS HAVE ADDRESSED THAT STRAIGHT  
5 UP, YOUR HONOR, AND, YES, THAT IS THE GIST OF THE ARGUMENT  
6 HERE.

7 THE COURT: THAT'S THE GIST OF THE ARGUMENT.

8 MR. MILLER: THAT'S RIGHT, AND THE SOO LINE CASE AND  
9 THE GRAND TRUNK LINE ARE THE ONLY COURTS THAT HAVE DIRECTLY  
10 ADDRESSED THIS 2 THIRD QUESTION, AND THAT THE D. C. CIRCUIT  
11 PRECEDENT THAT WE TALKED ABOUT, ATLANTIC COAST LINE, WAS  
12 REFERRED TO, AND RIGHTLY SO, BY THOSE COURTS AS THE LANGUAGE  
13 RELIED UPON AS DICTA, BECAUSE REALLY WHAT WAS AT ISSUE WASN'T  
14 WHO WAS THE REPRESENTATIVE. IT'S, WHAT ISSUES DO YOU HAVE TO  
15 HAVE IN NATIONAL HANDLING? THAT'S WHY BOTH THE 8TH CIRCUIT AND  
16 THE 6TH CIRCUIT REFERRED TO THE LANGUAGE THAT THE CARRIERS  
17 REFERRED TO HERE AS DICTA, BECAUSE IT WASN'T PART OF THE RES  
18 INTEGRA OF THE CASE. THE ISSUE WASN'T, WHO ARE THE APPROPRIATE  
19 PARTIES? IT'S, WHAT ARE THE APPROPRIATE ISSUES?

20 THE COURT: AS A PRACTICAL MATTER, WHO MADE THE  
21 DECISION IN THIS CASE, WAS IT UTU, THAT THREE COMMITTEES WOULD  
22 REPRESENT THEMSELVES, OR DID THE THREE COMMITTEES PRESSURE UTU  
23 TO MAKE THE DECISION FOR THE COMMITTEES?

24 MR. MILLER: ARTICLE 91 OF OUR CONSTITUTION PROVIDES  
25 FOR THREE ASSOCIATIONS OF DISTRICT GENERAL CHAIRPERSONS.

1 DISTRICT 1 IS RAIL USA. DISTRICT 2 IS CANADA, AND DISTRICT 3  
2 IS OUR BUS REPRESENTATION. THEY COME TOGETHER EVERY FOUR YEARS  
3 OR SO. IT'S THEIR OWN ORGANIZATION AND THEY DETERMINE IF  
4 THEY'RE GOING TO CARRY OUT A CONCERTED WAGE-AND-RULE MOVEMENT.  
5 ONCE THEY APPROVE A SECTION 6 NOTICE AND DETERMINE TO GO DOWN  
6 THAT COURSE, THEN THERE'S A NATIONAL NEGOTIATING COMMITTEE  
7 APPOINTED BY THE INTERNATIONAL PRESIDENT OF THE UNION THAT  
8 CARRIES OUT NATIONAL HANDLING. BUT AS PART OF THAT ARTICLE 91,  
9 ANY GENERAL COMMITTEE WHO WANTS TO OPT OUT OF NATIONAL HANDLING  
10 HAS THE RIGHT TO DO SO, WITH THE APPROVAL OF A MAJORITY OF THE  
11 REMAINDER OF THE GENERAL CHAIRPERSONS IN THAT ASSOCIATION, AND  
12 THAT'S EXACTLY WHAT THESE THREE GENTLEMEN DID HERE ON BEHALF OF  
13 THEIR GENERAL COMMITTEES.

14 THE COURT: RIGHT. SO THAT'S A LITTLE BIT DIFFERENT,  
15 THOUGH, FROM SAYING THAT UTU MADE THE DECISION TO HAVE THREE  
16 COMMITTEES REPRESENT THEMSELVES, ISN'T IT? OR IS THAT JUST A  
17 PLAY ON WORDS? THAT'S THE ARGUMENT IN YOUR PAPERS I LOOKED AT.

18 MR. MILLER: YES, YOUR HONOR. I GUESS WHEN I SAY UTU,  
19 I MEAN UTU WITH ALL OF THE ATTENDANT ORGANIZATIONAL STRUCTURE,  
20 WHICH IS CHIEFLY, WHICH CHIEFLY PUTS THE BARGAINING  
21 RESPONSIBILITIES AT THE DOOR OF THE GENERAL COMMITTEE OF  
22 ADJUSTMENT. IF ALL OF THE GENERAL COMMITTEES OF ADJUSTMENT,  
23 RAIL USA, DETERMINE TO CARRY OUT A CONCERTED WAGE-AND-RULE  
24 MOVEMENT, THEN, UNDER OUR INTERNAL ORGANIZATIONAL STRUCTURE,  
25 THE INTERNATIONAL PRESIDENT TAKES OVER AND APPOINTS A NATIONAL

1 NEGOTIATING COMMITTEE. BUT EVEN WITHIN THAT STRUCTURE, GENERAL  
2 COMMITTEES HAVE A RIGHT, WITH THE APPROVAL OF THE BALANCE OF  
3 THE COMMITTEES, TO OPT OUT AND TO KEEP THEIR ARTICLE 85  
4 JURISDICTION, AND THAT'S REALLY ALL THAT'S AT ISSUE HERE. THIS  
5 IS JUST, UTU WANTS TO HAVE THE SAME DIGNITY AS A PARTY UNDER 2  
6 THIRD AS THE CARRIERS HAVE AS A PARTY, AS TO WHO THEIR  
7 REPRESENTATIVE IS GOING TO BE, AND IT ILL BEHOOVES THE CARRIER  
8 TO GET INVOLVED.

9 I NOTICE IN THE REPLY THE SAME ARGUMENT THAT, FRANKLY,  
10 WE MADE, AND MR. CLARKE, I BELIEVE, IS THE ONE WHO DIRECTLY  
11 MADE IT, IN THE SOO LINE CASE, AND THAT IS, YOU CAN APPOINT  
12 DONALD DUCK OR ANYONE ELSE, BUT THEY HAVE TO SIT THERE AT THAT  
13 TABLE. WELL, THE 8TH CIRCUIT WASN'T GOING TO PUT UP WITH THAT,  
14 BECAUSE THE WAY THE 8TH CIRCUIT SAW IT, NO MATTER HOW YOU SLICE  
15 IT, THAT'S STILL NATIONAL HANDLING THAT YOU CANNOT OBLIGATE  
16 THEM TO ENGAGE IN FOR THESE THREE GENERAL COMMITTEES, IN OUR  
17 VIEW.

18 THE COURT: THIS CASE IS SIMPLY ABOUT, THEN, THE  
19 AUTHORITY OR NOT OF A PARTY TO MAKE A DESIGNATION PURSUANT TO  
20 ARTICLE 2 THIRD? THAT'S IT?

21 MR. MILLER: THAT'S THE WAY WE SEE IT, YOUR HONOR.

22 THE COURT: THIS COURT DOESN'T HAVE TO ORDER NATIONAL  
23 BARGAINING, DOES IT, OR NATIONAL HANDLING?

24 MR. MILLER: NO, YOUR HONOR. AS A MATTER OF FACT, ALL  
25 THAT, THE WAY WE SEE IT, MY --

1 THE COURT: I THINK THE CARRIERS AGREE WITH YOU IN THE  
2 REPLY. THE ISSUE HAS FOCUSED TO JUST THAT ONE PRECISE  
3 QUESTION, WHETHER OR NOT A PARTY, WHETHER OR NOT UTU HAS THE  
4 AUTHORITY TO DESIGNATE A REPRESENTATIVE PURSUANT TO ARTICLE 2  
5 THIRD.

6 MR. MILLER: RIGHT. I BELIEVE THAT THE CARRIERS ARE  
7 SEEKING INJUNCTIVE RELIEF FROM THE COURT TO ORDER UTU IN OUR  
8 CASE AND THE THREE GENERAL COMMITTEES IN THAT CASE TO ENGAGE IN  
9 THIS NATIONAL HANDLING, OR SO-CALLED NATIONAL HANDLING, BUT MY  
10 MOTION ON BEHALF OF UTU IS FOR SUMMARY JUDGMENT AND DISMISSAL  
11 AND LET THE ACT OPERATE THE WAY THAT WE SAY. TWO THIRD IS  
12 PLAIN ON ITS FACE THAT, AS A PARTY, WE HAVE A RIGHT TO  
13 DESIGNATE WHO WILL BE OUR REPRESENTATIVES IN THE EXECUTION OF  
14 OUR OBLIGATIONS UNDER THE ACT.

15 THE COURT: ALL RIGHT, AND THERE'S NOTHING IN YOUR  
16 INTERNAL CONSTITUTION THAT MANDATES THAT THE REPRESENTATIVE,  
17 PURSUANT TO 2 FOURTH, BE INDEED THE IDENTICAL REPRESENTATIVE  
18 PURSUANT TO 2 THIRD?

19 MR. MILLER: THAT'S CORRECT, YOUR HONOR, EXCEPT TO SAY  
20 THAT, UNDER 2 FOURTH AND 2 NINTH, UTU IS THE DULY DESIGNATED  
21 REPRESENTATIVE FOR PURPOSES OF THE ACT. 2 THIRD ADDRESSES --

22 THE COURT: AND THERE'S NOTHING THAT PRECLUDES THE  
23 BARGAINING REPRESENTATIVE FROM HAVING A BARGAINING AGENT.  
24 THAT'S YOUR ARGUMENT?

25 MR. MILLER: ABSOLUTELY, YOUR HONOR, BECAUSE THAT'S 2

1 THIRD. EACH PARTY GETS TO DESIGNATE WHO THEIR REPRESENTATIVES  
2 ARE, FREE FROM COERCION BY THE OTHER PARTY.

3 THE COURT: WELL, THEN, WHAT'S WRONG WITH THE  
4 CARRIERS' ARGUMENT THAT "YOU CAN HAVE WHOEVER YOU WANT TO  
5 REPRESENT YOU, AND WE'LL WELCOME THEM AT THE BARGAINING TABLE"?

6 MR. MILLER: BUT THAT WAS THE SAME THING THAT WE TRIED  
7 IN THE SOO LINE CASE, AND THE 8TH CIRCUIT REJECTED IT AS  
8 CUTTING IT TOO FINE. YOU'RE SITTING AT THE TABLE. YOU'RE IN  
9 NATIONAL HANDLING. WHETHER YOU HAVE DONALD DUCK OR BOB ALLEN,  
10 IT MAKES NO DIFFERENCE. YOU STILL GET TO THE SAME PLACE.  
11 YOU'RE NOT ALLOWED TO DO THAT BECAUSE YOU HAVE TO NEGOTIATE  
12 WITH WHOM THEY PICK, NOT WHOM YOU PICK.

13 THE COURT: ALL RIGHT, THANK YOU, COUNSEL.

14 MR. MILLER: THANK YOU, YOUR HONOR.

15 THE COURT: ALL RIGHT, I'LL GIVE THE CARRIERS AND THE  
16 COMMITTEES A FEW MINUTES.

17 I'M SORRY. I DIDN'T GIVE YOU A FEW MINUTES TO  
18 HIGHLIGHT ANY ADDITIONAL ARGUMENTS YOU WANT TO MAKE. I'M  
19 FAMILIAR WITH YOUR ARGUMENTS. IF THERE'S SOMETHING NEW YOU  
20 WISH TO ADDRESS.

21 MR. MILLER: YOUR HONOR, IT'S NOTHING NEW, BUT I  
22 DIDN'T REALLY EMPHASIZE IT IN MY REPLY AND I SAW THAT YOU  
23 PICKED UP ON IT, AND THAT'S THE BUSINESS ABOUT WE HAVE TO HAVE  
24 SYSTEM-WIDE REPRESENTATIVES.

25 THE COURT: THE CRAFT-REPRESENTATION ISSUE.

1 MR. MILLER: RIGHT.

2 THE COURT: THAT'S A VERY SIGNIFICANT ISSUE, ISN'T IT?

3 MR. MILLER: I DON'T THINK SO, YOUR HONOR, BECAUSE I  
4 THINK THAT THEY'RE TURNING THE ACT ON ITS HEAD. THERE'S NO  
5 QUESTION, UNDER 2 NINTH, THAT UTU IS THE REPRESENTATIVE OF THE  
6 SYSTEM-WIDE CRAFTS AND CLASSES.

7 THE COURT: INCLUDING...?

8 MR. MILLER: WELL, INCLUDING, PRINCIPALLY, FIREMEN --

9 THE COURT: THERE'S NO DISTINCTION BETWEEN CRAFTS AND  
10 CLASSES, IS THERE? WE TALKED ABOUT THAT AT THE LAST HEARING.  
11 I LEFT WITH THE IMPRESSION THAT THERE'S NOT A MAJOR  
12 DISTINCTION.

13 MR. MILLER: THAT'S NOT AN ISSUE IN THIS CASE.  
14 THERE'S NO QUESTION ABOUT THAT. BUT, YOUR HONOR, THE CASES  
15 THAT THEY CITE AND RELY UPON ARE NOT ABOUT THE ISSUES IN THIS  
16 CASE. THE CITATIONS ARE FROM THE NATIONAL MEDIATION BOARD, AND  
17 THEY ARE, MOST OF THEM ARE DETERMINATIONS MADE BY THE NATIONAL  
18 MEDIATION BOARD UNDER A THOROUGHLY DISCREDITED THEORY OF  
19 PERMITTING CARRIERS IN MERGER SITUATIONS AND THE BOARD ITSELF  
20 IN MERGER SITUATIONS TO INVOKE THE REPRESENTATION JURISDICTION  
21 OF THE BOARD, WHICH WAS CLEARLY REJECTED BY THE EN BANC PANEL  
22 OF THIS CIRCUIT IN 1994. THAT'S OUT.

23 MOREOVER, IT'S CLEAR FROM THAT DECISION AND FROM THE  
24 ACT ITSELF THE CARRIERS HAVE ABSOLUTELY NO ROLE IN THE HANDLING  
25 OF REPRESENTATION DISPUTES. THEY ARE NOT EVEN AFFORDED PARTY

1 STATUS WHEN A REPRESENTATION DISPUTE IS BEFORE THE NATIONAL  
2 MEDIATION BOARD, AND ALL OF THAT ARGUMENT THAT HE'S GOT THAT'S  
3 BASED UPON THE HANDLING OF REPRESENTATION DISPUTES IS JUST  
4 HOOEY, BECAUSE IT INTRODUCES AN ISSUE THAT THEY DON'T HAVE A  
5 CLAIM ON. THEY ARE NOT PARTIES TO ANY REPRESENTATION DISPUTE,  
6 AND THE DECISION OF THIS CIRCUIT EN BANC IN 1994 MADE THAT  
7 CLEAR, THAT THEY'RE OUT OF THAT, AND THAT WAS THE ONLY THING  
8 THAT I FELT I OUGHT TO EMPHASIZE ORALLY.

9 THE COURT: ALL RIGHT, THANK YOU.

10 YOU KNOW, BEFORE I START WITH THE CARRIERS AND THE  
11 COMMITTEES, MAYBE IT'S THE APPROPRIATE TIME TO GIVE YOU A  
12 COUPLE OF MINUTES JUST TO TAKE A LOOK AT THE SOO LINE CASE.  
13 SINCE WE'RE TALKING ABOUT SOO LINE NOW, AND I'LL GIVE YOU A  
14 COPY. I HAVE ANOTHER COPY. I'LL GIVE YOU ANOTHER COPY. THAT  
15 MEANS YOU HAVE FOUR COPIES. WE'LL GIVE YOU ONE MORE COPY OF  
16 SOO LINE. I'LL GIVE YOU A FEW MINUTES TO TAKE A LOOK AT THAT,  
17 AND WE'LL FOCUS ON THAT BRIEFLY.

18 (RECESS)

19 THE COURT: MR. MILLER, DID YOU WANT TO TAKE THE FIRST  
20 CRACK AT JLJDGE MURPHY'S OPINION? IS THAT THIS CASE OR NOT?

21 MR. MILLER: YES, YOUR HONOR, AND IT SAYS VIRTUALLY  
22 WHAT WE'RE ARGUING HERE --

23 THE COURT: RIGHT.

24 MR. MILLER: -- I BELIEVE, AND IT WASN'T MATERIALLY  
25 CHANGED BY THE CIRCUIT, EXCEPT THAT I DO BELIEVE, AND I WAS

1 JUST TAKING A LOOK AT THE 8TH CIRCUIT'S OPINION, THAT THE  
2 CIRCUIT BRUSHED AWAY THE INCONCLUSIVE TREATMENT BY THE DISTRICT  
3 COURT OF THE ISSUES THAT THE DISTRICT COURT TALKS ABOUT THAT --

4 THE COURT: EXCUSE ME ONE SECOND. I LEFT MY FILE.  
5 I'M SORRY. GO AHEAD.

6 MR. MILLER: WHERE THE COURT TALKS ABOUT SOO LINE'S  
7 RIGHT TO SELECT ITS BARGAINING REPRESENTATIVE THEREFORE DOES  
8 NOT RESOLVE THE QUESTION OF WHETHER IT'S OBLIGATED TO  
9 PARTICIPATE IN NATIONAL HANDLING. BUT THE 8TH CIRCUIT, ON THE  
10 LAST PAGE OF ITS OPINION, MADE IT CLEAR THAT ISN'T GOING TO BE  
11 THE CASE --

12 THE COURT: RIGHT.

13 MR. MILLER: -- WHEN THEY SAID, IN SUM, WE FIND THAT  
14 THE RAILROAD HAS NO DUTY UNDER THE RLA TO GIVE NOTICE TO  
15 NEGOTIATE ITS WITHDRAWAL OF A NATIONAL BARGAINING  
16 REPRESENTATIVE. THE RAILROAD HAS A STATUTORY RIGHT TO  
17 DESIGNATE ITS OWN REPRESENTATIVE, AND IT HAS NO OBLIGATION TO  
18 ACCEPT NATIONAL BARGAINING. IT IS NOT BOUND BY NATIONAL  
19 NEGOTIATION IN WHICH IT CHOOSES NOT TO PARTICIPATE.

20 SO, PUTTING THE TWO OF THEM TOGETHER, I THINK THAT IT  
21 IS THIS CASE, AND, FRANKLY, SO WAS THE GRAND TRUNK CASE, WHICH  
22 WAS DEALT WITH IN A MUCH MORE SUMMARY FASHION, BECAUSE IT  
23 REALLY ADOPTED, INCORPORATED AND RELIED UPON JUDGE LAY'S  
24 OPINION OF THE 8TH CIRCUIT IN THE SOO LINE CASE. BUT THAT'S  
25 WHAT WE'VE BEEN SAYING, YOUR HONOR, THAT THIS IS THE FIRST TIME

1 IN THIS CIRCUIT WHEN THIS PRISTINE ISSUE OF WHO IS THE  
2 APPROPRIATE REPRESENTATIVE OF A PARTY UNDER 2 THIRD HAS BEEN  
3 BEFORE THE COURT. IT WASN'T BEFORE THE COURT IN THE ATLANTIC  
4 COAST LINE CASE. IT WAS DICTA. THE LANGUAGE THERE IS DICTA,  
5 BECAUSE WHAT WAS AT ISSUE THERE WAS, WHAT ISSUES DO YOU HAVE TO  
6 HANDLE? IT WASN'T AT ISSUE IN THE DELAWARE & HUDSON CASE. THE  
7 ISSUE THERE WAS, IT DIDN'T HAVE A THING IN THE WORLD TO DO WITH  
8 WHO'S THE APPROPRIATE PARTY. IT'S WHETHER OR NOT THE UNION  
9 COULD SELECTIVELY STRIKE AFTER NATIONAL HANDLING. AND IN THE  
10 ALTON & SOUTHERN CASE, THERE YOU HAD THE PARTY, THE BROTHERHOOD  
11 OF MAINTENANCE OF WAY EMPLOYEES, JUST LIKE UTU HERE, SAYING,  
12 "WE'RE NOT GOING INTO NATIONAL HANDLING." THAT'S NOT THIS  
13 CASE. UTU AS A PARTY IS IN NATIONAL HANDLING, BUT UNDER ITS  
14 OWN INTERNAL ORGANIZATIONAL STRUCTURE, ITS CORRELATIVE RIGHT TO  
15 DESIGNATE ITS OWN REPRESENTATIVES, THREE OF THE GENERAL  
16 COMMITTEES OF ADJUSTMENT HAVE CHOSEN, AS IS THEIR RIGHT, TO OPT  
17 OUT OF NATIONAL HANDLING. WE SEE IT AS PRESENTING THE  
18 IDENTICAL ISSUE THAT WAS PRESENTED IN THE SOO LINE CASE AND IN  
19 THE GRAND TRUNK CASE.

20 AND AGAIN, YOUR HONOR, IF THE LAW AND 2 THIRD HAVE ANY  
21 SYMMETRY, IT HAS TO BE INTERPRETED SIMILARLY WITH RESPECT TO  
22 BOTH PARTIES. AND, YOUR HONOR, I ALWAYS FOUND IT AMAZING THAT  
23 THE CARRIER CAN ARGUE WHAT IT DOES ABOUT 2 THIRD. TWO THIRD  
24 AND 2 FOURTH AND 2 NINTH WERE PUT INTO THIS ACT IN 1934  
25 BECAUSE, NOT BECAUSE OF CONDUCT OF THE UNION, BUT BECAUSE OF

1 CONDUCT OF RAILROADS WHO WERE GOING AROUND AND REFUSING TO  
2 TREAT WITH THE DESIGNATED REPRESENTATIVE, AND THEY WERE  
3 CREATING THEIR OWN YELLOW-DOG RUMP UNIONS THAT THEY WERE  
4 NEGOTIATING WITH. TWO THIRD, 2 FOURTH, AND TWO NINTH WERE  
5 INTENDED TO DEAL WITH THAT ISSUE. IT WAS ESSENTIALLY -- AND  
6 MR. CLARKE DOES A NICE JOB IN GOING OVER THE TESTIMONY OF  
7 GEORGE HARRISON AND THE COMMISSIONER, EASTMAN, AT THAT TIME.

8 THE COURT: IT'S VERY INTERESTING.

9 MR. MILLER: SO THE CARRIERS WERE THE ONES WHO FIRST  
10 OBTAINED THE BENEFIT OF THIS RIGHT TO OPT OUT, BECAUSE, AS  
11 JUDGE LAY SAID AND AS JUDGE NELSON SAID TO ME IN THE 6TH  
12 CIRCUIT, THE STATUTE SAYS WHAT IT SAYS, AND IT SAYS THAT  
13 NEITHER PARTY SHALL INTERFERE WITH THE OTHER'S CHOICE OF  
14 REPRESENTATIVE. AND THAT'S ALL WE'RE ASKING FOR HERE, IS AN  
15 EVEN APPLICATION OF 2 THIRD, JUST AS IT WAS APPLIED FOR THE  
16 CARRIERS' BENEFIT IN THE 8TH AND 6TH CIRCUITS, NOW THAT THE  
17 ISSUE IS FINALLY PRISTINELY PRESENTED IN THIS DISTRICT AND IN  
18 THIS CIRCUIT, AND THAT THE DECISION BE MADE SIMILARLY.

19 THE COURT: ALL RIGHT, THANK YOU, COUNSEL.

20 YES, COUNSEL.

21 MR. MUNRO: THANK YOU, YOUR HONOR.

22 THE COURT: GOOD MORNING.

23 MR. MUNRO: GOOD MORNING.

24 THE COURT: WHAT ABOUT SOO LINE?

25 MR. MUNRO: I'M AFRAID I HAVE TO RESPECTFULLY DISAGREE

1 WITH MY COLLEAGUE, MR. MILLER. I DO NOT BELIEVE THAT THE SOO  
2 LINE CASE IS THIS CASE. IT'S IMPORTANT, YOUR HONOR, AND I  
3 THINK THE COURT WAS ON THE RIGHT TRACK WITH YOUR FIRST QUESTION  
4 TO MR. MILLER: WHO IS THE REPRESENTATIVE HERE? THE  
5 REPRESENTATIVE OF THE EMPLOYEES --

6 THE COURT: WELL, THE FIRST QUESTION IS: WHO'S THE  
7 PARTY? THE PARTIES ARE WHO? THE CARRIER AND (PAUSE) --

8 MR. MUNRO: AND THE EMPLOYEES, YOUR HONOR.

9 THE COURT: AND THE EMPLOYEES. AND NOT UTU?

10 MR. MUNRO: EXACTLY.

11 THE COURT: UTU IS NOT A PARTY. DOES THE CONSTITUTION  
12 OR DOES THE RLA SAY THAT? THE RLA DOESN'T DEFINE PARTIES AT  
13 ALL, DOES IT?

14 MR. MUNRO: IT DOESN'T DEFINE PARTIES, YOUR HONOR, BUT  
15 IT DOES DEFINE WHO THE RELEVANT PLAYERS ARE HERE. THERE ARE  
16 EMPLOYEES AND THERE ARE REPRESENTATIVES, AND IF YOU READ THE  
17 STATUTE, IT MUST BE SPEAKING OF EMPLOYEES WHEN IT TALKS ABOUT  
18 PARTIES IN 2 THIRD. IT SAYS IN SECTION 2 FOURTH, THE MAJORITY  
19 OF ANY CRAFT OR CLASS OF EMPLOYEES SHALL HAVE THE RIGHT TO  
20 DETERMINE WHO SHALL BE THE REPRESENTATIVE OF THE CRAFT OR  
21 CLASS.

22 THE COURT : RIGHT, BUT THAT'S, THEY'RE TALKING ABOUT  
23 THE 2 FOURTH REPRESENTATIVE, OR 2 NINTH.

24 MR. MUNRO: EXACTLY. IF YOU READ THAT AND THEN YOU  
25 LOOK BACK AT 2 THIRD, WHAT YOU SEE IS, IT SAYS, REPRESENTATIVES

1 SHALL BE DESIGNATED BY THE RESPECTIVE PARTIES WITHOUT  
2 INTERFERENCE OR COERCION. NOW, THAT COULD --

3 THE COURT: IT'S STRANGE THE WORD "PARTY" IS NOT  
4 DEFINED. AT LEAST I'VE NOT BEEN ABLE TO FIND A DEFINITION OF  
5 PARTY.

6 MR. MUNRO: IT IS NOT, YOUR HONOR, BUT I BELIEVE THAT  
7 THE ONLY WAY TO READ THOSE TWO SECTIONS CONSISTENTLY IS TO SAY  
8 THAT THE EMPLOYEES ARE PARTIES, BECAUSE, YOUR HONOR, AS YOU  
9 POINTED OUT, OTHERWISE YOU'RE FORCED TO THINK THAT THE  
10 BARGAINING REPRESENTATIVE SHALL CHOOSE THE BARGAINING  
11 REPRESENTATIVE, AND THAT JUST DOESN'T MAKE ANY SENSE, YOUR  
12 HONOR, ESPECIALLY IN LIGHT OF 2 FOURTH'S LANGUAGE THAT IT IS  
13 THE MAJORITY OF THE EMPLOYEES THAT CHOOSES THE REPRESENTATIVE.  
14 IF THAT'S THE CASE, THEN WHAT 2 THIRD IS SAYING IS THAT THAT 2  
15 FOURTH CHOICE OF A REPRESENTATIVE SHALL BE MADE WITHOUT  
16 INTERFERENCE. THAT'S ALL IT'S SAYING. SO THE EMPLOYEES ARE  
17 THE PARTY HERE, YOUR HONOR.

18 NOW, THAT SORT OF STRUCTURE --

19 THE COURT: WELL, YOU MAY BE CORRECT, BECAUSE REplete  
20 THROUGHOUT THIS RLA, I MEAN, THERE ARE ONLY REFERENCES EITHER  
21 TO THE CARRIER OR TO WHAT? EMPLOYEES.

22 MR. MUNRO: EXACTLY, YOUR HONOR.

23 THE COURT: AND NOT THE BARGAINING AGENT.

24 MR. MUNRO: IT'S ALMOST TOO COMPLICATED TO FOLLOW MR.  
25 MILLER'S ARGUMENT. THERE ARE EMPLOYEES AND THEIR

1 REPRESENTATIVES. TO SAY THAT THE REPRESENTATIVE IS CHOOSING A  
2 REPRESENTATIVE JUST DOESN'T MAKE ANY SENSE.

3 THE COURT: WELL, UNLESS THE BARGAINING REPRESENTATIVE  
4 IS INDEED THE PARTY. I MEAN, WHY CAN'T THAT BE THE CASE,  
5 THOUGH? THE EMPLOYEES BAND TOGETHER TO APPOINT SOMEONE TO  
6 SPEAK FOR THEM. THEY WANT SOMEONE TO GET THE BEST DEAL FOR  
7 THEM.

8 MR. MUNRO: THEY HAVE, YOUR HONOR.

9 THE COURT: RIGHT, AND IT'S THE BARGAINING  
10 REPRESENTATIVE. BUT THE BARGAINING REPRESENTATIVE, FOR  
11 WHATEVER REASONS, DETERMINES THAT IT'S MORE APPROPRIATE TO HAVE  
12 GENERAL COMMITTEES ADVOCATE FOR PURELY LOCAL ISSUES AT NATIONAL  
13 HANDLING AND LET THE GENERAL COMMITTEES NEGOTIATE FOR  
14 THEMSELVES. WHAT'S, I MEAN, WHAT'S WRONG WITH THAT?

15 MR. MUNRO: BECAUSE, YOUR HONOR, THE EMPLOYEES ARE  
16 ONLY ENTITLED TO ONE REPRESENTATIVE.

17 THE COURT: SAYS WHO?

18 MR. MUNRO: SAYS THE RAILWAY LABOR ACT, YOUR HONOR.

19 THE COURT: WHERE DOES IT SAY THAT?

20 MR. MUNRO: IT SAYS THE MAJORITY OF ANY CRAFT OR CLASS  
21 SHALL HAVE A RIGHT TO DETERMINE WHO SHALL BE THE REPRESENTATIVE  
22 OF THE CRAFT OR CLASS.

23 THE COURT: WHERE ARE YOU READING FROM?

24 MR. MUNRO: SECTION 2 FOURTH, YOUR HONOR. THE SAME  
25 LANGUAGE APPEARS IN SECTION 2 NINTH, AND IT'S CLEAR, AND

1 COMMISSIONER EASTMAN, THE TESTIMONY THAT MR. CLARKE RELIES ON,  
2 IS CLEAR, IS CRYSTAL-CLEAR, THAT THE RAILWAY LABOR ACT  
3 CONTEMPLATES A SINGLE, SYSTEM-WIDE REPRESENTATIVE, AND I DON'T  
4 THINK THERE CAN BE ANY DEBATE ABOUT THAT, YOUR HONOR. THE  
5 NATIONAL MEDIATION BOARD OPINIONS ARE ABSOLUTELY CLEAR ON THAT  
6 AS WELL. THEY'RE ONLY ENTITLED TO ONE REPRESENTATIVE, YOUR  
7 HONOR, AND THEY HAVE PICKED IT. THEY ADMIT IT. THEY PICKED  
a THE UTU IN THIS CASE. THAT IS THEIR REPRESENTATIVE.

9 THE COURT: SO THAT PRECLUDES REPRESENTATION BY THE  
10 UTU IN CONJUNCTION WITH THE GENERAL COMMITTEES UNDER 2 THIRD,  
11 THEN?

12 MR. MUNRO: THE GENERAL COMMITTEES, YOUR HONOR, ARE  
13 THE UTU. THEY'RE DERIVATIVE OF THE UTU. ANY AUTHORITY OR  
14 POWER OR BARGAINING RIGHTS THAT THE GENERAL COMMITTEES HAVE ARE  
15 ENTIRELY DERIVATIVE OF THE UTU. SO WHEN THEY SAY, "WE'VE  
16 SELECTED THE GENERAL COMMITTEES AS OUR BARGAINING  
17 REPRESENTATIVE," THEY'RE REALLY JUST SAYING THAT "WE SELECTED A  
1a BARGAINING REPRESENTATIVE." IT'S SORT OF HYDRA-HEADED. IT'S  
19 SORT OF MULTIPLE SPOKESMEN, AND THEY'RE ENTITLED TO DO THAT,  
20 YOUR HONOR. THEY ARE ENTITLED TO SAY, "WE WANT TO SELECT A  
21 BARGAINING REPRESENTATIVE," THE UTU, THAT HAS THAT SORT OF  
22 MULTIFACETED STRUCTURE, BUT NEVERTHELESS --

23 THE COURT: BUT IF YOUR ARGUMENT IS CORRECT, IT MEANS  
24 THAT IN ALL BARGAINING CASES THE EMPLOYEES WOULD HAVE NO CHOICE  
25 AT ALL BUT TO HAVE ITS DULY APPOINTED BARGAINING REPRESENTATIVE

1 BARGAIN FOR THE EMPLOYEES IN ALL CASES.

2 MR. MUNRO: ABSOLUTELY, YOUR HONOR. THEY HAVE TO.

3 THE COURT: WELL, THERE'S NO NEED FOR 2 THIRD, THEN.

4 MR. MUNRO: NO, YOUR HONOR. WHAT 2 THIRD PROTECTS IS  
5 THEIR RIGHT TO CHOOSE A REPRESENTATIVE FREE OF COERCION. IT  
6 DOESN'T SAY THAT THEY CAN CHOOSE ANY REPRESENTATIVE OF  
7 WHATEVER, YOU KNOW, WITH LIMITED AUTHORITY OR --

8 THE COURT: BUT 2 THIRD, YOU'RE NOT ASKING ME TO READ  
9 2 THIRD TO MEAN THAT THE REPRESENTATIVE CHOSEN BY THE EMPLOYEES  
10 MUST BE THE DULY APPOINTED BARGAINING REPRESENTATIVE, ARE YOU?

11 MR. MUNRO: WELL, IN ESSENCE, IT HAS TO BE, YOUR  
12 HONOR, BECAUSE EVEN THEN --

13 THE COURT : WELL, THEN THE EMPLOYEES NEVER HAVE A  
14 CHOICE. TWO THIRD IS MEANINGLESS, THEN. WHY HAVE 2 THIRD?  
15 THAT'S WHY I WAS ASKING THE QUESTION. TWO FOURTH PUTS IN PLACE  
16 THE BARGAINING REPRESENTATIVE FOR THE UNIONS. CORRECT?

17 MR. MUNRO : CORRECT.

18 THE COURT: WHY HAVE A 2 THIRD THAT PERTAINS TO  
19 EMPLOYEES IF 2 THIRD, ACCORDING TO YOU, MEANS THAT THE PARTY  
20 APPOINTED OR REPRESENTED BY THE EMPLOYEES MUST ALWAYS BE THE  
21 BARGAINING REPRESENTATIVE? IT'S MEANINGLESS.

22 MR. MUNRO: NO, YOUR HONOR.

23 THE COURT: IT DOESN'T GIVE THEM A CHOICE.

24 MR. MUNRO: I'M SORRY, YOUR HONOR. IT DOES. WHAT 2  
25 FOURTH MEANS IS THAT IT'S THE MAJORITY THAT SELECTS A SINGULAR

1 REPRESENTATIVE.

2 THE COURT: RIGHT.

3 MR. MUNRO: TWO THIRD MAKES IT CLEAR THAT YOU CAN'T  
4 HAVE THESE SORTS OF YELLOW-DOG UNIONS THAT MR. MILLER WAS  
5 SPEAKING ABOUT EARLIER. IT SAYS THAT THAT CHOICE, THAT 2  
6 FOURTH CHOICE BY THE EMPLOYEES, SHALL BE PROTECTED; YOU CAN'T  
7 INTERFERE OR COERCE THE EMPLOYEES INTO SELECTING A CERTAIN KIND  
8 OF REPRESENTATIVE. NOW, I'M NOT SUGGESTING THAT THE EMPLOYEES'  
9 SPOKESMAN, THE PERSON WHO SHOWS UP TO THE BARGAINING SESSION,  
10 HAS TO BE THE UTU IN SOME SORT OF GENERAL CORPORATE SENSE. I  
11 MEAN, ULTIMATELY, YOU HAVE TO TALK AT THE BARGAINING TABLE  
12 THROUGH AN INDIVIDUAL.

13 THE COURT: THAT'S WHAT WE'RE TALKING ABOUT HERE,  
14 THOUGH. THAT'S EXACTLY WHAT WE'RE TALKING ABOUT. THAT'S ALL  
15 THEY'RE TALKING ABOUT: "WE WANT TO BE ABLE TO IDENTIFY THE  
16 PEOPLE TO REPRESENT US AT THE TABLE." SO WE'RE IN AGREEMENT ON  
17 THAT.

18 MR. MUNRO: ABSOLUTELY, YOUR HONOR, AND THEY WANT TO  
19 SEND THE UTU, BUT THEY WANT TO SEND THE UTU IN THE FORM OF  
20 MULTIPLE GENERAL COMMITTEES. AND, YOUR HONOR, WE'RE NOT  
21 OBJECTING TO THAT. WE'RE NOT SAYING YOU CAN'T BARGAIN THROUGH  
22 THE UTU. YOU CAN'T BARGAIN THROUGH THE GENERAL COMMITTEES.

23 BUT THE PROBLEM IS, YOUR HONOR, THAT WHAT THEY'RE  
24 SUGGESTING IS THAT THEIR RIGHT TO SELECT, TO IDENTIFY A  
25 REPRESENTATIVE ALLOWS THEM TO THEN CHOOSE NOT TO BARGAIN

1       NATIONALLY, AND THAT, YOUR HONOR, IS OVERRULING ATLANTIC COAST  
2       LINE.    AND THE REASON WHY THE SOO LINE CASE DOESN'T APPLY HERE,  
3       THE REASON WHY IT IS NOT ANALOGOUS TO THIS CASE IS BECAUSE OF  
4       WHO THE PLAYERS ARE.

5                THE COURT:    WHY CAN'T THEY BARGAIN NATIONALLY WITH  
6       THEIR OWN REPRESENTATIVE, SOMEONE OTHER THAN UTU?

7                MR. MUNRO:    BECAUSE THEY'VE SELECTED THE UTU AND THE  
8       UTU IS THEIR DULY DESIGNATED REPRESENTATIVE, YOUR HONOR.    THE  
9       UTU IS COMPOSED OF GENERAL COMMITTEES, AND THOSE COMMITTEES CAN  
10      COME AND BARGAIN NATIONALLY.    WE TALKED ABOUT THIS LAST TIME.  
11      WHEN MR. MILLER SAYS THAT THE 8TH CIRCUIT SAID THAT JUST SAYING  
12      THAT DONALD DUCK CAN COME IS NOT GOOD ENOUGH, WELL, I SUBMIT  
13      THAT IT IS, YOUR HONOR, BECAUSE WHEN THE GENERAL COMMITTEES  
14      COME TO THE NATIONAL BOARD, IF THEY ALL COME TOGETHER WITH  
15      AUTHORITY TO BARGAIN FOR EITHER A NATIONAL AGREEMENT OR LOCAL  
16      AGREEMENT, OR SOME COMBINATION OF THE TWO, THAT FULFILLS THEIR  
17      OBLIGATIONS UNDER BOTH 2 THIRD AND 2 FIRST, YOUR HONOR.  IN  
18      OTHER WORDS, ATLANTIC COAST LINE AND SECTION 2 THIRD ARE NOT  
19      INCONSISTENT.    YOU DON'T HAVE TO SAY THAT SECTION 2 THIRD  
20      TRUMPS IT.

21               THE COURT:    WELL, ATLANTIC COAST LINE DIDN'T ADDRESS  
22      AT ALL 2 THIRD.

23               MR. MUNRO:    THAT'S CORRECT, YOUR HONOR.

24               THE COURT:    RIGHT, AND SO I'M WRITING ON A CLEAN  
25      SLATE.    THE QUESTION IS WHETHER I SHOULD ACCORD SOME DEFERENCE

1 TO JUDGE HOGAN'S OPINION. THAT'S THE ONLY QUESTION. IT'S NOT  
2 BINDING ON ME.

3 MR. MUNRO: WITH RESPECT, YOUR HONOR, THE ISSUE IS  
4 WHETHER ATLANTIC COAST LINE SURVIVES, BECAUSE THEIR SECTION 2  
5 THIRD ARGUMENT REQUIRES OVERRULING. IF I CAN EXPLAIN WHY, YOUR  
6 HONOR. WHAT THEY'RE SAYING IS THAT THE SECTION 2 THIRD RIGHT  
7 TO SELECT A REPRESENTATIVE, THE IDENTITY OF THAT  
8 REPRESENTATIVE, THEY'RE SAYING, "WE DON'T WANT THE NATIONAL  
9 REPRESENTATIVE. WE WANT OTHER PEOPLE." IF THAT WERE THE CASE,  
10 WHAT THAT WOULD MEAN IS, SO LONG AS YOU CHOOSE LOCAL  
11 REPRESENTATIVES, YOU DON'T HAVE TO ENGAGE IN NATIONAL HANDLING.  
12 EVEN, YOUR HONOR, AND THIS IS THE KEY POINT --

13 THE COURT: I DON'T UNDERSTAND THAT TO BE THE CASE,  
14 THOUGH. WHY CAN'T YOU CHOOSE LOCAL REPRESENTATIVES AND GIVE  
15 THEM A MANDATE TO PARTICIPATE IN NATIONAL HANDLING? WHY ARE  
16 THEY NECESSARILY INCONSISTENT?

17 MR. MUNRO: THEY'RE NOT, YOUR HONOR, AND THAT'S MY  
18 POINT. IF YOU SAY THAT SECTION 2 THIRD TRUMPS ATLANTIC COAST  
19 LINE, THAT IT'S AN EXCEPTION TO ATLANTIC COAST LINE, WHAT  
20 YOU'RE REALLY SAYING IS --

21 THE COURT: WELL, SECTION 2 THIRD WASN'T ADDRESSED BY  
22 ATLANTIC COAST LINE. IT'S NOT PRECEDENT FOR WHAT WE'RE TALKING  
23 ABOUT TODAY. THIS IS A NEW ISSUE IN THIS JURISDICTION, WHETHER  
24 OR NOT A PARTY CAN SELECT A REPRESENTATIVE PURSUANT TO 2 THIRD.  
25 THAT WASN'T ADDRESSED BY ATLANTIC COAST LINE AT ALL. IF IT

1 WAS, TELL ME WHERE IT WAS. I'VE READ IT A NUMBER OF TIMES. IT  
2 WASN'T.

3 MR. MUNRO: THE ANSWER TO THE SECTION 2 THIRD --

4 THE COURT: ATLANTIC COAST LINE WAS ABOUT NATIONAL  
5 HANDLING.

6 MR. MUNRO: ABSOLUTELY, YOUR HONOR.

7 THE COURT: AND THAT'S DIFFERENT FROM WHAT WE HAVE  
8 BEFORE THIS COURT, ISN'T IT?

9 MR. MUNRO: LET ME TRY COMING AT IT THIS WAY.

10 THE COURT: NO. IN YOUR REPLY BRIEF, YOU SAID THE  
11 ONLY ISSUE BEFORE THIS COURT IS WHETHER OR NOT UTU HAS THE  
12 AUTHORITY TO SELECT A REPRESENTATIVE PURSUANT TO 2 THIRD.  
13 THAT'S WHAT YOU SAID. RIGHT?

14 MR. MUNRO: I THINK THAT THAT, THAT A KEY PART OF THIS  
15 CASE TURNS ON THAT QUESTION, YOUR HONOR, BUT --

16 THE COURT: THAT'S WHAT YOU SAID, THOUGH, THE ONLY  
17 ISSUE. YOU WERE EMPHATIC, THE ONLY ISSUE, IN YOUR REPLY BRIEF,  
18 THE ONLY ISSUE BEFORE THE COURT, AND I'LL GET IT.

19 MR. MUNRO: GIVEN THAT THEY HAVE --

20 THE COURT: JUST A MINUTE, JUST A MINUTE.

21 I BELIEVE IT'S IN YOUR REPLY BRIEF TO -- IT'S IN THE  
22 MOST RECENTLY FILED REPLY BRIEF. LET ME FIND THAT.

23 MAYBE IT'S NOT YOUR REPLY BRIEF. MAYBE IT'S IN YOUR  
24 PRINCIPAL SUBMISSION.

25 MR. MUNRO: YOUR HONOR, I'M WILLING TO CONCEDE THAT

1 THE SECTION 2 THIRD POINT IS CRITICAL HERE --

2 THE COURT: ALL RIGHT.

3 MR. MUNRO: -- BUT THE REASON IT IS --

4 THE COURT: IT'S IN YOUR SUPPLEMENTAL MEMORANDUM OF  
5 POINTS AND AUTHORITIES, AND IN YOUR INTRODUCTION, PAGE 1, THE  
6 ISSUE IN THIS CASE IS WHETHER UTU, THE EXCLUSIVE DULY  
7 DESIGNATED REPRESENTATIVE OF THE CARRIERS' EMPLOYEES, IS  
8 OBLIGATED TO ENGAGE IN COLLECTIVE BARGAINING ON BEHALF OF THE  
9 EMPLOYEES AND WHETHER IT HAS THE AUTHORITY TO SELECT A  
10 REPRESENTATIVE. THAT'S IT. IF I WERE TO SAY THAT THE UTU AS A  
11 PARTY HAS A RIGHT TO APPOINT A REPRESENTATIVE PURSUANT TO 2  
12 THIRD, THEN THAT WOULD, OF COURSE, MEAN THAT I WOULD DENY YOUR  
13 REQUEST FOR -- WELL, WHAT IS THE RELIEF THAT YOU'RE ASKING ME  
14 TO GRANT? WHAT IS THE PRECISE RELIEF?

15 MR. MUNRO: WE'RE ASKING FOR DECLARATORY AND  
16 INJUNCTIVE RELIEF REQUIRING NATIONAL HANDLING OF THE CURRENT  
17 SECTION 6 NOTICES, YOUR HONOR.

18 THE COURT: ALL RIGHT.

19 MR. MUNRO: NOW, THE REASON -- LET ME TRY IT THIS WAY.  
20 THE REASON WHY --

21 THE COURT: BUT YOU'VE JUST TOLD ME, THOUGH, THAT THEY  
22 HAVE A LOCAL REPRESENTATIVE WHO CAN PARTICIPATE IN NATIONAL  
23 HANDLING. SO I'M GRANTING YOUR RELIEF. IF I SAY THEY HAVE THE  
24 AUTHORITY TO APPOINT A REPRESENTATIVE PURSUANT TO 2 THIRD AND  
25 ORDER THEM TO PARTICIPATE IN NATIONAL HANDLING, WHAT'S WRONG

1 WITH THAT CONCLUSION?

2 MR. MUNRO: THAT'S PERFECTLY FINE, YOUR HONOR. THEY  
3 CAN APPOINT WHATEVER REPRESENTATIVE THEY WANT, BUT WHOEVER THAT  
4 REPRESENTATIVE IS HAS TO PARTICIPATE IN NATIONAL HANDLING.  
5 THIS IS THE POINT. THE TWO ARE CONSISTENT, YOUR HONOR. YOU  
6 CAN HAVE A SECTION 2 THIRD RIGHT AND STILL HAVE OBLIGATORY  
7 NATIONAL HANDLING. AND THE REASON, YOUR HONOR, WHICH I'M  
8 AFRAID I WAS UNCLEAR ABOUT LAST TIME, AND I APOLOGIZE TO THE  
9 COURT FOR THAT, IS THAT JUST BECAUSE THE CARRIERS ARE INSISTING  
10 ON A NATIONAL AGREEMENT, JUST BECAUSE THEY WANT A NATIONAL  
11 AGREEMENT, IF THEY CHOOSE A COLLECTION OF LOCAL REPRESENTATIVES  
12 AND WE SAY THEY HAVE TO COME TO NATIONAL HANDLING AND IT'S  
13 OBLIGATORY, THEY'RE STILL ENTITLED TO BARGAIN FOR LOCAL  
14 AGREEMENTS.

15 THE COURT: MR. MILLER, WHAT WOULD BE WRONG WITH THAT  
16 DIRECTIVE, YOU HAVE THE AUTHORITY TO APPOINT YOUR  
17 REPRESENTATIVES AND PARTICIPATE IN NATIONAL HANDLING?

18 MR. MILLER: YOUR HONOR, THERE'S A PRACTICAL PROBLEM  
19 WITH IT, BECAUSE THE NATIONAL NEGOTIATING COMMITTEES REACHED A  
20 TENTATIVE AGREEMENT WITH THESE CARRIERS AND THESE THREE GENERAL  
21 COMMITTEES HAVE NOT. MOREOVER, IT UTTERLY --

22 THE COURT: BUT THAT CAN BE RESOLVED IF THEY GO BACK  
23 TO THE BARGAINING TABLE, CAN'T IT?

24 MR. MILLER: WELL, THEY'D BE GOING BACK TO THE  
25 BARGAINING TABLE WITH THREE PEOPLE THEY DON'T WANT TO.

1 THE COURT: BUT THAT'S ALL RIGHT. IF I GIVE YOU THE  
2 RELIEF YOU'RE SEEKING, WHICH IS ONLY THE AUTHORITY TO APPOINT  
3 YOUR OWN REPRESENTATIVES TO REPRESENT YOU AT NATIONAL HANDLING,  
4 IT JUST MEANS THAT THEY WORK OVER THE HOLIDAYS AND TRY TO REACH  
5 AGREEMENT TO DO WHAT? AVOID STRIKES, WHICH IS ALL THE RLA IS  
6 ABOUT.

7 MR. MILLER: I THINK, YOUR HONOR, I'D PROBABLY BETTER  
8 LET MR. CLARKE DEAL WITH THAT, BECAUSE HE REPRESENTS THE  
9 GENERAL COMMITTEES, BECAUSE IT AFFECTS THEM.

10 THE COURT: I'M JUST INTERESTED IN THE ANSWER TO THIS.  
11 THE PODIUM IS BIG ENOUGH FOR THREE LAWYERS.

12 MR. MILLER: IT ALSO FAILS TO -- IT REWRITES THE UTU  
13 CONSTITUTION. I MEAN, THE UTU CONSTITUTION IS WHAT IT IS. WE  
14 COME TO THE TABLE AS A REPRESENTATIVE WITH AN INTERNAL  
15 ORGANIZATIONAL STRUCTURE. THIS ISN'T LIKE THAT AIRLINE CASE  
16 THAT HE CITED WHERE THERE WAS A PROVISION WHICH SAYS YOU CANNOT  
17 AGREE TO A CREW OF LESS THAN THREE ON AN AIRPLANE. WE'RE NOT  
18 THROWING ANYTHING OUT ON SUBSTANTIVE NEGOTIATIONS, BUT WE HAVE  
19 A STRUCTURE WE'RE ENTITLED TO AND THAT WE'VE HAD FOR YEARS AND  
20 YEARS.

21 THE COURT: I UNDERSTAND WHAT YOU'RE ASKING FOR.

22 WHAT WOULD BE WRONG WITH THAT DIRECTIVE, MR. CLARKE?

23 MR. CLARKE: YOUR HONOR, IF I CAN GO BACK A SECOND.

24 THE COURT: SURE.

25 MR. CLARKE: IF YOU NOTICED, IN THE SOO LINE CASE, I

1 WAS COUNSEL BEFORE JUDGE MURPHY.

2 THE COURT: YES, I NOTICED.

3 MR. CLARKE: MY FIRM ALSO HANDLED IT IN THE COURT OF  
4 APPEALS, AND AT THAT TIME WE WERE TAKING THE SAME POSITION THAT  
5 THE CARRIERS ARE TAKING: WHAT'S THE PROBLEM WITH HAVING SOO  
6 LINE SIT AT THE NATIONAL TABLE SO WE CAN NEGOTIATE THIS  
7 NATIONAL AGREEMENT? NOW, I GUESS IT'S ONE OF THESE THINGS  
8 WHERE WE BECOME WISER AFTER LOSING THE CASE, BUT WHAT HAS  
9 OCCURRED WHEN WE LOOK AT THIS IS, THE TWO ARE INCOMPATIBLE, AND  
10 THIS IS WHAT THIS WHOLE THING IS ABOUT. THIS IS WHY THE 8TH  
11 CIRCUIT WENT TO 2 THIRD AND CENTERED ON 2 THIRD, AND NEVER  
12 LOOKED AT JUDGE MURPHY'S ANALYSIS OF THE PRACTICAL  
13 APPROPRIATENESS OR THE 2 THIRD ANALYSIS.

14 WE'VE AGREED THROUGHOUT THIS THAT 2 FIRST IS AN  
15 ELEMENT THAT THE COURT HAS TO LOOK AT, BUT THE PROBLEM THAT YOU  
16 HAVE IS, IF YOU TAKE AND REQUIRE AN ORGANIZATION OR GROUPS OF  
17 PEOPLE WHO REPRESENT DIFFERENT GROUPS AND REQUIRE THEM TO  
18 PARTICIPATE IN A NATIONAL-BARGAINING SETTING, WHAT YOU'RE  
19 REQUIRING IS THAT THEY NEGOTIATE TOWARDS A SINGLE AGREEMENT,  
20 AND YOU CANNOT, UNDER DELAWARE & HUDSON AND THE LAW THAT'S BEEN  
21 DEVELOPED QUITE EXTENSIVELY ON THIS CONCEPT UNDER THE NATIONAL  
22 LABOR RELATIONS ACT, ONE CARRIER, ONE COMPANY, ONE UNION, ONE  
23 REPRESENTATIVE, NO MATTER WHO IT IS, CANNOT REFUSE TO ENTER  
24 INTO THE SINGLE AGREEMENT BECAUSE THEY HAVE AN ISSUE THAT'S  
25 UNIQUE TO THEM THAT THEY WANT TO HANDLE.

1 THE COURT: SO, IN OTHER WORDS, YOU HAVEN'T  
2 ACCOMPLISHED ANYTHING, THEN, IF I SAY YOU HAVE THE AUTHORITY TO  
3 APPOINT A REPRESENTATIVE TO PARTICIPATE IN NATIONAL HANDLING,  
4 BECAUSE THEN THE DIRECTIVE IS TO AGREE TO ENTER INTO ONE  
5 AGREEMENT. CORRECT?

6 MR. CLARKE: THAT'S CORRECT.

7 THE COURT: AND THE WHOLE PURPOSE FOR SPLINTERING OFF  
8 THIS CASE IS TO NEGOTIATE A BETTER AGREEMENT FOR LOCAL ISSUES.  
9 IS THAT CORRECT?

10 MR. CLARKE: THAT'S CORRECT, YOUR HONOR, AND THE OTHER  
11 PROBLEM IS, YOU HAVE TO AS A PRACTICAL MATTER AND AS A LEGAL  
12 MATTER.

13 THE COURT: THAT'S WHAT THE 8TH CIRCUIT SAID,  
14 ESSENTIALLY: LET THE CHIPS FALL WHERE THEY MAY, IF INDEED IT  
15 RESULTS IN SINGULAR AGREEMENTS. I THINK IT'S THE 8TH CIRCUIT.

16 MR. CLARKE: IT IS, YOUR HONOR. THEY SPECIFICALLY  
17 SAID IT LOOKS LIKE THE UNIONS ARE STARTING TO SPLINTER, BUT THE  
18 UNIONS HAVE A RIGHT TO STAY TOGETHER AND INSIST ON A SINGLE  
19 AGREEMENT. THE PROBLEM IS, IF YOU DESIGNATE, YOU REQUIRE THE  
20 PEOPLE TO SIT AT THE NATIONAL TABLE, WHAT YOU'RE REQUIRING IS  
21 THAT THEY GIVE TO A CENTRAL BARGAINER THE AUTHORITY. YOU HAVE  
22 TO, IN A SENSE, DESIGNATE PART OR ALL OF YOUR RESPONSIBILITY TO  
23 SOMEONE TO BARGAIN.

24 AND IF I MIGHT ADD ONE THING.

25 THE COURT: SO THEY CANNOT BE A COG IN THE BARGAINING

1 PROCESS AT ALL, THEN. THEY HAVE TO AT SOME POINT CAVE IN OR  
2 RELINQUISH, NOT "CAVE IN," RELINQUISH THEIR BARGAINING  
3 OBJECTIVES.

4 MR. CLARKE: THAT'S CORRECT, YOUR HONOR.

5 THERE'S ONE THING. WE KEEP TALKING ABOUT THE UTU AS  
6 BEING THE NEGOTIATOR AT THE NATIONAL NEGOTIATIONS. THAT'S NOT  
7 CORRECT. IF YOU LOOK AT THE UTU CONSTITUTION, THE GENERAL, THE  
8 DISTRICT --

9 THE COURT: THERE ARE NATIONAL NEGOTIATORS THAT  
10 NEGOTIATE FOR UTU.

11 MR. CLARKE: WELL, NO. THEY'RE NEGOTIATING FOR THE  
12 GENERAL COMMITTEES THAT HAVE JOINED TOGETHER TO PARTICIPATE IN  
13 THE NATIONAL WAGE-AND-RULE MOVEMENT.

14 THE COURT: ALL RIGHT.

15 MR. CLARKE: THEY'RE NOT NEGOTIATING FOR THE UTU  
16 INTERNATIONAL. NOW, THERE IS A SIMILARITY BETWEEN THE  
17 OFFICERS, AND MR. MILLER CAN CORRECT ME IF I'M WRONG ON THIS.  
18 THERE IS A SIMILARITY BETWEEN THE NATIONAL OFFICERS, BUT THE  
19 NATIONAL NEGOTIATING COMMITTEE IS ALSO MADE UP OF DESIGNATES BY  
20 THE GENERAL COMMITTEES, THE GENERAL COMMITTEES, THE RAIL,  
21 DISTRICT 1 RAIL SELECTING THE NATIONAL NEGOTIATORS, AND IF I'M  
22 NOT MISTAKEN, THE CHIEF NEGOTIATOR WAS BRIAN MILLER.

23 IS THAT CORRECT?

24 MR. MILLER: THAT'S CORRECT.

25 MR. CLARKE: WHO IS NOT THE UTU REPRESENTATIVE.

1 MR. MILLER: MY RECOLLECTION IS THAT, ONCE THE  
2 DISTRICT 1 CHAIRMEN OF THE RAILROADS IN THE UNITED STATES  
3 DECIDE THEY'RE GOING TO DO A CONCERTED WAGE-AND-RAIL MOVEMENT,  
4 THE INTERNATIONAL PRESIDENT APPOINTS THE NATIONAL NEGOTIATING  
5 COMMITTEE, AND THAT COMMITTEE IS CLOAKED WITH ALL THE AUTHORITY  
6 OF UTU AND, INTERNALLY, THE GENERAL COMMITTEES THAT ARE  
7 PARTICIPATING IN A CONCERTED WAGE-AND-RULE MOVEMENT.

8 YOUR HONOR, THIS WON'T SOUND THE DEATH KNELL OF  
9 ATLANTIC COAST LINE. ATLANTIC COAST LINE STILL LIVES WITH  
10 RESPECT TO WHAT ISSUES ARE PRACTICALLY APPROPRIATE AND  
11 HISTORICALLY HAVE BEEN HANDLED.

12 THE COURT: FOR NATIONAL BARGAINING.

13 MR. MILLER: CORRECT, YOUR HONOR, BUT THE CARRIER  
14 RAISES THIS HORRIBLE SITUATION WHERE IT'S JUST GOING TO DIE  
15 FLAT. YOU KNOW, WHAT'S TO STOP ALL THE COMMITTEES FROM DOING  
16 IT? WELL, I WOULD SAY, YOUR HONOR, IT WOULD BE A FEDERAL  
17 DISTRICT COURT. IF 95 PERCENT OF THE GENERAL COMMITTEES WERE  
18 TO SAY, "WE'RE OPTING OUT," THAT'S A DIFFERENT CASE THAN WHAT  
19 WE HAVE HERE. AND IF EVIDENCE WAS PRESENTED THAT IT WAS PART  
20 OF A CONCERTED ACTIVITY TO END-RUN THE OBLIGATIONS OF 2 FIRST  
21 AND THE ATLANTIC COAST LINE CASE, A COURT COULD RIGHTLY GRANT  
22 INJUNCTIVE RELIEF.

23 BUT WE DON'T HAVE THAT. WE HAVE THREE GENERAL  
24 COMMITTEES WHO FOLLOWED THE RULES INTERNALLY OF THE PARTIES TO  
25 THE NEGOTIATION, UTU. IF ANYBODY TRIES TO PLAY GAMES LIKE THE

1 BROTHERHOOD OF MAINTENANCE OF WAY TRIED TO PLAY GAMES BY THEIR  
2 INTERNATIONAL SAYING, "NO, WE'RE NOT GOING INTERNATIONAL THIS  
3 TIME," THEN A DISTRICT COURT CAN GRANT RELIEF, BECAUSE THAT  
4 WOULD BE RUNNING AFOUL OF THAT 2 FIRST OBLIGATION TO EXERT  
5 EVERY REASONABLE EFFORT TO MAKE AND MAINTAIN AGREEMENTS, WHERE  
6 PRACTICALLY APPROPRIATE, ON A NATIONAL LEVEL. BUT THAT'S NOT  
7 THIS CASE. THIS CASE IS A PURE 2 THIRD CASE, AND THAT I THINK  
8 YOUR HONOR HAS HIT THE NAIL ON THE HEAD WITH RESPECT TO ITS  
9 SIMILARITY TO THE SOO LINE CASE.

10 THE COURT: WELL, LET ME ASK YOU THIS WHILE YOU'RE AT  
11 THE PODIUM. RLA IS REplete WITH REFERENCES TO EMPLOYEES IN KEY  
12 AREAS. THOSE TWO ENTITIES SEEM TO BE THE ONLY TWO PARTIES THAT  
13 THE RLA COULD BE LOGICALLY ADDRESSING, BUT YOU WANT ME TO  
14 CONCLUDE THAT UTU IS INDEED THE PARTY IN THIS CASE THAT HAS,  
15 PURSUANT TO 2 THIRD, THE AUTHORITY TO DESIGNATE ITS OWN  
16 REPRESENTATIVE.

17 MR. CLARKE: YOUR HONOR, MAY I ADDRESS THAT ISSUE?

18 THE COURT: SURE.

19 MR. CLARKE: AND IF I COULD BORROW YOUR BOOK.

20 THE COURT: I'VE NOT SEEN A DEFINITION OF "PARTY."  
21 WAS LOOKING FOR ONE.

22 MR. CLARKE: IT'S NOT IN HERE, YOUR HONOR, BECAUSE YOU  
23 HAVE TO REMEMBER THAT THE WAY THIS ACT WAS DRAFTED, 2 FIRST, 2  
24 SECOND, AND 2 THIRD WERE DRAFTED IN THE 1926 ACT.

25 THE COURT: RIGHT, AND THE OTHERS CAME IN 1939 OR SO.

1 MR. CLARKE: 1934, AND 2 THIRD WAS MODIFIED IN 1934.  
2 IF YOU LOOK AT THE ACT, IT WAS DRAFTED BY RAIL LABOR AND RAIL  
3 MANAGEMENT AND THEY SAT DOWN TOGETHER, AND SO WHAT YOU'RE  
4 TALKING ABOUT IS IN 2 SECOND: ALL DISPUTES BETWEEN A CARRIER  
5 OR CARRIERS AND ITS OR THEIR EMPLOYEES SHALL BE CONSIDERED AND,  
6 IF POSSIBLE, DECIDED WITH ALL EXPEDITION, IN CONFERENCE BETWEEN  
7 REPRESENTATIVES DESIGNATED AND AUTHORIZED SO TO CONFER. THAT'S  
8 2 SECOND. AND THEN YOU GO TO 2 THIRD: REPRESENTATIVES SHALL  
9 BE DESIGNATED FOR PURPOSES OF THE ACT WITHOUT COERCION OR  
10 INFLUENCE BY THE OTHER PARTY.

11 SO INITIALLY WHEN THE ACT WAS SET UP, THE CONCEPT WAS  
12 THAT THE PARTIES WILL DESIGNATE WHO'S GOING TO BE THE  
13 BARGAINING REPRESENTATIVE, BECAUSE, NOW, THE CARRIER HAS TO  
14 DESIGNATE SOMEBODY AND SO DOES THE UNION. THE UNION IS THE  
15 UNINCORPORATED ASSOCIATION OF ALL THE MEMBERS. SO THE OFFICERS  
16 OR THE OFFICERS DESIGNATED, BUT SOMEONE HAS TO ACTUALLY SIT  
17 DOWN AT THE TABLE. THAT WAS THE FOCUS IN 1926.

18 NOW, IN 1934, THERE WERE ALL THE PROBLEMS, THAT THE  
19 LANGUAGE THAT THEY HAD IN 2 THIRD JUST DIDN'T WORK, AND THAT  
20 WAS THE TEXAS & NEW ORLEANS CASE, THE 1930 CASE. IT LENT A LOT  
21 OF STRENGTH TO THE ACT, BUT IT DIDN'T QUITE ELIMINATE THE  
22 PROBLEM. SO COMMISSIONER EASTMAN, WHO WAS THE RAILROAD  
23 COORDINATOR AT THE TIME, BASICALLY THE ONE WHO WAS DIRECTING  
24 THE RAILROADS DURING THE DEPRESSION, HAD EXPERIENCE WITH THIS  
25 BECAUSE HE HAD TWO OTHER ACTS THAT HAD SORT OF LIKE MODIFIED

1 THE RAILWAY LABOR ACT BETWEEN '36 AND '34, AND HE DRAFTED  
2 PROPOSE AMENDMENTS TO ALL THESE.

3 NOW, IT'S SIGNIFICANT WHEN YOU LOOK AT HIS AMENDMENTS  
4 AND LOOK AT THE SCHEME THAT WAS ADOPTED BY CONGRESS, MR. MILLER  
5 REFERRED TO THE COERCION LANGUAGE IN 2 THIRD AND SAYING THERE'S  
6 WHERE THE COERCION IS. YOU CAN'T COERCE THE EMPLOYEES TO  
7 SELECT A COMPANY UNION OR SOMEBODY ELSE, BUT THAT SAME LANGUAGE  
8 OF COERCION IS IN 2 FOURTH: IT SHALL BE UNLAWFUL FOR ANY  
9 CARRIER TO INTERFERE IN ANY WAY WITH THE ORGANIZATION OF  
10 EMPLOYEES. NO CARRIER, OFFICER, OR AGENT SHALL DENY OR IN ANY  
11 WAY QUESTION THE RIGHT OF ITS EMPLOYEES TO JOIN, ORGANIZE, OR  
12 ASSIST TO ORGANIZE ANY LABOR ORGANIZATION OF THEIR CHOICE.

13 SO WHAT YOU HAVE HERE IS TO INFLUENCE OR COERCE  
14 EMPLOYEES IN AN EFFORT TO INDUCE THEM TO JOIN OR NOT TO JOIN OR  
15 REMAIN MEMBERS OF ANY LABOR ORGANIZATION. WHAT YOU HAVE WHEN  
16 YOU LOOK AT THE ACT, AND IT'S A VERY CAREFULLY DETAILED SCHEME,  
17 2 FOURTH SPECIFICALLY SAYS THE MAJORITY OF THE CRAFT OR CLASS  
18 SELECTS THE REPRESENTATIVE, AND THAT'S TO BE FREE OF CHOICE,  
19 BASICALLY THE LACK OF INFLUENCE THAT THE TEXAS & NEW ORLEANS  
20 CASE EXPLAINS AND USES THAT LANGUAGE.

21 AND THE LEGISLATIVE HISTORY, WHEN YOU LOOK AT THAT,  
22 THE CARRIERS WANTED TO USE THE WORD "DOMINANCE" IN 2 FOURTH,  
23 AND THE COMMITTEE REJECTED THAT, BECAUSE THEY SAID, "WE KNOW  
24 WHAT 'INFLUENCE' MEANS. WHY PUT ANOTHER WORD IN THERE THAT WE  
25 DON'T KNOW WHAT IT MEANS? AND THE SUPREME COURT DEFINED

1 INFLUENCE AND LET'S STICK WITH THAT." SO YOU HAVE 2 FOURTH  
2 SAYING NO INFLUENCE; THE MAJORITY SELECTS. IF YOU HAVE A  
3 DISPUTE AS TO WHO THE REPRESENTATIVE OF THAT CRAFT IS, 2 NINTH  
4 PROVIDES THE MECHANISM FOR THE NLRB TO PROVIDE.

5 NOW, ONCE THAT REPRESENTATIVE IS SELECTED, THEN YOU GO  
6 BACK TO 2 THIRD, AND AS HARRISON SAID WHEN HE ADDED THAT, ASKED  
7 THAT THAT LAST LANGUAGE BE ADDED TO THE ACT, WHICH THE  
8 COMMITTEE DID, THAT REPRESENTATIVES OF EMPLOYEES, FOR PURPOSES  
9 OF THIS CHAPTER, NEED NOT BE PERSONS IN THE EMPLOY OF THE  
10 CARRIER. HE SAID IT'S THE -- ONE OF THE THINGS THAT WAS  
11 HAPPENING WAS, THE CARRIERS REFUSED TO MEET WITH  
12 REPRESENTATIVES BECAUSE THEY WERE NOT EMPLOYEES OF THE CARRIER,  
13 THEY WERE FROM ANOTHER CARRIER, AND THAT LANGUAGE WAS INSERTED  
14 TO MAKE IT CLEAR THAT WE CAN SELECT WHOM WE WANT TO BE OUR  
15 ACTUAL BARGAINING AGENT, AND THAT'S A TERM --

16 THE COURT: SO, IN OTHER WORDS, THAT DOES NOT  
17 NECESSARILY BIND YOU TO SELECT UTU, THEN.

18 MR. CLARKE: THAT'S CORRECT, YOUR HONOR. THE UTU HAS  
19 4 CONSTITUTION WHICH SETS FORTH ESSENTIALLY HOW THE BARGAINING  
20 AGENT THAT IS THE REPRESENTATIVE FOR BARGAINING PURPOSES, THAT  
21 THE UTU SELECTS TO ACTUALLY BE THE ONE TO BE IN THE  
22 NEGOTIATING, IS DETERMINED, AND THAT IF YOU READ THE ACT THE  
23 WAY THE CARRIERS WANT TO READ 2 THIRD, YOU ELIMINATE ANY  
24 YEANING FROM 2 THIRD. YOU MAKE IT SUPERFLUOUS WITH 2 FOURTH  
25 AND 2 NINTH.

1           ON THE OTHER HAND, IF YOU READ IT THE WAY WE SUBMIT IT  
2 SHOULD BE READ, 2 FOURTH GUARANTEES THE ABSOLUTE RIGHT TO THE  
3 MAJORITY WITHOUT COERCION TO SELECT THE REPRESENTATIVE OF THE  
4 CRAFT OR CLASS. TWO NINTH PROVIDES THE MECHANISM. TWO THIRD  
5 GUARANTEES THE RIGHT TO VOTE THAT REPRESENTATIVE SO SELECTED  
6 AND THE CARRIER TO DESIGNATE WHO THEY WANT TO BE THEIR  
7 BARGAINING AGENTS. IT'S A PERFECT SYMMETRY.

8           THE COURT: BUT WHAT YOU'RE SAYING IS THAT UTU IS  
9 DESIGNATING NATIONAL BARGAINING REPRESENTATIVES ON BEHALF OF  
10 UTU, AND WILL ALSO ALLOW THREE GENERAL COMMITTEES TO REPRESENT  
11 THEMSELVES. HOW MANY REPRESENTATIVES DOES A REPRESENTATIVE GET  
12 TO HAVE?

13           MR. CLARKE: WELL, THEY'VE SELECTED THE NATIONAL  
14 REPRESENTATIVE TO REPRESENT THEM FOR THOSE COMMITTEES THAT HAVE  
15 AUTHORIZED BARGAINING, AND THE RECORD IN THIS CASE, YOUR HONOR,  
16 SHOWS THAT AT THE TIME THE NATIONAL BARGAINING BEGAN, ALL BUT  
17 ONE OF THE COMMITTEES ON THE BURLINGTON NORTHERN HAD OPTED OUT.  
18 TEN OF THE 11 HAVE OPTED OUT. SO AT THAT POINT THE NATIONAL  
19 BARGAINING WASN'T JUST THESE THREE SORT OF ROGUE COMMITTEES, AS  
20 IS NOW BEING LOOKED UPON. THERE WERE BASICALLY -- IT WAS THE  
21 MAJORITY OF THE EMPLOYEES ON THE BURLINGTON NORTHERN. THE UTU  
22 REPRESENTATIVE OPTED OUT, BUT GRADUALLY OVER TIME IT'S WEEDED  
23 DOWN TO WHERE WE JUST HAVE THESE THREE COMMITTEES. BUT IT'S  
24 BEEN CLEAR IN THE BARGAINING, AND THE RECORD ALSO SHOWS THIS,  
25 THAT DURING THE BARGAINING THE UTU HAS SPECIFICALLY SAID, "WE

1 DO NOT HAVE THE AUTHORITY TO REPRESENT THESE THREE COMMITTEES,  
2 THE MEMBERS OF THESE THREE COMMITTEES."

3 THE COURT: SO CONCEIVABLY, PURSUANT TO YOUR ARGUMENT,  
4 THEN, EACH COMMITTEE COULD HAVE A REPRESENTATIVE REPRESENT EACH  
5 COMMITTEE?

6 MR. CLARKE: YES, YOUR HONOR.

7 THE COURT: WHERE DOES IT STOP?

8 MR. CLARKE: IT STOPS AT THE FACT THAT IT'S THE  
9 COMMITTEE THAT DESIGNATES THE REPRESENTATIVE, AND THEY HAVE,  
10 AND THAT'S WHERE IT STOPS. THEY HAVE, BUT THEY ALSO HAVE THE  
11 OBLIGATION UNDER 2 FIRST TO NEGOTIATE AGREEMENTS. SO THIS  
12 ISN'T, THIS ISN'T SOMETHING THAT HASN'T BEEN DONE BEFORE.

13 AND I MIGHT ADD JUST HISTORICALLY, YOUR HONOR, IF YOU  
14 LOOK AT --

15 THE COURT: WAIT A MINUTE; WAIT A MINUTE.

16 IF YOU'RE CORRECT, THEN WHY DOESN'T THAT SOUND THE  
17 DEATH KNELL TO NATIONAL HANDLING, IF YOU'RE CORRECT? BECAUSE  
18 YOU'D HAVE ALL THESE REPRESENTATIVES NEGOTIATING FOR LOCAL  
19 MATTERS AS WELL AS POTENTIALLY SOME NATIONAL MATTERS, BUT NOT  
20 ALL UNDER A MANDATE TO REACH ONE AGREEMENT.

21 MR. CLARKE: YOUR HONOR, NATIONAL HANDLING, THE  
22 OBLIGATORY ASPECT IS SOMETHING THAT FIRST CAME TO BE CONSIDERED  
23 IN 1967 WITH THE ATLANTIC COAST LINE CASE. PRIOR TO THAT, WHEN  
24 YOU LOOK AT THE HISTORICAL EXPERIENCE, AND WE'VE QUOTED, AND IN  
25 FACT THE SOLICITOR, NOT THE SOLICITOR, BUT THE DEPARTMENT OF

1 JUSTICE BRIEF IN ATLANTIC COAST LINE HAS A REAL NICE DETAIL  
2 ABOUT THE PAST HISTORY, AND IN SOME CASES THE CARRIERS TOOK THE  
3 POSITION, UNION CHECK-OFF. THEY WOULDN'T DO THAT ON A NATIONAL  
4 BASIS. THEY SAID THAT'S SOMETHING WE CAN DO ON A LOCAL BASIS,  
5 AND THE REPRESENTATIVE SPECIFICALLY RAISED 2 THIRD AS THE  
6 RATIONALE FOR THEIR POSITION.

7 NATIONAL HANDLING IS A VERY EFFICIENT WAY OF HANDLING  
8 THINGS WHEN YOU'RE LOOKING AT ISSUES THAT ARE BASICALLY, CAN BE  
9 RESOLVED IN A UNIFORM SETTING -- WAGE RATES, JURY DUTY,  
10 CERTAIN -- HEALTH AND WELFARE IS A GOOD EXAMPLE. BUT IT'S NOT  
11 NECESSARILY THE MOST EFFICIENT WAY. IN FACT, IT'S A DEATH  
12 KNELL, REALLY, IF YOUR MAIN CONCERN IS NOT SO MUCH THE WAGE  
13 RATE, BUT IF YOUR MAIN CONCERN IS THE QUALITY-OF-LIFE AND  
14 PRODUCTIVITY ISSUES.

15 NOW, THE RECORD SHOWS THAT THE GENERAL COMMITTEE 386,  
16 IN 1984, DID NOT PARTICIPATE IN NATIONAL HANDLING. IN FACT, IN  
17 NINETEEN -- AND THAT WENT FORWARD IN 1988. THE CARRIER TRIED  
18 TO IMPOSE THE AGREEMENT THAT WAS IMPOSED BY CONGRESS ON  
19 NATIONAL HANDLING IN 1991 TO RESOLVE THE 1988 ROUND ON THIS  
20 GENERAL COMMITTEE AND THE OTHER, WHAT THEY CALL, NORTHERN LINE  
21 COMMITTEES OF THE BURLINGTON NORTHERN THAT WERE NOT  
22 PARTICIPATING, AND THE ARBITRATOR SPECIFICALLY FOUND THAT THEY  
23 WERE NOT IN NATIONAL HANDLING AND THEREFORE NOT COVERED, AND  
24 THEY THEN SUBSEQUENTLY REACHED THEIR OWN AGREEMENT. IN 1994,  
25 THE NEXT ROUND OF BARGAINING, AND THIS COMMITTEE TOOK THE SAME

1 POSITION. GO BACK TO 1991, OR 1981. THE BURLINGTON NORTHERN  
2 TOOK THE POSITION THAT IT WOULD GO TO NATIONAL HANDLING ON ALL  
3 BUT ONE OF THE COMMITTEES BECAUSE IT WAS HAVING A LOCAL PROBLEM  
4 WITH THAT COMMITTEE, AND IT AUTHORIZED THE NCCC TO REPRESENT  
5 THEM ON ALL BUT THAT ONE.

6 SO HISTORICALLY, IF YOU LOOK AT THE HISTORICAL  
7 FACTORS, THERE HAVE BEEN INS AND OUTS. SOME INS, SOME OUTS,  
8 AND IT'S BEEN VARIED. SOMETIMES THE CARRIERS DO IT, AND  
9 SOMETIMES THE ORGANIZATIONS DO IT. THIS DOES NOT MEAN -- AND  
10 THE ORGANIZATION IS THE THREE GENERAL COMMITTEES. YOU FULLY  
11 REALIZE THAT WHATEVER COMES OUT OF THE NATIONAL HANDLING WILL  
12 MOST LIKELY BE THE PATTERN THAT WILL BE APPLIED. THEY REALIZE  
13 THAT. I MEAN', YOU'RE NOT GOING, IF YOU GET DOWN TO A DISPUTE,  
14 YOU'RE NOT GOING TO GET AN ARBITRATOR OR A PRESIDENTIAL  
15 EMERGENCY BOARD TO REPRESENT MORE THAN A PATTERN. BUT IT'S  
16 TAKING THAT PATTERN AND DIVIDING IT UP THAT THEY WANT TO DO.

17 NOW, THE CARRIER SAYS, "WHY DON'T YOU JUST SIT DOWN AT  
18 THIS NATIONAL TABLE, BECAUSE WE'VE ALWAYS NEGOTIATED THESE  
19 LOCAL AGREEMENTS?" NOT ALWAYS, BUT THEY SAY IT'S OFTEN DONE  
20 WELL, IT'S DONE, BUT IT'S DONE UNDER, AS THE REPORT SHOWS, THE  
21 PEACEFUL PROCEDURES OF THE RAILWAY LABOR ACT, WHICH MEANS,  
22 SIMPLY, NEGOTIATE, NEGOTIATE, NEGOTIATE, BUT YOU CAN'T. AS  
23 JOHN FITZGERALD INDICATED IN HIS DEPOSITION, YOU DON'T HAVE  
24 CLOSURE. WE DID THAT IN 1994, JOHN FITZGERALD SAID. WE CAME  
25 TO AN AGREEMENT CALLING FOR BINDING MEDIATION, WHICH NO ONE

1 KNOWS WHAT THAT MEANS, BUT THAT HASN'T BROUGHT CLOSURE TO ALL  
2 THE ISSUES.

3 IT'S TIME WE BROUGHT CLOSURE TO THESE ISSUES. THE  
4 ONLY WAY TO DO THAT IS TO RETAIN THE RIGHT TO BARGAIN OVER  
5 EVERY ISSUE. THAT'S A MANDATORY SUBJECT OF BARGAINING, AND  
6 HAVE THE RIGHT, IF WE CAN'T GET AN AGREEMENT, TO EXERCISE  
7 SELF-HELP OVER THAT. NOT THAT SELF-HELP WILL BE DONE, BUT  
8 SELF-HELP OUT THERE IS A VERY EFFECTIVE INDUCEMENT ON BOTH  
9 PARTIES TO REACH AN AGREEMENT. THAT'S WHAT THE ACT WAS  
10 DESIGNED TO DO, AND WHAT WE'RE SEEKING TO DO IS TO TRY TO  
11 IMPLEMENT IT.

12 I REALIZE I'M INTERRUPTING MR. MUNRO'S ARGUMENT.

13 THE COURT: I'M GOING TO GIVE HIM EQUAL TIME. IT WAS  
14 APPROPRIATE FOR YOU TO CHIME IN. I NEEDED AN ANSWER.

15 MR. CLARKE: I WOULD JUST LIKE TO MAKE ONE POINT ON  
16 THIS WHOLE THING, YOUR HONOR. IT'S COMING DOWN TO THE POINT  
17 WHERE THEY'RE SAYING, IF YOU ACCEPT THE UNION'S ARGUMENTS, WHAT  
18 YOU'RE DOING IS YOU'RE TRUMPING, YOU'RE USING 2 THIRD TO TRUMP  
19 2 FIRST.

20 THE COURT: I THINK BOTH SIDES ARE MAKING THEIR  
21 RESPECTIVE ARGUMENTS BECAUSE, ESSENTIALLY, YOU'RE TELLING ME,  
22 THEY'RE SAYING IF I GRANT YOUR RELIEF, THEN I'M SOUNDING THE  
23 DEATH KNELL TO ATLANTIC COAST LINE AND NATIONAL HANDLING, AND  
24 YOU'RE SAYING THAT IF I FOLLOW JUDGE HOGAN, 2 THIRD MEANS  
25 NOTHING.

1 MR. CLARKE: YES, YOUR HONOR, AND THAT'S THE POINT  
2 WE'RE TRYING TO MAKE HERE.

3 THE COURT: I HAVE TO WRITE AN OPINION, HOPEFULLY,  
4 THAT WILL GIVE SOME MEANING TO BOTH ARTICLE 2 THIRD AND 2 FIRST  
5 SO THEY OPERATE IN TANDEM AND NOT TRUMP ONE ANOTHER. THEY'RE  
6 NOT SUPPOSED TO.

7 MR. CLARKE: THEY HAVE TO BE READ SO THEY GIVE EFFECT  
8 TO EACH, JUST AS ALL OF THEM ARE A PART OF THE WHOLE. TWO  
9 FIRST AND 2 THIRD ARE A PART OF THE INTEGRAL WHOLE. THEY HAVE  
10 TO BE READ INTRA MOENIA. SO, THEREFORE, NEITHER ONE CAN TRUMP  
11 THE OTHER ONE, IF WE CAN USE THAT PHRASE. NOW, CAN IT BE DONE  
12 SO THAT THEY'RE BOTH READ TO GIVE EFFECT TO EACH? WE SUBMIT,  
13 OBVIOUSLY, IT CAN BE, BECAUSE 2 THIRD GIVES THE COMMITTEES THE  
14 RIGHT TO SAY, "WE WANT TO BE THE BARGAINERS FOR ANY AGREEMENT  
15 CHANGE THAT AFFECTS US."

16 THE COURT: YOU TURNED THAT AROUND A LITTLE BIT. YOU  
17 SAID IT GIVES THE GENERAL COMMITTEES THE RIGHT TO SAY, "WE WANT  
18 TO BE THE BARGAINERS." UTU'S ARGUMENT IS THAT 2 THIRD GIVES  
19 LJTU THE RIGHT TO DESIGNATE WHO WILL BARGAIN ON BEHALF OF UTU.

20 MR. CLARKE: THE GENERAL COMMITTEES ARE THE DESIGNATED  
21 BARGAINING AGENTS FOR THE UTU, BUT THEY OBVIOUSLY HAVE A RIGHT  
22 TO SELECT WHO THE PERSON WILL BE WHO DOES THE BARGAINING FOR  
23 THEM. IT'S A DELEGATION OF AUTHORITY, AND THEY HAVE THE SAME  
24 RIGHTS AS THE UTU DOES. I MEAN, IT'S ONE THING -- THE EXAMPLE  
25 WOULD BE, YOU SELECT, WHEN YOU HAVE A GENERAL COMMITTEE, AND

1 NORMALLY THEY'RE THE ONES WHO DO THE BARGAINING, THEY HANDLE  
2 THE GRIEVANCES. THEY HANDLE THE --

3 THE COURT: BUT ISN'T YOUR ARGUMENT THAT THE GENERAL  
4 COMMITTEES ARE INDEED THE PARTIES MAKING THE DECISION, AS  
5 OPPOSED TO UTU?

6 MR. CLARKE: YES, YOUR HONOR.

7 THE COURT: THAT'S YOUR ARGUMENT, AND THAT'S DIFFERENT  
8 FROM UTU'S ARGUMENT.

9 MR. CLARKE: I DON'T THINK IT IS, BECAUSE THE GENERAL  
10 COMMITTEES AND THE UTU ARE SYNONYMOUS. THEY ARE THE ONES WHO  
11 DESIGNATE.

12 THE COURT: UTU IS COMPOSED OF GENERAL COMMITTEES.

13 MR. CLARKE: YES, SIR. WELL, UTU IS COMPOSED OF THE  
14 MEMBERS, WHO THEN FORM THE GENERAL COMMITTEES TO HAVE  
15 BARGAINING AUTHORITY, AND IT'S SORT OF LIKE AN UP-AND-DOWN  
16 THING, BUT THEY ARE THE DESIGNATED REPRESENTATIVE.

17 NOW, THE POINT I'M GETTING AT IS THIS: THE UTU  
18 GENERAL COMMITTEES HAVE DECIDED THAT IN THEIR CASE THESE ARE,  
19 THE QUALITY-OF-LIFE AND THESE OTHER ISSUES ARE VERY IMPORTANT  
20 TO THEM. IF YOU LOOK AT 2 FIRST, WHAT THEY'RE DOING IS, THERE  
21 IS NOTHING IN ANY WAY THAT VIOLATES 2 FIRST. PUT ASIDE THE  
22 NATIONAL. PUT THAT OUT OF THE PICTURE. THESE ARE ISSUES THAT  
23 ARE EXTREMELY IMPORTANT TO THEM IN BARGAINING, AND THEY HAVE  
24 DECIDED THAT THESE ARE THE THINGS THAT ARE IMPORTANT TO US THAT  
25 WE HAVE TO GET RESOLVED. WE'RE WILLING TO TRADE WAGES TO DEAL

1 WITH THE RULES. THAT'S THE MOST IMPORTANT ASPECT TO US. SO  
2 THEY HAVE DECIDED, THEY HAVE DECIDED THE BEST WAY WE CAN GET  
3 THAT HANDLED, IF WE DESIGNATE THE NATIONAL BARGAINERS, THEN OUR  
4 INTERESTS ARE SUBORDINATED TO THE OVERALL INTEREST, AND IN THE  
5 PAST WE KNOW THESE ISSUES HAVE NOT BEEN RESOLVED. SO,  
6 THEREFORE, WE DON'T WANT TO DO IT.

7 NOW, WE'RE WILLING TO BARGAIN WITH THE CARRIER, AND  
8 ANY PROPOSAL THEY'VE MADE TO OUR AGREEMENT, WE'LL SIT DOWN AND  
9 WE'LL WORK IT OUT WITH THEM. WE'LL WORK IT OUT WITH THEM IN  
10 TANDEM WITH THE NATIONAL, BUT NOT IN A NATIONAL SETTING IN THAT  
11 WE HAVE TO GIVE UP OUR RIGHT TO BARGAIN FOR A LOCAL ISSUE,  
12 BECAUSE THOSE ARE THE IMPORTANT ONES TO US, AND ACCEPT WHATEVER  
13 COMES OUT OF THIS MULTI-CARRIER, MULTI-UNION BARGAINING.

14 NOW, THAT PROTECTS BOTH 2 THIRD AND IT PROTECTS 2  
15 FIRST. DOES IT INTERFERE WITH THE CARRIER'S RIGHTS UNDER 2  
16 FIRST TO HAVE, JUST AS THE UTU GENERAL COMMITTEES SAID, "WE  
17 NEED THIS LOCAL AGREEMENT," THE CARRIER SAYS, "WE WANT A  
18 'UNIFORM AGREEMENT'? IT DOESN'T, BECAUSE THEY'VE BEEN TALKING  
19 ALL ALONG. THE EVIDENCE IS REplete WITH THIS DUAL TRACK, HOW  
20 LOCAL ISSUES HAVE BEEN HANDLED. YES, YOU CAN, IN A NATIONAL  
21 BARGAINING, HAVE A PROCESS WHEREBY BOTH PARTIES AGREE THAT  
22 WE'RE GOING TO TAKE SOME ISSUES AND SEND THEM DOWN TO A LOCAL  
23 RESOLUTION, AND THEY'RE SAYING THAT THAT'S A PERFECTLY  
24 APPROPRIATE TYPE OF BARGAINING IN A NATIONAL SETTING. WE AGREE  
25 WITH THAT. IT'S WHAT HAPPENS WHEN PUSH COMES TO SHOVE, WHEN

1 YOU GET TO THE END AND YOU CAN'T GET AN AGREEMENT. IF YOU'RE  
2 IN A NATIONAL TYPE OF NEGOTIATION, YOU CAN'T HOLD OUT, BECAUSE  
3 THE LOCAL AGREEMENTS ARE IMPORTANT. YOU HAVE TO ACCEPT THE  
4 NATIONAL, SO YOU GIVE UP YOUR LOCAL.

5 ON THE OTHER HAND, THEY HAVE THE PERFECT RIGHT UNDER 2  
6 FIRST AND 2 THIRD TO HAVE THE NCCC BE THE ONE WHO BARGAINS WITH  
7 THE GENERAL COMMITTEES. WE DON'T DISPUTE THAT AT ALL. WE  
8 DON'T CARE IF THAT BARGAINING WOULD OCCUR AT THE SAME TABLE,  
9 BUT AS A PRACTICAL MATTER, IT CREATES PROBLEMS AND YOU DON'T DO  
10 IT. WE DON'T CARE IF THAT SAME TABLE IS THE NATIONAL TABLE AS  
11 LONG AS IT'S NOT IN NATIONAL HANDLING. WE'LL BARGAIN IN TANDEM  
12 OR SEPARATELY. WE DON'T CARE HOW, BUT WE'LL BARGAIN WITH THEM  
13 SO LONG AS WE RETAIN THE RIGHT TO STATE AND ENFORCE OUR LOCAL  
14 DEMANDS. THEY HAVE THE RIGHT ON THE OTHER SIDE, AS SOO LINE  
15 INDICATED, TO ENFORCE THEIR DEMAND THAT WE HAVE ONE AGREEMENT.  
16 THEY CAN GET THAT. THE ME-TOOS, ANY OF THEM. WE ADOPT THE  
17 NATIONAL AGREEMENT. THAT IS A LEGITIMATE BARGAINING RIGHT ON  
18 THEIR PART.

19 SO WHAT WE'RE SAYING, THEN, WHEN YOU LOOK AT IT THIS  
20 WAY, YOUR HONOR, NEITHER 2 FIRST NOR 2 THIRD TRUMPS THE OTHER.  
21 TO INTERPRET THE ACT THE WAY THEY'RE DOING, YOU ARE USING 2  
22 FIRST TO TRUMP 2 THIRD BY FORCING AN ORGANIZATION INTO A  
23 SETTING WHERE THEY HAVE TO ACCEPT THE WILL OF THE GROUP RATHER  
24 THAN THEIR OWN. TO DO IT THE WAY WE'RE SAYING, THERE'S NOTHING  
25 IN ANY WAY THAT AFFECTS THEIR RIGHTS UNDER 2 FIRST. THERE'S

1 NOTHING THAT AFFECTS THEIR RIGHTS UNDER 2 THIRD. YOU READ THEM  
2 IN TANDEM, YOU READ THEM TOGETHER, AND THAT WAY, WE SUBMIT, IS  
3 THE WAY THIS ACT WAS INTENDED TO BE READ ALL ALONG.

4 NOW, IT VARIES. ONCE YOU'VE ACCEPTED THE RIGHT TO GET  
5 INTO NATIONAL HANDLING, ONCE YOU'VE ACCEPTED THAT, AND THEN AS  
6 THE THING GOES ALONG AND YOU SAY, "OH, NO, I DON'T WANT THAT.  
7 I WANT OUT," WELL, THAT RAISES AN ENTIRELY DIFFERENT ISSUE  
8 THAT'S NOT BEFORE YOU. THAT'S WHAT JUDGE MURPHY SAID WAS THE  
9 WAY ATLANTIC COAST LINE SHOULD BE INTERPRETED. so OUR  
10 POSITION, YOUR HONOR, IS THAT THIS ACT IS A BEAUTIFUL ACT WHEN  
11 YOU LOOK AT IT IF IT IS READ PROPERLY AND EVERYTHING IS IN  
12 TANDEM, NOT ONE SECTION TRUMPING THE OTHER. THEY'RE ALL READ  
13 TOGETHER.

14 THE COURT: ALL RIGHT, THANK YOU, COUNSEL.

15 ALL RIGHT, I'LL HEAR FROM THE CARRIERS' COUNSEL.

16 MR. MUNRO.

17 MR. MUNRO: YOUR HONOR, THERE WAS A LOT SAID THERE.

18 LET ME BEGIN BY GOING BACK TO THE STATUTE. MR. CLARKE  
19 PRESENTED A WAY OF READING THE STATUTE THAT WOULD REQUIRE, I  
20 WOULD SUBMIT, YOU TO READ SECTION 2 THIRD THIS WAY:  
21 REPRESENTATIVES FOR PURPOSES OF THE CHAPTER SHALL BE DESIGNATED  
22 BY THE RESPECTIVE REPRESENTATIVES WITHOUT INTERFERENCE,  
23 INFLUENCE, OR COERCION. THAT DOESN'T MAKE ANY SENSE, YOUR  
24 HONOR. THE PARTIES ARE THE EMPLOYEES, AND THE SUPREME COURT  
25 SAID THAT IN THE TEXAS & NEW ORLEANS CASE. THAT'S AT 281

1 U.S., YOUR HONOR. WE CITED IT IN OUR SUPPLEMENTAL MEMORANDUM.  
2 SPECIFICALLY, IT SAYS THAT IT'S THE SECTION 2 THIRD RIGHT OF  
3 EMPLOYEES TO CHOOSE A UNION TO REPRESENT THEM.

4 THIS CIRCUIT SAID THE SAME THING IN THE RAILWAY LABOR  
5 EXECUTIVES CASE, YOUR HONOR. THAT'S AT 29 F.3D. THEY SAID  
6 THAT THE RAILWAY LABOR ACT PROTECTS THE EMPLOYEES' CHOICE OF  
7 REPRESENTATIVE. IT'S NOT THE REPRESENTATIVE'S CHOICE OF  
8 REPRESENTATIVE, YOUR HONOR. IT'S THE EMPLOYEES', AND THEY'VE  
9 CHOSEN UTU.

10 NOW, IN TERMS OF READING SECTION 2 FIRST AND 2 THIRD  
11 IN TANDEM, MR. CLARKE'S ARGUMENT MIGHT WORK BUT FOR THE FACT  
12 THAT IN THIS JURISDICTION THIS CIRCUIT HAS HELD THAT SECTION 2  
13 FIRST MEANS THAT NATIONAL HANDLING IS OBLIGATORY WHENEVER IT'S  
14 PRACTICAL AND APPROPRIATE. AND WHAT HE IS SAYING, YOUR HONOR,  
15 IS THAT IT'S NOT OBLIGATORY EVEN WHEN IT'S PRACTICAL AND  
16 APPROPRIATE IF WE'VE CHOSEN NOT TO USE THE NATIONAL  
17 REPRESENTATIVE. WELL, THAT'S JUST TO SAY IT'S VOLUNTARY, YOUR  
18 HONOR. HE'S SIMPLY SAYING, IF WE'VE CHOSEN NOT TO USE THE  
19 NATIONAL REPRESENTATIVE, THEN IT'S NOT OBLIGATORY, EVEN IF IT  
20 IS PRACTICAL AND APPROPRIATE. THAT IS THE DEATH KNELL OF  
21 ATLANTIC COAST LINE, YOUR HONOR.

22 THE COURT: WELL, ATLANTIC COAST DIDN'T SAY NATIONAL  
23 HANDLING IS ALWAYS OBLIGATORY.

24 MR. MUNRO: WHENEVER IT'S PRACTICAL AND APPROPRIATE,  
25 IT SAID.

1 THE COURT: WELL, THAT MEANS THE CARRIER. IT'S ALWAYS  
2 MANDATORY AND APPROPRIATE. I WOULDN'T OPT FOR ANYTHING OTHER  
3 THAN NATIONAL HANDLING, WOULD YOU?

4 MR. MUNRO: WE HAVE TO SHOW THAT IT'S PRACTICAL AND  
5 APPROPRIATE, YOUR HONOR, AND I SUBMIT WE HAVE. WE PUT IN AN  
6 UNFORTUNATELY LARGE STACK OF PAPER THAT SHOWS IT'S PRACTICAL  
7 AND APPROPRIATE BASED ON THE HISTORY HERE, AND THEY HAVE NOT  
8 REBUTTED THAT, YOUR HONOR. THEY HAVE NOT ATTEMPTED TO CONTEST  
9 OUR SHOWING THAT IT'S PRACTICAL AND APPROPRIATE IN THIS CASE.

10 ASSUME THAT IT IS PRACTICAL AND APPROPRIATE FOR THE  
11 MOMENT. WHAT HE'S SAYING IS THAT, EVEN THOUGH IT'S PRACTICAL  
12 AND APPROPRIATE AND WOULD BE OBLIGATORY UNDER ATLANTIC COAST  
13 LINE, IT'S NOT IN THIS CASE BECAUSE WE'VE CHOSEN NOT TO USE THE  
14 NATIONAL REPRESENTATIVE. THAT'S JUST THE SAME THING AS SAYING  
15 THAT ATLANTIC COAST LINE IS OVERRULED.

16 THE COURT: IS IT YOUR ARGUMENT THAT UTU IS THE  
17 DESIGNATED REPRESENTATIVE PURSUANT TO ARTICLE 2 THIRD AS A  
18 RESULT OF UTU'S EXISTENCE PURSUANT TO ARTICLE 2 FOURTH?  
19 BECAUSE I THINK THE TWO HAVE TO BE READ IN TANDEM.

20 MR. MUNRO: THEY DO, YOUR HONOR. THE MAJORITY OF THE  
21 EMPLOYEES WHO ARE AT ISSUE HERE CHOSE THE UTU AS THEIR  
22 REPRESENTATIVE, AND THEIR RIGHT TO DO SO --

23 THE COURT: RIGHT, TO PARTICIPATE IN COLLECTIVE  
24 BARGAINING. RIGHT.

25 MR. MUNRO: CORRECT, AND THEIR RIGHT TO DO SO WAS --

1 THE COURT: WHAT YOU'RE TELLING ME, THEN, IS THAT IN  
2 ALL CASES A COLLECTIVE BARGAINING REPRESENTATIVE DOES NOT HAVE  
3 THE AUTHORITY TO APPOINT SOMEONE ELSE TO REPRESENT THE  
4 COLLECTIVE BARGAINING REPRESENTATIVE. THAT'S WHAT YOU'RE  
5 SAYING.

6 MR. MUNRO: THAT'S CORRECT, YOUR HONOR. THE  
7 COLLECTIVE BARGAINING REPRESENTATIVE HAS TO REPRESENT THE  
8 EMPLOYEES THAT IT WAS APPOINTED TO REPRESENT.

9 THE COURT: WE KNOW THAT DOESN'T HAPPEN, BECAUSE THE  
10 COLLECTIVE BARGAINING REPRESENTATIVE HAS NEGOTIATORS WORKING  
11 FOR THE COLLECTIVE BARGAINING REPRESENTATIVE.

12 MR. MUNRO: WELL, THE REPRESENTATIVE IS A COLLECTIVE,  
13 YOUR HONOR. IT'S NOT AN INDIVIDUAL. OBVIOUSLY, YOU CAN'T HAVE  
14 A SITUATION WHERE THE UTU GOES OUT AND HAS THE UNITED AUTO  
15 WORKERS REPRESENT THE EMPLOYEES. I MEAN, AND WE COULDN'T FORCE  
16 THEM TO DO THAT. THAT'S WHERE THE SOO LINE ANALOGY IS, YOUR  
17 HONOR, IN JUDGE MURPHY'S OPINION. WHAT THE UNIONS --

18 THE COURT: SO, IN OTHER WORDS, THERE'S A DIFFERENT  
19 STANDARD, THEN, FOR THE UNIONS AND THE WORKERS THAN THERE IS  
20 FOR THE CARRIER. THE CARRIERS CAN HAVE NCCC OR UNITED AUTO  
21 WORKERS OR DONALD DUCK REPRESENT THE CARRIERS AT ANY TIME.  
22 RIGHT?

23 MR. MUNRO: THE OBLIGATIONS ARE ABSOLUTELY PARALLEL,  
24 YOUR HONOR, AND THIS IS WHERE THE UNIONS --

25 THE COURT: WHERE ARE THE CARRIERS BOUND? THEY'RE NOT

1 BOUND BY THE RLA, ARE THEY?

2 MR. MUNRO: HERE'S HOW IT MATCHES UP. IN SOO LINE,  
3 WHAT JUDGE MURPHY SAID IS THAT THE SOO LINE CAN'T BE FORCED TO  
4 ACCEPT NCCC, A MULTI-EMPLOYEE BARGAINING UNION. YOU CAN'T  
5 FORCE A CARRIER WHICH IS A PARTY TO ACCEPT A REPRESENTATIVE NOT  
6 OF ITS CHOOSING. IN THE SAME WAY, WE CAN'T FORCE THE EMPLOYEES  
7 WHO HAVE CHOSEN THE UTU TO ACCEPT A MULTI-UNION BARGAINING  
8 REPRESENTATIVE. THAT'S THE PARALLEL, YOUR HONOR, JUST AS YOU  
9 CAN'T FORCE THE SOO LINE INTO THE NCCC.

10 THE COURT: BUT IT'S A LITTLE DIFFERENT BECAUSE  
11 NATIONAL HANDLING HAD ALREADY STARTED AND ALL THE WORKERS WERE  
12 TRYING TO DO WAS TO TRY TO KEEP THE CARRIERS IN NATIONAL  
13 HANDLING. THAT'S WHAT THE ISSUE WAS IN SOO LINE, WASN'T IT?

14 MR. MUNRO: I BELIEVE THAT SOO LINE HAD REFUSED TO  
15 PARTICIPATE FROM THE BEGINNING. I'M NOT SURE. BUT IN ANY  
16 EVENT, IT'S RELEVANT BECAUSE NO CASE HAS EVER HELD THAT,  
17 WHETHER NATIONAL HANDLING IS OBLIGATORY OR NOT, IT DEPENDS ON  
18 WHETHER OR NOT THE BARGAINING HAS STARTED. IF YOU LOOK AT  
19 ATLANTIC COAST LINE, THE UNION IN THAT CASE REFUSED TO ENGAGE  
20 [N NATIONAL HANDLING FROM THE OUTSET, YOUR HONOR, AND SO IF  
21 [HAT HAD BEEN THE DECIDING FACTOR, THEN THE COURT WOULD HAVE  
22 NEVER GONE ON TO SAY IT TURNS ON WHETHER IT'S PRACTICAL AND  
23 APPROPRIATE. IT WOULD HAVE JUST SAID, YOU MADE THE DECISION  
24 BEFORE BARGAINING STARTED. CASE CLOSED.

25 THE COURT: I THINK YOU'RE RIGHT. IN SOO LINE, THE

1 NATIONAL HANDLING HAD NOT STARTED. I THINK YOU'RE CORRECT.

2 MR. MUNRO: AND LIKEWISE IN ALTON & SOUTHERN, YOUR  
3 HONOR. IN THAT CASE, THE NBWA REFUSED FROM THE OUTSET. SO  
4 THAT'S NOT A DISTINCTION, YOUR HONOR. YOU CAN'T DISTINGUISH  
5 THIS CASE FROM ALTON & SOUTHERN ON THAT BASIS.

6 THE PROBLEM IN THIS CASE IS THAT THEY'RE TRYING TO  
7 ANALOGIZE THE GENERAL COMMITTEES, WHICH ARE DERIVATIVE OF THE  
8 UTU, TO CARRIERS. WELL, THAT'S NOT THE ANALOGY. THE UTU IS  
9 THE EQUIVALENT OF THE CARRIER, NOT THE GENERAL COMMITTEES, AND  
10 WE CAN'T FORCE THE UTU, WE CAN'T FORCE THE EMPLOYEES  
11 REPRESENTED BY THE UTU TO JOIN TOGETHER WITH OTHER UNIONS AND  
12 BARGAIN TOGETHER, JUST AS THEY COULD NOT FORCE THE SOO LINE TO  
13 BARGAIN WITH OTHER CARRIERS. BUT THE OBLIGATIONS ARE  
14 RECIPROCAL, YOUR HONOR.

15 THE COURT: WELL, UTU THE IS INDEED THE EMPLOYEE.  
16 THAT'S WHAT THE UTU IS.

17 MR. MUNRO: THAT IS THEIR DULY DESIGNATED  
18 REPRESENTATIVE.

19 THE COURT: RIGHT. SO THE UTU IS THE PARTY, THEN IT  
20 HAS TO BE. OTHERWISE, EVERY INDIVIDUAL EMPLOYEE WOULD BE  
21 INDEED A PARTY. THE UTU REPRESENTS ALL THE EMPLOYEES, AND IT  
22 HAS TO BE THE PARTY.

23 MR. MUNRO: NO, YOUR HONOR.

24 THE COURT: WHY NOT?

25 MR. MUNRO: I DON'T THINK THAT'S CORRECT, BECAUSE THE

1 EMPLOYEES ARE THE ONES WHO CHOOSE THE REPRESENTATIVE, NOT THE  
2 REPRESENTATIVE. TWO FOURTH MAKES THAT VERY CLEAR.

3 THE COURT: ALL RIGHT.

4 MR. MUNRO: THE EMPLOYEES ARE THE EQUIVALENT OF  
5 CARRIERS.

6 THE COURT: ALL RIGHT.

7 MR. MUNRO: TWO SECOND MAKES THAT CLEAR AS WELL. IT'S  
a DISPUTES BETWEEN A CARRIER AND ITS EMPLOYEES. I MEAN, THAT'S  
9 WHAT WE'RE TALKING ABOUT HERE, SHALL BE DECIDED BY THE  
10 REPRESENTATIVES, AS MR. MOORE POINTS OUT TO ME. IT'S THEIR  
11 REPRESENTATIVES, THE CARRIER'S REPRESENTATIVES AND THE  
12 EMPLOYEES' REPRESENTATIVES.

13 THE COURT: RIGHT.

14 MR. MUNRO: AND I THINK THAT TEXAS & NEW ORLEANS CASE  
15 MAKES IT VERY CLEAR THAT THE SECTION 2 THIRD RIGHT IS TALKING  
16 ABOUT THE EMPLOYEES' RIGHT. MR. CLARKE AND MR. MILLER CAN'T  
17 CITE YOU A SINGLE CASE THAT SAYS THAT IT'S THE REPRESENTATIVE'S  
18 RIGHT TO SELECT THE REPRESENTATIVE. IT JUST DOESN'T MAKE  
19 SENSE, YOUR HONOR.

20 NOW, THE WAY TO READ THE TWO PROVISIONS IN TANDEM --  
21 AND I'M USING SHORTHAND HERE, BECAUSE ATLANTIC COAST LINE SORT  
22 OF IS AN INTERPRETATION OF 2 FIRST IN THIS JURISDICTION. SO  
23 WHAT I'M SAYING IS THAT YOU HAVE TO READ 2 THIRD AND ATLANTIC  
24 COAST LINE IN TANDEM, AND THE WAY TO DO THAT IS, YOU SAY THE  
25 EMPLOYEES' RIGHT TO IDENTIFY THEIR REPRESENTATIVE IS PROTECTED.

1 WE CAN'T FORCE THEM TO USE THE UNITED AUTO WORKERS OR BILL  
2 GATES, OR ANYONE ELSE. THEY GET TO PICK THE UTU AND THEY'VE  
3 DONE SO, AND THE UTU WANTS TO PROCEED THROUGH A COLLECTIVE  
4 SPOKESPERSON. THEY WANT TO PROCEED THROUGH A MULTIFACETED  
5 SPOKESPERSON, THE GENERAL COMMITTEES, AND THEY'RE ENTITLED TO  
6 DO THAT, TOO, SO LONG AS THEY ALL COME AND BARGAIN WITH US IN  
7 NATIONAL HANDLING.

8 THEIR REPRESENTATIVE, WHOEVER THAT MAY BE, HAS TO COME  
9 AND TRY, YOUR HONOR, NOT HAS TO AGREE, BUT HAS TO TRY TO  
10 BARGAIN NATIONALLY, AND THAT'S WHERE MR. CLARKE IS WRONG. IT'S  
11 A QUESTION OF AUTHORITY. OUR REPRESENTATIVES COME TO THAT  
12 NATIONAL TABLE, YOUR HONOR, WITH THE AUTHORITY TO AGREE TO  
13 EITHER A NATIONAL AGREEMENT OR LOCAL AGREEMENTS. IF THEY  
14 CONVINCED US IN BARGAINING THAT LOCAL AGREEMENTS ARE WHAT WE  
15 HAVE TO HAVE, OUR NATIONAL BARGAINERS HAVE THE AUTHORITY TO  
16 GIVE THEM THAT.

17 THE PROBLEM HERE, YOUR HONOR, IS THAT THEY'VE COME TO  
18 THE TABLE WITH THE AUTHORITY TO ONLY AGREE TO LOCAL AGREEMENTS.  
19 THEY CAN'T EVEN TALK TO US ABOUT OUR DEMAND FOR A NATIONAL  
20 AGREEMENT, AND THEY HAVE TO DO THAT, YOUR HONOR. THEY HAVE TO  
21 BE AT LEAST ABLE TO AGREE TO A NATIONAL AGREEMENT, AND AS  
22 THINGS STAND, THERE'S NO TABLE IN THE WORLD THAT THE CARRIERS  
23 CAN GO TO AND GET A NATIONAL AGREEMENT -- NOT ONE. WE TALKED  
24 TO MR. MILLER'S CLIENTS AND THEY SAY, "WE DON'T HAVE  
25 AUTHORITY." WE TALKED TO MR. CLARKE'S CLIENTS AND THEY SAY,

1 "WE CAN'T AGREE FOR THE WHOLE UTU." THERE'S NOBODY.

2 THE COURT: HOW MANY EMPLOYEES ARE REPRESENTED BY THE  
3 THREE GENERAL COMMITTEES?

4 MR. MUNRO: IT'S A LARGE NUMBER. ONE OF THE GENERAL  
5 COMMITTEES IS THE LARGEST ONE AMONG THE CLASS ONE CARRIERS, I  
6 BELIEVE, SO IT'S A SIGNIFICANT PERCENTAGE.

7 THE COURT: MR. CLARKE? I MEAN JUST APPROXIMATIONS.

8 MR. MILLER: I WOULD ESTIMATE ABOUT 5,000.

9 THE COURT: ABOUT 5,000?

10 MR. MILLER: YES.

11 MR. MUNRO: SO WE'RE TALKING ABOUT A BIG CHUNK OF  
12 EMPLOYEES HERE, YOUR HONOR, AND THERE'S NOBODY THAT WE CAN TALK  
13 TO ABOUT OUR LEGITIMATE DEMAND, AND I DON'T THINK ANYBODY CAN  
14 CONTEST THE FACT THAT WE HAVE THE RIGHT UNDER THE RAILWAY  
15 NATIONAL LABOR ACT THAT WE CAN SEEK A RIGHT TO AGREEMENT  
16 NATIONALLY. THEY CAN SEND THEIR REPRESENTATIVES TO THE  
17 NATIONAL TABLE AND IF MR. CLARKE'S CLIENTS WANT TO AT THAT  
18 TABLE INSIST ON LOCAL AGREEMENTS OR TALK ABOUT LOCAL, AND THEY  
19 CAN'T INSIST ON IT, BECAUSE THAT'S WHAT THE DELAWARE & HUDSON  
20 CASE SAYS. IT SAYS YOU CAN'T STICK TO A BARGAINING POSITION TO  
21 THE EXCLUSION OF GOOD-FAITH BARGAINING. BUT THEY CAN CERTAINLY  
22 TALK ABOUT LOCAL CARVE-OUTS AND LOCAL AGREEMENTS, AND THAT IS  
23 WHAT THAT HUGE AFFIDAVIT WE PUT IN SHOWS. THEY DO IT EVERY  
24 TIME, AND THEY'VE DONE IT IN THIS CASE, YOUR HONOR. THE  
25 TENTATIVE NATIONAL AGREEMENT THAT WE'RE TALKING ABOUT HERE HAS

1 AN EXPRESS PROVISION IN IT THAT ALLOWS FOR A  
2 ?PROPERTY-BY-PROPERTY ADJUSTMENT TO THE NEW RULES. SO THERE IS  
3 NO INTRUSION ON THEIR SECTION 2 THIRD RIGHT.

4 THE COURT: IT MUST MEAN SOMETHING, BECAUSE WHY WOULD  
5 THERE BE A NEED FOR A 2 THIRD AND A 2 FOURTH? BOTH TALK ABOUT  
6 THE IMPORTANCE OF BEING FREE FROM INTERFERENCE BY THE CARRIER.  
7 WHAT'S THE NEED FOR 2 THIRD, THEN?

8 MR. MUNRO: THE DISTINCTION IS THIS, YOUR HONOR. TWO  
9 FOURTH EXPLAINS THAT IT HAS TO BE A MAJORITY OF THE CRAFT OR  
10 CLASS THAT'S THE REPRESENTATIVE. TWO THIRD EXPLAINS THAT IT'S  
11 A VIOLATION FOR THE CARRIER TO TRY TO INFLUENCE THAT PROCESS.

12 THE COURT: TWO FOURTH SAYS THAT, ALSO. IT SAYS  
13 FREEDOM FROM INTERFERENCE BY THE CARRIER.

14 MR. MUNRO: THAT'S A SLIGHTLY DIFFERENT PROVISION,  
15 YOUR HONOR, BECAUSE IT GOES TO THE ORGANIZING LABOR  
16 ORGANIZATIONS AND PAYING SORT OF CARRIER-SUPPORTED UNIONS.  
17 THAT'S WHAT THAT PROVISION IS GOING TO. I THINK IF YOU READ  
18 THE LEGISLATIVE HISTORY, WHAT YOU'LL FIND THAT THEY WERE  
19 WORRIED ABOUT IS, THERE WAS THOSE YELLOW-DOG UNIONS THAT MR.  
20 CLARKE SPOKE ABOUT EARLIER.

21 THE COURT: ALL RIGHT.

22 MR. MUNRO: NOW, YOUR HONOR, I'D LIKE TO SAY A FEW  
23 WORDS ABOUT THE CRAFT-WIDE POINT, BECAUSE I THINK THAT'S SORT  
24 OF GOTTEN BURIED HERE, AND IT IS A VERY IMPORTANT POINT.

25 THE COURT: BEFORE YOU LEAVE THAT, HOW OFTEN DO THE

1 EMPLOYEES VOTE FOR THE COLLECTIVE BARGAINING REPRESENTATIVE?  
2 EVERY FOUR YEARS OR FIVE YEARS, OR SO? I DON'T KNOW. HOW  
3 OFTEN?

4 MAYBE MR. MILLER KNOWS.

5 MR. MILLER: YOUR HONOR, ONCE THEY'RE DESIGNATED,  
6 UNLESS A DISPUTE ARISES WITH THE COMPETING UNION OR COMPETING  
7 INDIVIDUAL, IT REMAINS FOREVER. I MEAN, UTU AND ITS  
a PREDECESSOR'S REPRESENTATION GOES BACK TO THE 1920'S AND  
9 THIRTIES ON THIS PROPERTY.

10 THE COURT: RIGHT, RIGHT.

11 WHILE YOU'RE THERE, CAN YOU POINT TO ANY OTHER CASE IN  
12 WHICH THERE'S BEEN SUCCESSFUL BARGAINING, SUCCESSFUL NATIONAL  
13 HANDLING AS WELL LOCAL HANDLING IN THIS TYPE OF SCENARIO WHERE  
14 UTU HAS HAD CO-REPRESENTATION BY GENERAL COMMITTEES OR  
15 ANALOGOUS GROUPS? CAN YOU POINT TO ANY OTHER?

16 MR. MILLER: I THINK THE ONES MR. CLARKE WAS TALKING  
17 ABOUT EARLIER.

18 MR. CLARKE: YOUR HONOR, 1988.

19 THE COURT: 1988.

20 MR. CLARKE: WHICH LED TO THE --

21 THE COURT: BUT THERE WAS A SETTLEMENT, THOUGH.

22 MR. CLARKE: THERE WAS EVENTUALLY A SETTLEMENT AFTER  
23 IT WAS DETERMINED THAT THE NATIONAL DIDN'T APPLY TO THOSE LOCAL  
24 LINE COMMITTEES. THEY REACHED AN AGREEMENT THEN.

25 THE COURT: ISN'T THAT FAIRLY SIGNIFICANT, THOUGH,

1 THAT IN THE LAST 12 YEARS THERE'S NOT BEEN ANY TYPE OF  
2 ANALOGOUS EFFORT TO BARGAIN WITH THE CARRIERS?

3 MR. CLARKE: I'M SORRY, YOUR HONOR?

4 THE COURT: IS IT NOT SIGNIFICANT OR INSIGNIFICANT IN  
5 THE LAST 12 YEARS THAT NO UNION HAS HAD AN INTEREST IN  
6 ATTEMPTING TO BARGAIN FOR LOCAL ISSUES AT THE SAME TIME THAT  
7 IT'S ENGAGED IN BARGAINING FOR A NATIONAL CONTRACT?

8 MR. CLARKE: WE THINK IT'S SIGNIFICANT THE FACT THAT  
9 ONE OF THE GENERAL COMMITTEES, 386, SINCE 1984, HAS INSISTED  
10 UPON LOCAL BARGAINING. IN THE LAST TWO ROUNDS OF BARGAINING,  
11 TWO OTHER COMMITTEES HAVE DONE IT, TOO.

12 MR. MUNRO: THAT'S NOT EXACTLY TRUE, YOUR HONOR,  
13 BECAUSE THOSE COMMITTEES HAVE, IN EVERY CASE, ULTIMATELY COME  
14 INTO NATIONAL HANDLING. IN THE LAST ROUND, IN FACT, THEY WROTE  
15 A LETTER AND THEY SAID, "WE ACCEDE TO NATIONAL HANDLING."

16 MR. CLARKE: BASED ON THE AGREEMENT.

17 MR. MUNRO: BUT THEY ENTERED NATIONAL HANDLING, IS THE  
18 POINT.

19 THE COURT: RIGHT.

20 MR. MUNRO: NOW, THERE ARE EXAMPLES OF DUAL TRACK,  
21 YOUR HONOR. IN FACT, THE BLE, THE PARTY THAT WAS LET OUT OF  
22 THIS CASE, THE SETTLEMENT WITH THAT ORGANIZATION WAS PREDICATED  
23 ON A DUAL-TRACK ARRANGEMENT, WHICH WAS WHAT WAS ACTUALLY DONE  
24 WITH THAT UNION THE LAST TIME. THE PROBLEM WITH THAT, YOUR  
25 HONOR --

1 THE COURT: WHERE YOU BARGAIN NATIONAL AND LOCAL  
2 ISSUES. WHY CAN'T YOU DO THAT HERE?

3 MR. MUNRO: WE'RE PERFECTLY HAPPY TO DO THAT, YOUR  
4 HONOR, AND THEY'VE REFUSED TO DO THAT. THEY'VE TURNED US DOWN.

5 MR. CLARKE: AGAIN, THIS GOES BACK TO, WE'VE TURNED  
6 THEM DOWN BECAUSE WE HAVE TO HAVE BARGAINING OVER IN A NATIONAL  
7 SETTING, WHERE WE'RE BOUND BY THE NATIONAL RESULT. IF YOU  
8 CAN'T GET AN AGREEMENT ON THE LOCAL ISSUES, THEY'RE SUBSUMED  
3 INTO THE NATIONAL RESULT. THAT'S THE PROBLEM.

10 THE COURT: WHY DON'T YOU AT LEAST TRY IT? ISN'T IT  
11 WORTHY OF AN EFFORT?

12 MR. CLARKE: YOUR HONOR, THEY HAVE IN THE PAST. THEY  
13 HAVE. THEY HAVE. THAT'S WHAT THEY DID IN 1994.

14 THE COURT: RIGHT.

15 MR. CLARKE: BUT AGAIN IT COMES DOWN TO THIS PROBLEM  
16 YOU RUN INTO: WHAT DO YOU DO WHEN YOU CAN'T RESOLVE THE LOCAL  
17 ISSUES? HOW DO YOU FINALLY ALLOW THEM TO BE RESOLVED? AND  
18 WHAT WE HAVE FOUND IS THAT WE HAVE TO INSIST UPON A MEANS TO  
19 HAVE GOOD CLOSURE, AND THE CARRIER'S NOT GOING TO VOLUNTARILY  
20 AGREE TO HAVE, YOU KNOW, ALLOW YOU TO HAVE THESE SECTION 6  
21 ISSUES OUT THERE THAT YOU CAN THEN STRAGGLE AT THE END.

22 I MIGHT ALSO ADD, NATIONAL HANDLING IS SORT OF LIKE A  
23 MISNOMER. WE'RE NOT DEALING WITH NATIONAL HANDLING IN THE  
24 SENSE OF ALL OF THE CARRIERS IN THIS COUNTRY. THERE ARE THREE,  
25 AS POINTED OUT --

1 THE COURT: NO; I UNDERSTAND.

2 MR. CLARKE: -- WHAT THEY CALL CANADA OWNED, BUT THREE  
3 LARGE CARRIERS. MANY OTHER CARRIERS HAVE WHAT THEY CALL  
4 STANDBYS. THEY ALLOW NATIONAL TO GO AND THEN THEY'LL TAKE WHAT  
5 COMES OUT OF THE NATIONAL HANDLING. SOMETIMES, YOU CAN DO THAT  
6 BY AN AGREEMENT THAT WILL DEFINITELY TAKE WHAT'S GOING TO COME  
7 OUT, OR ELSE YOU CAN GET AN AGREEMENT AND WE'LL SIT DOWN AND  
8 TALK ABOUT WHAT COMES OUT AND SEE HOW IT APPLIES TO US. so I  
9 MEAN, IF YOU LOOK AT THE HISTORY OF THE ACT, THIS CONCEPT OF  
10 DUAL TRACK IS SOMETHING THAT IS OF FAIRLY RECENT VINTAGE. IT  
11 FIRST CAME IN 1994.

12 MR. MUNRO: IT'S AN INVENTION OF MR. MOORE, ACTUALLY.

13 MR. CLARKE: SO NOW I GUESS WE'RE TALKING ABOUT, DO WE  
14 HAVE TO PARTICIPATE IN NATIONAL, LOCAL, OR DUAL TRACK? MAYBE  
15 ATLANTIC COAST LINE HAS BROADENED THAT IN THAT SENSE. THE  
16 POINT IS, HISTORICALLY, THE CONCEPT WAS THAT YOU WEREN'T FORCED  
17 INTO IT, SO IT WAS ALWAYS VOLUNTARY. I DON'T LIKE WHAT I'M  
18 GETTING, I'M GETTING OUT, AND IT WAS DONE. THEY GOT OUT OF  
19 NATIONAL HANDLING. THAT'S WHAT THE DEPARTMENT OF JUSTICE'S  
20 BRIEF POINTS OUT. OTHER TIMES, THEY SAY AT THE END, WE'RE OUT  
21 OF LOCAL, BUT I LIKE NATIONAL. I'LL SIGN ON TO THE NATIONAL.  
22 THE WHOLE STRUCTURE OF THIS IS FREEDOM, THE FREEDOM TO SELECT  
23 WHERE YOU'RE GOING TO DO YOUR BARGAINING.

24 MR. M'JNRO: NOT IN THIS JURISDICTION, YOUR HONOR, NOT  
25 IF WE'VE SHOWN IT'S PRACTICAL AND APPROPRIATE. THE HISTORY OF

1 FREEDOM TO ENTER INTO NATIONAL HANDLING IS NOT ENDED WITH THE  
2 COURT OF APPEALS' DECISION IN ATLANTIC COAST LINE, BECAUSE  
3 UNDER THAT OPINION IF WE'VE SHOWN IT'S PRACTICAL AND  
4 APPROPRIATE, THE COURT SAYS IT'S OBLIGATORY; YOU'VE GOT TO DO  
5 IT. IT DOESN'T MEAN YOU HAVE TO AGREE TO A NATIONAL AGREEMENT.  
6 IT DOESN'T MEAN THAT YOU'VE GOT TO COME TO THE TABLE AND IT'S  
7 NATIONAL AGREEMENT OR NOTHING. YOU KNOW, SORRY, YOUR LOCAL  
8 CONCERNS, WE WON'T LISTEN. BUT IT DOES MEAN YOU'VE GOT TO TRY  
9 IT. AND WE'VE NOT ONLY OFFERED TO DO THAT, YOUR HONOR. WE  
10 HAVE OFFERED TO TRY IT BOTH WAYS. WE'VE SAID WE'LL TALK TO YOU  
11 NATIONALLY AND WE'LL TALK TO YOU ABOUT YOUR LOCAL CONCERNS.  
12 THEY'VE REFUSED TO DO THAT, YOUR HONOR.

13 THE COURT: WHY SHOULDN'T THE COURT ORDER THAT THE  
14 PARTIES ENGAGE IN A DUAL-TRACK MEDIATION FOR TEN DAYS OR SO,  
15 IT'S A COURT ORDER, AND SEE IF YOU CAN WORK OUT AN AGREEMENT?

16 MR. MUNRO: WELL --

17 THE COURT: YOU CREATED THIS. WHY DON'T YOU GET UP  
18 HERE AND TELL ME WHY I SHOULDN'T DO THAT? WHY SHOULDN'T I DO  
19 THAT IN AN EFFORT TO TRY TO BRING THE PARTIES TOGETHER? SAY,  
20 LOOK, SIT DOWN AND PROCEED ALONG THESE DUAL TRACKS FOR FIVE  
21 DAYS, TEN DAYS, OR SO, AND LET ME KNOW IF YOU'VE BEEN ABLE TO  
22 YORK OUT AN AGREEMENT. I'M GOING TO RESOLVE THE ISSUE, BUT  
23 YOU'RE TELLING ME THIS IS SOMETHING YOU CREATED, THIS IS  
24 SOMETHING THAT HAS WORKED. IT SOUNDS VERY INNOVATIVE.

25 MR. MOORE: I DIDN'T CREATE IT.

1 THE COURT: TAKE THE CREDIT. YOU'VE GOT A FEDERAL  
2 JUDGE APPLAUDING YOUR EFFORTS. NOW SETTLE THIS CASE.

3 MR. MOORE: I THINK THAT'S A FINE OUTCOME. I DON'T  
4 THINK THE TEN-DAY LIMIT IS APPROPRIATE. YOU PROBABLY WANT THE  
5 BARGAINING TO GO ON IN THE WAY THAT THE RAILWAY LABOR ACT  
6 APPLIES, WHETHER IT DOES OR DOESN'T WORK. DUAL TRACK IS THE  
7 SENSIBLE WAY TO TAKE CARE OF NATIONAL AND LOCAL PROBLEMS.

a THE COURT: WHY SHOULDN'T I DO IT FOR A REASONABLE  
9 PERIOD OF TIME, AND WHAT'S REASONABLE?

10 MR. MOORE: IT'S UNTIL THE MEDIATION BOARD SAYS THAT  
11 [IT'S NOT GOING TO WORK.

12 THE COURT: RIGHT, BUT YOU'RE IN A DIFFERENT FORUM,  
13 THOUGH. LOOK, I TOLD YOU I'D GIVE YOU A DECISION BEFORE THE  
14 END OF THE YEAR AND I'LL DO THAT, BUT IT MAY NOT BE CONSISTENT  
15 WITH WHAT'S NORMALLY DONE INSOFAR AS MEDIATION OF THESE TYPES  
16 OF DISPUTES. BUT DO YOU THINK IT WOULD SERVE ANY PURPOSE AT  
17 ALL TO GET THE PARTIES TO TALK FOR TEN DAYS OR SO REGARDING  
18 THESE DUAL-TRACK ISSUES? WHY ISN'T IT WORTH A TRY, I GUESS?

19 MR. CLARKE: YOUR HONOR, THE GENERAL COMMITTEES ARE  
20 AGREEABLE TO SIT DOWN WITH THE CARRIERS AND TALK ABOUT ANY  
21 ISSUE THAT CARRIERS WANT TO ADDRESS, AND THEY'RE WILLING ALSO  
22 TO ADDRESS THE ISSUES THAT THEY WANT TO ADDRESS.

23 THE COURT: TALK DOESN'T MEAN ANYTHING. I'M GOING TO  
24 ORDER IT. IT'S A FASCINATING CASE, AND I'M GOING TO WRITE AN  
25 OPINION AND RESOLVE THE ISSUE. BUT YOU'RE TELLING ME THAT THIS

1 IS SOMETHING THAT'S NEW AND SOMETHING THAT HAS WORKED, AND I'M  
2 ORDERING THE PARTIES DO IT.

3 MR. CLARKE: THEY'RE WILLING TO NEGOTIATE WITH THE  
4 CARRIERS.

5 THE COURT: THAT'S WHAT I'VE BEEN HEARING FROM BOTH  
6 SIDE, "WE'RE WILLING TO TALK."

7 MR. MUNRO: YOUR HONOR, THAT'S A PERFECTLY LOGICAL AND  
8 REASONABLE RESULT, AND WE THINK THAT, SO LONG AS THE UTU IS  
9 OBLIGATED TO COME AND TRY NATIONAL HANDLING, WE'RE PERFECTLY  
10 HAPPY TO TALK TO THEM LOCALLY AS WELL.

11 MR. CLARKE: THAT'S WHERE WE GET BACK TO THE KICKER IN  
12 THIS.

13 THE COURT: IF I ORDER THE PARTIES TO TALK, IT WILL BE  
14 ALONG THE DUAL TRACKS, NATIONALLY AND LOCALLY, AND GENERAL  
15 COMMITTEES AS WELL AS UTU.

16 MR. CLARKE: WELL, UTU --

17 THE COURT: UTU IS PARTICIPATING IN NATIONAL HANDLING.

18 MR. CLARKE: BUT IT HAS REACHED AN AGREEMENT WITH THE  
19 CARRIERS.

20 MR. MUNRO: NOT ON BEHALF OF THESE EMPLOYEES, YOUR  
21 HONOR. THEY HAVE REFUSED TO TALK TO US. THAT'S THE PROBLEM.

22 THE COURT: NO; I UNDERSTAND. SO WHY IS SOMEONE, WHY  
23 [S ANYONE PREJUDICED IF I TELL UTU, NOTWITHSTANDING WHAT YOU'VE  
24 DONE, I WANT YOU TO PARTICIPATE ALSO TO SEE IF YOU CAN'T HELP  
25 BROKER AN AGREEMENT BETWEEN THE GENERAL COMMITTEES ON SOME OF

1 THESE NATIONAL ISSUES, AS WELL AS THE LOCAL ISSUES? I MEAN,  
2 YOU'RE THE COLLECTIVE BARGAINING AGENT, YOU KNOW.

3 MR. MILLER: YES, YOUR HONOR. THAT CREATES SEVERE  
4 INTERNAL PROBLEMS, BECAUSE THE NATIONAL NEGOTIATING COMMITTEE  
5 HAS NO INTERNAL JURISDICTION WITH RESPECT TO THESE THREE  
6 GENERAL COMMITTEES OF ADJUSTMENT.

7 MR. MUNRO: IT HAS JURISDICTION UNDER THE RAILWAY  
8 LABOR ACT, YOUR HONOR, THOUGH.

9 MR. MILLER: THE UNION, TAKING US AS WE ARE, AS THE  
10 REPRESENTATIVE, IS THE CERTIFIED COLLECTIVE BARGAINING AGENT,  
11 BUT THE NATIONAL NEGOTIATING COMMITTEE HAS NO AUTHORITY TO BEAT  
12 THE GENERAL COMMITTEES ABOUT THE HEAD. THEY'RE ALLOWED TO OPT  
13 OUT.

14 THE COURT: NO, NO, AND I'M NOT TRYING TO GET THEM TO  
15 TWIST ANY ARMS OR BEAT ANYONE ABOUT THE HEAD. I'M NOT TRYING  
16 TO DO THAT AT ALL. I'M JUST TRYING TO GET EVERYONE TO SIT AT  
17 THE SAME TABLE TO SEE IF THESE ISSUES CAN BE RESOLVED  
18 NATIONALLY AND LOCALLY. THAT'S ALL I'M DOING. I'M NOT TRYING  
19 TO GET YOU TO DO WHAT YOU WOULDN'T NORMALLY DO, WHICH IS TO  
20 TWIST ARMS, TAKE IT OR LEAVE IT.

21 MR. MILLER: YOUR HONOR, AS A PRACTICAL MATTER, I  
22 DON'T KNOW HOW THE NATIONAL NEGOTIATING COMMITTEE WOULD HAVE  
23 ANY INPUT INTO THE PROCESS THAT'S LEFT FOR THESE THREE GENERAL  
24 COMMITTEES BECAUSE, AS MR. CLARKE HAS MADE CLEAR, YOU CAN'T --  
25 YOU'VE GOT A NATIONAL AGREEMENT AND YOU'VE GOT LOCAL ISSUES.

1 THE TWO HAVE NO REAL PLACE WITH EACH OTHER IF EVERYTHING IS  
2 PART OF ONE MIX. THE NATIONAL NEGOTIATING COMMITTEE HAS DONE  
3 ITS JOB. IT'S NEGOTIATED A TENTATIVE AGREEMENT --

4 THE COURT: A TENTATIVE NATIONAL AGREEMENT.

5 MR. MILLER: -- WITH RESPECT TO THE GENERAL COMMITTEES  
6 THAT IT HAD AUTHORITY TO NEGOTIATE FOR, AND THAT'S THE END OF  
7 IT. ANYTHING THAT'S LEFT IS BETWEEN THESE GENERAL COMMITTEES  
8 ACROSS THE BROAD RANGE OF ISSUES THAT THEY HAVE AND THE  
9 CARRIERS WHO PARTICIPATE.

10 THE COURT: BUT THEY'RE STILL CONCERNED ABOUT, THE  
11 THREE GENERAL COMMITTEES ARE STILL CONCERNED ABOUT SOME OF THE  
12 SAME NATIONAL ISSUES, THOUGH, AREN'T THEY?

13 MR. MILLER: WELL, THEY WANT TO DEAL WITH RATES OF  
14 PAY.

15 THE COURT: BECAUSE THEY DON'T HAVE A CONTRACT FOR  
16 ANYTHING, NATIONAL OR LOCAL.

17 MR. MILLER: BUT REMEMBER THEY HAVE A DIFFERENT  
18 CONTRACT. UNDER THE RAILWAY LABOR ACT, CONTRACTS DON'T EXPIRE.  
19 SO THEY'VE GOT AN EXISTING CONTRACT. AS MR. CLARKE MADE  
20 CLEAR --

21 THE COURT: IS YOUR CONTRACT AS GOOD AS WHAT'S BEEN  
22 NATIONALLY NEGOTIATED, OR DO YOU KNOW?

23 MR. CLARKE: I KNOW THEY LIKE THE LOCAL RULES A LOT  
24 BETTER.

25 MR. MILLER: SEE, YOUR HONOR, HE'S MADE IT CLEAR THAT

1 THESE GENERAL COMMITTEES WANT TO CONSIDER AS PART OF THE MOVING  
2 THE PIECES AROUND TO TAKE A DIFFERENT, TO TAKE PERHAPS LOWER  
3 WAGES IN EXCHANGE FOR BETTER RULES, YOU KNOW, AND THE NATIONAL  
4 NEGOTIATING COMMITTEE WOULDN'T HAVE ANY PART IN THAT PROCESS.  
5 WE'VE DEALT WITH WHAT WE'VE DEALT WITH, OR AT LEAST THE  
6 NATIONAL NEGOTIATING COMMITTEE DID.

7 I MIGHT ALSO ADD THAT ALL THIS BUSINESS ABOUT -- FIRST  
8 OF ALL, ATLANTIC COAST LINE ONLY DEALT WITH THE CREW-CONSIST  
9 ISSUE. UTU WOULD NOT NEGOTIATE THAT NATIONALLY, AND THE  
10 CIRCUIT ENDED UP SAYING YOU DON'T HAVE TO NEGOTIATE IT  
11 NATIONALLY; IT IS A PURE LOCAL ISSUE.

12 MOREOVER, AS FAR AS IT WOULD DO NO MORE HARM TO  
13 NATIONAL HANDLING IN PERMITTING THESE THREE GENERAL COMMITTEES  
14 TO EXERCISE THE RIGHT THAT UTU HAS CONSTITUTIONALLY AS A PARTY  
15 UNDER 2 THIRD THAN IT HAS BEEN FOR IN THE LAST 15 YEARS, THE  
16 SOO LINE RAILROAD, A CLASS ONE, TO GET OUT, THE ILLINOIS  
17 CENTRAL RAILROAD, A CLASS ONE, TO GET OUT, AND THE GRAND TRUNK  
18 WESTERN RAILROAD, TO GET OUT. THERE ARE FIVE CLASS ONE  
19 CARRIERS LEFT: BNSF, NS, UP, CSX, AND ICANSAS CITY SOUTHERN,  
20 KCS. THAT'S IT. WHAT IF FOUR DECIDE THAT THEY'RE NOT GOING TO  
21 GET THE NCCC THE NEXT TIME AROUND? THERE'S NO NATIONAL  
22 HANDLING. IT'S MORE PREDICTABLE THAT NATIONAL HANDLING WOULD  
23 END THAT WAY THAN BY GRANTING TO THESE THREE GENERAL COMMITTEES  
24 THE RIGHT THAT UTU HAS AS A PARTY UNDER 2 THIRD, BECAUSE WE'VE  
25 GOT WHAT, THREE OUT OF EIGHT CLASS ONE CARRIERS THAT HAVE IN

1 THE LAST 50 YEARS LEFT.

2 THE COURT: IF I GRANT YOU THE RELIEF YOU'RE SEEKING,  
3 THAT'S GOING TO BE THE END OF NATIONAL HANDLING, BECAUSE  
4 EVERYONE WILL SAY, "WE'RE NOT GOING TO DO IT. WE WANT TO  
5 REPRESENT OURSELVES." INSTEAD OF THE THREE GENERAL COMMITTEES  
6 THIS TIME, IT WILL BE ALL 11. THEN WHAT HAPPENS?

7 MR. CLARKE: YOUR HONOR, IF WE WENT INTO, IF WE WERE  
8 ABLE TO -- IF YOU LOOK AT THE 1994 ROUND, THAT'S VERY  
9 INSTRUCTIVE ON THIS. THERE WAS A RACE TO THE COURTHOUSE IN  
10 1994. THE CARRIERS WON BY COMING HERE. IN ANY OTHER CIRCUIT  
11 IN THIS COUNTRY, WE WOULD NOT HAVE HAD THE PROBLEM. GRAND  
12 TRUNK WOULD HAVE BEEN THE RULE. IT'S JUST BECAUSE IN THIS  
13 CIRCUIT, BECAUSE OF ATLANTIC COAST LINE, THAT WE HAVE THE  
14 PROBLEM, AND IT'S BECAUSE THE CARRIERS INSIST ON COMING HERE.

15 MR. MILLER: YOUR HONOR, EVERYBODY IN THE UNION  
16 RECOGNIZES THAT NATIONAL HANDLING IS VERY EFFICIENT. THAT'S  
17 WHY IT'S PART OF THE CONSTITUTION, BECAUSE IT'S A LOT OF WORK  
18 FOR A GENERAL COMMITTEE. IT'S A LOT OF EXPENSE, A LOT OF  
19 RESEARCH. THEY DON'T HAVE THOSE RESOURCES.

20 THE COURT: THAT'S WHY THEY HAVE A DULY APPOINTED  
21 REPRESENTATIVE SUCH AS YOU.

22 MR. MILLER: AND THAT'S WHY, YOUR HONOR, MORE TO THE  
23 POINT, THEY CHOOSE TO PARTICIPATE BY HAVING THE NATIONAL  
24 NEGOTIATING COMMITTEE HANDLE THEIR PROBLEMS.

25 MR. CLARKE: AND MOST OF THE GENERAL COMMITTEES ON THE

1 BN, EVEN THOUGH INITIALLY THEY DECIDED TO OPT OUT, DECIDED TO  
2 OPT BACK IN. SO IT'S SOMETHING THAT -- WE SUBMIT THIS IS NOT  
3 THE DEATH KNELL. THIS IS THE WAY TO GIVE SOME STRENGTH TO THE  
4 RIGHT TO BARGAIN FOR ISSUES THAT THE UNION BELIEVES ARE  
5 IMPORTANT TO US.

6 THE COURT: RIGHT. I'M GOING TO GIVE YOU EQUAL TIME,  
7 BUT WAIT A MINUTE. I'M INTERESTED. WHAT DOES HAPPEN IN OTHER  
8 CIRCUITS, THOUGH? YOU DON'T HAVE ATLANTIC COAST LINE. HOW DO  
9 YOU BARGAIN AS A PRACTICAL MATTER?

10 MR. CLARKE: IT'S 2 THIRD, YOUR HONOR, WHOEVER YOU  
11 DESIGNATE AS BEING YOUR REPRESENTATIVE.

12 THE COURT: SO, ROUTINELY, AN ENTITY SUCH AS UTU WOULD  
13 DESIGNATE THREE GENERAL COMMITTEES OR FOUR GENERAL COMMITTEES,  
14 OR WHATEVER?

15 MR. CLARKE: IT DOES, YOUR HONOR.

16 THE COURT: THAT HAPPENS?

17 MR. CLARKE: IT DOES. UNDER ITS CONSTITUTION, THE  
18 GENERAL COMMITTEES ARE THE ONES TO RECEIVE AND DEAL WITH AND  
19 SERVE THEIR OWN SECTION 6 NOTICES. THAT'S THE WAY IT'S DONE.  
20 THE ONLY DIFFERENCE IS NOW THAT WE'RE INTO THIS NATIONAL VERSUS  
21 LOCAL WHERE IT'S TRYING TO BE ENFORCED, BEGINNING IN 1994, AND  
22 THIS IS WHAT THE RECORD SHOWS, IN 1994, THE NATIONAL CARRIERS  
23 CONFERENCE COMMITTEE CHANGED THE METHOD OF SENDING THE SECTION  
24 6 NOTICES AND THEY SENT THEM DIRECTLY TO THE INTERNATIONAL UTU.

25 THE COURT: THAT'S WHAT HAPPENED IN THIS CASE.

1 NOVEMBER 1ST, 1999, THE LETTER WAS SENT TO UTU AND NOT THE  
2 GENERAL COMMITTEE.

3 MR. CLARKE: THAT'S CORRECT, YOUR HONOR.

4 THE COURT: BUT THE CARRIER SAYS, "WELL, WE GAVE  
5 NOTICE TO BOTH THE GENERAL COMMITTEES AS WELL AS UTU."

6 BUT THAT WAS NOT CORRECT, WAS IT, MR. MUNRO?

7 MR. MUNRO: ACTUALLY, WE SENT THE SECTION 6 NOTICE  
8 BOTH TO MR. LITTLE, THE HEAD OF UTU, AT THE SAME TIME ALL THE  
9 CARRIERS INDIVIDUALLY SENT THE SAME NOTICE, SAME TIME, TO ALL  
10 THE GENERAL COMMITTEES, AND MR. CLARKE MAKES A BIG POINT ABOUT  
11 THIS IN HIS REPLY BRIEF WHERE HE SAYS WE NEVER SERVED THE  
12 GENERAL COMMITTEES.

13 THE COURT: THE WHOLE PURPOSE IS JUST TO GIVE NOTICE.

14 MR. MUNRO: IT IS, YOUR HONOR.

15 THE COURT: NO ONE CLAIMED THEY DIDN'T KNOW WHAT WAS  
16 GOING ON.

17 MR. MUNRO: EXACTLY, YOUR HONOR.

18 THE COURT: SO SECTION 6 IS NOT A VIABLE ISSUE IN THIS  
19 CASE, IS IT?

20 MR. CLARKE: IT IS IN THIS ONE SENSE, IN RESPONSE TO  
21 THEIRS. SECTION 6 ALSO GIVES THEM THE REQUIREMENT THAT THE  
22 PARTIES HAVE THE INITIAL CONFERENCE WITHIN 30 DAYS.

23 THE COURT: RIGHT, AND THE CARRIER TAKES THE POSITION  
24 THAT THE CONFERENCE TOOK PLACE IN NOVEMBER.

25 MR. MUNRO: EXACTLY, YOUR HONOR.

1 MR. CLARKE: WITH THE NOVEMBER 30, WITH THE UTU,  
2 WHEREAS THE GENERAL COMMITTEES, WHO ARE THE DESIGNATED REPS --

3 THE COURT: YOU SAID IF THEY DID TAKE PLACE. YOU  
4 WEREN'T THERE.

5 MR. CLARKE: THEY ASKED, THEY SAID, "WE'RE NOT WILLING  
6 TO WAIVE. WE WANT TO SIT DOWN AND NEGOTIATE," AND THEY NEVER  
7 RESPONDED. THIS IS THE POINT I WAS GETTING AT, YOUR HONOR. UP  
8 UNTIL 1994, THE WAY THE SECTION 6 NOTICES WERE SERVED IN  
9 NATIONAL OR LOCAL -- IT DOESN'T MATTER WHICH TYPE -- THE  
10 CARRIER WOULD SERVE AND NORMALLY THE CARRIERS DIDN'T,  
11 APPARENTLY. IT WAS THE GENERAL COMMITTEES. BUT IF THE CARRIER  
12 WANTED THE NOTICE, IT WOULD SERVE IT ON THE GENERAL COMMITTEES,  
13 BECAUSE THE GENERAL COMMITTEES ARE THE ONES WHO ARE DESIGNATED  
14 FOR CERTAIN AGREEMENTS. AND IF YOU WANT TO CHANGE THAT  
15 AGREEMENT, THIS IS THE PERSON YOU'RE REQUIRED TO TALK TO.

16 LIKewise, THE GENERAL COMMITTEES WOULD SERVE THEIR  
17 NOTICE AND THEN THE PARTIES WOULD SAY THIS IS GOING TO BE THE  
18 SAME NOTICE EVERYONE ELSE IS GETTING. I SUGGEST WE ARE WILLING  
19 TO WAIVE INITIAL HANDLING, INITIAL CONFERENCE, AND ENGAGE IN  
20 NATIONAL HANDLING. THEN BOTH PARTIES DESIGNATE THE NATIONAL  
21 BARGAINERS AS THE ONE TO DO THE BARGAINING. THAT'S THE WAY  
22 HISTORICALLY IT WAS DONE.

23 SO WHAT WE'RE DEALING WITH HERE, THIS IS A CHANGE  
24 BEGINNING IN 1994, SOLELY BECAUSE OF THIS CONCEPT OF TRYING TO  
25 FORCE PEOPLE INTO NATIONAL HANDLING. PRIOR TO THAT TIME, MOST

1 PEOPLE WENT INTO IT, AND IT IS AN EFFECTIVE WAY OF HANDLING  
2 THESE THINGS.

3 YOUR HONOR, I HAVE, IF I CAN AT THE END, I HAVE ONE  
4 POINT.

5 THE COURT: WHY DON'T YOU GO AHEAD AND SAY IT NOW?

6 MR. CLARKE: WE ARE CONTESTING THE PRACTICAL  
7 APPROPRIATENESS OF NATIONAL HANDLING IN THIS CASE. I GUESS I  
8 DIDN'T MAKE IT THAT CLEAR IN THE LAST HOURS OF THE NIGHT, WHEN  
9 I WAS WRITING THAT. MR. MUNRO DIDN'T REALIZE THAT. BUT OUR  
10 POSITION IS THIS: THE UTU GENERAL COMMITTEES, THESE THREE  
11 COMMITTEES HAVE DECIDED THAT THESE LOCAL ISSUES ARE VERY  
12 IMPORTANT TO THEM. THEY HAVE A RIGHT.

13 THE COURT: YOU'RE TALKING ABOUT QUALITY-OF-LIFE  
14 ISSUES SUCH AS...?

15 MR. CLARKE: SUCH AS WHETHER OR NOT THE CAB IS GOING  
16 TO BE WINTERIZED, WHETHER OR NOT THEY HAVE TO HAVE THE SEAT FOR  
17 THE CONDUCTOR IN THE CAB, THINGS OF THAT SORT.

18 THE COURT: RIGHT.

19 MR. CLARKE: A DEAD-HEADING.

20 THE COURT: BRAKES?

21 MR. CLARKE: WELL, NOT SO MUCH BRAKES, BUT  
22 DEAD-HEADING.

23 THE COURT: BRAKES, B-R-A-K-E-S, NOT B-R-E-A-K-S --

24 MR. CLARKE: YES.

25 THE COURT: -- WORKING.

1 MR. CLARKE: WHAT KIND OF TERMINAL TIMES.

2 THE COURT: SO YOU'RE TALKING ABOUT LOCAL  
3 WORKING-CONDITION ISSUES, THEN.

4 MR. CLARKE: THEY ARE LOCAL, BUT THEY'RE ALSO  
5 CREW-CONSIST ISSUES, TOO. THE RULE ISSUES WITH HOW THE  
6 CARRIER, DOES THE PERSON HAVE TO BE ON CALL FOR FOUR HOURS  
7 BEFORE HIS SHIFT, OR CAN IT ONLY BE TWO HOURS? THINGS OF THAT  
8 SORT, THEY'RE LOCAL ISSUES. THEY CONSIDER THEM LOCAL. WE  
9 SUBMIT, UNDER THE RAILWAY LABOR ACT, THEY CLEARLY HAVE A RIGHT  
10 TO GO FOR THOSE.

11 NOW, IF THEY WERE IN NATIONAL HANDLING, BECAUSE OF THE  
12 CONCEPT OF THE SINGLE AGREEMENT, THE DELAWARE & HUDSON RULE,  
13 WHICH, WE ACKNOWLEDGE, APPLIES, THEIR LOCAL ISSUES ARE  
14 SUBORDINATED TO THE NATIONAL ISSUES, AND YOU CAN'T HOLD OUT FOR  
15 THAT. NOW, SO, THEREFORE, IF THE LOCAL ISSUES ARE THE DRIVING  
16 ISSUES, AND AS DELAWARE & HUDSON INDICATES, WHERE YOU'RE  
17 DEALING WITH RULES, YOU HAVE TO HAVE THE WAGES IN THERE, TOO,  
18 SO YOU CAN DEAL WITH THE ECONOMICS IN ORDER TO GET THE RULES,  
19 BECAUSE RULES ALL HAVE AN ECONOMIC ASPECT TO THEM.

20 SO WE AGREE THAT ALL OF THE ISSUES HAVE TO BE DONE IN  
21 THE SAME SETTING, BUT IS IT PRACTICALLY APPROPRIATE TO REQUIRE  
22 GENERAL COMMITTEES, WHO LOOK AT THE RULES AS BEING THE DRIVING  
23 ISSUES, TO GIVE UP THEIR ABILITY TO GET CLOSURE ON THOSE ISSUES  
24 BY BEING REQUIRED TO GO INTO NATIONAL? IS IT PRACTICALLY  
25 APPROPRIATE? WE SUBMIT IT IS NOT, BECAUSE THE ESSENCE OF

1 ATLANTIC COAST LINE IS THAT THE RAILWAY LABOR ACT REQUIRES  
2 REASONABLE EFFORTS. IT DOESN'T REQUIRE EFFORTS THAT ARE AT WAR  
3 WITH REALITY. IT'S AT WAR WITH REALITY TO REQUIRE PEOPLE TO  
4 BARGAIN IN A SETTING WHERE THEY CAN'T INSIST UPON AND ACT UPON  
5 THEIR PAROCHIAL INTERESTS. ON THE OTHER HAND, IT DOESN'T  
6 PREVENT THE CARRIERS FROM GETTING INTO IT BY DEALING LOCALLY,  
7 BECAUSE THEY CAN INSIST UPON, AS THE SOO LINE INDICATED, THE  
8 GENERAL AGREEMENT.

9 SO OUR POSITION IS, UNDER ATLANTIC COAST LINE, GIVING  
10 EFFECT TO THE ESSENCE OF THE CASE, WHICH IS THE ACT DOESN'T  
11 REQUIRE SOMETHING AT WAR WITH REALITY, TO REQUIRE THE LOCAL  
12 COMMITTEES TO ENGAGE IN NATIONAL HANDLING WOULD EFFECTIVELY  
13 DISABLE THEM, HOBBLE THEM. I TRIED TO FIND A GOOD WORD TO  
14 BRING THE POINT ACROSS, BUT ESSENTIALLY IT'S THE DEATH KNELL  
15 FOR A LOCAL AGREEMENT UNLESS THE CARRIER IS WILLING TO ACCEPT  
16 IT, BUT YOU CAN'T FORCE IT, AND THE RAILWAY LABOR ACT GIVES YOU  
17 THE RIGHT TO FORCE IT BECAUSE, BY HAVING THAT ABILITY, PEOPLE  
18 COMPROMISE MORE READILY THAN IF THEY DON'T HAVE TO COMPROMISE.

19 THE COURT: ALL RIGHT, THANK YOU, COUNSEL.

20 MR. MUNRO: YOUR HONOR —

21 THE COURT: MR. MUNRO.

22 MR. MUNRO: -- LET ME JUST RESPOND.

23 THERE ARE NO LOCAL ISSUES PRESENTED IN THIS DISPUTE,  
24 YOUR HONOR, BECAUSE THEY HAVEN'T SERVED SECTION 6 NOTICE. THE  
25 ONLY ISSUES THAT ARE PRESENTED, THE ONLY SECTION 6 NOTICES

1 PENDING ARE THOSE FOR THE OTHER GENERAL COMMITTEES THAT ARE IN  
2 NATIONAL HANDLING AND THE CARRIERS, AND SO THE ISSUES THAT MR.  
3 CLARKE TALKS ABOUT, SUCH AS THE WINTERIZING OF CABS, WE DON'T  
4 HAVE A SECTION 6 NOTICE THAT SAYS THAT. WE'RE NOT BARGAINING  
5 ABOUT THAT. THE ISSUES FOR WHICH NATIONAL HANDLING ARE  
6 OBLIGATORY ARE THE ISSUES CONTAINED IN THE CARRIERS' SECTION 6  
7 NOTICE -- WAGES, NATIONAL HEALTH AND WELFARE PLAN, WORK  
8 RULES -- AND WE'VE SHOWN IN OUR BRIEF, AND THEY HAVE NOT  
9 REBUTTED THE FACT, THAT THOSE KIND OF ISSUES HAVE BEEN  
10 NATIONALLY HANDLED FOR GENERATIONS.

11 THE COURT: DID YOU RECEIVE A SECTION 6 NOTICE AT ALL  
12 FROM THE THREE GENERAL COMMITTEES?

13 MR. MUNRO: NO, YOUR HONOR, NO SECTION SIX NOTICE HAS  
14 EVER BEEN SERVED BY THEM. SO MR. CLARKE'S COMPLAINT ABOUT  
15 HANDLING LOCAL ISSUES IS JUST A DEAD LETTER.

16 THE COURT: WHAT ABOUT THAT? WEREN'T YOU UNDER AN  
17 OBLIGATION, IF INDEED YOU THOUGHT YOU HAD THE AUTHORITY TO  
18 REPRESENT YOURSELVES, WEREN'T YOU UNDER AN OBLIGATION TO SERVE  
19 4 SECTION 6 NOTICE?

20 MR. CLARKE: YES, YOUR HONOR, BUT THE SECTION 6 NOTICE  
21 THAT THE CARRIERS SERVED ASKED TO CHANGE THE AGREEMENTS THAT  
22 HAD THE LOCAL AGREEMENTS THAT THE UTU IS INTERESTED IN, AND  
23 THOSE ARE THE ISSUES THAT THEY WANT TO BARGAIN ABOUT. AND  
24 THEY'RE WILLING TO DO SOME CHANGES, BUT THEY WANT TO CHANGE IT  
25 IN A WAY THAT WILL BE BENEFICIAL TO THEM. AND WE POINTED OUT

1 IN OUR EARLIER PAPERS IN THIS CASE ALL OF THE, THE WAY IN WHICH  
2 THE SECTION 6 NOTICE THAT THE CARRIERS SERVED OPENED UP ALL OF  
3 THE ISSUES, ON THE LOCAL ISSUES AS WELL AS --

4 THE COURT: SO THE ANSWER IS, YOU ARE NOT LEGALLY  
5 OBLIGATED TO SERVE SECTION 6 NOTICES.

6 MR. CLARKE: NO, BECAUSE THEY WANT TO CHANGE IT, AND  
7 WE WANT TO SIT DOWN AND BARGAIN ABOUT THE CHANGES. NOW, I'M  
8 NOT GIVING --

9 THE COURT: SO, IN OTHER WORDS, HAD THEY NOT RAISED  
10 THE ISSUE, YOU WOULDN'T HAVE BEEN DEMANDING SEPARATE TREATMENT  
11 FOR LOCAL ISSUES, THEN.

12 MR. CLARKE: THAT'S CORRECT, YOUR HONOR. IF THEY  
13 HADN'T SERVED THE SECTION 6 NOTICE TO CHANGE THE AGREEMENTS  
14 THESE COMMITTEES HAVE BEEN DESIGNATED TO MAINTAIN, WE WOULD NOT  
15 BE IN COURT. THAT'S THE ONLY ISSUE.

16 NOW, I SHOULD -- I DON'T WANT TO MISLEAD THE COURT.  
17 THE GENERAL COMMITTEES ARE WAITING TO SEE WHAT THE ANSWERS ARE  
18 TO THE QUESTIONS THAT HAVE BEEN POSED ABOUT THE NATIONAL  
19 AGREEMENT, AND THIS IS BROUGHT OUT IN THEIR DEPOSITIONS AS TO  
20 WHETHER THEY WILL ACCEPT OR NOT THAT NATIONAL AGREEMENT, OR  
21 WHETHER THEY'LL SIGN ON IF THEY CONCLUDE THEY'RE NOT GOING TO  
22 SIGN ON TO THE NATIONAL AGREEMENT, THEY WILL THEN SERVE THEIR  
23 OWN SECTION 6 NOTICE.

24 THIS DOESN'T MOOT OUT THIS CASE, BECAUSE THE NATIONAL  
25 AGREEMENT HAS A MORATORIUM CLAUSE WHICH, WHOEVER IT APPLIES TO,

1 PREVENTS THEM FROM SERVING NOTICES. SO IT'S OBVIOUS, BECAUSE  
2 MANY OF THE ISSUES THAT THEY WANT TO ADDRESS WERE NOT ADDRESSED  
3 BY THE NATIONAL AGREEMENT, BUT THEY WILL IN FACT, IF THEY DON'T  
4 ACCEPT THE NATIONAL, SERVE THE SECTION 6 NOTICES.

5 THE COURT: ALL RIGHT.

6 MR. MUNRO: YOUR HONOR, THERE ISN'T ANY DISPUTE THAT  
7 WAGES, FOR EXAMPLE, ARE PRACTICAL AND APPROPRIATE FOR NATIONAL  
8 HANDLING. WE SERVED SECTION 6 NOTICE THAT INCLUDES A PROPOSAL  
9 TO CHANGE WAGES, AND THEY ARE OBLIGATED TO NATIONALLY BARGAIN  
10 ABOUT THAT WITH US. NOW, HE SAYS THAT HE'S NOT LEGALLY  
11 OBLIGATED TO SERVE A SECTION 6 NOTICE. EVEN IF THAT WERE TRUE,  
12 OUR NATIONAL NEGOTIATORS HAVE THE AUTHORITY TO TALK TO THEM  
13 ABOUT LOCAL ISSUES.

14 THE COURT: ALL RIGHT, WHAT ABOUT THE QUESTION? I  
15 NEVER GOT AN ANSWER FROM YOU ABOUT THE DUAL-TRACK SETTLEMENT  
16 DISCUSSIONS. WOULD YOU BE AGREEABLE TO IT OR NOT?

17 MR. MUNRO: WE ARE AGREEABLE TO DUAL TRACK, YOUR  
18 HONOR. IN FACT, WE PROPOSED IT AND THEY TURNED US DOWN. NOW,  
19 YOU HAVE TO REMEMBER THAT DUAL TRACK IS DUAL TRACK, AND IT  
20 INCLUDES AN OBLIGATION ON THEIR PART TO COME AND TRY TO  
21 BARGAIN.

22 THE COURT: YOU'RE REFERRING TO THE GENERAL COMMITTEES  
23 AS WELL AS UTU?

24 MR. MUNRO: THE ENTIRE UTU, YOUR HONOR.

25 THE COURT: ALL RIGHT.

1 MR. MUNRO: AND AS LONG AS THEY DO THAT, WE'RE  
2 PERFECTLY HAPPY.

3 THE COURT: SUPPOSE UTU DID NOT PARTICIPATE.

4 MR. MUNRO: I'M SORRY, YOUR HONOR?

5 THE COURT: SUPPOSE UTU DID NOT PARTICIPATE.

6 MR. MUNRO: WELL, THE UTU, I BELIEVE, HAS, WHOEVER  
7 COMES TO THE TABLE HAS TO HAVE AUTHORITY TO BARGAIN FOR  
8 EVERYONE THAT THIS UNION REPRESENTS. IT DOESN'T HAVE TO -- I  
9 MEAN, THERE ISN'T ANYONE OUT THERE WHO IS THE UTU. THERE'S  
10 SOME PERSON WHO'S GOING TO SPEAK ON THEIR BEHALF, AND WHOEVER  
11 THAT IS, WE DON'T CARE WHO IT IS, BUT WHOEVER IT IS HAS TO HAVE  
12 AUTHORITY TO MAKE A NATIONAL AGREEMENT FOR A TRUE NATIONAL  
13 HANDLING. AS LONG AS THAT'S GOING ON, AS LONG AS WHOEVER THEY  
14 SENT TO THE TABLE HAS THAT AUTHORITY, WE'RE HAPPY TO TALK ABOUT  
15 LOCAL ISSUES, EITHER IN THAT SETTING OR SEPARATELY.

16 AND IN FACT THAT'S WHAT HAPPENED LAST TIME, YOUR  
17 HONOR. THEY SIGNED ON TO THE NATIONAL AGREEMENT, AND IN RETURN  
18 FOR THAT, WE TALKED ABOUT LOCAL ISSUES. MR. CLARKE SAYS  
19 THERE'S NO CLOSURE THERE, BUT THERE WAS A PROVISION FOR BINDING  
20 MEDIATION, AND THEY CHOSE NOT TO USE IT.

21 THE COURT: ALL RIGHT. FINALLY, ARE THERE ANY NEW  
22 REASONS WHY I SHOULD GIVE DEFERENCE TO JUDGE HOGAN'S DECISION?

23 MR. MUNRO: I THINK THAT THE PERSUASIVE VALUE OF JUDGE  
24 HOGAN'S OPINION IS IN ITS RECOGNITION OF WHAT THIS SECTION --

25 THE COURT: HE RECOGNIZES THAT ARTICLE 2 THIRD DOESN'T

1       EXIST, ESSENTIALLY.    THAT'S HIS RECOGNITION.

2               MR. MUNRO:    I DON'T THINK SO, YOUR HONOR.    HE HAS A  
3       FAIRLY CAREFUL ANALYSIS OF WHAT SECTION 2 THIRD PROVIDES AND  
4       HOW IT CAN BE RECONCILED WITH ATLANTIC COAST LINE.    HE SAYS  
5       THAT IT'S ABOUT FREEDOM OF CHOICE IN THE SELECTION OF  
6       REPRESENTATIVES.    IT PROTECTS THE RIGHT OF EMPLOYEES TO PROCEED  
7       THROUGH COLLECTIVE BARGAINING WITH THE REPRESENTATIVE.

8               THE COURT:    I DO AGREE WITH HIM WHEN HE SAID THAT. I  
9       AGREE WITH HIM.    THAT'S WHAT ARTICLE 2 THIRD SAYS.    IT'S ABOUT  
10       'THE FREEDOM OF CHOICE TO APPOINT A REPRESENTATIVE, AND THAT'S  
11       ALL THE COMMITTEES AND UTU ARE LOOKING FOR, THE RIGHT TO  
12       DESIGNATE A REPRESENTATIVE.

13              MR. MUNRO:    YOUR HONOR, BEYOND THAT, WHAT THEY'RE  
14       SAYING IS, THEY'RE TRYING TO DO WHAT JUDGE HOGAN SAID SECTION 2  
15       THIRD DOES NOT MEAN, WHICH IS DICTATE THE TERMS UNDER WHICH  
16       COLLECTIVE BARGAINING WILL OCCUR, I.E., NOT NATIONALLY.  
17       THEY'RE SAYING, BECAUSE WE'VE CHOSEN A LOCAL REPRESENTATIVE,  
18       BECAUSE WE ARE NOT USING THE NATIONAL REPRESENTATIVE, YOU CAN'T  
19       FORCE US INTO NATIONAL HANDLING, AND THAT'S WHAT'S WRONG.    THEY  
20       GET TO PICK THEIR REPRESENTATIVE.    THAT'S FINE.    IT DOESN'T  
21       MATTER WHO IT IS, BUT WHOEVER THAT REPRESENTATIVE IS HAS GOT TO  
22       COME TO THE NATIONAL HANDLING.

23              THE COURT:    SO A FOOTNOTE TO HIS OPINION WOULD BE, IN  
24       OTHER WORDS, WHENEVER A CARRIER HAS OPTED FOR NATIONAL  
25       HANDLING, THE EMPLOYEES ARE RELEGATED TO HAVING THEIR

1 COLLECTIVE BARGAINING REPRESENTATIVE REPRESENT THEM IN  
2 NEGOTIATIONS. I MEAN, THAT WOULD BE A FOOTNOTE. IN OTHER  
3 WORDS, WHENEVER THERE IS A DEMAND FOR NATIONAL HANDLING, THE  
4 EMPLOYEES ARE OBLIGATED TO HAVE AS THEIR REPRESENTATIVE THE  
5 COLLECTIVE BARGAINING REPRESENTATIVE APPOINTED PURSUANT TO 2  
6 FOURTH.

7 MR. MUNRO: THEY'RE ALWAYS, I THINK, OBLIGATED TO  
8 BARGAIN THROUGH THEIR DULY DESIGNATED REPRESENTATIVE. WHOEVER  
9 THEIR SPOKESPERSONS ARE, THAT'S UP TO THEM.

10 THE COURT: ALL RIGHT, AND TO BE CLEAR, FREEDOM TO  
11 CHOOSE, THEN, MEANS THE EMPLOYEES' RIGHT TO CHOOSE THEIR  
12 ORGANIZED BARGAINING REPRESENTATIVE PURSUANT TO THE RAILWAY  
13 LABOR ACT.

14 MR. MUNRO: YES.

15 THE COURT: IT MEANS NOTHING MORE THAN THAT.

16 MR. MUNRO: THAT'S CORRECT. THEY GET TO PICK WHOEVER  
17 THEY WANT.

18 THE COURT: RIGHT, BUT THEY DO IT ONCE AND THAT'S  
19 FOREVER, BECAUSE UTU IS THE DESIGNATED REPRESENTATIVE.

20 MR. MUNRO: NO, NOT NECESSARILY, YOUR HONOR. THEY CAN  
21 PICK A DIFFERENT ONE. THE MAJORITY OF THE CRAFT OR CLASS  
22 ALWAYS HAS A RIGHT TO CHANGE.

23 THE COURT: BUT THE UTU HAS BEEN THE REPRESENTATIVE  
24 PURSUANT TO 2 FOURTH SINCE THE INCEPTION OF THE RLA. RIGHT?

25 MR. MUNRO: SINCE 1969, YOUR HONOR. IT WAS

1 ACTUALLY -- IN 1969, I BELIEVE THERE WERE FOUR DIFFERENT UNIONS  
2 THAT CAME TOGETHER TO FORM THE UTU, BUT TOMORROW A MAJORITY OF  
3 THE EMPLOYEES COULD VOTE OUT THE UTU AND TAKE THE BLE. RIGHT?

4 THE COURT: RIGHT, OR THE NCCC.

5 MR. MUNRO: OR WHOEVER THEY WANT, YOUR HONOR.

6 THE COURT: THAT'S NOT GOING TO HAPPEN.

7 MR. MUNRO: I DON'T THINK SO.

8 THE COURT: NO.

9 MR. MUNRO: LET ME JUST SAY A FEW WORDS ABOUT --

10 THE COURT: YOU CAN CHOOSE WHOEVER YOU WANT. YOU CAN  
11 CHOOSE THE NCCC. YOU CAN CHOOSE ANY ENTITY YOU WANT TO CHOOSE.  
12 RIGHT?

13 MR. MUNRO: THE CARRIERS CAN COLLECTIVELY. A CARRIER  
14 CAN CHOOSE TO BARGAIN THROUGH ITS OWN LABOR RELATIONS  
15 DEPARTMENT, FOR EXAMPLE. IT CHOOSES ITS OWN REPRESENTATIVE.  
16 IN THIS CASE, THE CARRIERS HAVE CHOSEN THE --

17 THE COURT: THE 6TH CIRCUIT CASE AND 8TH CIRCUIT CASE  
18 WERE JUST WRONG. IS THAT RIGHT?

19 MR. MUNRO: NO, NO, NO, YOUR HONOR. THEY'RE PERFECTLY  
20 CORRECT. A CARRIER CAN'T BE FORCED TO SELECT A PARTICULAR  
21 REPRESENTATIVE. THE CARRIER CAN'T BE FORCED TO SELECT A  
22 MULTI-EMPLOYER BARGAINING REPRESENTATIVE, JUST AS A UNION, JUST  
23 AS THE EMPLOYEES CAN'T BE FORCED TO BARGAIN THROUGH SOMEONE  
24 OTHER THAN THE UTU. THEY SAID, "WE DON'T WANT TO BARGAIN  
25 THROUGH A MULTI-UNION GROUP." THE RAILROAD LABOR EXECUTIVES

1 ASSOCIATION, FOR EXAMPLE, YOUR HONOR, THAT'S THE EQUIVALENT OF  
2 THE NCCC. IT'S A MULTI-UNION GROUP, AND IF THE UNIONS WANTED  
3 TO, THEY COULD DESIGNATE THAT ENTITY AS THEIR BARGAINING  
4 REPRESENTATIVE, AND THEN THE CARRIERS WOULD BE FORCED TO COME  
5 AND BARGAIN, AND WE'D BE FORCED TO ENGAGE IN NATIONAL HANDLING  
6 WITH THE ENGINEERS AND THE CONDUCTORS AND THE FIREMEN AND THE  
7 MAINTENANCE OF WAY ALL TOGETHER IN ONE PLACE. THEY HAVE THE  
8 RIGHT TO DO THAT, JUST AS WE HAVE THE RIGHT TO ASK THEM TO COME  
9 AND BARGAIN WITH ALL THE CARRIERS TOGETHER. THAT'S THE  
10 PARALLEL, YOUR HONOR. THAT'S WHY SOO LINE AND GRAND TRUNK ARE  
11 PERFECTLY CONSISTENT WITH THE LAW OF THIS JURISDICTION.

12 THE COURT: ALL RIGHT, I'LL TAKE A FIVE-MINUTE RECESS.  
13 I'LL GIVE YOU FIVE MINUTES TO SUM UP.

14 (RECESS)

15 THE COURT: MR. MUNRO, IT SEEMS LIKE WHENEVER THE  
16 CARRIERS WANT LOCAL HANDLING, THEY GO TO THE 8TH CIRCUIT.  
17 WHENEVER THEY WANT NATIONAL HANDLING, THEY COME TO THIS  
18 CIRCUIT. IS THAT ACCURATE?

19 MR. MUNRO: I DON'T THINK SO, YOUR HONOR. I MEAN,  
20 THIS ISSUE HAS NOT REALLY COME UP ALL THAT MUCH.

21 THE COURT: YES. DID I HEAR YOU SAY A LITTLE WHILE  
22 AGO THAT YOU CAN NEVER FORCE MULTI-UNION BARGAINING? DID YOU  
23 SAY THAT?

24 MR. MUNRO: WE CAN'T FORCE THEM (PAUSE) -- NO. WHAT I  
25 SAID WAS THAT THEY, JUST AS THEY CAN'T FORCE A CARRIER INTO

1 BTU, BUT THAT'S MY UNDERSTANDING OF THE CONSTITUTION.

2 MR. MUNRO: THE CONSTITUTION CERTAINLY SAYS THAT, YES,  
3 YOUR HONOR.

4 THE COURT: RIGHT.

5 MR. MUNRO: BUT WHAT THAT MEANS, THOUGH, YOUR HONOR,  
6 IS THAT, SUPPOSE THE CONSTITUTION SAID WE WILL BARGAIN THROUGH  
7 THE SINGLE INDIVIDUAL. WELL, THAT INDIVIDUAL HAS TO COME TO  
8 NATIONAL HANDLING. THAT'S MY ARGUMENT. LIKEWISE, THE  
9 CONSTITUTION SAYS WE'RE GOING TO BARGAIN THROUGH A WHOLE BUNCH  
10 OF DIFFERENT COMMITTEES. WELL, ALL THOSE COMMITTEES HAVE GOT  
11 TO COME TO NATIONAL HANDLING. THAT'S THE POINT OF WHOEVER THE  
12 REPRESENTATIVE IS, WHETHER IT'S AN INDIVIDUAL OR AN ENTITY OR  
13 COLLECTION OF ENTITIES, THAT COLLECTIVE REPRESENTATIVE HAS TO  
14 BARGAIN WITH US NATIONALLY. THAT'S THE POINT.

15 THE COURT: ALL RIGHT.

16 MR. MUNRO: I DON'T WANT TO TAKE UP ANY MORE OF THE  
17 COURT'S TIME, BUT I REALLY DO FEEL A NEED TO SAY SOMETHING  
18 ABOUT THIS CRAFT-WIDE BARGAINING POINT, BECAUSE I THINK IT'S  
19 REALLY GOTTEN LOST HERE, AND IT'S A CRITICAL POINT. WHAT'S  
20 GOING ON IN THIS CASE IS, IN MANY RESPECTS, EVEN MORE DRAMATIC  
21 THAN WHAT WAS IN THE ALTON & SOUTHERN CASE, BECAUSE THERE YOU  
22 HAD A UNION AS A WHOLE REFUSING TO ENGAGE IN NATIONAL HANDLING,  
23 WHEREAS HERE YOU'VE JUST GOT NOT A SEGMENT OF A UNION ON A  
24 SINGLE CARRIER, BUT A PORTION OF THE UNION ON THAT SINGLE  
25 CARRIER, AND THEY'RE NOT ENTITLED TO DO THAT, YOUR HONOR. EVEN

1 IF YOU THOUGHT THAT EVERYTHING I SAID ABOUT NATIONAL HANDLING  
2 IS WRONG, THEY HAVE AN OBLIGATION TO BARGAIN FOR THE ENTIRE  
3 CRAFT ON THE BURLINGTON NORTHERN AND SANTA FE.

4 AND THE LAW ON THAT IS CLEAR. SECTION 2 FOURTH AND  
5 SECTION 2 NINTH SPEAK OF THE REPRESENTATIVE FOR THE CLASS OR  
6 CRAFT. THEY GET ONE. THE UNITED STATES SUPREME COURT IN THE  
7 STEEL MACHINISTS CASE SAID THAT WHOEVER THE REPRESENTATIVE IS  
8 HAS TO REPRESENT THE ENTIRE CRAFT OR CLASS. THE NATIONAL  
9 MEDIATION BOARD, YOUR HONOR, HAS LIKEWISE BEEN VERY CLEAR ON  
10 THIS POINT. THEY'VE SAID OVER AND OVER AGAIN THERE HAS TO BE A  
11 SYSTEM-WIDE REPRESENTATIVE. YOU ONLY GET ONE. WHENEVER THEY  
12 CERTIFY ONE, IT'S ONE REPRESENTATIVE FOR THE ENTIRE CRAFT OR  
13 CLASS.

14 NOW, THE RESPONSE OF THE GENERAL COMMITTEES TO THAT  
15 ARGUMENT HAS BEEN, WELL, WE HAVE A WHOLE BUNCH OF LOCAL  
16 AGREEMENTS. YOU NEGOTIATE LOCAL AGREEMENTS ALL THE TIME. I'M  
17 NOT SAYING, YOUR HONOR, THAT CRAFT-WIDE/SYSTEM-WIDE AGREEMENTS  
18 ARE REQUIRED. WHAT I'M SAYING IS THAT SYSTEM-WIDE/CRAFT-WIDE  
19 AUTHORITY IS REQUIRED. WHENEVER THEY COME TO US TO ASK FOR AN  
20 AGREEMENT, WHETHER IT BE AN AGREEMENT THAT WILL APPLY TO  
21 EVERYONE ON THE BURLINGTON NORTHERN AND SANTA FE OR EVERYONE  
22 JUST ON THE FORMER GREAT NORTHERN, JUST A LITTLE PIECE OF THE  
23 RAILROAD, IN EITHER CIRCUMSTANCE, THEY HAVE TO HAVE THE  
24 AUTHORITY TO SPEAK FOR THE ENTIRE CRAFT IN THOSE CIRCUMSTANCES.  
25 AND THEY DON'T CITE, THEY CAN'T CITE ANY CASE THAT