Supreme Court of the United States

OCTOBER TERM

In the Matter of:

ATLANTIC COAST LINE RAILROAD COMPANY, Petitioner, vs. BROTHERHOOD OF LOCOMOTIVE ENGINEERS, et al. Respondents.	Docket No. 477

Pt. 2

Place Washington, D. C.

Date March 3, 1970

ALDERSON REPORTING COMPANY, INC.

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C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

ATLANTIC COAST LINE RAILROAD COMPANY, Petitioner	)	
vs	)	No. 477
BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL., Respondents	)	

Argument in the above-entitled matter was resumed at 10:19 o'clock a.m., on Tuesday, March 3, 1970.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

FRANK X. FRIEDMANN, JR., ESQ.
1300 Florida Title Building
Jacksonville, Florida 32202
Attorney for Petitioner

DENNIS G. LYONS, ESQ.
1229 19th Street, N.W.
Washington, D. C. 20036

ALLAN MILLEDGE, ESQ.
1300 Northeast Airlines Building
150 S. E. Second Avenue
Miami, Florida 33131
Attorney for Respondents

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 477, Atlantic Coast Line Railroad Company against Brotherhood of Locomotive Engineers. We will pick up where we left off yesterday.

Mr. Lyons.

ORAL ARGUMENT (Continued) BY DENNIS G. LYONS, ESQ.

ON BEHALF OF THE PETITIONER

MR. LYONS: Mr. Chief Justice, and may it please the Court: Yesterday afternoon we were to the point where we were discussing what we take to be the principal contention of the Respondents here, and that is that the April 26, 1967 order of the Federal District Court, and that was the order that denied the Atlantic Coast Line a preliminary injunction.

That order was being protected or effectuated by the subsequent injunction, the 1969 injunction against enforcement of the May '67 order of the State Court and on that basis they contend there is an exception here from Section 2283.

Our basic answer to that proposition is that the Federal District Court never purported to pass upon the availability of state rights or state remedies to the Atlantic Coast Line. His decree amounted to the denial of an injunction which is sought solely under Federal Law.

Their argument, whichwas made for the first time, two years later that the State injunction of May 1967 contravenes the Federal denial of an injunction is, we submit, simply a

setting up of a Federal Law defense based onthis Court's subsequent decision in Jacksonville Terminal against the injunction in the State Court proceedings.

Now, there are a number of subsidiary reasons why that April 26, 1967 order could not be the basis of a claimed exception here from Section 2283. In the first place, as we read the order, there is some dispute about it, but most of the cases that it cited are Norris-LaGuardia cases and it appears to us to proceed primarily on the basis of the Norris-LaGuardia Act.

We contend that the Federal Court order simply defines an injunction by reason of the Norris-LaGuardia Act, and of course, the legislative history of that Act is -- leaves open the remedies under State law and inthe State Courts.

The Respondents contend that the Federal Court order somehow constituted a comprehensive declaration of a party's rights, and, in effect, I suppose, held thatthe Coast Line, the neutral road had no right to injunctive relief here on any basis.

On its face, the order simply doesn't say that. The most you could say if the order were a declaration of rights and we don't read it that way at all; we read it as simply a denial on the basis of the Norris-LaGuardia Act. All it denied were rights under Federal Law. There is the further point that it's simply an order made upon applications for, at the most,

a preliminary injunction; indeed, it might have been an order simply denying a temporary restraining order. The record is a little unclear, but giving the Respondents the benefit of the doubt, it's an order denying a preliminary injunction. And ???????? the laws, we submit, quite block letter, on the point that you cannot have a termination of the party's substantive rights through a proceeding on a preliminary injunction application.

We submit that really, what the Respondents are trying to do here is to adjudicate this Federal Law defense; call it preemption or supercession, or maybe, perhaps, simply call it the assertion of a Federal Law of defense, to the State Court injunction by an enjoining proceedings in the State Court, and this, we submit, is at the core of what Section 2283 says that the Federal Courts are not to do.

Q For what reason, Mr. Lyons, did the District Court give for denying your application for leave to discontinue the action?

A He said that since the respondents had filed the handwritten answer, which they did very shortly before the notice of dismissal, that it was not dismissable as a right and he then declined to grant the injunction -- the order for a voluntary dismissal upon motion.

And he said thatsince the Court was of the opinion that the defendant's motion for a preliminary injunction; that is their counter-motions seeking to enjoin the State Court

proceedings has merit, our motion for voluntary dismissal will be denied.

Q What page is that?

A That's on page 195 of the appendix, Your Honor. In effect, he's assigning the reason that he wants to pass an injunction against the plaintiff as a reason for denying the plaintiff's motion to dismiss.

Q Well, was it the railroad's application for an injunction that was denied?

A Back in 1967; yes, sir.

Q And was the case dismissed?

A No, it was not; the case simply lay dormant for two years.

Q And that is the case in which this current order has been entered?

A That is correct, Your Honor; that is the case we now have before this Court.

If the contentions that we make as to the applicability of Section 2283 are not well-founded, the Court must still reach the question of whether the defense that the Respondents have urged to the State Court injunction is a good defense.

Now, of course, if the Court is in agreement with us that Section 2283 is applicable here and that none of the exceptions is applicable, then the Court need not reach this point.

Q Then, I suppose what happens is the right to the union to review the State Court injunction is still available; is it not?

A Yes.

Q Because there is no final judgment has been entered.

A That's correct.

If I might amplify a little bit on my answer to the Chief Justice yesterday. One of the basic reasons why we did not proceed tohave a final judgment entered ourselves right away, was that Judge McRae's order out of the Federal District Court enjoined us from proceeding further with the State Court proceedings. That injunction followed on the heels, fairly closely of the statement by the state judge that he would be willing to enter a final order.

Q Do you think that was broad enough to preclude the State Court implementing its own decision by a judgment?

A Well, he restrained us, Your Honor, from taking any further action infurtherance of the rights thatwe had in the State Court.

Q By the Court, too; or just you?

A Just us, but the State Court judge indicated he wanted the parties to prepare a decree and at that point we were under the Federal Court injunction and we were shortly thereafter.

Q I see.

A But, our position is plain. The Respondents are entitled to a final judgment that they can appeal to --

Q Do you think that that's very clear, Mr. Lyons?

A Yes; that is completely clear, Your Honor.

Q And you concede it?

A Yes; we concede that they are entitled to have a final judgment.

Q And are they satisfied they do?

A I believe they are, but I can't speak for them.

We submit that the Jacksonville Terminal case, which is the Respondent's principal, perhaps sole authority, for the proposition that they have a Federal Law defense, is not applicable to the situation involved here at the Moncrief Yard, which is a yard wholly owned by the Atlantic Coast Line, a non-struck carrier.

Now, we don't intend to take the liberty of parsing for the Court its opinion rendered only one year ago, but we do call the Court's attention to the fact that there was a very, very extensive discussion of the very peculiar facts involved in the Jacksonville Terminal case.in that opinion.

The fact that there we have ajoint terminal facility, jointly-owned and jointly-controlled by the carriers, including the struck carriers and the struck carrier had a right of veto over the major decisions thatmight be undertaken with respect

to those premises.

Q If we agree with your basic argument with respect to Section 2283, we dont' get at all to the question of whether or not there is any difference between this case and Jacksonville, do we?

A You do not have to reach this --

Q At all if we agree with you on your primary --

A That is correct, Your Honor.

Q Contention.

A I shall not belabor the point, but the opinion in Jacksonville Terminal, abbreviated, at least, seems to us to turn on these unique factors at the jointly-owned facility. This is a facility where FEC employees report for work every day on foot, which was generally controlled by them, which was, in effect, the FEC passenger terminal at the northern end, which sold tickets for the FEC, which prepared FEC cards, which performed extensive switching and routing services for them.

The Court discussed at some length the analogy with the common situs cases under the Taft-Hartley Act and, in effect, as we read the opinion, the Court included that in that context. The rather tangled and involved context of a joint facility, that the Court did not believe that it could make a judgment as to what extent the parties'self-help rights were properly exercisable and to what extent they were not.

The Court took the view that, we submit, in that area

at least, that that essentially had to be a legislative judgment.

Now, here we have gone beyond the exercise of self-help rights against the primary parties to the dispute. We have gone beyond the situation where the primary party, the FEC is involved in the joint use and control of a terminal facility.

What we have here is, essentially, "hot car picketing." At first it didn't start out that way, and there are still in this Court, protestations that that is not what was going on. But, particularly in the last few days of the picketing here, what you had was an attempt and a successful attempt to induce the employees of the Coast Line operating within the Coast Line's own yard not to handle cars which had originated on the FEC, and not to handle inbound cars coming down from the north that were ultimately destined to the FEC.

Now, there is some thought by the Respondents that this was done in a limited way, that they only refused to handle long, solid blocks of cars; that they only refused to make the very next move down to the point where the interchange would take place.

But the record is plain, particularly in the last few days of the picketing that the refusals by the employees went well beyond that, that they were beyond simply involving this last move down or back from the interchange point, that in one

case they declined to move a roadtrain that was destined up to go to Waycross, Georgia, which was fully made up, simply because it had FEC cars in it.

And inthe Court below, namely, before the State Court, I should say, the counsel for the Respondents took the view that this Court's opinion in Jacksonville Terminal was to the effect that there was no longer any question of how far you can go or how far you can't go, that there wasno longer any body of law available to any employer doing business with the FEC, that would in any way restrict their rights to picket his business.

Now, we contend that if you read the Jacksonville Terminal case that way, what you have is picketing that I think anybody would consider secondary picketing. That's not a magic word, but it's a word that expresses sort of judgments about what it is when people who are essentially strangers to a labor dispute, have their businesses interfered with by the parties to a labor dispute. And it is a practice which the Congress has outlawed and outlawed in increasingly stringent terms for the last 23 years, starting in 1947 and which the legislators in virtually the states and the State Courts of common law, have outlawed.

What the position of the Respondents is, as I understand it, is that despite that, because of the fact thatthe Taft-Hartley Act is not as we concede, not applicable here in the railroad industry, that there is no agency of government

state or Federal, judicial or administrative, that can any way regulate or any way deal with these practices, regardless of how far removed they are from directly operating upon the party that they have the dispute with.

In other words, the hot car approach or the hot cargo approach or the so-called "hot property" approach is outlawed in virtually every industry by the Taft-Hartley Act and the Landrum-Griffin Act, but not in the railroad area and what's more, say the Respondents, the States can't do anything about it, either.

Q Do what extent did the District Judge rely, if at all, on the business relationships between the Florida East Coast and the Atlantic Coast Line?

A It's -- I assume he had those before him, because that transcript was available to him from the hearing two years before. And he did refer to certain findings that the use of the Moncrief Yard was an integral and necessary part of the FEC's operations, which is clear. If they can't receive cars coming down from the north or if they can't, if there is a blockage in the way in which their cars go up to the north, they simply cannot operate.

Q But that reasoning would apply equally if this facility had been owned by a completely independent entity with the Florida East Coast and Atlantic Coast Line leasing the facilities, apparently, wouldn't it?

A Well, I suppose that would be the case, Your Honor, but of course, here we do have an independent owner; we do have the ACL which is completely independent of the FEC.

Q Yes, but I mean independent of each of them; if there had been a complete independence the result would have been the same.

A Yes, or indeed, I would think you would have the same results had they gone up to Waycross, Georgia, or whatever the next junction point or the next point where they could have conveniently blockaded the trains. Getting through these other points, going up to the north, are similarly integral and essential to the FEC's business, unless it can have some way of getting its cars through to the points that it is supposed to get them beyond its own line, it isn't going to continue to operate.

Your Honors, we --

Q Mr. Lyons, you would be making somewhat the same argument if this case wasn't a railroad labor case, but was under a NLRB or NLRA regime; wouldn't you?

A I wouldn't -- we wouldn't have gone to the State Courts, but we would have made a similar argument --

Q Let's assume a State Court purports to enjoin a union from doing something that is either arguably or actually protected or prohibited by the Labor Act, and that the National Labor RElations Board has exclusive jurisdiction to deal with

it, but the State Court nevertheless, purposts to deal with it by an injunction.

A Yes.

Q And I suppose you would be making the same argument that the employer or the union may not resort to Federal Court for an injunction to prohibit the State Court from doing it?

A I certainly would. I wouldmake the Section 2283 argument. I don't really see how I could make an argument on the merits in support of the State, because that's a very clear error.

Q But the fact that the State Court had no jurisdiction or it would be said to have no jurisdiction; it wouldn't make any difference to your case?

A Not at all, Your Honor.

We submit, lastly, that if the Jacksonville Terminal decision means what the Respondents say that it means, it should be reconsidered by this Court, although certainly we think the Court need not reach that point at all.

Our final contention takes us into an area which is relatively uncharted by this Court's decisions and thatis that the Norris-LaGuardia ACt here, as well as Section 2283, precludes the injunction that the Federal Court granted.

The relationship between the nonstruck carriers and the rail unions has been held by the lower court and this Court

in a 4-4 decision, once upheld that as being a relationship arising out of a labor dispute, and hence, in the Jacksonville Terminal case by this Court and in this case, the Moncrief case, by the lower court, the nonstruck carriers have been held not to be entitled to have a Federal Court injunction.

We say that the Norris-LaGuardia Act works both ways. If the Federal Courts may not pass an injunction against the unions, we submit that in this situation they may not pass an injunction against the nonstruck carriers restraining them from the use of the State Courts.

It is clear on the face of the Norris-LaGuardia Act that it does work both ways; that it does inhibit injunctions against management, just as it inhibits injunctions against unions and, in fact, we quote in our brief, considerable dialogue on the Floor of the Senate and the House, which indicates that Congress recognized that this was a two-way sword when it was passed in 1932.

Indeed, some of the practices that can't be enjoined are practices that only an employer could commit, i.e., joining an employer organization, so we submit that the very broad contention that the Respondents make that the Act doesn't apply at all to injunctions against management is not correct.

We also say that Section 4-D of the statute makes it plain that injunctions against the ordinary courts of judicial proceedings, were one of the evils that Congress was trying to

deal with when it passed the statute.

That being so, we are confronted with the very flat prohibition in Section 7 which flatly restrains the courts of the United States from granting any injunction in a labor dispute [illegible], and those findings were not made here, including findings which certainly were very relevant to the subject matter here; namely: there is no finding that complainant has no adequate remedy at law. Certainly his appellate rights in the Florida State Courts would have precluded the making of that finding.

Indeed, there was no attempt to comply with the Norris-LaGuardia Act at all.

So, for this reason as well, we contend that the injunction here should not have been granted against the State Court proceedings and that the judgment of the Court of Appeals should be reversed.

Q What's the status of things now. There is no picketing going on now in this yard?

A No; there is not; we do have a stay of the Federal Court order --

Q That's the stay that Justice Black issued?

A Yes, Your Honor.

With the Court's permission I'll reserve the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Lyons.

Mr. Milledge.

ORAL ARGUMENT BY ALLAN MILLEDGE, ESQ.

ON BEHALF OF THE RESPONDENTS

MR. MILLEDGE: Mr. Chief Justice and may it please the Court: We will demonstrate in our argument that this case, this injunction issued by Judge McRae against the inconsistent State Court actions is not an isolated case, but it arises out of a totality of regulation of the Florida East Coast dispute. that goes back to 1964 and involves every aspect of this strike, including regulation of good-faith bargaining, regulation of the self-help rights of a railroad, regulation of the self-help rights of the union, the actual operations of the railroad itself and that all of these are interrelated and all bear upon each other.

Q You mean you have some problems with the State Court enjoining violent picketing?

A Well, not violent picketing --

Q Well, then the Federal Court didn't take over the entire controversy --

A With that exception.

Q Well, why not the exception for secondary activities?

A Because this Court has held in the Jacksonville Terminal Company case that that is not only preempted, that is State Law may not apply in that field --

Q Well, it's not preempted the Federal Court, either. What can the Federal Court do about it?

A Well, it is, as we interpret the opinion, it is protected conduct toengage in whatever reasonable conduct that the organization --

Q Well, what jurisdiction does the Federal Court have over it?

A Well, the railway --

Q The Federal Court is preempted, too; isn't it?

A In the opinion, there is the area, of course, of damages which would be an area that the Federal Court could deal with, but in the opinion of the Court of the last term is, as we read it, that there is no limitation upon the self-help rights so long as they are reasonable and that is a matter that has been before the District Courts a number of times.

And I think I can develop, also, the interrelationship.

The second thing that we will demonstrate is that the power of the District Court to enjoin the State Court action here under 2283 and this Court's opinions, is beyond question that it has that power.

Q Do you agree with Mr. Lyons that Norris-LaGuardia is a two-way street?

A Well --

Q In its prohibitions?

A We think that with the two -- really there is only one provision in the Norris-LaGuardia Act that applies to management, and that is the one he cited about employer organizations. But, we think -- our basic position on that is that the tail will go with the hide; that once the 2283 problem is dealt with the Norris-LaGuardia Act problem -- the Norris-LaGuardia Act is just basically not designed for this type of a problem, and we will develop that later, but our position is not that the Norris-LaGuardia cannot apply to an employer.

Now, the third position that we will develop is that this case is the strongest case for the application that is the "should" aspects. We will demonstrate that there is the power of the District Court to do this. But this is the strongest case for the application of an injunction against the State that has ever come before this Court or a lower court in a reported opinion and it is a stronger case for the granting of such injunction than any reported case granting one.

In connection with the totality of regulation by the Federal Courts, there are four separate cases, that is with separate file numbers, that the jurisdiction of which is aided by this injunction and orders need the protection of this injunction.

Now, the types of matters which have been before the Courts below are absolutely legion. This Court recalls the Clerks' case that was before this Court. That was a case

brought by the United States Government; it is a case in which it was determined that the Florida East Coast Railroad for the first two years of its operation, it's post-strike operation was operating in violation of the Railway Labor Act. There was an order entered in that case requiring good-faith bargaining. There was an order in that case granting to the railroad certain limited exceptions or deviations from its collective bargaining contracts in aid of its self-help rights.

That case still pends; there is a trial commencing or another final hearing in that case commencing the first week of April to go on for all of April and all of May, and the issues are, again, the good-faith bargaining -- that's on contempt citations -- the good-faith bargaining, massive violations of the injunction since the strike and on other issues.

All of that still pends and the good-faith order depends on economic sanction. As Mr. Justice Brennan has written in the Insurance Agent's case and has written in other cases, too, and it's in the Galveston Wharves case, the decisionof the Fifth Circuit in this same area of 2283.

But, bargaining, the motive power in bargaining is economic sanction. Now, in this case, that is the Florida East Coast Strike, there are, as there are in all railroad or other situations, two type of economic sanction. One is the withdrawal of your people at the commencement of the strike,

and the second type is picketing aimed at those persons, the employees of persons making pickups and deliveries to the struck employer.

In other industries it's more general than that, but in the railroad industry the place where you put the pressure on is where the railroad gets its freight, from another railroad.

Now, from the commencement of this strike up until the present, there has not, with the exception of a few hours in '66 and a few hours in 1967, been any use of the economic sanction to stop pickup and deliveries from other railroads by asking the employees of other railroads not to do so.

That has been prevented by an injunction initially issued by the United States District Court for the Middle District of Florida. And that is another case in which -- that case still pends. Now, Mr. Lyons, in his brief, has talked about that case. That's a case in which the United States District Court has assumed jurisdictionover interchanges, and the organizations, the labor organizations were never allowed to get into that case. And, as they say, it mandates interchange.

Now, what has happened since that time is there was a lawsuit filed in 1965 by the organization to construe that injunction as not to apply to employees of the connecting carrier.

Then, in 1966, the trainmen strike against -- the trainmen picketing of the terminal began and effectively. There was a construction of that assumed jurisdictionover interchange to initially not permit picketing of the terminal company and ultimately to permit picketing of the terminal company.

And then in 1967 in this case, with a different file number, nonetheless, the Court has again, but with a differnt file number, assume jurisdiction to determine whether or not we and I say, in this, "we" is the Brotherhood of Locomotive Engineers, can picket the Moncrief Yard.

All of these cases are all interrelated and they all have impacts back and forth on each other.

Q May I ask you a question? Supposing that Judge McRae had allowed dismissal of Atlantic Coast Line's suit; or suppose that that particular suit had not been in existence at all, could you have gone into the State Court -- to the Federal Court to bring an original action and bypass the State Appellate procedures and ultimate review here, if it was granted?

A If there was no jurisdiction thathad been assumed by the United States District Court or no orders that needed to be protected or effectuated, I would say that we couldnot.

Q Well, could you have gone into any of these other

pending suits?

A We could. I thinkthat we could have gone into the Government's case, the good-faith bargaining nexus is exactly the same there as inthe Galveston Wharves case, which we will discuss after a bit. And we gone in, if permitted, into the case in which there was already assumed jurisdiction, what's called the "6316 case," or the initial case assuming jurisdiction over interchange.

Once, and as we come later -- I'll get into it as quickly as I can, into the 2283 question -- once there is Federal jurisdiction to determine the controversy, we're in far enough so that an injunction may be issued. Now, in a case like that you probably wouldn't get into the area of "should it be issued?"

This case makes, as we will show later, an overwhelming posture for the "should" aspect of it, but what the statute says on the "could," or the power, is simply a case in which it is necessary to aid jurisdiction or a case in which an order needs protecting or effectuating. That's what the Congress says.

This Petitioner is not, however, a party in any of the actions that you are talking about; is he?

A Petitioner is a party to all of the interchange actions.

Q Atlantic Coast Line?

A Atlantic Coast Line Railroad is.

Q Is it the only one, or --

A No; all the railroads are to the initial case upon which the Federal Court assumes and mandated interchange, all of the carriers are; possibly Southern is not, but Atlantic Coast Line, Seaboard -- of course, it's all one railroad now -- and the Jacksonville Terminal are all parties to that and Southern was, too; I can recall that.

Q Well, now, is that a litigation that involves this labor dispute with FEC?

A It is, and that the petition, thatis the complaint was filed in that case on January 27th, four days after the strike commenced, by the FEC, against these other carriers saying that they, the other carriers were refusing interchange, that they had imposed an embargo and indeed, they had imposed an embargo.

And the labor organizations were not parties, but the justification given by the defendant railroads, that is the other railroads, was that there was a labor dispute and these people, that is our people, would picket the interchange and so they wanted --

Q You probably already said it, but will you repeat it to me again? If I understand your argument there is a judgment in that case which would entitle the union now to relief inthat action of the kind you got here against the State

Court suit. How does that come about?

A All right. That -- the injunction in that case applied to the Atlantic Coast Line and its employees and terminal company and its employees.

Now, that is an injunction -- the jurisdiction of the Court is over the question of interchange and it applied to employees and --

Q How are you going to get into that suit; that's what I'd like to know.

A Well, we would be by intervention, but the question is a question simply: "How does 2283 read?" For instance inthe Capital Service case --

Q I appreciate it, but you answered Mr. Justice Harlan that if this present proceeding hadn't been brought at all in the Federal Court, that nevertheless, you'd be able to get in, as I understood you to say, into this interchange case.

A Well --

Q In a way that would entitle you to have the same relief that you actually got in this case; is that right?

A Yes. Now, we actually win a battle; the way we won a battle was in 1965 we filed another case to construe -- we sought intervention and were denied it and Judge Tuttle discusses that in the case -- one of the Jackson Terminal Company cases.

So then we filed a suit to construe it --

Q Where did you bring that one?

A Before the same judge in the same court.

Now, that one didn't reach any final determination, because in the meantime, in 1966 the trainmen went on strike and began to picket the terminal which was normally in violation of the injunction and the same judge, Judge McRae, enjoined it initially and then later his injunction was reversed by the Fifth Circuit.

So that as a practical matter, that original case, 6316, the original embargo injunction case, has beenmodified by the '66 case and by the '67 case, this case that's presently before this Court, all of which deal with the, reallythe same problems: the interchange between the connection carriers and this railroad.

Q Well, basically, then your argument is, is it, that the 2283 problem is that this interchange act has a judgment of which this present proceeding protects or effectuates; is that it?

A No; our basic answer is thatJudge McRae has, as he says, "determined the right to the parties" in this order on appeal he says, "I delineated the rights of the parties; I did make a substantive determination between the parties."

Now, assume that he was wrong about that, that he really hadn't done that, that Mr. Lyons is somehow right that all his order was was a Norris-LaGuardia order. Certainly he

assumed jurisdiction to do that. He's had jurisdiction --

Q Well, I know, but to protect or effectuate what judgment?

A Well, the language of the statute does not require that there be a judgment to be protected or effectuated. The language of the statute is: "where necessary in aid of its jurisdiction."

Q Oh, I see; is thatthe one you are relying on?

A We rely on both of them, because they are both in point. What I was saying is that even if his '67 order wasn't an order that required protection. In the first place -- well, even if it was; we say it was, because he said it was. Even if it wasn't, he certainly could assume jurisdiction to determine the legality of this conduct.

So, he certainly has the jurisdiction. Now, we've heard over here that everything was done, everything was done in this litigation to entitle them to a final judgment. I forget the exact terms, but you recall when they -- when Mr. Lyons talked about it, and so did Mr. Friedmann, that after this injunction against the State Court proceedings was entered that they asked Judge Scott, the other District Judge, to either set it aside or give them a final judgment, because everything that had been done, all the facts were in and all he had to do was just enter a final order. And that's true; I mean, that's where the case is, it's a question of either our

conduct is legal or illegal. Judge McRae says he's ruled that it is legal conduct and when he made that ruling back in 1967, and this is along the lines that there is a judgment to protect or effectuate, he -- this Court had not yet ruled in Jacksonville Terminal, but you will see in his opinion or order that he cites Section 20 of the Clayton Act.

Now, this Court has heard about Section 20 of the Clayton Act from us since 1966, that Section 20 of the Clayton Act, as discussed by the Hutchinson case, and Norris-LaGuardia breathing life into the -- back into Clayton, is then our position on legality from the beginning and that's what Judge McRae said in his order in 1967 and that was before the order of this Court, to be sure; but that's what his determination was. He determined that Norris-LaGuardia applied, but he went much farther than that.

He also, in terms of this order being an order which is necessary to protect or effectuate, he cites he finds that we were engaged in a major dispute and he cites the B&O case, which is the standard, very recent case, saying that once you had exhausted the procedures of the Railway Labor Act; once there was a major decision, then you were entitled to self-help; you had a legal right to self-help.

Now, the content of self-help is something else, but it has certainly been said often enough by this Court that that self-help implies, as it must, since there is the duty to

bargain in the Act, it must imply primary strikes and primary pickets.

Now, he cites the B&O case. This is a major dispute. He talks about what we did. Now, I haven't gotten into the facts and I may never have a chance to get very far into the facts, but we've heard over and over again and this Court has heard over and over again, this great tale of horror: the world is going to come to an end.

Now, since 1963 one road train has been 32 minutes late and the yard in this case was 15 hours late, but that's all that's ever happened and all that's ever happened is that in the exact place where the Florida East Coast Railroad ends, and I'm not talking about ownership; I'm talking about where its railroad trains run. In this case they run into the Atlantic Coast Line property where they complete their business. They make a deliver andthey make pickups, and the employees of the neutral, the Atlantic Coast Line, are people that, under any idea of primary picketing, we are entitled to ask: "Don't pick up and don't make deliveries to the primaries."

Now, this happens to be a case, this Moncrief Yard picketing in which every effort was made to limit the matter of picketing so that it would have the effect only on pickups and deliveries.

Now, we didn't even use a picket line. If we put a picket line up at the one and only entrance, the only place

that employee of Atlantic Coast Line go to work in the Moncrief Yard is at this one employee entrance. If you throw up a picket line there, those employees whose duty it is to make pickups and deliveries through the FEC within that yard where the FEC engines come, no other place to reach those people and if we put a picket line there, that closes the yard down.

Now, there is this assertion over here made that that's really what we had in mind doing, that we just wanted to close the yard down. Now, what we did, I might say, is we let the people go to work. We just asked them, a simple fact: "Don't handle the interchange," and that's what they did.

Now, that relates back, because that's what Judge McRae found in his order and I'll show youthat in just a moment. But --

Q Does that go to any issue, other than the character of the picketing --

A No; it really doesn't. This conduct here in question, however, is more primary than the conduct in the Jacksonville Terminal Company case. That'sabout all it really does go to. We are not some villains that are out to close down the world or close down the railroad or anything else. We do want to applythe economic power, the economic sanction to the place where the railroad gets its traffic; it doesn't reeally go any farther than that in this case.

Q It doesn't really touch the 2283 issue or the --

A Or the Norris-LaGuardia? No, sir.

Just to go, because there was this business about we want to close the yard down or something; that's what they say over and over in their brief. They quote a man named Jeannette, who is quoting a man named Sims. Jeanette is their overall man and Sims is our overall man.

Now, of course, Mr. Sims testified, and as Judge McRae found, allwe were doing was stopping the interchange movements. Mr. Jeannette, in cross-examination said -- my question to him was: "And you had some conversations, I believe" -- I'm reading from page 109 from the appendix. "You had some conversations, I believe, with other different union people, or at least they were there, like Mr. Sims? ANSWER: 'I talked to you and to Mr. Sims.' QUESTION: You understood, did you not, that the purpose of this activity was only to stop FEC traffic? ANSWER: 'That was my understanding; yes, sir.'"

That's the man they are quoting earlier that "we are going to close the world down."

Now, in connection -- well I just might, since I got started on it, just tell you that Judge McRae's order, the order of 1967, paragraph number 6, which is on page 66 of the appendix finds that that's what we were doing that we were asking people not to make pickups and not to make deliveries; and that was that.

Now,--

Q How many cases have there been -- I know there are two primary cases in this Court that you gentlemen have referred to. How many cases have you been able to find where the 2283 power has been exercised by a Federal Court?

A The Galveston case in the Fifth Circuit, in which certiorari was denied by this Court this past term, was picketing very similar to this on the grounds that the State Court had enjoined it as secondary. And the nexus was a good faith bargaining order. There is that case.

There is the Capital Service case. Capital Service is a case which came before Richman Brothers and in Capital Service the board had invoked the jurisdiction of the District Court; hadn't entered any orders at all, but had invoked it, invoked the jurisdiction for the purpose of entering some orders pertaining to alleged secondary conduct and this Court held that that was proper under 2283 and the injunction against the State Court was proper to unfetter the Federal Court so that it could make a determination.

There is that case. There is -- I have a list if I can pick them out quickly.

Q Well, they are collected in your brief; aren't they?

A Yes, sir. The Looney case is the case that this one, that this case is most similar to. This case is very

similar to, really three cases. It's very similar to Galveston Wharves; it's very similar to Capital Service, because the difference there, the Board invoked the jurisdiction as only the Board can under that Act. Here it is private parties who may invoke the jurisdiction of the Court.

But, the Looney case is a case that goes back quite a number of years, but the Looney case is a case in which this Court approved an injunction against a State Court case, State Court injunction in a Texas rate dispute, the way I think of it in any event, and that case, the Looney case is discussed -- it's quite significant because it's like Capital Service in that an injunction was issued; it was in aid of jurisdiction, but of the Court, rather than to protect or effectuate a judgment.

But, the Looney case is of particular significance, because it is discussed at length in the Toucey decision, the Justice Frankfurter opinion for the Court, and Justice Reed's opinion for the minority. And in both, the majority and the minority, the same conclusion is reached about Looney.

The -- Justice Frankfurter in that case said that that case was granted merely to protect this jurisdiction until the suit brought by the carriers was finally settled.

Now, the significance of that is this: 2283, Mr. Lyons has suggested to us that 2283 has a lot of pigeonholes, and this doesn't fit a pigeonhole. The pigeonhole for a race,

there is a pigeonhole for a removed case; there is a pigeonhole for a fully-adjudicated case. That's all he said the pigeonholes were in his main brief. Now, a lot of cases don't happen to fit in those pigeonhole, but 2283 isn't a pigeonhole statute.

The history of 2283 is that it initially was a flat, blanket statement by the Congress that District Courts shall not enjoin State Courts, and then eventually, the bankruptcy addition came into it. And then finally in 1948 it was changed because of Toucey.

But what had this Court done in the meantime? This Court had said that obviously there are situations in whichit is necessary that having jurisdiction, a District Court has got general equity jurisdiction and it's got to be able to protect that jurisdiction.

And so, various cases came along and Looney wasone of them that it was necessary to protect the jurisdiction. Now, Justice Frankfurter in 1941 in the Toucey case, said that the policy against enjoining State Courts was so great that even a fully-litigated case that was a money-judgment diversity case, the policy of the United States against enjoining State Courts was great enough to require somebody who fully litigated the matter in the Federal Courts, to go ahead and just plead it as res adjudicata, and go on all the way up again through the State system and back around. And that was reversed by Congress.

So, you no longer, you have an entirely different statutory format, starting in 1948. It isn't a question anymore of the Court having to look to some general equity considerations, but the Congress has said and the revisors say the same thing. They don't limit it to pigeon holes, but particularly the language of Congress, "the District Court may enjoin where necessary in aid of jurisdiction or to protect and effectuate judgments. "

Now, you have both here, and really the question is the question of the "should," aspect.

Q Well, you don't suggest, do you, that this '67 judgment was res adjudicata on the railroad, do you? Insofar as precluding it from going into the State Court under --

A No. What our position is with regard to the State Court matter is that whatever that Court does or does not do: right, wrong or indifferent, that that impinges upon the jurisdictionof the Federal Court which was assumed to make those determinations. We also say that --

Q Well, why does it, if it's acting under State Law?

A We now know that the Federal Court --

Q Was the Federal Court dealing with the State Law problem?

A Well, the Federal Court could deal with the

State law problem.

Q It didn't purport to be.

A Well, under Avco, a decisionof this Court, what you plead is a set of operative facts. You do not plead all this business that comes from the other side of the table about the Federal Court couldn't deal with the State Court --

Q Was there diversity in this case?

A No, I didn't --

Q Well, what jurisdiction would the Federal Court have had to deal with a state law question?

A Well, there is no longer a state law question, but I would assert, based upon last year's determinaion in this Court, but at that time, if the Court had jurisdiction as it did, under the Railway Labor Act and underthe Interstate Commerce Act, it could use whatever body of law that there was that was applicable under pendant jurisdiction or ancillary jurisdiction.

It's -- the District Courts of the United States every day apply State Law and it's usuall in diversity cases, but they also apply State Law in pendant jurisdiction cases where, in this case, it would be the Railway Labor Act.

Q What you're saying is that in '67 the District Court, in effect, declared that this is protected conduct, free from interference by any court under the Federal Law?

A That is what we say he did.

Q What?

A Correct; yes.

Q And you're saying that the railroad, going into the State Court may be enjoined because it's acting contrary to at least the declaratory judgment that was entered against it?

A Yes. Defendants can win -- I mean, it is the position of Mr. Lyons that, well, if you rule for the plaintiff and don't grant an injunction, then nothing has happened. Defendants can never have the benefit for this doctrine, or benefit of protection if it had been, let's say a fully-litigated case, with res adjudicata. I suppose that would be something different.

But, somehow, if the defendant gets ruled for that that isn't an order requiring some kind of protection.

Well, he did rule the question of the legality, the issue of legality of our conduct was submitted to Judge McRae in 1967. About that there can be no question. Now, there was a question up until this past year as to whether or not there might be some independent State remedy as it was thought, that could intrude into Railway Labor.

Now, as long as that was the case, and the suggestion is made: "Well, if it's whatyou say it is, why didn't you go in in '67? Well, you are into the area then of the question of really, a "should" proposition. Until this Court had ruled,

and, incidentally, the arrangement was with counsel, that we would let the 1967 picketing cases lie until this Court had ruled and when this Court had ruled, within about two weeks, we were in before Judge Luckie, so why -- the reason for not going in in 1967 is that a Federal District Court, with that question remaining as an open question would be reluctant to enjoin, not because he couldnt', not because it didn't interfere, but because that just wouldn't -- you'd never get somebody to do it, is really what's involved.

But once it's clear that that interferes, it is not a question of trying a res adjudicata defense; it's not a question -- under the statute it's not a question of any of those things. It's simply a question that theState Court action fetters the Federal Court in making its determination, or it is contrary or, in some -- it doesn't really even need to be contrary as long as it's necessary for -- that there is some reason for it to be necessary for the Court to take action, and here that is really very clear.

Now, it is said by Mr. Lyons that Richman Brothers ends the matter, because Richman Brothers says that there's a forbidden fruit here, that you can't try a preemption court defense in the Federal District Court, that you've got to let that go on up. Well, that isn't what Richman Brothers says.

In Richman Brothers, there was no jurisdiction of the United States District Court. Thatjurisdiction had been

preempted by the National Labor Relations Act.

Q There is no jurisdiction in either the State Court or the Federal Court?

A No; there's no jurisdiction anywhere around, so there was no jurisdiction to aid and there were no orders had been entered, so that 2283 could not apply.

It really is just about as simple as that. Now, the language --

Q The opinion of the Court isn't written quite that simply; is it?

A No, no. The opinion of the Court in the "should" area is Justice Frankfurter again, writing, the author of Toucey, and he writes lots of reasons why it shouldn't be done, but fundamentally it all does come back down to the question of there was no jurisdiction to aid or a judgment or order to be protected.

Now, Professor Moore has something to say about this. Professor Moore says the -- and this is on page 43 of our brief -- "the second exception permits the Federal Court to grant an injunction against State proceedings were necessary in aid of its jurisdiction." This puts back into 2283 some of the judicial flexibility which Toucey had removed from the statute. And, despite the strict reading of 2283 by Richman Brothers, flexibility still remains for Richman, as we shall see, held only that the District Court had no jurisdiction to aid, but if,

on the other hand, the Federal Court has jurisdiction, then under the terms of 2283 it may enjoin State Court proceedings where necessary in aid of its jurisdiction.

Now, since that time there has been the Galveston Wharves decision of the Fifth Circuit. It is possible that the Sperry-Rand decision is since that time, as well, but perhaps not.

The Galveston Wharves decision was a case like the FEC in this regard, that it had been to the Fifth Circuit Court of Appeals three times. It was a case that had spawned considerable litigation. The State Court had enjoined picketing; the Federal Court had mandated that the carriers engage in good-faith bargaining. The Federal Court enjoined the State Court from enjoining the picketing because of the impact that that would have, regardless of considerations of secondary conduct; in Galveston, again was the decision before this Court's decision in Jacksonville Terminal.

And that case is essentially, in terms of the power, under 2283, is essentially the same case as this one.

The Sperry-Rand case is a Court of Appeals case, and in that case, an injunction was issued against the State Court to protect a discovery order of the Federal Court.

In the Brown versus Pacific Mutual case, which is a case which goes back prior to the 1948 Amendments. Justice Parker issued an injunction against a State Court, or rather,

he affirmed an injunction against a State Court in a case which only involved cancellation of an insurance policy. The suit before the Federal Court was for cancellation; the suit in the State Court was on a $450 claim, arising under the policy. He discusses at great length, and this is back when there were no exceptions to 2283. He discusses the Kline case, which is a case -- Kline and Toucey and Richman are really the cases most often talked about.

But, when you come through all of it, and that injunction was sustained, but it never reached this Court -- but when you come down, really to all of it, certainly the Looney case is still the law; the Looney case doesn't fit into anybody's pigeonhold; the Looney case is simply a case in aid of jurisdiction.

This is what the Respondents say about Looney, and the Sperry Rand case: "What they teach is that an interlocutory order of the Federal Court is as much entitled to protection by injunction against interference from a STate Court as is a final order."

That's certainly true under Looney. Looney -- the principles of Looney were certainly carried forward and probably broadened, but at least carried forward in the '48 revision and that is certainly within thelanguage of 2283.

Now, the reason that this case is the strongest case that -- of any case for the application of 2283, is this:

there are at least 30 or 40 separate cases; the District Court has had innumerable cases involving this; the Fifth Circuit has had opinions that I don't thinkyou can number on two hands.

All of these matters, ultimately come down to one thing, that the Florida East Coast strike will be settled only if there is bargaining, when you finally come down to it. Now, there has been no economic power, no economic sanction that could be put to bear upon the Florida East Coast Railroad, since the first two years of the strike, except the economic sanction of asking the employees of the neutral railroads not to deliver cars to the FEC.

Now, in a situation like this, and the reason, really, I think that the economic sanctions initially didn't bring any kind of settlement, was because the FEC immediately started all of these illegal operations of which, there is a proceeding now about restoration of the status quo, and so forth, but they, effectively, through illegal conduct, wanted that. That's not the fault of Atlantic Coast Line.

But, also, from the very beginning, the other form of primary activity and surely there must be some way in the railroad industry that you're entitled to ask the people who make pickups and deliveries, in the terms of the Steelworker case or in ther terms of this Court last year, not to do that. And, of course, one knows that in this industry that they won't do it if you ask them not to, so there is an economic power that

has never been used.

That is what is involved in this case, and this Court has decided that State Courts have no business in this field. That interferes with, not only the Federal scheme, but that interferes with jurisdiction assumed over the bargaining, over the self-help rights of the railroad and over the question, not only of interchange between the carriers, but interchange as it affects the rights of these people. And it's all one ball of wax, but if, for instance, let us assume that a State Court tells the Federal Court that the railroad cannot deviate one iota from its contract and we know that Judge Simpson, who was originally the District Judge, following the mandate of this Court allowed the railroad to get away in its operations from certain matters. I forget exactly what they were at the moment, but some matters of its collective bargaining agreement.

Now, there wouldn't be any hesitation, I daresay, if that injunction by a State Court would come within 2283 and be stopped, and this is simply the other side of the coin and the only reason it looks any different in perspective is because the order says, "okay; dood; or at least I'm not going to give relief against it." And so you can say that isn't some kind of affirmative duty, but it bears on -- the Court assumed jurisdiction over the legality of this conduct.

And there is a State Court order that impinges upon

that. It isn't tangential at all; it's the heart of the whole business and no bargaining will ever make any sense until the day that there is some economic power on thepart of the organization. I mean, the basic dispute still pends. It's over ten cents an hour, a demand made in 1961 and for ten cents an hour the whole strike can be settled. For ten cents an hour in an economy that, from '61 to '69, has expanded what, on inflation, 25 percent.

So, something's wrong in this strike and it is that there is no -- that this traditional weapon of labor, primary picketing against people who make deliveries and pickups has never been able to be applied.

Q Did I understand you sometime back to say that absent the '67 injunction suit by the railroad in the Federal District Court, that you might have some problems here, if you had to start a new suit to enjoin a --

A Well, I think that in the totality of this situation, that with the perspective -- in the first place -- the perspective of the statute is not litigants' contentions, or anything else. The perspective of the statute is the power of the Court, and its whether -- the power of the court depends on whether it is assumed jurisdiction and it has assumed jurisdiction over the bargaining order --

Q Well, wouldn't you have some problem with Richman Brothers, at least; if there hadn't been any suit in the

Federal District Court at all and that the employer went to the State Court and got an injunction and then you started an action in the Federal Court. Mr. Justice Harlan asked you a while ago about that, I think. I thought your answer was: you might have some real problems with that.

A Well, the Capital Service case -- this case, if that were so, if there were no prior litigation at all,-- I believe that is your assumption, no litigation at all, you would then have a situation which is like the Capital Service case.

The difference would be in Capital Service it is the Board thatinvokes the jurisdiction of the Court, and then, in Capital Service, the court unferred itself first. Under the Railway Labor Act it is private litigation to invoke jurisdiction of the court to make a determination under the Railway Labor Act. And, if Capital Service is analogized to the Railway Labor Act, then an initial proceeding brought by a private litigant to have the Federal Court determine a question of Railway Labor Act Law, would be entitled, once the court had assumed jurisdiction to do that, would be within 2283.

Now, that doesn't make a strong a case for the "should" aspect, as we have in this case, because of the totality of all of the different factors.

Now,it's been said several times,well, all we need to do is just go ahead and follow our appellate remedies.

And it's true that the appellate remedies are there. We can take an appeal and we'll get back around here --

?????? Q Could you appeal the final judgment?

A Well, if Judge Luckie would do what he said he would do in his letter, and enter his final judgment, we could appeal from that: that's quite true. That's true in every 2283 case and that doesn't affect the policy of 2283, and that is a singularly inappropriate way to deal with a labor dispute. If a Federal Court has taken jurisdiction and had orders, then we'll be back here two years from now so that this Court can say that Jacksonville Terminal, when it says that State Law can't apply, means that, and then when some State Judge wants to take jurisdiction over something again, well, we'll be back in another two years after that and so forth and so on.

Now, the Federal interest in the settlement of the Florida East Coast strike is enormous. The Federal Government has been in the case since the beginning; not the one with this case number on it. It does affect whole regions and to have that procedure, and that's really what the decision of this Court comes down to, really the question that is, is this the type of a case, like a money judgment case, in a -- you know, it's already been determined that Toucey was wrong; that a fully-litigated diversity, but personal money judgment case you could and should enjoin a State Court. Congress said that; Congress was upset to think that you couldn't do that.

MR. CHIEF JUSTICE BURGER: Your time has expired now, Mr. Milledge.

MR. MILLEDGE: But this case, if that's so, then this case is just overwhelming for that and I didn't discuss the Norris-LaGuardia Act at all, but our position is stated in the brief.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Milledge. Mr. Lyons. You have about five minutes.

REBUTTAL ARGUMENT BY DENNIS G. LYONS, ESQ.

ON BEHALF OF PETITIONER

MR. LYONS: Mr. Chief Justice and may it please the Court: Mr. Milledge referred to a number of other proceedings besides the case at bar, which, presumably the District Court was protecting orders in by enjoining the State Court proceedings here.

Now, the District Court itself, never cited any of these other cases, and I don't believe they were cited to us by counsel. They were mentioned for the first time in this Court. There were three proceedings, essentially; one of them was the so-called Clerk's case, to which the neutral carriers aren't even a party. The other is a proceeding in which there has never been an order entered of any affirmative or even negative sort, and the only other one is this 1963 case and the only order that's ever been entered in that, and we discuss all of these in our replybrief, any order that has ever been entered in

that is the order that the FEC got against the Atlantic Coast Line and the other neutral carriers, requiring them to interchange. And we scarcely see how the State Court order in any way contravenes that order, since the picketing that the State Court sought to enjoin was designed to disrupt the interchange by getting the Coast Line to stop the interchange.

This case is quite different, then, from the Looney case which was mentioned frequently by counsel in his oral argument. In Looney there was an affirmative interlocutory injunction granted by the Federal Court. Then the State Court ordered the taking of certain action which was inconsistent, completely inconsistent with the Federal Court injunction. And it was held that the Federal Court could enjoin the proceedings upon that State Court injunction, notwithstanding that the Federal Court injunction was interlocutory.

This is an entirely different case. There is no order whatsoever that the injunction here on the review, protects or effectuates the assertions of the Federal Court's jurisdiction in this case, have been solely assertions as to the Federal Law rights. There is no diversity; the State Law claims were never pleaded.

We get down to the final pointiin this case, that what the Respondents are trying to do here is to adjudicate this defense, based on their reading of the Jacksonville Terminal case by way of bringing an injunction against the

State Court proceedings.

Now, they have stated that the argument we're making is essentially a pigeonhole argument, that they have to point to a specific exception to the statute. Well, that's the way the statute reads. Pigeonhole is kind of a tendentious way of saying it, but it's a general statute with specific exceptions.

As the Court said in Richman Brothers, "Legislative policy is here expressed in Section 2283, in a clear-cut prohibition qualified only by specifically-defined exceptions."

The exception, I think, that the Respondents are trying to urge on this Court is the exception that we heard much of at the very end of Mr.Milledge's argument, and that is that they just can't wait for the orderly adjudication of their Federal defenses in the State Courts. They have not joined with us in entering a final judgment; they admit that they could have had one entered. They have let that situation stand now for nine months; they have not lifted a finger to take an appeal in the State Courts.

The proposition, we submit, that the Respondents are urging upon this Court, cuts at the veryheart of what Congress tried to do back in 1793 and ever since, when it has enacted and reenacted this statute.

Q Mr. Lyons, let me ask you if this -- if, in 1967 the Federal Court had said expressly, or in effect, that "this issue before me is governed exclusively by Federal Law and

that the railroad has no right to an injunction under Federal Law, period.

And then, the railroad promptly resorted to the State Court and asked the State Court to adjudicate the controversy under State Law and asked for an injunction under State Law.

A If he had purported to, purported to exercise the power to adjudicate State Law claims or to deny their existence, then --

Then that Federal Law is created and is exclusive. Then we would have quite a different case. You could make the argument that what we are trying to do then is to relitigate that order and that we should have appealed that order.

Now, we didn't appeal his order and if it had said something else from what it had said, presumably our decision as to appeal would have been quite different.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, Mr.Lyons. Thank you, Mr. Milledge. The case is submitted.

(Whereupon, at 11:48 o'clock a.m. the argument in the above-entitled matter was concluded)