SUPREME COURT OF THE UNITED STATES

Nos. 90–1419 AND 90–1769

NATIONAL RAILROAD PASSENGER CORPORATION, ET AL., PETITIONERS
90–1419 *v.*
BOSTON AND MAINE CORPORATION ET AL.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES, PETITIONERS
90–1769 *v.*
BOSTON AND MAINE CORPORATION ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March 25, 1992]

JUSTICE WHITE, with whom JUSTICE BLACKMUN and JUSTICE THOMAS join, dissenting.

The majority opinion proceeds from the well-established principle that courts should defer to permissible agency interpretations of ambiguous legislation.[1] *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984); *Pauley* v. *Bethenergy Mines, Inc.*, 501 U. S. ___, ___ (1991). I have no quarrel with that general proposition. I do, however, object to its invocation to justify the majority's deference, not to an agency interpretation of a statute, but to the *post hoc* rationalization of government lawyers attempting to

[1] I agree with the majority that the Court of Appeals erred in concluding that section 402(d) of the Rail Passenger Service Act (RPSA), 45 U. S. C. §562(d), unambiguously prohibits transactions such as the sale and leaseback arrangement between Amtrak and the Central Vermont Railroad. Legislation passed while this case was pending before the Court of Appeals makes it clear such that such transactions are permissible. Independent Safety Board Act Amendments of 1990 §9(a), Pub. L. 101–641, 104 Stat. 4658.

explain a gap in the reasoning and factfinding of the Interstate Commerce Commission (ICC or Commission). *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 50 (1983).

Section 402(d) of the Rail Passenger Service Act (RPSA), codified at 45 U. S. C. §562(d), provides that Amtrak may apply to the ICC for an order directing the conveyance of another railroad's property *if* Amtrak can meet two conditions: Amtrak and the other railroad must be unable to agree upon terms for sale of the property, and the property must be ``required for intercity rail passenger service.'' If these conditions are met, ``the need of [Amtrak] for the property shall be deemed to be established,'' and the other railroad will be able to retain its property only if it can rebut the strong presumption of Amtrak's need. *Ibid.*

Because conferring upon Amtrak the presumption of need will determine the outcome of most disputes under this section, the two conditions that Amtrak must establish to receive the benefit of the presumption assume particular importance. However, in the present case, the ICC failed to address one of these factors. Although the Commission determined that the parties had been unable to come to terms for sale of the disputed property, see App. to Pet. for Cert. in No. 90–1419, pp. 130a-131a, it neither interpreted nor applied the second condition, that the property be ``required for intercity rail passenger service.'' Instead, after rejecting respondent's argument that Amtrak could restore Montrealer service by obtaining trackage rights or an easement, the ICC simply concluded that ``Amtrak has demonstrated sufficient reason to justify acquisition of ownership of the line.'' *Id.*, at 43a.

The majority acknowledges that ``the ICC's opinion is not explicit in all of its details,'' see *ante*, at 9, but nevertheless concludes that the Commission's reading of the statute is entitled to deference because it ``gave effect to the statutory presumption of Amtrak's `need' for the track, and in so doing implemented and interpreted the statute in a manner

that comports with its words and structure.'' *Ibid*. But this begs the question of what showing Amtrak must make to establish that the track is ``required'' so that Amtrak may therefore obtain the benefit of the presumption of need.

The simple fact is that *the ICC never addressed this point*, and therefore failed to construe a key portion of the statute. The omission is particularly significant because this is the first case treating Amtrak's condemnation powers under §402(d) of the Act; it will guide future adjudications.

Rather than acknowledging the ICC's omission and remanding for clarification and factfinding, the majority relies on the Government's argument that the Commission must have interpreted the word ``required'' as meaning ``useful or appropriate.'' *Ibid*. But this interpretation was not developed by the ICC during its administrative proceedings. Indeed, the explanation was not even proposed in the Commission's argument to the Court of Appeals.[2] This ICC definition of ``required'' debuted in the Commission's briefs before this Court. It is nothing more than a creation of appellate counsel, concocted to fill the gaps in the Commission's analysis. ``The

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[2]This is how the Commission framed its argument to the Court of Appeals:

``Under *Chevron*, the Commission had broad discretion to interpret RPSA in this proceeding. This is certainly true with regard to the central issu[e] of determining . . . what must be shown to justify a taking under section 402(d) . . . . As to [this] issue, the statute merely states that Amtrak's need for the property will be presumed unless the transfer will significantly impair the ability of the carrier to carry out its common carrier obligations *and* Amtrak's needs can be met with alternative property.'' Joint Brief of Respondents in No. 88–1631 (CADC), pp. 15–16.

short—and sufficient—answer to [this] submission is that the courts may not accept appellate counsel's *post hoc* rationalizations for agency action. . . . It is well established that an agency's action must be upheld, if at all, on the basis *articulated* by the agency itself.'' *Motor Vehicle Mfrs. Assn.*, *supra*, at 50 (emphasis added), citing *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 168 (1962); *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196–197 (1947); *American Textile Mfrs. Institute, Inc.* v. *Donovan*, 452 U. S. 490, 539 (1981). Therefore, the majority is simply wrong in asserting that, even though ``the ICC did not in so many words *articulate* its interpretation of the word `required,''' the Court may nevertheless defer to the Commission's decision. See *ante,* at 11 (emphasis added).

Because of the gap in the ICC's interpretation of the statute, ``[t]here are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion.'' *Burlington Truck Lines, Inc., supra*, at 167. The majority concludes, again based on the agency's presumed interpretation of the statute, that the Commission was not obligated to make specific findings as to whether the property was ``required for intercity rail passenger service.'' See *ante,* at 12. This magnifies the ICC's mistake; an administrative ``agency must make findings that support its decision, and those findings must be supported by substantial evidence.'' *Burlington Truck Lines, Inc.,* 371 U. S., at 168.

Deferring to a federal agency's construction of the legislation that it is charged with administering is one thing. But deferring to inferences derived from reading between the lines of an agency decision or excerpted from the brief of a government lawyer is another matter entirely. ``For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly

functioning of the process of judicial review.'' *Id.,* at 169. Because the ICC has failed to provide a clear, authoritative construction of ``required for intercity rail passenger service,'' we should return this case to the Commission so that the agency can do its job properly. But we should not strain the *Chevron* principle by deferring to what we imagine an agency had in mind when it applied a statute. Therefore, I respectfully dissent.