ORAL ARGUMENTS - 10/08/97

96-0684

Southwestern Electric Power Co. v. Burlington Northern Railroad Co

LAWYER: This case presents contractual overcharges in a 25-year multibillion dollar railroad coal hauling contracts. The two contracts involved are clearly by their explicit terms cost plus contracts, with escalation to be up or down based on the entries in the railroad's costs. With the abolition of ICC regulation under the Staggers Act of 1980, the only place for the consumers of Texas (SWEPCO) to turn for enforcement of these contracts is to the state courts of Texas.

GONZALEZ: How about the amicus claim that there has been or an adjustment made by SWEPCO, and that SWEPCO has already gotten what they are due from the ratepayers?

LAWYER: Your honor points to a very important point that I want to return to, and that is that two issues were tried. There are two contractual provisions that were tried to the trial court. One, the gross inequity provision, which I think your honor is referring to; two, the breach of the contract to overcharges under the contract on an adjusted enrichment theory. The TC below made a material error. And I respectfully submit made a farce at the trial of the gross inequity provision by allowing evidence of SWEPCO's financial health into the picture and allowing the railroads to argue to the jury that there could be no gross inequity no matter how great the overcharge if SWEPCO was in sound financial condition. Of course that is absurd since those fuel charges, those rate charges imposed by the railroad where property flowed through and the cost of them was borne by the consumers of the State of Texas. And I think you have an amici brief to that effect. But there was no relief there.

Let me come to where I think the crux of this case is. No question that the parties explicitly state: The intent of the formula, the intent of these contracts is cost plus. Base rates were established under both contracts, then they attempted to put in formulas so that they would escalate up or down based on the railroad's costs. What happened is, particularly after deregulation, prior to deregulation the railroads were always trying to get costs increases, and evidence was kept out that showed that the railroads interpreted them to mean that they were entitled to get any increase in their costs under this contract.

Now for example, and this I believe is in Tab 6 of the books you have here, there has been an enormous divergence to between cost and the rate charges. This isn't even an issue. The railroads refused to even produce their cost studies, let their experts be stricken and not even testify on it. It is uncontroverted that there is this enormously widening gap, and that the basic purpose of these contracts has been breached and frustrated.

Date transcribed: May 10, 2010

The railroad's position is twofold. First they argued that there is a gross inequity provision in the contracts that provides that under unusual economic circumstances if there is a gross inequity because the costs are not fairly covered, then the contracts can be changed by mutual agreement. They argue first that that's an exclusive remedy. It doesn't say it's an exclusive remedy, it's a contract, all principles and interpretation to make that an exclusive remedy without further indication that there was the intent of the parties. But secondly and even more remarkably they say not only is it an exclusive remedy, but the courts have no power to enforce it. They move for summary judgment, that it was merely an agreement to try to agree and unenforceable by the courts. And I put that page from their summary judgment in the briefs. And if you read the briefs carefully they don't concede it to this court. They tell you it's exclusive. Basically the railroad's position is sure these are costs plus contracts, sure they are out of whack, but all that SWEPCO can do is depend on the kindness of the railroad to renegotiate the contract if it chooses to do so, because it has no legal remedy.

HECHT: So your position is if there were gross inequity not fairly covered, then damages could be awarded rather than simply some other dissolution of the contract or some other remedy?

LAWYER: Our position is that if we had obtained a finding under the gross inequity clause, we could have obtained a new base rate, and perhaps a new formula because this formula has failed in its purpose to breach the contract. We did not obtain jury findings on that. I respectfully submit it was because of the material error of allowing the jury to believe that we had to prove that SWEPCO was suffering economically, and because the jury was deprived of knowing that BN. had administered this contract, this clause in precisely the way that we say it should be administered, that evidence was kept from the jury.

Our secondary ground was to obtain a finding, and this is at Tabs 1 and two of the little booklet you have, issues seven and nine, that there had been a breach of the contract, that there was a disparity between the amount that was actually paid under the contract and what should have been paid under the contract. And further that the retention of that differential between what was paid and should have been paid would unjustly enrich the railroads.

HECHT: By should have been paid, you don't mean equitably, you mean under the contract?

LAWYER: Under the contract.

HECHT: Should have, is just a shorter hand expression for what was due under the contract?

LAWYER: Precisely. I believe it's at Tab 3 of the little booklet. We pleaded under the

contract, no question that issues seven and nine submitted to the jury the question what should have been paid under the contract. That was the only evidence they heard from our costs expert saying under proper costs accounting. Let me pause here and just say one of the many strawmen that the railroads puts up is that there is some problem about this, there is a uniform system of railroad accounting mandated by law, railroads annually collect these costs, by law required to report them to the Dept. of Transportation. There is no problem in ascertaining what these costs are and effectuating the purpose of the contract for it to be a cost plus contract.

OWEN: Was the contract to be based on a particular railroad's costs, or the average industry cost?

LAWYER: I think if you look at the formula intent clause, very clear, not only the formula applies to two different market baskets ____ one to Western Railroads, the second, the 1984 contract to an ICC formulation. But the contract refers specifically not only to BN's costs, but to SWEPCO's costs. They can trace it to the train(?) And I think it's very clear that under the contract the costs that are to go up and down are SWEPCO's hauling costs.

OWEN: Is there any case law that construes clauses like this where the parties agree to mutually agree? Is there any case law that says what happens if they can't agree, or don't?

LAWYER: There is. Let me say that I am not prepared on this issue because we lost it to the jury in the court below, and I did not try this case, and I did not familiarize myself with the arguments pro and con. The railroads argued this was unenforceable. We argued it was enforceable. We could certainly file a short supplement with the court with the authority on that issue.

ENOCH: The argument here seems to be that Burlington Northern is just making too much money off this deal. Is there a price in this contract, or is it always a jury question when the parties disagree that we are paying...I mean what I see here is simply an argument by SWEPCO that we are just being charged too much. Do we go to the contract, and the contract has two provisions in it, and we're claiming one of those applies, now let's go to the jury? But all I see here is just the argument they are just charging too much.

LAWYER: Let me say first your honor, we are being charged too much. We are being obscenely overcharged.

ENOCH: Is that the threshold? I guess that's my point. How do you keep this not being a jury question every single time?

LAWYER: I don't know. I think if the court reinstates the TC's judgment, this will be worked out. I don't believe we will have any problem with it. This is not a mere complaint about we're being charged too much. It is a complaint that they have breached the contract. If you look

at the formula intent provision under both contracts, it states as clear as you can state that any changes in the cost of transporting this coal to SWEPCO up or down is to be taken into account. A base rate was established and what happened here is that they attempted to use proxies, these formulas that simply failed, that frustrated the contractual intent, the explicit contractual intent.

Now we don't have an alternative rate formula. But this is no different than a contract that calls for market value, or calls for a just and reasonable rate. Here what it calls for is the base rate which is a specific agreed on number escalated by their costs. And it doesn't say: Here's the base rate and we're going to escalate your rates under this formula. We wouldn't be here. It doesn't say that.

OWEN: What do we do with the formula? There is this formula and the parties say it's supposed to cover our costs, but if we can't agree then the contract stays in effect. What do we do with the specific _____?

LAWYER: I think your honor that you can and the evidence on this was very clear and these are matters of routine determining railroad costs. The formula was a proxy to try to deal with escalation over time. It failed.

OWEN: If it's just a pure cost plus, and you say that it's that easy to determine cost over time, why didn't they just say: this is a cost plus contract and any cost above or below the 1971 base cost would be taken into account and those would be our rates?

LAWYER: I think they did. That's what they said. They say this is the intent of the parties. They put in a formula. And frankly before deregulation in 1980 and before competitive pressures completely changed the nature of the railroad market, those formulas were probably reasonable proxies. Under regulation railroad rates very rarely went down. But the guts of the contract and they tell you what their intent is, it was base rate escalation as to cost. And the courts clearly can administer and enforce the agreement of the parties. And that's what contract interpretation is about: seeing that the intent of the parties is honored.

ABBOTT: Will you briefly address the legal underpinnings of your unjust enrichment argument? I think that despite your briefing that the law is far from clear on this particular issue.

LAWYER: It seems to me that the confusion that arises here is that there are many cases that speak broadly that when you have an express contract, you can't have qua si contractual or equitable remedies. I think what they are referring to are remedies in the nature of quantum meruit. For example, where you have an express contract, but you would in effect try to bury contradicting by remedies such as quantum meruit. It is the genius of the common law that we are taught from the first year in law school not to take sweeping statements too broadly, but to look at the specific application in the case. And we have cited many such cases where there are expressed contracts, but

an equitable remedy such as unjust enrichment or money had and received is used as a remedy to enforce the contract. For example, there is the Vagetta case where Mr. Hatchell argued before this court, where there was a violation of an express oil and gas lease, which provided for half royalty that paid a 1/16, had a division order. The court looked to the Doctrine of Unjust Enrichment to say we won't be barred by the division order, we will nevertheless apply unjust enrichment. Money had and received, you have to give it back. The Bowers case is another. It was the classic way to deal with railroad reparation cases with freight overcharges before the creation of the ICC, and the people being remitted to administrative remedies. I think it will come again.

You take here, classic situation. We were paying under duress. We had to keep the lights burning in the cities. We had to take this coal, even though we knew we were being overcharged, even though we disagreed with the invoices, we had to pay.

ABBOTT: Because you freely join into a contract, why would the provisions that you discussed in the first part of your argument not be provisions that you pursue to seek remedy instead of seeking this unjust enrichment?

LAWYER: We sought it as a contractual remedy. First we tried to get gross inequity and we failed. And I told you I thought the jury was misled. Secondly, we asked for this remedy. We said, find that the contract has been breached.

ABBOTT: I know you asked for it. But I don't understand legally why you would be entitled to it in addition to the gross inequity?

LAWYER: I would say two reasons. One, the gross inequity provision is not exclusive. Does it say it's exclusive? In fact in the 1984 contract there is an express provision that says: all other rights and remedies are reserved. They are the ones who have got to make the extremely unattractive argument that it was the intent of the parties that they entered into a contract explicitly stated the intent was to make it cost plus, but provided no legal remedy. Because they will tell you that the gross inequity provision merely agreement to agree, not enforceable. But there is nothing in there that says, this is the exclusive remedy. And I submit to you that the normal inference is when there is not an agreement on an exclusive remedy, and we can show that they breached the contract in the sense that they increased the charges more than their cost had increased above the base rate, then we are entitled to a remedy.

HECHT: To make it very clear on your unjust enrichment claim, you're not seeking equity, you are seeking to enforce the contract?

LAWYER: Yes. I think that's exactly right. I mean it is equitable in a historical sense. But we seek to enforce the contract. We want our just part of the differential of the over charge.

OWEN: And the language that you rely on is the contractual base for your argument is in the gross inequity provision?

LAWYER: No. It is in the formula intent provision as I would see it. The first contract has a heading "formula intent," and then it states what the intent of the parties was with regard to the cost. The second contract I think it's heading is "gross inequity" and then states...

OWEN: But both provisions have the language?

LAWYER: Both of the provisions have this language on cost. Both state this is our purpose: base rate, cost escalations, up or down.

BAKER: Did I understand you to say that they renegotiated contract has a clause that specifically states that you reserve other remedies at law or _____ inequity, but the first one doesn't?

LAWYER: That is correct.

BAKER: Isn't that a material difference?

LAWYER: I think not.

BAKER: Then why would you put it in there the second time?

LAWYER: Believe me, I didn't have anything to do with that. As I understand Texas law, the presumption is the other way. If you don't say it's exclusive, then it's not exclusive. Here somebody had broad vision and said you know further we have all these other things. The first one it's not there, but I believe the law would presume it to be there. I think it's your duty if you want somebody limited to a single remedy, I think you have to say so.

* * * * * * * * *

RESPONDENT

HATCHELL: I have handed out to the court a bench memorandum that I think will be helpful to the court. What it has is the unjust enrichment submission, a reproduction of question 7. Question 7 and 9 are the two questions upon which this judgment must stand or fall. The second part of my handout is a reproduction of the clause that SWEPCO contends was violated in this case, the gross inequity clause. If the court would refer to those, I think that the argument will be much more understandable.

It's very important to understand the nature of this contract in order to

understand the arguments. The two contracts are largely identical insofar as the provisions that we are talking about. One of the contracts calls the provision a "Formula Intent" in the heading, and the second contract calls the clause "the Gross Inequity" clause, and they are virtually identical clauses. The way the contracts work is this: there is an initial transportation rate specifically set in the contract for hauls of coal under the contract. That rate is adjusted. In one case of one contract is suggested annually and in the other contract it's adjusted quarterly, based upon a formula published by government agencies. And the formulas candidly are different in both contracts.

The formula in the latter contract actually has a component in it that takes into account Burlington Northern's own specific costs insofar as they are part of railroad costs. And what the parties were doing (I disagree fundamentally with opposing counsel's characterization of this case and as a cost plus contract) in the railroad industry the computation of costs is a raging battle. You could have the simplest of contracts in which you had only one cost component in the railroad industry and you could get ten experts who would come up with different ways of evaluating those costs.

PHILLIPS: Can we tell that by looking at the record in this case?

HATCHELL: Indeed. Because there were two experts that testified on their side, and two experts on our side, and they are $177 million apart on cost alone. So what the parties did in this case was to adopt a surrogate for any increases or decreases in the railroad's cost of transporting this coal. And what they did was to adopt the formula intent clause, the gross inequity clause. And it says, it is the intent of Burlington Northern, KCS, LA & SWEPCO that the formulas will compensate the railroads for any changes in the costs of transporting SWEPCO's coal. The formulas will do that. The formulas take into account changes in costs and they adjust the rates.

There is a third mechanism for adjusting rates in these two clauses, and that is where a "gross inequity" is suffered by one of the parties as a result of unusual economic conditions.

HECHT: You say this is a mechanism for adjusting the rates?

HATCHELL: It is a mechanism for deriving a new rate, I think is the more accurate rate. And Justice Owen has asked a very telling question is, in view of the fact that the rate adjusted under the gross inequity formula is one that has to be mutually agreed upon by the parties, how does it get into court? Fortunately we don't have to deal with that issue. It's a somewhat complex issue. I think the Moreburger case from this court is the leading authority on agreements to agree. While I have views as to how the matter could be gotten in court, the gross inequity submission in this case by which SWEPCO attempted to claim overcharges through the occurrence of a gross inequity was answered negatively by the jury, and that issue went out of the case.

So bear with me in mind now what we have gone through. You have a contract that has an initial rate, a rate that is adjusted for changes in costs based on a formula, and you have a rate that is determined by mutual agreement if a gross inequity occurs. Those are the only three rates that can be charged in this contract. The initial rate is no longer applicable because the contracts that proceeded through the years, and they bypassed that rate, the adjusted rate worked perfectly. And SWEPCO has admitted that every charge that we have made in this case was computed precisely and accurately in accordance with the formulas, or if they were not computed accurately we adjusted the rates in accordance with the formulas. So those are the two contract rates and the gross inequity rate has dropped out the case by virtue of the jury finding.

OWEN: Do you agree that that is a fact question that should have been submitted to the jury?

HATCHELL: I was afraid your honor would ask me that question. I'm not sure that I agree in this case that it should have been. I agree that it can be.

OWEN: But you're not arguing up here that it was a question of law?

HATCHELL: No. Because the gross inequity question has been answered in our favor, failure to find, and we simply don't reach the issue. It's not a basis for the judgment.

OWEN: Assuming that was properly a fact question for the jury and they give a negative answer or failed to find, why wasn't it prejudicial to SWEPCO to introduce their financial condition on the gross inequity question?

HATCHELL: Because as the interstate commerce itself has said, the understanding of the name "gross inequity" requires one to look at the impact of economic conditions upon the party claiming the gross inequity.

OWEN: Well shouldn't we look at the impact on the ratepayers here, since this was passed through?

HATCHELL: No, you should not look at the impact on the ratepayers, because insofar as ratepayers are concerned, they are fully protected by the PUC. This contract is subject to the PUC scrutiny insofar as the rates are concerned, and the public is particularly well protected as a result of any fuel adjustment problems because there are specific provisions of the Public Regulatory Act which allows the PUC to adjust the electric rates upwards or downwards if there is an imbalance in fuel costs.

OWEN: But that's different isn't it from adjusting these transportation charges between SWEPCO and Burlington Norther, the PUC or the PURA can't directly act on those can they?

HATCHELL: That is exactly correct, but I don't think that the public is particularly concerned about whether or not SWEPCO's stockholders get dividends.

OWEN: But these costs are directly passed through are they not?

HATCHELL: There are provisions where they can be passed through, yes.

OWEN: They currently are being passed through?

HATCHELL: I'm not sure that I can answer that question on the basis of this record. But I think that it is not an illogical presumption to say that they are. But again the PUC can act even on its own initiative if these are not in the public interest. As a matter of fact, SWEPCO bragged to the PUC when these contracts were done about what wonderful contracts they were. And they were particulary proud of the fact that the Welch contract, the second contract, contained in the escalation formula provision whereby the costs could go down as adjusted under the formula because of Burlington Norther's actual productivity sales.

SPECTOR: Do you disagree with the chart that was on the easel, that the costs have in fact gone down considerably?

HATCHELL: The costs have gone down, yes. They have gone down as a result of what is known in the industry as "productivity savings." I guess the best way I could put that is that Burlington has made money in this case the old fashion way - they earned it.

GONZALEZ: Was that because of deregulation?

HATCHELL: It's probably a combination of things. Deregulation only allowed Burlington the flexibility to meet pricing demands without having to go through such a tremendous regulatory process. It's probably the demand for coal as a clean, efficient, and clearly economical fossil fuel to run generation plants, that has fueled the demand for coal, and therefore, the profitability of these contracts. And quite frankly, that can change on a moment's notice.

OWEN: Getting back to gross inequity. Under your definition of "financially healthy" a company would never be able to rely on this provision of the contract, because they are in good financial condition, is that your position?

HATCHELL: No, I don't think that's true. You know, the contract uses the word "suffers.," I think that if you are going to apply all of the words, and as a result of unusual economic conditions, that a jury ought to be able to see whether or not the company that is claiming a gross inequity is suffering. But particularly if it's financial condition has been affected by unusual economic conditions, looking at the financial status of a company to determine whether or not it is being

impacted by something which is unusual economically it seems to me to be a very, very relevant inquiry, and ...

OWEN: Well there may be something unusual out of the economy that impacts severely a healthy company, the company is still healthy, but that's not inconsistent is it?

HATCHELL: I don't think it's inconsistent, but i do think that it is a relevant inquiry, and SWEPCO must have thought it was. Because they filled this record with volumes of evidence about Burlington Northern's productivity. Probably an entire volume of the statement of facts has to do with all of the money we've made, how we are prospering under these contracts. And that was to demonstrate to the jury that what has happened is "unusual", and unusual economic condition that we have profited so greatly under these contracts.

BAKER: But didn't you say earlier that productivity is the _____ and parcel of the costs determination? So wasn't that evidence material to determining the costs if they were disputing what they were?

HATCHELL: Yeah, I think it's material.

BAKER: If I understand your answer to Justice Owen's question, your evidence that you put in on the financial condition of SWEPCO was a general nature to show the entire financial circumstances based on a theory that they had to show a gross inequity to their entire financial condition?

HATCHELL: As a result of unusual economic conditions.

BAKER: Can you agree that when you read the rest of that clause, that it's not a general gross inequity to the entire financial condition, but which results in the formula that they raised to cover certain cost changes?

HATCHELL: Certainly I would agree with that.

BAKER: So then would any evidence of the gross inequity be limited to this particular contract between the parties on whether the cost had changed to an extent that under the contracts SWEPCO has suffered a gross inequity, because of what happened there but not generally?

HATCHELL: I still think that in order to compare the impact of financial matters upon a specific aspect of the company, you have to know what the company's overall financial condition is. And our evidence of financial condition in this case was done directly in response to SWEPCO's introducing, as I've said, reams and reams of testimony about our financial condition. As the court well knows, when we objected on the ground that it wasn't relevant, that was overruled. And as the

court knows, we have the right essentially to fight fire with fire. If the court is going to allow in this evidence, then we have the right to rebut it in this particular case. But I do not understand how you can assess one aspect of the pie in terms of economic consequences if you don't know what the entire pie is.

HECHT: In any event, you say the gross inequity has gone out of the case, issue has gone out of the case, but that depends on the evidentiary argument that's before us?

HATCHELL: That's true. If you were to sustain either of their two evidentiary issues, the case would be reversed and remanded for a new trial.

HECHT: What do you think the remedy is on the gross inequity provision?

HATCHELL: The remedy for a gross inequity it seemed to me to depend upon the way in which the case came to the court. If the case came to the court after the parties were in negotiation, and there was a claim that one party was not negotiating in good faith, as a trial judge I might look at that and say: I will accept jurisdiction of this case, I will abate it, I will appoint a master, and I will require you to comply with the conditions of the contract, I will then receive to negotiate a rate to eliminate the gross inequity, I will then receive the report of the master and determine whether or not the parties are in good faith. If the parties are not in good faith, then I will let a jury decide it. It could come to the court in other ways.

HECHT: But your position is that the court could hold the parties to the agreement, and by one mechanism or another, determine the rate?

HATCHELL: Yes, but I do think in order to be true to the contract, you would have to remand the parties to some sort of process where they could negotiate in good faith. I do not think you can come directly to the court to do that.

OWEN: And if they don't agree, what's the remedy?

HATCHELL: And I think if they don't agree, that the remedy would be as we say, as a trial judge I would say the parties are not in good faith, there is a good faith obligation to mutually negotiating in good faith and agree, and if you don't, then, but only in that event, will we allow the jury to consider the question.

OWEN: What question? What would the instructions to the jury be?

HATCHELL: The question would be just exactly as the clause is written: Did one party or the other, depending on who's making the claim, suffer a gross inequity as a result of unusual economic conditions? Answer Yes, then specify either the rate or the amount of damages that it

would take to remedy that inequity.

SPECTOR: Was there negotiation over a period of years?

HATCHELL: There was as a matter of fact. In 1989, which was really what participated this lawsuit, and in fact the parties thought they had agreed, the jury found that there was no mutual agreement over that, and Burlington has accepted that finding and will not challenge it.

But I think we are at the part where I need to get to what really is the crux of the argument by opposing counsel. When I took this case, I guess to some extent, I was pressured because I said: they haven't done it now, but they are going to argue that the unjust enrichment claim is a contract submission. And that's the reason that I have gone through and tried to explain the way this contract is set up. What actually happened in this case was, the unjust enrichment claim was submitted because of SWEPCO's fear that these contracts were unenforceable. That is a perfect avenue for the doctrine of unjust enrichment. When benefits have been obtained and sums have been paid but there is no contract remedy unjust enrichment can step in through equity. And that is precisely why this unjust enrichment claim was submitted. They moved for judgment on the ground that their claim was inequity. I know opposing counsel has not had time to study this record, but you need to look at their motion for judgment. They ask for prejudgment interest under equitable doctrines, because their claim was that the issues upon which they took judgment were equitable in nature.

I don't think this court is going to have much difficulty understanding because it has held in Crest Construction, Truly v. Austin, Woodward and many other cases that if a contract covers and fully adjusts the rights of the parties, you do not have a claim under restitutionary principles based on unjust enrichment.

BAKER: What about _____ if you can show duress, fraud or undue advantage. Do you agree that exception exists?

HATCHELL: I don't agree that that happens if a contract still covers the party's rights. If you're talking about fraud and the inducement of the contract, bring a fraud action. If you're talking about undue advantage or duress from the performance of a contract, that's breach of contract. But the law it appears to me in this court's decision to separate very, very well causes of action which are covered by a contract and causes of action which are based upon unjust enrichment.

BAKER: Aren't there some cases that say even if there is a contract, if you can show one of those three things, you can still get unjust enrichment?

HATCHELL: There are no cases in my judgment that say if there is an _____ valid ongoing and enforceable contract, that can adjust the rights of the parties, that you can get that.

There are many instances where a contract fails in some way or another when the unjust enrichment remedy is appropriate: I agree to sell you a bull, you pay me $5000 advance, the bull is struck by lightening, there is no contract, the contract has failed, but you have a restitutionary claim based on unjust enrichment.

BAKER: The two questions and the definition in this case appear to support your contention that it's equitable rather than on the contract because there is no reference to the contract?

HATCHELL: That's true your honor. Let me try to take that a little bit deeper because this is very fundamental. Question 7 and 9 talk about something that should have been charged. And you heard opposing counsel, very able argument, say that that was "under the contract." And this is why I've gone to such pains to try to explain what the proper charges are under the contract. Burlington never charged anything that wasn't appropriate and they have admitted that. In order to have an overcharge, you have to have a contract standard and a charge that is greater than that. The only charges we ever made by admission were profit. So in this particular question, you are not comparing a contract rate with an improper charge. It has to just be something known as "well jury just look at this and let's all feel good about it."

OWEN: Well their argument is that the contract rate was something other than the escalation clause.

HATCHELL: That's exactly right.

OWEN: If they were right about that, simply a legal theory, and there had been overpayment they would have a cause of action for overpayment under a contract based on unjust enrichment?

HATCHELL: Not based on unjust enrichment, based on the contract.

OWEN: But it's an overpayment, so it's a money had and received cause of action?

HATCHELL: No, not if there is an ongoing contract which adjusts the rights of the parties. This contract lives today, the parties perform it every day and if there are overcharges or undercharges, the remedy is contract. If the contract fails on the basis of some complete failure, I think Carbon calls it a total breach, then there may well be a remedy in unjust enrichment based on restitutionary principles. But the whole basis for unjust enrichment is the implication of a duty to pay. And the rhetorical question that we have asked is: Why do you imply a duty to pay when the parties can be fully _____ a reference to the contract if it means what they say. Their problem is, is they have to take this first sentence of a gross inequity clause that just says: The formulas will adjust the rate, and say: that's a fourth great sitting mechanism. A fourth one. You can't see it, but we know it's there. That's why their contract falls.

HECHT: But isn't the recovery for a contractual overcharge, what Professor Laycock calls "restitution on the contract," what's wrong with that? It doesn't import an equitable component.

HATCHELL: Well what's wrong with that, Professor Laycock in the middle of his brief says: that in order for the unjust enrichment remedy to be what he calls restitution "on the contrary", it has to be based on a mistake or duress. And please find that part of his brief. Because he pulls the card out from under their entire...by the way Professor Laycock was hired by SWEPCO to write that brief...

HECHT: Well there's got to be some reason why you paid too much. You didn't pay too much because you thought you owed too much. You paid too much for some other reason.

HATCHELL: No, no. There is no too much here.

HECHT: But if there were. I'm assuming that restitution on the contract simply says: I've paid too much because I didn't realize what I was doing, and you should give me money back.

HATCHELL: And what I take restitution on the contract to mean is a breach of contract. That's just another way of saying breach of contract.

PHILLIPS: Before you sit down, would you address why you do not believe there is reversible error in excluding the deposition of a Burlington Northern official regarding the meaning of the contract?

HATCHELL: Do you want me to address the sanctions as well as the merits of the contention?

PHILLIPS: I just want you to anticipate what's going to happen in the next 8 minutes and give your answer.

HATCHELL: Well it suffers from two problems. First of all, we asked 5 times for any statement that they had from the witness Sandgren that they were going to introduce at trial. And they first of all told us they didn't have any such thing, and then when they finally discovered Sandgren's deposition in the files of their own lawyers, they immediately knew it was relevant to this case, and they notified us that they had it, but they said: We're not going to give it to you. And in hearings before the court, they testified that, well we'll give it to you promptly or it will be forthcoming.

There is testimony in the record that we did not have it, which the trial judge believed. And the trial judge found in this case, that this statement was withheld deliberately. And

I think you can read into that finding, that it was done as tactical gainsmanship...

SPECTOR: Who was Sandgren?

HATCHELL: He's a former Burlington Northern employee who testified in 1979 about the impact of...

SPECTOR: He was a Burlington employee?

HATCHELL: That's correct. I think that the test here is abuse of discretion. Did the TC abuse its discretion in saying that there was discovery abuse by withholding this statement until the day of...

PHILLIPS: If there had been no abuse and no timeliness question, would this have been...

HATCHELL: Well they discovered it more than 30 days before trial.

PHILLIPS: But setting all that aside and going to the merits, was it relevant? Should it have been produced but for these...

HATCHELL: Right. There's no question that it should have been produced.

PHILLIPS: I mean should it have been admitted, but for this sanction?

HATCHELL: Yes. Well, I rank this to kind of like an out of court experiment. Mr. Sandgren's 28 lines of testimony was given in 1979 about the so-called gross inequity under a contract that is not introduced in evidence and expresses only his opinion as to whether the economic circumstances that were apparent in that particular situation constituted a gross inequity under that particular contract. Like an out of court experiment, if you're going to introduce the experiments you've got to show _____ it's relevant to these issues.

I don't know how you can say that Sandgren's opinion about another contract whose provisions we don't know anything about, and which is not anywhere to be found in the record based upon economic issues and economic facts, that are also not in the record, is in any way, shape or form relevant to whether or not there was a gross inequity under a different contract with a different shipper, with different provisions under different economic conditions. In addition to that, Sandgren's 28 lines of testimony is very cumulative. They loaded up the record in this case with all kinds of statements by Burlington Northern officials, that they believed gross inequity occurred in this situation, and they believed gross inequity occurred in that situation. So if they wanted to tar and feather Burlington Northern with opinions about when and under what circumstances gross inequities occur, they did that in spades. And this court would have to say as

I understand its most recent writings on this, that the whole case turned upon Mr. Sandgren's testimony in 1979 under a different contract.

BAKER: You answer to the question seemed to indicate, your primary concern was not relevant, but the TC's order was based on sanctions for discovery abuse for not... So its relevance as proper inquiry on the issue that they raised...

HATCHELL: It is under this court's decision in National Union v. McKinney where you found that the TC was wrong in imposing sanctions, but that the admission of the testimony was harmless in any event. So, yes, I think it is always an inquiry.

* * * * * * * * *

REBUTTAL

LAWYER: Let me begin by referring to questions that Justice Baker, Justice Owen and Justice Abbott have asked in the area of equitable remedy, are precisely on point. I think Professor Laycock's amicus brief lays out very well both the Texas cases which make it clear, that where you have a breach of a contract, you can still have appropriate circumstances in equitable remedy.

Mr. Hatchell's response to Justice Baker was very carefully put. He said, no, he doesn't think it could exist when it's fully covered by the contract. And I concede that in the sense that if we could not show a breach of contract, if we could not show an overcharge that a differential between the price that was actually charged and the price that should have been charged under the contract, we asked the jury, then we are not entitled to recover unjust enrichment.

BAKER: My question on that is, neither one of these issues state: Should have been charged under the contract.

LAWYER: At Tab 3, you will see how we pleaded our third cause of action: unjust enrichment; and you will see that we plead expressly rates that should have been charged in compliance with the contract.

BAKER: Well I understand that. But that's not the question you asked the jury. Is that right?

LAWYER: It is the question we asked the jury. If you will look at Tab 4, page 2, we say: Did we receive an unjust enrichment by retaining all or part of the difference, if any, between the rate actually charged and the rate that should have been charged? Now it does not have the words "under the contract." But I think that was clearly understood. That was all the evidence the jury had what we said should have been charged under the contract. And they cannot be heard to complain about that.

BAKER: But unjust enrichment was defined as the retention of money or property against the fundamental principles of justice or equity in good conscience. So if they're following that definition in the two questions, there's nothing about the contract either in the definition or the issue even though they may have understood it. Aren't they limited to answering the questions based on what they _____?

LAWYER: They are. They concede in their briefs they have no objection to the form of this question. They cannot object. Their only objection was we're not entitled to unjust enrichment theory submission because of the contract. So they can't now complain that...

BAKER: But I can see why they say that if you're arguing unjust enrichment as a purely equitable relief outside the bounds of the contract. But your argument here is that it's restitution under the contract.

LAWYER: Absolutely it is your honor. What the unjust enrichment definitions speaks to is the retention of the money or property, the retention of the sum, but the jury never gets to an overcharge, they never get to whether we have a right to keep it or not unless they decide under the contract that there was a differential between the rate that was actually charged, and the rate that should have been charged. And I respectfully submit that couldn't mean anything but under the contract.

BAKER: Mr. Hatchell argued that purportedly there's no dispute on the computation of the rates based on the formula.

LAWYER: You have to listen very carefully to Mr. Hatchell's argument. At least that's my experience in reading his briefs. What he says and in this, he is correct, that mechanically that formula was applied and they took the Western for example under 71, they took the Western Railroads cost and they multiplied correctly. That much is true. He unfairly tries to argue from that that we concede that an appropriate price was charged. That's absolutely false. We wrote them. We complained to them. We demanded their cost figures. We have evidence in this case that they were deliberately concealing their cost figures from us because they know, and there is no dispute about this, the utter failure to meet the agreed and explicit intent of the parties...

BAKER: So then do I understand that the real basis of the whole dispute is, is "the cost," and what increments that Burlington either did or didn't put in there, that made the costs so that if you have the wrong cost item you can do whatever you want under the formula; is that right?

LAWYER: No, that's not the dispute.

BAKER: What is it then?

LAWYER: The dispute is this. There is no controversy that this vast gap between Burlington's cost and what they were charging us _____. There is no dispute that there was an utter failure of that formula to perform and satisfy the intent of the contracts, and that was to take the agreed base cost and escalate it up or down with cost increases in the Burlington Northern. Burlington Northern was sanctioned and not allowed to put in cost evidence because they refused in the face of the TC's order to put in their studies would show what their SWEPCO costs were. Now I think that you can draw a legitimate interest that the reason they didn't is they probably were even getting a bigger spread than we knew. But that's not the issue. The court can take its _____ that those formulas failed and that there was a vast increase in charges over the increase in costs. That's not in controversy.

OWEN: A moment ago you were talking about unjust enrichment, and you said that you were trying to distinguish something that Mr. Hatchell said. You said ordinarily or some circumstances unjust enrichment is appropriate when you have a valid contract. Can you explain to us when it is and is not inappropriate?

LAWYER: I think there are a number of circumstances. Interestingly enough at page 8 of his original application, Mr. Hatchell gives the number of exceptions when you can have unjust enrichment when there is an existing contract. You can even have quantum meruit in circumstances of partial performance.

Let me say, and let me urge the court's attention to Prof. Laycock's brief, it is a flat black letter misstatement of the law to say that the existence of express contracts excludes the application of principles of unjust enrichment of money had and received. We cite a number of cases illustrating that. Indeed often the courts will require additional factors. Here as Prof. Laycock explains in his brief and as we have explained in our reply brief duress clearly applies, or taking undue advantage. We have absolutely no choice but to pay those invoices computed under a formula that we knew that had failed because we had to keep the lights on.

PHILLIPS: Are you asking us to find that as a matter of law?

LAWYER: Not at all. There was no objection below. We obtained a finding, and clearly there is a deemed finding of duress. We submitted an issue on unjust enrichment. We said principles, etc. They know the element. They didn't object to it. They were smart not to tactically because I didn't want that.

ENOCH: I'm not sure economist would agree that because you have one supplier you are under duress to buy its supplies. But that's a different issue. My question for you is: Did the pricing arrangement for the purchase of this transportation fail, or are you saying we're just having a dispute about how the pricing arrangement applies?

LAWYER: It failed.

ENOCH: So if it failed, then why aren't we here talking about equitable remedies for a contract that fails as opposed to urging: Oh, no, we're just seeking enforcement of the contract. I understood your argument to be, no, we're seeking enforcement of the contract by its terms, which has as its terms here, but isn't this really a case where you're arguing that the pricing arrangement of the contract fails, and you are now here seeking an equitable solution to the pricing on this?

LAWYER: I think that's a fair statement. We are seeking it under the contract. We proved the failure of the formulas. We proved we were overcharged. Remember that the fundamental...

ENOCH: The only reason you're overcharged is not because we agreed to pay $5 and we ended up paying $7 by a bill that came in, we were only overcharged because the contract says if the $5 is charged is unjust enrichment you can go seek a different charge.

LAWYER: What the contract says and there's no dispute about this: base rate, we agreed on a base rate, that's a fixed number under both contracts, then we agreed that we would have a formula whose intent was to move it up or down with the railroads cost from the SWEPCO route, that's what we agreed to pay. Base rate and protect them against cost increases, or if costs went down, we got the benefit of it. That's clear. We picked the formula but failed and did not satisfy, did not meet the intent of the parties. And that's why we say we are paying more than it was ever intended that we pay. We are not paying base rate plus their cost increases. We are paying base rate plus a huge windfall profit to them that we never agreed to pay because that formula is totally out of whack. That formula gives weight to diesel fuel. They use 1/4 as much diesel fuel as it uses. It gives to weight to how much you pay employees. Instead of 6 people on the train, they have 2. The formula doesn't work. They know that. And they don't even deny that they are getting all these huge amounts above their cost increase. So we flatly say under the contract we are paying more than we ever agreed to pay and in violation of the clear intent of authorities.

ENOCH: The point is the pricing in this agreement failed and we now have to look elsewhere to come up with a pricing arrangement?

LAWYER: That's right. I agree with that. But that's no different than a contract where you say we will pay a just and reasonable price, or we will pay market value, or we will pay cost plus. There are standard railroad rates for capturing costs that they compute every year. They can do this. They could tell us in a minute what those costs were and what it would be if the formula had worked properly.

OWEN: What if their costs were much higher than the industry average, wouldn't you have a basis for complaint because your formula was to take an industry average and if Burlington

Northern's costs were way out of line, I don't think you'd be here would you?

LAWYER: No, we wouldn't. But your honor brings up an interesting point. They were there repeatedly before 1980. When the Staggers Act was passed and deregulated, they came in repeatedly and said we want more money because our costs are higher than the industry's costs, and this formula doesn't give us enough money. They came in I believe 4 times.

OWEN: And what happened?

LAWYER: They got more money. They have a lot of leverage. We are under duress. We've got to take that coal. They would go and threaten to file unilateral Tarriffs with the ICC, etc., but we would negotiate. We had to keep the coal coming. Now what happens, and that's why Mr. Sandgren's testimony is so important, high-level Vice President of Burlington involved in these repeated efforts to get more money under gross inequity clauses, and what he said that the jury never got to hear is this is the way we do it. This is the way we administer these clauses. He said if there's a $30,000 increase, that Burlington is entitled to more money under a gross inequity clause. That's the way they played it until they got to Texas, then they kept that from the jury.

OWEN: What about the argument that it's cumulative, that that testimony would have been cumulative?

LAWYER: It's not cumulative. There were references by our expert to efforts by the Burlington to use the gross inequity clause to get money. The Burlington executives knowing that they were insulated, and Mr. Sandgren's testimony refused to make any admissions of that type about their administration and their understanding of the application...

OWEN: Were there documents that showed how they had used it?

LAWYER: No.

GONZALEZ: I think I understood Mr. Hatchell to argue that this contract that you said now had failed, that he had bragged about this contract before the regulatory agency. If I remember his argument correctly. Can you respond to that?

LAWYER: First let me say, I don't know the facts. It wouldn't surprise me when they made the contract that would have to come in and say: this is a reasonable prudent contract. At the time people thought we were going to run out of natural gas and that Wyoming Coal was going to be our savior and people were building nuclear plants. But the world has changed a great deal. Railroads have been deregulated. They are just like airlines. All of a sudden they had external reasons to lower their costs, and they're lowering them and they're making these huge profits. That's all well and good, but we guaranteed them a profit, but part of the award for our guarantee is we got

the benefit if their costs went down. And that's what they have refused to give us. And if you listen against carefully to Mr. Hatchell, he says: We have no remedy, we depend on the kindness of the railroads if they agree to renegotiate it, you can imagine when that will happen.