

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNION PACIFIC RAILROAD :

4 COMPANY, :

5 Petitioner :

6 v. : No. 08-604

7 BROTHERHOOD OF :

8 LOCOMOTIVE ENGINEERS AND :

9 TRAINMEN GENERAL :

10 COMMITTEE OF ADJUSTMENT, :

11 CENTRAL REGION. :

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13 Washington, D.C.

14 Wednesday, October 7, 2009

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16 The above-entitled matter came on for oral
17 argument before the Supreme Court of the United States
18 at 12:59 p.m.

19 APPEARANCES:

20 J. SCOTT BALLENGER, ESQ., Washington, D.C.; on behalf of
21 the Petitioner.

22 THOMAS H. GEOGHEGAN, ESQ., Chicago, Ill.; on behalf
23 of the Respondent.

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

2 (12:59 p.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 08-604, Union Pacific Railroad v.
5 The Brotherhood of Locomotive Engineers and Trainmen.

6 Mr. Ballenger.

7 ORAL ARGUMENT OF J. SCOTT BALLENGER

8 ON BEHALF OF THE PETITIONER

9 MR. BALLENGER: Mr. Chief Justice, and may
10 it please the Court:

11 Section 3 First (q) of the Railway Labor Act
12 says that the findings in an order of the division shall
13 be conclusive on the parties, except that the order of
14 the division may be set aside for one of three specified
15 reasons. As a matter of plain dictionary meaning in
16 this context, "except" means that there are three and
17 only three exceptions to the otherwise conclusive nature
18 of these awards.

19 In the Sheehan case, this Court explains
20 that the dispositive question is whether the parties'
21 objections falls within one of the three reasons
22 specified within the statute. This Court explained that
23 the statutory language means just what it says and that
24 a contrary conclusion would ignore the terms,
25 purposes --

1 JUSTICE SOTOMAYOR: Counsel, the circuit
2 court did things in an unusual order. Instead of
3 reaching the statutory question, it reached the
4 constitutional question, in par, because it viewed the
5 two as intertwined.

6 Why isn't its judgment that there's a
7 statutory violation what's at issue before us, because
8 that's what they said?

9 MR. BALLENGER: Well, Your Honor, it
10 certainly would be this Court's prerogative and
11 appropriate for this Court to choose to reach the
12 statutory ground first, but we think that the
13 Respondents have no viable claim under the statute, and
14 so then --

15 JUSTICE SOTOMAYOR: Why not?

16 MR. BALLENGER: Their only claim under the
17 statute is under the second statutory ground of review
18 for an award that fails to confine or conform itself to
19 the board's jurisdiction. An arbitrator's
20 jurisdiction --

21 JUSTICE SOTOMAYOR: No. It's an award that
22 is contrary to the act.

23 MR. BALLENGER: But, Your Honor --

24 JUSTICE SOTOMAYOR: That's the --

25 MR. BALLENGER: They -- they have never made

1 that argument, Your Honor.

2 JUSTICE SOTOMAYOR: Well, I saw it in their
3 brief to the Ninth Circuit. The Ninth Circuit analyzed
4 the requirements of the act and of circular one and said
5 the board's ruling is not based on those.

6 MR. BALLENGER: Your Honor, on -- on page 5
7 of their brief to the Seventh Circuit, they waived any
8 argument based on that first statutory ground of review.
9 There was a first count in their petition for review
10 that was based on that statutory ground, and on page 5
11 they renounced it.

12 The only --

13 JUSTICE BREYER: It's the same argument --
14 it's the same argument, as if you had an APA case, and
15 the words in the APA are "arbitrary, capricious, abuse
16 of discretion," so somebody who has an unfair procedure
17 says it violates those words.

18 MR. BALLENGER: Well, if --

19 JUSTICE BREYER: And I don't really see that
20 it's any different, except we normally go to those words
21 before we would decide a due process question. It's the
22 similar kind of question. Why wouldn't we do the same
23 thing here?

24 MR. BALLENGER: Your Honor, I think that
25 there is an important difference. The first ground of

1 review under the act provides review for violations of
2 the plain terms of the RLA itself. The second ground is
3 for an act in excess of jurisdiction, which the lower
4 courts have correctly understood to be a reference to
5 this Court's Steelworker trilogy standard of review for
6 labor arbitration generally. An arbitrator's
7 jurisdiction is to interpret and to apply the parties'
8 agreement and the relevant arbitral rules. An
9 arbitrator exceeds his jurisdiction if but only if,
10 under this Court's well-settled case law, his decision
11 isn't even arguably construing or applying the relevant
12 principles, and this decision clearly satisfies that
13 standard, Your Honor.

14 I would urge the Court to look at the
15 board's decision in this case, and one of the five
16 appears at pages 65 -- 65a to 72a of the petition
17 appendix. The relevant reasoning starts on 68a to 71a.
18 The award contain five pages of careful reasoning by the
19 board. The board says that, quote: "We carefully
20 studied the arbitral and judicial precedents cited by
21 both parties in support of their respective positions";
22 and that "An evidentiary process after the appeal to
23 this board would have been contrary to the procedural
24 requirements contained in circular 1, as well as the
25 weight of arbitral precedents supporting the carrier's

1 position."

2 Well, what are those requirements? Section
3 301.2(b) of circular 1 expressly says that, quote: "No
4 petition shall be considered by any division of the
5 board unless the subject matter has been handled in
6 accordance with the provisions of the Railway Labor
7 Act," which includes the statutory requirement that a
8 conference must have occurred. The board has reasonably
9 understood that --

10 JUSTICE STEVENS: May I ask, just to be --
11 do you -- do you contest the question of whether there
12 was conferencing?

13 MR. BALLENGER: It's a complex question,
14 Your Honor. In the arbitration, Union Pacific went --
15 when this issue came up, Union Pacific went back to its
16 records and determined that it had proof in its own
17 records that two of the five cases had been conferenced.
18 And so we essentially conceded that point in the
19 arbitration.

20 JUSTICE STEVENS: You conceded that there
21 was conferencing?

22 MR. BALLENGER: We didn't contest that point
23 in the arbitration. Of course, the arbitrators
24 correctly determined that it was irrelevant.

25 As to the other three, the -- Union Pacific

1 did not have in its files the paperwork that it would
2 expect to see there if conferences occurred. So --

3 JUSTICE STEVENS: I'm not sure that answers
4 my question.

5 MR. BALLENGER: Well, we took the position
6 in the arbitration that we don't know for sure whether
7 conferencing occurred and that it's Respondent's burden
8 to prove it, and that the proof that they proffered in
9 the arbitration was not convincing and sufficient to
10 satisfy their burden. We think that constitutes
11 contesting the issue in an ordinary legal sense.

12 JUSTICE GINSBURG: But you didn't contest it
13 in two. Two cases, you concede that there was in fact a
14 conference.

15 MR. BALLENGER: In two cases, that appears
16 to be correct, Justice Ginsburg. But, of course, the
17 board properly determined within its discretion that
18 that fact is not relevant because the board enforced its
19 procedural rule that the evidence of conferencing --

20 JUSTICE GINSBURG: Yes, but the board can
21 make rules of procedure. It can't make rules of
22 jurisdiction. The dismissal of all these petitions was
23 for want of jurisdiction.

24 Now, if the board has no authority to set
25 its jurisdiction -- and I think that's plain; Congress

1 has that authority, not the board -- then it is required
2 to exercise the jurisdiction that Congress gave it. So
3 why isn't that the very first question that this Court
4 should deal with?

5 The board threw these cases out for want of
6 jurisdiction. Whatever the failing was, it was not and
7 could not be jurisdictional because the board has no
8 authority to describe its own jurisdiction.

9 MR. BALLENGER: But Your Honor, the
10 board was -- I think the board is entitled to mean
11 different things by the word "jurisdiction" than perhaps
12 an Article 3 court would mean. This Court often means
13 many different things when it uses that word.

14 What the board held was that the -- under
15 the language of circular 1 and the weight of arbitral
16 precedent the board cannot consider information that is
17 not included in the parties' initial submissions. The
18 board has understood for a very long time, consistent
19 with the language of circular 1, like Section 301.2(a),
20 that it is an appellate body that makes decisions on the
21 basis of a record that is before it, that was organized
22 on property and presented by the parties in their
23 initial submissions.

24 JUSTICE GINSBURG: So you say this is just a
25 mistaken use of words, rather than -- than the board

1 saying, under our rules, we don't have power to handle
2 this?

3 MR. BALLENGER: The substance -- I think it
4 can -- you can get tied up in the word "jurisdiction" in
5 a way that makes it more confusing than it needs to be.

6 What the board held was that the confluence
7 of the procedural rules, specific procedural rules, in
8 circular 1 established two propositions: First, that
9 the board cannot consider a matter unless conferencing
10 in fact occurred; and second, that the only evidence
11 that the board is ever allowed to look at under its own
12 procedural rules is the evidence that is in the initial
13 submissions. If you put --

14 JUSTICE GINSBURG: Do you -- do you dispute
15 what your opponent tells us, that some panels of the
16 board, even when there has been no conference, let alone
17 no proof of a conference, but some panels have stayed
18 proceedings to allow the conference to occur, and then
19 the board will pick up?

20 MR. BALLENGER: That -- we don't contest
21 that, Justice Ginsburg. But, of course, this isn't
22 ordinary agency adjudication of the sort conducted under
23 the APA, where the board has to stand behind as an
24 entity every decision that is made by any panel.

25 This is a peculiar sort of agency-supervised

1 arbitration, and it's perfectly appropriate in this
2 context for two simultaneous panels of the board to
3 reach different interpretations of the same language.
4 And a Court really --

5 JUSTICE SOTOMAYOR: That's true generally,
6 but if the board believes that as a matter of law it
7 can't hear this dispute and consider normal grounds for
8 excusing a failure to include something in the record
9 because, in its own language, we can't do it, the law
10 doesn't permit us to do it, we have no jurisdiction to
11 consider matters outside the record, we don't apply
12 normal rules of waiver or forfeiture or any of the other
13 rules that attend themselves to a failure of a party to
14 immediately raise a defense like you could have done and
15 waited two and a half years to do, doesn't that suggest
16 that the board is not reaching -- merely resting its
17 decision on a merely procedural rule, it's resting its
18 decision on its erroneous view that the law deprives it
19 of jurisdiction to hear the case?

20 MR. BALLENGER: I don't believe so, Your
21 Honor. First of all, this Court squarely rejected in
22 the Sheehan case itself the suggestion that there is
23 independent judicial review just because a question of
24 law is at stake. That was the --

25 JUSTICE SOTOMAYOR: No, but that -- this is

1 not merely a question of law. This is a question of
2 jurisdiction: Is it entitled to hear a dispute by law?

3 MR. BALLENGER: There is no question, no one
4 has ever disputed in this case, that the board was
5 entitled to hear this matter.

6 For instance, the question of arbitral
7 jurisdiction, no one has ever disputed that this Court
8 -- that this dispute was properly before the board. The
9 board resolved it. The board simply resolved it on
10 procedural grounds. And the explanation that it gave
11 was that considering material outside of the initial
12 submissions would be contrary to circular 1 and to the
13 weight of arbitral precedent directly on the point.

14 JUSTICE GINSBURG: I am looking at the
15 decision and they are all identical in this respect.
16 The board said it has no jurisdiction to consider any of
17 the remaining procedural or substantive issues
18 associated with this claim.

19 "No jurisdiction," that sounds like they are
20 saying: We have no authority to consider anything about
21 this case; we must toss it out because there is no proof
22 of the conference.

23 MR. BALLENGER: Again, Your Honor, I think
24 the important point is that the board is not required to
25 use the word "jurisdiction" in precisely this sense.

1 There is no question that the board has jurisdiction
2 over this dispute. It is a minor grievance under the
3 Railway Labor Act within the --

4 JUSTICE SOTOMAYOR: Don't you think there is
5 a big difference between the adjudicator saying: I
6 could, but I choose not to because there is no reason
7 for your failure, from: I won't because I can't.

8 MR. BALLENGER: Yes.

9 JUSTICE SOTOMAYOR: Those are -- those are
10 two very different concepts.

11 MR. BALLENGER: They're -- they certainly
12 are in an Article 3 court, Your Honor. But this Court
13 has said many, many times that the word "jurisdiction"
14 is a word of many meanings, too many meanings.

15 JUSTICE BREYER: Can you -- could you go
16 back for a minute? I mean, this reads as if it's very
17 complicated, but for me, I read the AFL-CIO brief and
18 that's what I am thinking of and it seems this is not
19 such a hard case. Basically, there is a statute filled
20 with words of procedure, and it isn't too difficult to
21 interpret that statute as meaning that the board should
22 have fair procedure, not unfair procedure.

23 Now, if you are willing to make that giant
24 step, the remaining issue in the case is whether the
25 procedure here was fair or unfair. And the Seventh

1 Circuit is filled with pages of opinion that explains
2 why it was unfair. And the reason basically it was
3 unfair is because no one in his right mind previous to
4 this case would have thought that you should fill up
5 your brief with a lot of facts that nobody's going to
6 contest. And after this case, the board said: By the
7 way, you have to put in a whole lot of jurisdictional
8 facts even if nobody is going to contest them, and since
9 you didn't do it, you are out, and we won't even give
10 you a chance to do it now.

11 Okay? So I read that. I thought, is there
12 something wrong with that? And then I thought I'd ask
13 you, because you would know.

14 (Laughter.)

15 MR. BALLENGER: I think that there are
16 several things wrong with it, Your Honor, starting from
17 the premise that the statute guarantees in all instances
18 procedures that are, quote unquote, "fair" in an
19 untethered sense.

20 This statute guarantees specific procedural
21 rights, which if you put them together do guarantee fair
22 procedures. But it doesn't guarantee fairness in the
23 abstract. So what you have to look at are whether the
24 specific procedures that are guaranteed by the statute
25 were complied with, and they were.

1 Now, taking a step back, even if we are
2 going to talk about what is fair and unfair, there is
3 absolutely nothing unfair about what happened here. As
4 the board explained, referencing its own prior
5 precedents and the plain language of the regulations
6 that are governing, the Respondents clearly were on
7 notice that they had to do this.

8 Several prior decisions of the board had
9 dismissed grievances for precisely the reason that there
10 was no evidence of conferencing in the on-property
11 record. That is if you look at page 40 of the joint
12 appendix 18679 from the first --

13 JUSTICE STEVENS: Are there any -- is there
14 any rule describing how one has to get this into the
15 record? It's just-- how -- what would have been the
16 proper way to prove that conferencing occurred?

17 MR. BALLENGER: As the board has explained
18 in prior cases, the ordinary method of proving that
19 conferencing occurred is that the last exchange of
20 correspondence on the property between the carrier and
21 the union, references the conference that had occurred
22 and what happened. And then both parties or -- or
23 the -- the union use that exchange of correspondence
24 to -- in their initial submissions to the board pursuant
25 to section 301.2(a), which requires, consistent with the

1 text of the statute itself, that every submission of the
2 board will include, quote, "A full statement of the
3 facts and all supporting data bearing on the dispute."

4 JUSTICE STEVENS: But that doesn't refer to
5 conferencing, does it?

6 MR. BALLENGER: A full statement of -- of
7 all of the facts and supporting data, which includes
8 conferencing. Yes, Your Honor.

9 JUSTICE STEVENS: Implicitly includes con --
10 not expressly includes conferencing.

11 MR. BALLENGER: Well, that's how the board
12 has understood it, and, of course, the board is entitled
13 as an arbitral body to interpret its own rules.

14 JUSTICE STEVENS: I see.

15 MR. BALLENGER: Within the enormous
16 discretion that this Court has established in the
17 Steelworkers trilogy standard of review, which is that
18 as long as the arbitrator is even arguably construing or
19 applying the appropriate principles, his decision has to
20 stand. There is no real question, I think, if you look
21 at the five pages of careful reasoning and the expressed
22 text of Circular 1 here that this -- this is an
23 exemplary arbitral award. The arbitrators were careful,
24 they were construing and applying the relevant
25 principles. And this Court has said --

1 JUSTICE GINSBURG: And it's going against
2 another panel that says, not only you don't have to have
3 the proof, even if you didn't have the conference we are
4 not going to throw you out.

5 Now, there is different panels, but it is
6 the same board. Why shouldn't the grievants here say,
7 we don't understand this? It's conceded there was a
8 conference, at least in two of the cases. Our buddies
9 didn't even have a conference and this same board, a
10 different panel, allowed them to cure it. And I can't
11 cure it now. That is the height of arbitrary behavior
12 by the board, it seems to me.

13 MR. BALLENGER: Your Honor, exactly the same
14 thing happens to litigants in courts all of the time.
15 Three identically situated litigants go to three
16 different trial courts in the same State with identical
17 claims under the same statute and they present those
18 claims and they get three different answers from the
19 State trial courts. That is not a violation of due
20 process. Sometimes --

21 JUSTICE GINSBURG: I'm not -- I'm not
22 talking about due process. I'm talking about conformity
23 with the act, the act's requirement. I --

24 MR. BALLENGER: Your Honor, it is a feature
25 of the Railway Labor Act scheme that different -- each

1 panel of the board is its own discreet interpretive
2 universe and is to be judged by the Federal courts
3 according to the standards set up in the statute. It
4 will happen that boards -- that panels disagree about
5 the proper resolution of an issue. That's happened --

6 JUSTICE GINSBURG: So does the board as a
7 whole apparently, because I am looking at the
8 instruction about joint exhibits and it tells the
9 parties, when you are going to make a submission don't
10 include unnecessary documents, and among things don't
11 include things that aren't in dispute --

12 MR. BALLENGER: Three things about --

13 JUSTICE GINSBURG: -- like letters
14 requesting conferences.

15 MR. BALLENGER: Three things about that,
16 Your Honor. First of all, that instruction sheet
17 doesn't apply here at all. It applies only when the
18 parties get together beforehand and agree to file a
19 joint -- a joint submission to the board, so that they
20 really have talked about what is in dispute and what
21 isn't. It wasn't even promulgated until after the
22 submissions in this case were made.

23 And it's not clear how the board is going to
24 understand that language. It doesn't say that the
25 parties can omit evidence of conferencing. It says they

1 can omit, if they don't dispute it, letters requesting a
2 conference.

3 JUSTICE BREYER: It must be what they think
4 of as an interpretation of the rule and the statute that
5 they already had promulgated. The rule and the statutes
6 say, the rule says you have to include all known
7 relevant argumentative facts. So if the circular says
8 we mean it, we mean the facts that people are having an
9 argument about.

10 And then the statute says, a full statement
11 of the facts bearing upon the dispute. And the circular
12 and then this document say we mean a full statement of
13 facts that somebody might think have something to do
14 with an argument that people are having.

15 And, so, only after this case did the board
16 say, oh, no, you have to include some disputes that
17 nobody is disputing, some facts that nobody has ever
18 disputed or seems to.

19 Now, what's -- what's the response to that?

20 MR. BALLENGER: Again, Your Honor, there is
21 nothing unique or new about what the board did here.
22 The board has done this before.

23 Now, as to the circular, it remains --

24 JUSTICE BREYER: I'm right in `stating what
25 they did? Is my statement of what they did, which was

1 meant to be as pejorative as I could possibly make it --

2 (Laughter.)

3 JUSTICE BREYER: -- and you are going to
4 say, that's right, that's the correct statement of what
5 happened?

6 MR. BALLENGER: No, I'm -- I'm disagreeing
7 with the -- the characterization that this is the board
8 saying, we're going to make up a new rule that we've
9 never applied before. That's not what happened here.
10 The board said that the weight of arbitral precedence
11 supports the carrier's position.

12 Now, as to the -- the instruction sheet, it
13 remains to be seen how the board is going to interpret
14 that. And in an appropriate case, a court, if they
15 interpret it in a manner that was wholly arbitrary and
16 without reason and would violate the Steelworkers
17 trilogy arbitral standard of review, then of --

18 JUSTICE GINSBURG: Then the board is telling
19 people, I will go back a sentence: "Representatives may
20 wish to omit documents that are unimportant and/or
21 irrelevant to the disposition of the dispute."

22 I mean that -- that seems to me is trapping
23 people, if the board says, please don't dump on us
24 unnecessary paper.

25 MR. BALLENGER: Your Honor, no one in this

1 case could have legitimately relied on that instruction
2 sheet, whatever it means. And the -- the board has not
3 yet construed what it's going to mean. But it doesn't
4 by its own terms apply here, because a joint submission
5 was not made.

6 JUSTICE GINSBURG: Then if -- then a person
7 following this is obliged not to pay heed to this advice
8 because if you don't put in every document, if you don't
9 put in enough evidence of conferencing, you are going to
10 be out and never have your grievance heard.

11 MR. BALLENGER: Your Honor, in an
12 appropriate case, if a board panel interpreted that
13 language in -- in a manner that would be inconsistent
14 with something that that panel then did, then there
15 might be an inherent conflict that --

16 JUSTICE SCALIA: Do I understand you to say
17 that that provision was not applicable here anyway?

18 MR. BALLENGER: It's not applicable at all,
19 Your Honor.

20 JUSTICE SCALIA: Does the other side contest
21 that?

22 MR. BALLENGER: Not that I am aware of.
23 It -- it only applies in the case of joint submissions,
24 and it was not promulgated until after the submissions
25 here were filed. So no one could legitimately rely on

1 that instruction sheet.

2 And in any event --

3 JUSTICE GINSBURG: They are not relying on
4 it as applicable in this case. They are relying on it
5 as the board's indication that it's sound to tell the
6 parties, don't dump on us unnecessary paper.

7 MR. BALLENGER: Well, the board obviously
8 does not consider evidence of conferencing unnecessary,
9 Your Honor. It has held for a very long time, going
10 back, I think, 40 years to Award 18679 at least, that
11 evidence of conferencing is essential to the board's
12 consideration of any dispute under the terms of the
13 statute.

14 JUSTICE GINSBURG: Some panels of the board.
15 Other panels think this is an eminently curable defect.

16 MR. BALLENGER: That's right, Your Honor.
17 But an arbitral decision does not violate the
18 Steelworkers standard of review simply because other
19 arbitrators disagree.

20 JUSTICE GINSBURG: That's a decision on the
21 merits. Here we are talking about a threshold barrier
22 to even get your case heard. And that is being decided
23 differently by different panels.

24 MR. BALLENGER: Your Honor, this Court has
25 made clear that issues of procedural arbitrability,

1 threshold conditions to arbitration, are governed by the
2 same standard as merits issues in arbitration. In the
3 Misco case, for instance, there was a question of
4 evidence, and the arbitrator refused to consider certain
5 kinds of evidence. And this Court said questions of
6 procedure are for the arbitrator.

7 In John Wiley v. Livingston, which is in
8 many ways very similar to this case, it involved a
9 procedural precondition to arbitration that the parties
10 have to meet in conference prior to beginning the
11 arbitration. And the question in John Wiley & Sons, was
12 whether that precondition of conferencing should be
13 waived on the grounds that on the facts of that case it
14 would be futile. And the party -- one party tried to
15 get a court to intervene on that question, because it
16 could have precluded the arbitration entirely. And the
17 Court said that procedural questions arising out of the
18 arbitration and bearing on its disposition are for the
19 arbitrator, not for a court.

20 JUSTICE STEVENS: May I ask this question.
21 I may have an incorrect impression about it. Is the --
22 the thing that's at issue is whether or not conferencing
23 occurred. Is it also important to know what happened at
24 the conferencing? You may not know this. Is the -- is
25 there some sort of -- of factual description of the

1 negotiations that took place during conferencing an
2 important part of the submission?

3 MR. BALLENGER: Not ordinarily, Justice
4 Stevens.

5 JUSTICE STEVENS: So the only -- the only
6 importance is to just to establish the fact that there
7 was a conference?

8 MR. BALLENGER: It was very important to the
9 congressional plan and so it's written into the statute
10 that the parties make one last effort to settle these
11 grievances before it comes to the board. That is a
12 precondition of the board's consideration of any
13 grievance.

14 JUSTICE GINSBURG: And in two cases you
15 concede that that condition was met, that there was a
16 conference?

17 MR. BALLENGER: Yes, Your Honor.

18 JUSTICE GINSBURG: So we are not even
19 talking about a conference requirement. We are talking
20 about a pleading rule, how you plead. Everybody
21 concedes that the conference occurred in two cases.

22 MR. BALLENGER: Your Honor --

23 JUSTICE GINSBURG: It's how you plead that.

24 MR. BALLENGER: Yes, Your Honor. Every
25 adjudicative body has to be able to enforce its

1 procedural rules. And the board has a procedural --

2 JUSTICE SOTOMAYOR: Can -- can we -- I'm
3 sorry.

4 Let's assume that in a published opinion
5 there are two procedural defaults. One, the union does;
6 the other, the railroad does. The board says, you know,
7 I am resolving this dispute. I'm not forgiving the
8 union's procedural default, but I will forgive the
9 railroad's procedural default, because they're an
10 important lifeline business for America and we've got to
11 make sure that they're protected at all costs, and union
12 members are just not important enough to that scheme.

13 MR. BALLENGER: Your Honor, in that --

14 JUSTICE SOTOMAYOR: In your theory, there is
15 no due process violation in that case? They have heard
16 the arguments, they have given you a full opportunity to
17 make your point about the procedural default. They are
18 announcing a new rule. It's okay. So what's wrong with
19 that?

20 MR. BALLENGER: That case would be
21 reviewable, Your Honor, and properly so under the --

22 JUSTICE SOTOMAYOR: Under what theory?

23 MR. BALLENGER: -- statutory ground of
24 review for exceeding jurisdiction.

25 JUSTICE SOTOMAYOR: Why?

1 MR. BALLENGER: Because in that case the
2 arbitrator is not even arguably construing or applying
3 the rules; he is dispensing his own brand of industrial
4 justice, as this Court said in the Enterprise Wheel and
5 Car case.

6 JUSTICE SOTOMAYOR: Well, point me to any
7 rule, that --- you know, anybody could point to a rule
8 and says it commands a result. They -- there are rules
9 here that say disputes should be submitted to the board
10 and resolved. And they are resolving the dispute, the
11 dispute, and they are saying, you have defaulted, you
12 didn't.

13 MR. BALLENGER: But every -- every
14 adjudicative body has to have the ability to set and
15 enforce procedural rules governing its procedures.

16 JUSTICE SOTOMAYOR: But they can do that.
17 That's what -- that's what the circuit said.

18 MR. BALLENGER: In the --

19 JUSTICE SOTOMAYOR: They could have passed a
20 rule that told people, warned them, and said this is a
21 procedural rule we are going to apply.

22 MR. BALLENGER: Well, they did, Your Honor.
23 They have Sections 301.2(a) and (b), which if you put
24 them together give at least fair warning of --

25 JUSTICE SOTOMAYOR: At what point does the

1 interpretation of rules that don't command a result
2 become improper, outside the board's jurisdiction?
3 According to you, never.

4 MR. BALLENGER: Under the -- under the
5 Steelworkers standard of review for arbitral decisions,
6 there will be a point at which the board's
7 interpretation isn't even arguably grounded in -- in the
8 rules, and it will be reviewable. As a matter of
9 constitutional due process, which is what we are here
10 talking about today, there probably is no point outside
11 of the substantive interpretation of a criminal statute
12 where that kind of interstitial gap-filling or
13 interpretation could be unfair. It happens to litigants
14 all of the time that they come to a court and are
15 surprised by how a court resolves a disputed procedural
16 question.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.
18 Mr. Geoghegan.

19 MR. GEOGHEGAN: "GAE-gunn," actually.

20 CHIEF JUSTICE ROBERTS: "GAE-gunn."

21 ORAL ARGUMENT OF THOMAS H. GEOGHEGAN

22 ON BEHALF OF THE RESPONDENT

23 MR. GEOGHEGAN: Good afternoon, Mr. Chief
24 Justice, and may it please the Court:

25 The first and most important thing that the

1 Respondent would like to stress is that we are not here
2 reviewing an arbitrator's interpretation of the contract
3 or here under the review standards set by Steelworkers
4 trilogy. We never received an interpretation of the
5 contract, and by that I mean the contract in any
6 aspect -- procedural rules of the contract, substantive
7 rules of the contract. No contract interpretation for
8 these five engineers. And the reason that the
9 Respondent urged both a statutory and due process
10 violation is that without any interpretation of the
11 contract, these five cases were dismissed invoking
12 Circular 1, Code of Federal Regulations, as the basis,
13 and denying these five engineers any determination of
14 their contract claims.

15 They never got to what the Railway Labor Act
16 with its mandatory arbitration procedure promised the
17 engineers and the carriers: a resolution of their
18 contract claims for the purpose of industrial peace.

19 JUSTICE SCALIA: But it didn't -- it didn't
20 promise them that categorically. There were certain
21 things they had to do, right? One of which was to have
22 conferencing, and in three of these cases they didn't.
23 So that promise didn't extend at least to those three
24 cases. And in the other two, where there was
25 conferencing, the act also provides, as any sensible act

1 would have to, for the adoption of procedural rules.
2 And the procedural rule here, according to the
3 arbitrator, required the submission of that evidence
4 of -- of consultation with the complaint, which didn't
5 happen.

6 MR. GEOGHEGAN: Your Honor, I respectfully
7 disagree. These cases -- the panel never said that the
8 three cases were not conferenced. Union Pacific has not
9 said that these three cases were not conferenced. The
10 panel said that, no matter how convincing the evidence
11 that these other three cases were conferenced, that all
12 five cases were conferenced, it would not consider that
13 evidence because it was not attached to the original
14 submission.

15 JUSTICE SCALIA: Do -- do you say that all
16 five were -- were conferenced? Is that your position?

17 MR. GEOGHEGAN: Oh, absolutely. We have
18 correspondence --

19 CHIEF JUSTICE ROBERTS: But we have rules
20 like that -- we have rules like that all the time. No
21 matter how clear it is what happened below, if it wasn't
22 included in the question presented, we say you can't
23 raise it. This is just a rule like that.

24 They have a rule saying this is what you
25 have to do, you have got to put the evidence of

1 conferencing in -- in the record at a particular time.
2 You didn't do it, so we are not going to -- the fact
3 that on the facts, on the real facts, it occurred is not
4 an adequate challenge to the procedural rule.

5 MR. GEOGHEGAN: Your Honor, that would be
6 true if there was a rule that required these documents
7 to be attached to the original submission. There is no
8 such rule. 301 --

9 CHIEF JUSTICE ROBERTS: You think there is
10 now? In other words, this is -- rulemaking by
11 adjudication is not unheard of.

12 MR. GEOGHEGAN: Rulemaking by adjudication
13 is not unheard of, Your Honor. But this is not
14 rulemaking by adjudication because this particular
15 panel, which is an arbitration panel, a division, it's
16 five members, it's a division of the adjustment board,
17 has no power to make rules. Congress in section (v) of
18 Section 153 of the act delegated the rulemaking power
19 under this act on a one-time basis. In fact, it put in
20 the dates. It had to start in June 1934 and be done in
21 19 -- October 1934. That is the only power that this
22 34-member adjustment board has to make rules.

23 A panel has no power delegated to it by the
24 Congress under this act, and the act is very specific,
25 because Congress --

1 CHIEF JUSTICE ROBERTS: So is it -- is --
2 where is the rule that there has to be conferencing?

3 MR. GEOGHEGAN: The rule -- there is no rule
4 that there has to be conferencing. There --

5 CHIEF JUSTICE ROBERTS: So you think -- you
6 think that was where the board erred, in requiring
7 conferencing?

8 JUSTICE SCALIA: It's in the statute, isn't
9 it?

10 MR. GEOGHEGAN: It is in Section 152, which
11 is not a statute, by the way, that the NRAB administers.

12 We are not disputing that we have to prove
13 conferencing. We're happy to prove it. We have
14 evidence of conferencing.

15 CHIEF JUSTICE ROBERTS: Well, it's -- can
16 the board adopt procedures about how you go about
17 proving conferencing? You say there is no rule because
18 there wasn't a rule adopted in 1934. There is a rule
19 that there has to be conferencing. Does that mean that
20 at any point in time you can just pop up and say, oh, by
21 the way, there was conferencing? Or can the board say,
22 this is how you go about establishing it?

23 MR. GEOGHEGAN: We believe that, given there
24 are no rules on this point -- and the Seventh Circuit
25 made that point clear -- that what has been to be done

1 is to facilitate the purpose of the act, which is to get
2 a contract interpretation. We have --

3 CHIEF JUSTICE ROBERTS: So they can -- the
4 board can never have a rule that says, you have to
5 establish conferencing, you know, before the date of the
6 first arbitral proceeding, or within 30 days? The fact
7 that all that has to happen under the act is that there
8 be conferencing, you are free to establish it at any way
9 you want, at any time you want?

10 MR. GEOGHEGAN: No, you're not. Your Honor,
11 you are not free to establish it any way you want. You
12 have to have relevant evidence that the conferences
13 occurred, relevant probative evidence that it is not
14 prejudicial. The only rule that has been cited here for
15 keeping this evidence out is 301.5, and that is at page
16 50 -- 62a. And it is the rule that the Seventh Circuit
17 focused on, and it describes what should be in the
18 original submission. And it says, if I may quote part
19 of it, at 62a, the Court can read along with me: that
20 "Under the caption 'position of employees,' the
21 employees must clearly and briefly set forth all
22 relevant argumentative facts, including all documentary
23 evidence submitted in exhibit form quoting the agreement
24 or rules involved, if any; and all data submitted in
25 support of employees' position, must affirmatively show

1 the same to have been presented to the carrier and made
2 a part of the particular question in dispute."

3 That rule is referring to the investigative
4 process as to whether -- for example, one of the
5 engineers ran a red light, it's alleged. So we are
6 going to argue about that. They put on testimony. We
7 have witnesses. There is cross-examination. And then
8 the investigative officer makes a decision about whether
9 that's going to be put in the record.

10 The conference is an informal phone call.
11 It's not specified in the collective bargaining
12 agreement. There is nothing in the collective
13 bargaining agreement about it. But it's an informal
14 phone call that takes place after the whole contract
15 grievance procedure has been exhausted, and then,
16 before, it can be 30 seconds -- you know, Charlie
17 Ridenour, can call up Mr. Stone and say -- you know, can
18 we settle this? No. We can't. Okay.

19 That's -- that's a conference. That's all
20 it is, and what has to happen under the Act and,
21 unfortunately -- and it is unfortunate, we did not put
22 in the joint appendix, Section 2, Part 6, 152, Part 6,
23 of the Railway Labor Act, which describes what happens.
24 The union has to send a letter requesting a conference.

25 I hope it is not out of turn, given that we

1 have been describing evidence, but we've got letters
2 about all of these conferences, saying, we want to have
3 a conference. Once that happens, that triggers a
4 process. They have to specify -- both sides have to get
5 together and specify a meeting take place.

6 CHIEF JUSTICE ROBERTS: Where -- where does
7 it say the unions have to send in letters requesting a
8 conference?

9 MR. GEOGHEGAN: Oh, it's in Section 2 of
10 Part 6 of the Railway Labor Act. We did not cite that.
11 It's in the statute.

12 The conferencing, by the way, is in Section
13 2 of the Railway Labor Act. The board and its power and
14 procedures is in Section 3. Section 3 has no mention of
15 conferencing whatsoever in it. There isn't -- the word
16 doesn't appear in the section which describes what the
17 board is supposed to do or the board's procedures.

18 And it doesn't appear in the CFRs either.
19 The CFR's has this rule, Your Honor, that says -- you
20 know, trial type evidence has to be presented at this
21 investigative hearing below. Why? Because it's an
22 appellate court mand you don't want to get surprised --
23 you know, the union can't come forward in this case and
24 say, well, we have a surprise witness that shows
25 Mr. Smith didn't run the red light.

1 I mean, that's just out of bounds. It
2 surprises. It's blind-siding. You can't do it. The
3 Seventh Circuit said: Wait a second. This rule doesn't
4 have anything to do of proof of whether this phone call
5 occurred after the whole written record has been created
6 below. There are no rules about this, and, given that
7 there are no rules -- and given that the union -- and
8 the panel says this in its opinion -- is waving before
9 the panel -- you know, Mr. Neutral, we have letters --
10 you know, back and forth between the parties about the
11 fact that conferences occurred, and they don't dispute
12 that two of them occurred.

13 JUSTICE ALITO: I -- I still don't
14 understand your answer to the Chief Justice's question
15 about how the panels -- how these panels -- how the
16 board, in your view, is supposed to go about making some
17 sort of sensible procedural rules about establishing the
18 that conferencing took place.

19 They can't do it by rulemaking, and you seem
20 to argue that they can't do it by adjudication, so
21 what -- they can't do it at all? There -- this is just
22 going to be chaos, that there is no way to establish a
23 regular procedure to establish that there was
24 conferencing?

25 MR. GEOGHEGAN: Your Honor, that's a good

1 question. I think the answer is that there are no
2 procedures on this because it wasn't -- it's not part of
3 the -- the process was set up to develop the trial type
4 evidence -- you know, whether the red light was run or
5 not.

6 It wasn't set up to determine how
7 conferencing occurred, and it's artificial to put the
8 rulemaking in here. The Seventh Circuit said:
9 Giving -- given the how and why of it, it should be done
10 in a way that is least prejudicial to the parties.

11 The Union Pacific could have raised this
12 issue when we filed the notices. They didn't. They
13 didn't because the --

14 JUSTICE GINSBURG: You said, on that point
15 in your brief, that, normally, the carrier will raise
16 the absence of conferencing as an impediment at the time
17 the union files its notice of intent to file a
18 submission.

19 What is -- what is the basis? You didn't
20 give any citation for that. You say, ordinarily, that's
21 what the -- the carrier will -- would do, and then you
22 are tipped off, and then you put in your evidence about
23 conferencing.

24 What -- what makes you -- what backs up this
25 statement that, normally, carrier raises the absence of

1 conferencing as an impediment at the time the union
2 files its notice of intent?

3 MR. GEOGHEGAN: Your Honor, the answer is
4 past practice. Although this is not a collective
5 bargaining situation, we are not applying the
6 contractor. That was the past practice. That's what we
7 alleged. This case was to show --

8 CHIEF JUSTICE ROBERTS: So could the
9 board -- could the board adopt a rule requiring that?

10 MR. GEOGHEGAN: The adjustment board could
11 adopt a rule. That is the agency -- and it still
12 exists. It has got offices here in Washington, D.C., 34
13 members. They were given this explicit rulemaking power
14 by Congress. They were delegated with the authority.
15 If there is an agency out there that is entitled to
16 Chevron type deference, that is the agency.

17 JUSTICE SCALIA: Do they do anything else?
18 What do they do? What does the adjustment board do?

19 MR. GEOGHEGAN: Your Honor, I'm not sure.

20 JUSTICE SCALIA: I don't want to get you in
21 trouble, but I'm not sure they do anything.

22 MR. GEOGHEGAN: I --

23 CHIEF JUSTICE ROBERTS: Just to be clear --
24 I will take you off the hook.

25 (Laughter.)

1 CHIEF JUSTICE ROBERTS: Just to be clear,
2 you say it's established practice that the railroads
3 normally file their objection at a -- you know, at a
4 particular point, and you think the board is without
5 power to say: Look. This is the established practice.
6 You, railroad, did not follow it, and so we're not going
7 to consider your objections.

8 MR. GEOGHEGAN: No, no, Your Honor. Our --
9 our position is --

10 CHIEF JUSTICE ROBERTS: No. No. You mean
11 that they -- the board can't do that?

12 MR. GEOGHEGAN: We don't think that the
13 board can or should do that. What we do think is that,
14 if there is -- the rule that I just read from, 301.5,
15 says that you raise relevant argumentative facts.

16 Union Pacific, when the parties exchanged
17 the submissions, did not say that there wasn't any
18 conferencing. Now, their -- their comeback to that in
19 the reply brief was, well, we didn't know you had not
20 conferenced until we saw that you didn't have any
21 evidence of it. I mean, that's just not -- slightly, in
22 our view, disingenuous.

23 JUSTICE ALITO: Could they -- could they
24 adopt a rule that says that, if the -- if the parties go
25 through -- do everything that is necessary prior to the

1 time of the adjudication, they can't pop up at the very
2 last minute and send in a letter saying: Oh. By the
3 way, there was no conferencing; could they adopt a rule
4 like that because it's just a big waste of everybody's
5 time to leave it to -- to the last minute?

6 MR. GEOGHEGAN: Your Honor, in our view, the
7 panel couldn't, but the adjustment board could, and the
8 adjustment board comes out with these little procedures,
9 like the one read here that -- which they say is not
10 relevant, that says -- you know, let's have these joint
11 submissions, let's keep evidence of conferencing out.

12 They are trying to -- these submissions that
13 come in for these arbitration cases are not to be
14 believed. I mean, they are like six feet high. So
15 there is a constant effort on the part of everybody in
16 the process to pare down the submissions to what is
17 actually in dispute.

18 CHIEF JUSTICE ROBERTS: I thought, under the
19 Steelworkers trilogy, the arbitrators has broad
20 deference to adopt these sorts of modes of procedure.

21 MR. GEOGHEGAN: But, Your Honor --

22 CHIEF JUSTICE ROBERTS: That we would review
23 only for whatever it is.

24 MR. GEOGHEGAN: This is not the Steelworkers
25 trilogy. The Steelworkers trilogy is about private

1 arbitrators determining private contracts and
2 determining the procedures under private contracts.
3 They are -- they are applying the procedural rules of
4 the contract. There is nothing like that here.

5 We are here because a government-funded
6 panel, under a mandatory procedure, funded by the
7 government, was applying the Code of Federal
8 Regulations, not rules that the parties agreed to
9 themselves, so the deference that is given to -- by this
10 Court to a private arbitrator applying private
11 procedural rules that the parties agree to, and so on
12 and so forth, isn't present here because this is
13 governmental action. It is a governmental agency.

14 Now, we can -- the AFL-CIO gets into an
15 argument about whether it's a state action. But the
16 bottom line is that these are arbitrators paid for by
17 the government. The arbitrators are selected -- or the
18 eligible pool is selected by the government.

19 They are applying the Code of Federal
20 Regulations to keep us from getting to any procedural
21 rule or any substantive rule under a private collective
22 bargaining agreement. That looks a lot like
23 governmental action blocking the people from getting
24 their -- resolution of their private contractual claims.
25 That's why --

1 CHIEF JUSTICE ROBERTS: So the review -- the
2 review of government arbitrators arbitrating provisions
3 pursuant to a collective bargaining agreement, the
4 standard of review of that is different than private
5 arbitrators under the Steelworkers trilogy?

6 MR. GEOGHEGAN: It should be, and, in the
7 hornbook sense, it is, the reality of it is, and that's
8 true here. We can say it's de novo review. We can say
9 it's a different standard than -- than Steelworkers or
10 John Wiley, and this is not a John Wiley case.

11 But the reality is you aren't going to get a
12 court's attention, unless they did something that is
13 actionable under the Steelworker trilogy, too. And the
14 Steelworker trilogy has the Enterprise Wheel case, which
15 says, if the arbitrator starts making up rules
16 willy-nilly, dispensing "his own brand of industrial
17 justice," not drawing their essence from the collective
18 bargaining agreement or, in this case, the CFRs.

19 CHIEF JUSTICE ROBERTS: But you don't think
20 that this is that. I mean, if you say: Look. Here's
21 the rule. You have got to file these things by this
22 date, that is not imposing your own rule of industrial
23 justice.

24 MR. GEOGHEGAN: But there is no such rule,
25 Your Honor. I mean, if -- if there was, we would be in

1 a --

2 CHIEF JUSTICE ROBERTS: I'm saying that, if
3 the board adopts a procedure exactly like that, you may
4 challenge it as-- as violating due process because you
5 didn't have notice, any number of things, but you can't
6 say that the board is imposing its own brand of
7 industrial justice.

8 That sort of seems, to me, goes to the
9 merits in the standards of arbitration, rather than
10 procedures like this, unless it's a procedure like was
11 hypothesized earlier, that only applies to one side and
12 not the other.

13 MR. GEOGHEGAN: Your Honor, all I can say,
14 in answer to that, is that there are governmental rules
15 that have very specific procedures that are in place.

16 JUSTICE GINSBURG: I thought your position
17 was -- at least I thought I heard you say earlier, that
18 these individual panels do not have rulemaking authority
19 for the board. I'm looking at something that says,
20 "National Railway Adjustment Board, Uniform Rules of
21 Procedure, Revised June 23rd." That's put out by the --
22 the board, the one that you said that is --

23 MR. GEOGHEGAN: The adjustment board down
24 the street. 34 members.

25 JUSTICE GINSBURG: And I thought that

1 your -- because there's nothing in this statute, nothing
2 in any regulation, that gives an individual panel the
3 right to proscribe rules of procedure that all parties
4 to these disputes are obliged to follow.

5 MR. GEOGHEGAN: That's correct, Your Honor.

6 JUSTICE GINSBURG: That -- that authority is
7 vested only in the board, not in the panels.

8 MR. GEOGHEGAN: Arguably, in the board.

9 JUSTICE SCALIA: I don't know how that could
10 possibly be true. I can't imagine being an arbitrator
11 and not being able to say: All right, you know, we are
12 going to have a conference next Tuesday. I want you to
13 have all of the -- all of the papers relevant to this
14 particular point that we are going to discuss in by two
15 days before.

16 Can't do that?

17 MR. GEOGHEGAN: Well --

18 JUSTICE SCALIA: I would not know how to run
19 an arbitration without -- without establishing some
20 rules of procedure.

21 MR. GEOGHEGAN: Your Honor, that didn't
22 happen here. If I may explain, there is --

23 JUSTICE SCALIA: Well --

24 MR. GEOGHEGAN: The whole question that this
25 was -- that these documents were --

1 JUSTICE SCALIA: Well, at least back off
2 from your statement that an arbitrator cannot set rules
3 of procedure.

4 MR. GEOGHEGAN: I -- well, Your Honor, an
5 arbitrator can set rules of procedure within the
6 parameters of what is allowed by the act.

7 JUSTICE SCALIA: Oh, all right. That's a
8 little different.

9 MR. GEOGHEGAN: But the act itself, and the
10 CFRs, are very clear that there is no requirement that
11 this evidence has to be submitted in the original
12 submission. And once the --

13 JUSTICE SCALIA: Well, you're making sense.
14 It says that, or it just doesn't address the question of
15 whether they have to be included in the original
16 submission? I mean, I assume there is no provision that
17 says -- or I missed it, there is no provision that says
18 the conferencing materials do not have to be included in
19 the original submission?

20 MR. GEOGHEGAN: There is no CFR that says
21 that the conferencing materials have to be in the
22 original submission or the case is dismissed. There is
23 nothing like --

24 CHIEF JUSTICE ROBERTS: Presumably, there is
25 none that says they don't have to be. In other words, I

1 take it that this is an issue that is simply not
2 addressed by the CFR rules?

3 MR. GEOGHEGAN: Well, in any specific way.
4 I understand Your Honor's point, but the fact of it is
5 that the record that you attach to the original
6 submission is only about the relevant argumentative
7 facts that are in dispute. That doesn't mean that
8 that -- that there isn't other evidence in the record
9 down below.

10 What happened here, and this is different
11 from all the other cases, is that the union came in and
12 said: Oh, we've got evidence. And we've got evidence
13 that relates even to correspondence between the parties.

14 CHIEF JUSTICE ROBERTS: Well, you are just
15 disputing the validity or applicability of the rule.
16 You don't want to comply with the rule. I mean, is it
17 any different than saying: Look, okay, we've got this
18 arbitration that is going to go forward. We are going
19 to meet at 10:00 Monday morning. It is the first
20 meeting. One side doesn't show up and then they say,
21 well, there's no rule that says we have to be there at
22 10:00 Monday morning; that's just the arbitrator saying
23 that to -- to move the procedure along, so you can't
24 penalize us in any way for not showing up at 10:00
25 Monday morning.

1 MR. GEOGHEGAN: I think that an arbitrator
2 could penalize a party for not showing up. But the --
3 the fact of this is that there is no authority in the
4 arbitrator to bar evidence of conferencing simply
5 because it wasn't in the original citation.

6 JUSTICE BREYER: I take it your point is
7 that there is a rule? It's called 29 CFR 301.7(b). If
8 that rule happened to say, you must show up by 11, that
9 would be a fair inference you don't have to show up by
10 10. And that rule says you have to submit the
11 argumentative facts, so there is a fair inference you
12 don't have to submit the facts that are not
13 argumentative.

14 I take it that that -- suppose that you are
15 wrong -- suppose that you are wrong on that. I think
16 maybe you are right, but suppose you are wrong. Suppose
17 they have loads of authority to make rules. Again, you
18 have a strong argument they don't, but suppose they did.

19 In your research -- and the same question is
20 really addressed to your fellow counsel. In your
21 research on this, did you find any instance in which
22 either a court or an agency does change a rule, and
23 says: Now you have to say the date right underneath the
24 caption, whereas previously it was stamped by the clerk.
25 Okay? They changed the rule. And they have every good

1 reason in the world for doing it. And then they apply
2 it to the case in front of them, which didn't know about
3 it, and then they won't let them change it.

4 Now, is there any case at all which said
5 that that was lawful? I can think of lots of cases that
6 say you cannot apply rules retroactively where it is
7 unfair to do it, even if you had have all the power in
8 the world to make the rules. I have lots of cases like
9 that. What I wondered is if anybody found a case along
10 the lines that I just said.

11 MR. GEOGHEGAN: We did not, Your Honor, and
12 the Wells case in particular, where there was no
13 question that the rule was valid, was a case where the
14 Fourth Circuit found a violation of due process because
15 the parties did not have reasonable notice, or the
16 carrier in that case did not have reasonable notice that
17 it was the postage date that was the date for the brief,
18 instead of the postmark.

19 CHIEF JUSTICE ROBERTS: Do you recall the
20 situation -- do you recall the situation Justice Breyer
21 described, and we can debate about it, whether it's
22 rulemaking by adjudication, which does take place, you
23 would say that in the situation you described, it
24 violated due process, right?

25 MR. GEOGHEGAN: I would say that it is also

1 in excess of the arbitrator's power under the act
2 because this arbitrator does not have rulemaking power.

3 JUSTICE BREYER: And because -- I mean, in
4 the normal --

5 JUSTICE SCALIA: I thought you said he did
6 have rulemaking power, so long as it did not contradict
7 --

8 MR. GEOGHEGAN: Your Honor, you were asking
9 me whether he could require the parties to show up at a
10 certain time. I mean, there are certain rulings that
11 are in the case. I don't want to get hung up on -- on
12 rules.

13 JUSTICE SCALIA: Let's not get -- can I ask
14 about argumentative facts? I frankly have never heard
15 of a phrase like argumentative facts. You seem to think
16 it means only those facts that are in dispute.

17 MR. GEOGHEGAN: Yes.

18 JUSTICE SCALIA: Well, that would be a
19 pretty incomprehensible statement of the -- of the
20 event, if you write in your brief statement of facts and
21 you only write down the facts that are disputed and none
22 of the facts that are agreed to.

23 It couldn't possibly mean that. I would
24 think that argumentative facts simply means facts
25 relevant to the argument, and one of the facts relevant

1 to the argument is whether you did the necessary
2 consultation. But I don't know how you could interpret
3 argumentative facts to mean only those facts that are in
4 dispute. What kind of a statement of facts would that
5 be?

6 MR. GEOGHEGAN: Well, Your Honor, you may be
7 correct in your view of it, but the parties have
8 interpreted this as being the facts that are in dispute.

9 JUSTICE SCALIA: Well --

10 MR. GEOGHEGAN: And remember, this is a
11 procedure that is not about conferencing or proving
12 conferencing, it is a procedure that -- about what
13 happened at the trial.

14 So when you are looking at that 301.5, you
15 are looking at a rule that is designed to make clear to
16 the arbitrator and the panel what it is that is being
17 disputed, after the investigative hearing where the
18 carrier superintendent signs off and says, you know, we
19 are going to discharge this guy because he ran the red
20 light.

21 JUSTICE ALITO: What does the government
22 party define --

23 MR. GEOGHEGAN: In that context, it is not
24 about conferencing at all.

25 JUSTICE ALITO: How does the party filing

1 the grievance know exactly which facts are in dispute at
2 the time when they made the submission? Here, there's a
3 dispute about whether there was a dispute about
4 conferencing.

5 MR. GEOGHEGAN: Yes. Well, that's because
6 this particular rule is so focused on what happens at
7 trial.

8 Your Honor, if you look at the collective
9 bargaining agreement and the trial-type procedures, they
10 are elaborate. It is like a state court proceeding.
11 There is not a neutral party. There is a carrier's
12 officer behind it. But you have union representatives
13 who are better than most lawyers, I must say, in terms
14 of putting in the exhibits and evidentiary record and
15 cross-examination. This is all transcribed elaborately
16 in the transcript, so that it's like at the end of a
17 trial. I mean, the parties know, at the end of a
18 contested criminal or civil trial that may go on for,
19 basically, all day, what the facts are that are in
20 dispute.

21 But at any rate, this is the regulation that
22 was created in 1934, and it was not about proving
23 conference --

24 JUSTICE STEVENS: Let me ask you this
25 question, if I may: Your opponent says there is sort of

1 a common-law adjudication method of developing new
2 rules. And that there is precedent out there for
3 dismissing these arbitrations because the conferencing
4 was not established in the record at the time the
5 proceeding started. Is this a reference to the -- to
6 precedent, correct?

7 MR. GEOGHEGAN: Your Honor, this isn't a
8 system of precedent. There is certainly no strict stare
9 decisis here.

10 JUSTICE STEVENS: Well, I understand that,
11 but were there presidents that might well have put you
12 on notice that you better get this in the record?

13 MR. GEOGHEGAN: No, Your Honor, not in or
14 our view. I mean, the cases they cite are arbitration
15 awards where the arbitrator says, looking at the whole
16 record, not what was attached to the original submission
17 -- there isn't a single arbitration award that says, we
18 are only looking at the original submission and we won't
19 look at any evidence that might have been in the record
20 below and you want to add now. There isn't any case
21 like that. So -- but there are only a handful of these
22 cases that they cite in the joint appendix.

23 Your Honor, there are probably 60,000,
24 70,000 of these cases. They are not codified online.
25 What lawyer -- what lawyer would want to practice law in

1 a system where the procedural rules are maybe in 4 cases
2 out of 80,000 that are not codified --

3 JUSTICE STEVENS: Well, that's really not my
4 -- but you do concede, do you, that there are half a
5 dozen cases out there which were dismissed because there
6 was the failure of the record to show that there was
7 conferencing below?

8 MR. GEOGHEGAN: We do admit that, but we say
9 that in our particular case, the record would certainly
10 include or we would be allowed to supplement with the
11 evidence from the --

12 JUSTICE STEVENS: So your -- your objection
13 is -- is two-fold. One, that you think the requirement
14 that the record show it affirmatively is not supported.
15 And secondly, there -- you should have had an
16 independent right to -- to make an offer of proof that
17 would have cured the defect.

18 MR. GEOGHEGAN: That's correct and we don't
19 know of any case that --

20 JUSTICE GINSBURG: You did -- you did make
21 an offer of proof as to --

22 MR. GEOGHEGAN: Yes.

23 JUSTICE GINSBURG: In fact, the panel
24 invited it and you have made it; and then the panel said
25 sorry, it's too late, you have to do it at the time you

1 make your initial filing.

2 MR. GEOGHEGAN: Your Honor, I don't -- I
3 wish I had made that point earlier. I mean, they --
4 they -- originally we passionately objected to this, and
5 the -- and the neutral members said, oh, fine, you know,
6 we will -- we will reconvene for -- we will reschedule
7 this in three months, come back.

8 So everybody came back with the evidence.
9 Union Pacific came back with what -- I mean, they found
10 out that, in fact, they have -- probably two of these
11 cases had been conferenced, we came back with our
12 letters, we said here it is, and -- and the neutral
13 member said, oh, no, you don't understand, I didn't
14 really want you to do this. So, you know, why -- why --

15 CHIEF JUSTICE ROBERTS: So you think you
16 could submit that offer of proof at any time during the
17 proceeding and the board would have to accept it?

18 MR. GEOGHEGAN: We think of it as relevant,
19 probative evidence as to conferencing when the objection
20 had not been raised at the time that these cases were
21 conferenced, at the time that this --

22 CHIEF JUSTICE ROBERTS: Why wouldn't the
23 other side say we don't have to raise the objection at a
24 particular time. You can't make a rule telling us we
25 have to do that.

1 MR. GEOGHEGAN: Your Honor, I'm afraid there
2 is such a rule, and that is 301.5. And it says that the
3 parties have to praise relevant argumentative facts in
4 the original submission. That doesn't mean that it only
5 has to be in the original submission, but there was only
6 one submission here, and they did not raise
7 conferencing.

8 CHIEF JUSTICE ROBERTS: So your answer to my
9 earlier question is that you can submit that offer of
10 proof at any time, and it has to be considered?

11 MR. GEOGHEGAN: Well, any time that the
12 objection is raised. If -- if it is not done in a way
13 that prejudices the other party, the answer is yes.
14 There is no rule that prohibits that.

15 And the purpose of the Act, Your Honor, is
16 to get the parties to have contract interpretations.
17 And the way this was done -- the way these cases were
18 dismissed without any hearing and what the Seventh
19 Circuit called blind-siding and what the union
20 dissidents said was gamesmanship is the kind of thing
21 that should be of concern of this Court, because it
22 really undermines the integrity of the arbitration
23 process, and it's very important to keep that.

24 JUSTICE STEVENS: Let me ask you some
25 questions about the common law that we are talking about

1 here.

2 MR. GEOGHEGAN: Yes.

3 JUSTICE STEVENS: Are there also cases out
4 there in which the record doesn't tell us whether there
5 was conferencing, but nevertheless, the merits were
6 decided?

7 MR. GEOGHEGAN: Oh, sure. I mean, but it --

8 JUSTICE STEVENS: There are least six -- six
9 or are there more than that?

10 MR. GEOGHEGAN: I don't think that there
11 are -- there are the cases that we cited where it turned
12 out there wasn't conferencing and the arbitrator said go
13 back and conference. I mean, you can step outside the
14 hall and do it in 30 seconds. You know, it's a -- it's
15 a statutory procedure that is not really part of this
16 proof process that is set up by the collective
17 bargaining agreement. Well, my time up.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 Mr. Geoghegan.

20 Mr. Ballenger, you have three minutes
21 remaining.

22 REBUTTAL ARGUMENT OF J. SCOTT BALLENGER

23 ON BEHALF OF THE PETITIONER

24 MR. BALLENGER: Four quick points.

25 Justice Stevens, the awards that you are

1 looking for are at pages 40 and 45 of the joint
2 appendix, and also we would suggest that you look at
3 first division award 23883, which is easy to locate.

4 JUSTICE STEVENS: Were any of those
5 decisions that were boardwise or did they apply to one
6 panel?

7 MR. BALLENGER: All these decisions are
8 rendered by one panel. The board never sits as -- as a
9 body.

10 The Respondent suggests that the Steelworker
11 trilogy standard that this Court has articulated for
12 labor arbitration generally doesn't apply under the RLA.
13 There is no authority for that, that many I am aware of.
14 The lower courts have understood it the same way, and
15 there is every reason to think that's correct. Congress
16 was quite clear in the legislative history to the '66
17 amendment that it anticipated that the standard of
18 review under this statute would be the same as that
19 applied in ordinary private labor arbitration. And, of
20 course, the Sheehan case rejects the idea that there is
21 some kind of special judicial review for question of law
22 under the RLA.

23 JUSTICE SOTOMAYOR: But there is a
24 difference between governmentally ordered arbitrations
25 and private contracts. In private contracts the parties

1 negotiate the rules and they set them forth, and the
2 arbitrators then follow --

3 MR. BALLENGER: The difference, Your Honor,
4 I believe, is that in the ordinary arbitral context when
5 you have a procedural question, the question is what the
6 parties would have wanted. Here the question is what
7 Congress would have wanted, but there is no -- about the
8 correct standards of review. But there is no reason to
9 think that Congress wanted anything other than what the
10 parties ordinarily want under this case law, which is
11 for procedural questions to be resolved by the
12 arbitrator.

13 JUSTICE SOTOMAYOR: Is it your position that
14 if you go through the first phase and as everybody is
15 walking out the two adversaries in the first
16 investigative space say this is never going to be
17 settled, this is the most important case in the history
18 of this -- the railroad system. Let's go take it to the
19 board.

20 MR. BALLENGER: Yes, Your Honor.

21 JUSTICE SOTOMAYOR: That they can't waive
22 the grievance procedure, that they just can't go
23 straight to you?

24 MR. BALLENGER: That -- that's correct, Your
25 Honor. The statute in section 2 Second requires a

1 conference. And Respondents argued initially in this
2 case that the statute shouldn't be read that way and
3 there should be an exception read in from section 2
4 Sixth. That was rejected by the district court and they
5 chose not to appeal it to the Seventh Circuit. It's not
6 before this Court.

7 Now, Respondent focuses a lot on section
8 301.5 in its language about argumentative facts. I
9 think that our interpretation here today of that
10 language isn't ultimately the point. That this is a
11 question for the arbitrators to resolve unless -- even
12 if a court is convinced that the arbitrators committed
13 serious error.

14 But the more important maybe threshold point
15 is that the arbitrators didn't say that they were
16 resting their opinion just on section 301.5. They never
17 invoked 301.5. They said circular one and the weight of
18 precedent under the arbitration. And if this Court
19 looks at section 301.2(a), which requires the parties to
20 include all facts relevant to the dispute in their
21 initial submissions, I think that resolves the
22 question.

23 JUSTICE SOTOMAYOR: But we disagree with
24 you. You say if the board was just plain wrong. If we
25 look at the Act and circular one and say we can't find

1 what they said anywhere in there, does that doom your
2 argument? Have they asked -- acted outside, has the
3 board acted outside its jurisdiction?

4 CHIEF JUSTICE ROBERTS: You may answer the
5 question, counsel.

6 MR. BALLENGER: Thank you, Mr. Chief
7 Justice.

8 The relevant standard is if the board is
9 even arguably construing or applying the relevant rules
10 and its decision stands, even if a court is convinced
11 that the arbitrator committed serious error.

12 CHIEF JUSTICE ROBERTS: Thank you counsel.
13 The case is submitted.

14 (Whereupon, at 2:00 p.m., the case in the
15 above-entitled matter was submitted.)

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