IN THE SUPREME COURT OF THE UNITED STATES

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UNION PACIFIC RAILROAD :

COMPANY, :

Petitioner :

v. : No. 08-604

BROTHERHOOD OF :

LOCOMOTIVE ENGINEERS AND :

TRAINMEN GENERAL :

COMMITTEE OF ADJUSTMENT, :

CENTRAL REGION. :

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Washington, D.C.

Wednesday, October 7, 2009

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

APPEARANCES:

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

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

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P R O C E E D I N G S

(12:59 p.m.)

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

Mr. Ballenger.

ORAL ARGUMENT OF J. SCOTT BALLENGER

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

JUSTICE SOTOMAYOR: Why not?

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

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

MR. BALLENGER: But, Your Honor --

JUSTICE SOTOMAYOR: That's the --

MR. BALLENGER: They -- they have never made

that argument, Your Honor.

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

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

The only --

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

MR. BALLENGER: Well, if --

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

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

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

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

position."

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

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

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

JUSTICE STEVENS: You conceded that there was conferencing?

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

As to the other three, the -- Union Pacific

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This is a peculiar sort of agency-supervised

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

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

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

JUSTICE SOTOMAYOR: No, but that -- this is

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

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

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

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

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

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

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

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

MR. BALLENGER: Yes.

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

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

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

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

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

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

(Laughter.)

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

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

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

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

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

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

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

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

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

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

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

JUSTICE STEVENS: I see.

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

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

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

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

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

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

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

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

MR. BALLENGER: Three things about --

JUSTICE GINSBURG: -- like letters requesting conferences.

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

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

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

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

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

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

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

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

Now, as to the circular, it remains --

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

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

(Laughter.)

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

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

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

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

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

MR. BALLENGER: Your Honor, no one in this

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

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

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

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

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

JUSTICE SCALIA: Does the other side contest that?

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

that instruction sheet.

And in any event --

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

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

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

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

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

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

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

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

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

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

MR. BALLENGER: Not ordinarily, Justice Stevens.

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

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

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

MR. BALLENGER: Yes, Your Honor.

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

MR. BALLENGER: Your Honor --

JUSTICE GINSBURG: It's how you plead that.

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

procedural rules. And the board has a procedural --

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

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

MR. BALLENGER: Your Honor, in that --

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

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

JUSTICE SOTOMAYOR: Under what theory?

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

JUSTICE SOTOMAYOR: Why?

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

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

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

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

MR. BALLENGER: In the --

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

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

JUSTICE SOTOMAYOR: At what point does the

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Geoghegan.

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

CHIEF JUSTICE ROBERTS: "GAE-gunn."

ORAL ARGUMENT OF THOMAS H. GEOGHEGAN

ON BEHALF OF THE RESPONDENT

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

The first and most important thing that the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GEOGHEGAN: I --

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

(Laughter.)

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

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

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

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

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

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

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

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

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

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

MR. GEOGHEGAN: But, Your Honor --

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

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

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

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

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

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

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

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

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

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

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

a --

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

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

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

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

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

JUSTICE GINSBURG: And I thought that

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

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

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

MR. GEOGHEGAN: Arguably, in the board.

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

Can't do that?

MR. GEOGHEGAN: Well --

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

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

JUSTICE SCALIA: Well --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GEOGHEGAN: I would say that it is also

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

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

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

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

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

MR. GEOGHEGAN: Yes.

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

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

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

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

JUSTICE SCALIA: Well --

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

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

JUSTICE ALITO: What does the government party define --

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

JUSTICE ALITO: How does the party filing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GEOGHEGAN: Yes.

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

make your initial filing.

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

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

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

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

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

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

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

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

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

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

here.

MR. GEOGHEGAN: Yes.

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Geoghegan.

Mr. Ballenger, you have three minutes remaining.

REBUTTAL ARGUMENT OF J. SCOTT BALLENGER

ON BEHALF OF THE PETITIONER

MR. BALLENGER: Four quick points.

Justice Stevens, the awards that you are

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

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

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

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

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

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

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

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

MR. BALLENGER: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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