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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 (g) 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 --

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 part, because it viewed the  
5 two as entwined.

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 1 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, it --

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 awards contain five pages of careful reasoning by  
19 the 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: But may I ask, just to be  
11 sure, do you -- do you contest the question of whether  
12 there 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 III 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 The -- what the board held was that the  
7 confluence of the procedural rules -- specific  
8 procedural rules in circular 1 establish two  
9 propositions: First, that the board cannot consider a  
10 matter unless conferencing in fact occurred; and second,  
11 that the only evidence that the board is ever allowed to  
12 look at under its own procedural rules is the evidence  
13 that is in the initial 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: Counsel, that's true  
6 generally, but if the board believes that as a matter of  
7 law it can't hear this dispute and consider normal  
8 grounds for excusing a failure to include something in  
9 the record because, in its own language, we can't do it,  
10 the law doesn't permit us to do it, we have no  
11 jurisdiction to consider matters outside the record, we  
12 don't apply normal rules of waiver or forfeiture or any  
13 of the other rules that attend themselves to a failure  
14 of a party to immediately raise a defense like you could  
15 have done and waited 2 and a half years to do, doesn't  
16 that suggest that the board is not reaching -- merely  
17 resting its decision on a merely procedural rule; it's  
18 resting its decision on its erroneous view that the law  
19 deprives it 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  
4 one 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 - that  
8 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  
20 are saying: We have no authority to consider anything  
21 about this case; we must toss it out because there is no  
22 proof 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: In --

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

11 MR. BALLENGER: They're -- they certainly  
12 are in an Article III 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: Could -- can 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 seemed 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 I think  
16 that there are several things wrong with it, Your Honor,  
17 starting from the premise that the statute guarantees in  
18 all instances procedures that are, quote/unquote, "fair"  
19 in an untethered sense.

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

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

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

1 pursuant to section 301.2(a), which requires, consistent  
2 with the text of the statute itself, that every  
3 submission of the board will include, quote, "a full  
4 statement of the facts and all supporting data bearing  
5 on the dispute."

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

8 MR. BALLENGER: It's a full statement of --  
9 of all of the facts and supporting data, which includes  
10 conferencing. Yes, Your Honor.

11 JUSTICE STEVENS: Implicitly includes --  
12 not expressly includes conferencing.

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

16 JUSTICE STEVENS: I see. Okay.

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

1 they were construing and applying the relevant  
2 principles. And this Court has said --

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

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

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

23 JUSTICE GINSBURG: I'm not -- I'm not  
24 talking about due process. I'm talking about conformity  
25 with the Act, the Act's requirement. I --

1 MR. BALLENGER: Your Honor, it is a feature  
2 of the Railway Labor Act scheme that different -- each  
3 panel of the board is its own discrete interpretive  
4 universe and is to be judged by the Federal courts  
5 according to the standards set up in the statute. It  
6 will happen that boards -- that panels disagree about  
7 the proper resolution of an issue. That's happened --

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

14 MR. BALLENGER: Three things about --

15 JUSTICE GINSBURG: -- like letters  
16 requesting conferences.

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

25 And it's not clear how the board is going to

1 understand that language. It doesn't say that the  
2 parties can omit evidence of conferencing. It says they  
3 can omit, if they don't dispute it, letters requesting a  
4 conference.

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

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

17 MR. BALLENGER: But if --

18 JUSTICE BREYER: And, so, only after this  
19 case did the board say: Oh, no, you have to include  
20 some disputes that nobody is disputing, some facts that  
21 nobody has ever disputed or seems to.

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

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

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

2 JUSTICE BREYER: I'm right in stating what  
3 they did? Is my statement of what they did, which was  
4 meant to be as pejorative as I could possibly make it --

5 (Laughter.)

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

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

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

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

25 I mean, that -- that seems to me is trapping

1 people, if the board says, please don't dump on us  
2 unnecessary paper.

3 MR. BALLENGER: Your Honor, no one in this  
4 case could have legitimately relied on that instruction  
5 sheet, whatever it means. And the -- the board has not  
6 yet construed what it's going to mean. But it doesn't  
7 by its own terms apply here, because a joint submission  
8 was not made.

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

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

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

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

23 JUSTICE SCALIA: Does the other side contest  
24 that?

25 MR. BALLENGER: Not that I am aware of.

1 It -- it only applies in the case of joint submissions,  
2 and it was not promulgated until after the submissions  
3 here were filed. So no one could legitimately rely on  
4 that instruction sheet.

5 And in any event --

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

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

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

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

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

1 differently by different panels.

2 MR. BALLENGER: Your Honor, this Court has  
3 made clear that issues of procedural arbitrability,  
4 threshold conditions to arbitration, are governed by the  
5 same standard as merits issues in arbitration. In the  
6 Misco case, for instance, there was a question of  
7 evidence, and the arbitrator refused to consider certain  
8 kinds of evidence. And this Court said questions of  
9 procedure are for the arbitrator.

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

23 JUSTICE STEVENS: May I ask this question?  
24 I may have an incorrect impression about it. Is the --  
25 the thing that's at issue is whether or not conferencing

1 occurred. Is it also important to know what happened at  
2 the conferencing? You may not know this. Is the -- is  
3 there some sort of -- a factual description of the  
4 negotiations that took place during conferencing an  
5 important part of the submission?

6 MR. BALLENGER: Not ordinarily, Justice  
7 Stevens.

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

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

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

20 MR. BALLENGER: Yes, Your Honor.

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

25 MR. BALLENGER: Your Honor, every -- every

1 --

2 JUSTICE GINSBURG: The question is how you  
3 plead that.

4 MR. BALLENGER: Yes, Your Honor. Every  
5 adjudicative body has to be able to enforce its  
6 procedural rules. And the board has a procedural rule

7 --

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

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

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

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

1 that?

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

4 JUSTICE SOTOMAYOR: Under what theory?

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

7 JUSTICE SOTOMAYOR: Why?

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

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

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

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

25 MR. BALLENGER: In this --

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

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

7 JUSTICE SOTOMAYOR: At what point does the  
8 interpretation of rules that don't command a result  
9 become improper, outside the board's jurisdiction?  
10 According to you, never.

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

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
25 Mr. Geoghegan.

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

2 CHIEF JUSTICE ROBERTS: "GAE-gunn."

3 ORAL ARGUMENT OF THOMAS H. GEOGHEGAN

4 ON BEHALF OF THE RESPONDENT

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

7 The first and most important thing that the  
8 Respondent would like to stress is that we are not here  
9 reviewing an arbitrator's interpretation of the contract  
10 or here under the review standards set by Steelworker  
11 trilogy. We never received an interpretation of the  
12 contract, and by that I mean the contract in any  
13 aspect -- procedural rules of the contract, substantive  
14 rules of the contract. No contract interpretation for  
15 these five engineers. And the reason that the  
16 Respondent urged both a statutory and due process  
17 violation is that without any interpretation of the  
18 contract, these five cases were dismissed invoking  
19 circular 1, Code of Federal Regulations, as the basis,  
20 and denying these five engineers any determination of  
21 their contract claims.

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

1 JUSTICE SCALIA: But it didn't --

2 MR. GEOGHEGAN: The way these cases --

3 JUSTICE SCALIA: It didn't promise them that  
4 categorically. There were certain things they had to  
5 do, right? One of which was to have conferencing, and  
6 in three of these cases they didn't. So that promise  
7 didn't extend at least to those three cases. And in the  
8 other two, where there was conferencing, the Act also  
9 provides, as any sensible act would have to, for the  
10 adoption of procedural rules. And the procedural rule  
11 here, according to the arbitrator, required the  
12 submission of that evidence of -- of consultation with  
13 the complaint, which didn't happen.

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

23 JUSTICE SCALIA: Do -- do you say that all  
24 five were -- were conferenced?

25 MR. GEOGHEGAN: Oh, absolutely.

1 JUSTICE SCALIA: Is that your position?

2 MR. GEOGHEGAN: We have -- we have  
3 correspondence --

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

9 They have a rule saying this is what you  
10 have to do. You have got to put the evidence of  
11 conferencing in -- in the record at a particular time.  
12 You didn't do it, so we are not going to -- the fact  
13 that it -- on the facts, on the real facts, it occurred  
14 is not an adequate challenge to the procedural rule.

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

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

22 MR. GEOGHEGAN: Rulemaking by adjudication  
23 is not unheard of, Your Honor. But this is not  
24 rulemaking by adjudication because this particular  
25 panel -- which is an arbitration panel, a division; it's

1 five members; it's a division of the adjustment board --  
2 has no power to make rules. Congress in section (v) of  
3 section 153 of the Act delegated the rulemaking power  
4 under this Act on a one-time basis. In fact, it put in  
5 the dates. It had to start in June 1934 and be done in  
6 19 -- October 1934. That is the only power that this  
7 34-member adjustment board has to make rules.

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

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Well, it's -- can

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

8 MR. GEOGHEGAN: We believe that the -- that,  
9 given that there are no rules on this point -- and the  
10 Seventh Circuit made that point clear -- that what has  
11 been to be done is to facilitate the purpose of the Act,  
12 which is to get a contract interpretation. We have --

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

20 MR. GEOGHEGAN: No, you're not - Your  
21 Honor, you are not free to establish it any way you  
22 want. You have to have relevant evidence that the  
23 conferences occurred, relevant probative evidence that  
24 is not prejudicial. The only rule that has been cited  
25 here for keeping this evidence out is 301.5, and that is

1 at page 50 -- 62a. And it is the rule that the Seventh  
2 Circuit focused on, and it describes what should be in  
3 the original submission. And it says, if I may quote  
4 part of it, at 62a, the Court can read along with me:  
5 that "Under the caption 'position of employees,' the  
6 employees must clearly and briefly set forth all  
7 relevant argumentative facts, including all documentary  
8 evidence submitted in exhibit form quoting the agreement  
9 or rules involved, if any; and all data submitted in  
10 support of employees' position must affirmatively show  
11 the same to have been presented to the carrier and made  
12 a part of the particular question in dispute."

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

20 The conference is an informal phone call.  
21 It's not specified in the collective bargaining  
22 agreement. There is nothing in the collective  
23 bargaining agreement about it. But it's an informal  
24 phone call that takes place after the whole contract  
25 grievance procedure has been exhausted, and then

1 before -- it can be 30 seconds -- you know, Charlie  
2 Ridenour, can call up Mr. Stone and say, you know, can  
3 we settle this? No. We can't. Okay.

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

10 I hope it is not out of turn, given that we  
11 have been describing evidence, but we've got letters  
12 about all of these conferences, saying, we want to have  
13 a conference. Once that happens, that triggers a  
14 process. They have to specify -- both sides have to get  
15 together and specify a meeting take place.

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

19 MR. GEOGHEGAN: Oh, it's in section 2 of  
20 part 6 of the Railway Labor Act. We did not cite that.  
21 It's in the statute.

22 The conferencing, by the way, is in section  
23 2 of the Railway Labor Act. The board and its power and  
24 procedures is in section 3. Section 3 has no mention of  
25 conferencing whatsoever in it. There isn't -- the word

1 doesn't appear in the section which describes what the  
2 board is supposed to do or the board's procedures.

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

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

23           JUSTICE ALITO: I still -- I still don't  
24 understand your answer to the Chief Justice's question  
25 about how the panel -- how these panels -- how the

1 board, in your view, is supposed to go about making some  
2 sort of sensible procedural rules about establishing the  
3 that conferencing took place.

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

10           MR. GEOGHEGAN: Your Honor, that's a good  
11 question. I think the answer is that there are no  
12 procedures on this because it wasn't -- it's not part of  
13 the -- the process was set up to develop the trial-type  
14 evidence -- you know, whether the red light was run or  
15 not.

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

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

24           JUSTICE GINSBURG: You said, on that point  
25 in your brief, that normally the carrier will raise

1 the absence of conferencing as an impediment at the time  
2 the union files its notice of intent to file a  
3 submission.

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

9 What -- what makes you -- what backs up this  
10 statement that normally carrier raises the absence of  
11 conferencing as an impediment at the time the union  
12 files its notice of intent?

13 MR. GEOGHEGAN: Your Honor, the answer is  
14 past practice. Although this is not a collective  
15 bargaining situation, we are not applying the  
16 contract here, but that was the past practice. That's  
17 what we alleged. This case was to show --

18 CHIEF JUSTICE ROBERTS: So could the  
19 board --

20 MR. GEOGHEGAN: -- but --

21 CHIEF JUSTICE ROBERTS: Could the board  
22 adopt a rule requiring that?

23 MR. GEOGHEGAN: The adjustment board could  
24 adopt a rule. That is the agency -- and it still  
25 exists. It has got offices here in Washington, D.C., 34

1 members. They were given this explicit rulemaking power  
2 by Congress. They were delegated with the authority.  
3 If there is an agency out there that is entitled to  
4 Chevron-type deference, that is the agency.

5 JUSTICE SCALIA: Can they do anything else?  
6 What do they do? What does the adjustment board do?

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

9 (Laughter.)

10 JUSTICE SCALIA: I don't want to get you in  
11 Trouble. I'm not sure they do anything.

12 (Laughter.)

13 MR. GEOGHEGAN: They may --

14 CHIEF JUSTICE ROBERTS: So just to be clear  
15 -- I will take you off the hook.

16 (Laughter.)

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

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

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

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

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

14 JUSTICE ALITO: Could they -- could they  
15 adopt a rule that says that, if the -- if the parties go  
16 through every -- do everything that is necessary prior  
17 to the time of the adjudication, they can't pop up at  
18 the very last minute and send in a letter saying, oh, by  
19 the way, there was no conferencing? Could they adopt a  
20 rule like that because it's just a big waste of  
21 everybody's time to leave it to the last minute?

22 MR. GEOGHEGAN: Your Honor, in our view, the  
23 panel couldn't, but the adjustment board could, and the  
24 adjustment board comes out with these little procedures,  
25 like the one read here that -- which they say isn't

1 relevant, that says -- you know, let's have these joint  
2 submissions, let's keep evidence of conferencing out.

3           They are trying to -- these submissions that  
4 come in for these arbitration cases are not to be  
5 believed. I mean, they are like 6 feet high. So  
6 there is a constant effort on the part of everybody in  
7 the process to pare down the submissions to what is  
8 actually in dispute. So this --

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

12           MR. GEOGHEGAN: But, Your Honor, this --

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

15           MR. GEOGHEGAN: This is not the Steelworkers  
16 trilogy. The Steelworkers trilogy is about private  
17 arbitrators determining private contracts and  
18 determining the procedures under private contracts.  
19 They are -- they are applying the procedural rules of  
20 the contract. There is nothing like that here.

21           We are here because a government-funded  
22 panel, under a mandatory procedure, funded by the  
23 government, was applying the Code of Federal  
24 Regulations, not rules that the parties agreed to  
25 themselves. So the deference that is given to -- by

1 this Court to a private arbitrator applying private  
2 procedural rules that the parties agree to, and so on  
3 and so forth, isn't present here because this is  
4 governmental action. It is a governmental agency.

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

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

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

22 MR. GEOGHEGAN: It should be, and in a  
23 hornbook sense it is, the reality of it is, and that's  
24 true here. We can say it's de novo review. We can say  
25 it's a different standard than -- than Steelworkers or

1 John Wiley, and this is not a John Wiley case.

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

11 CHIEF JUSTICE ROBERTS: No, but you don't  
12 think that this is that.

13 MR. GEOGHEGAN: Oh, sure.

14 CHIEF JUSTICE ROBERTS: I mean, if you say:  
15 Look, here's the rule, you have got to file these things  
16 by this date -- that's not imposing your own rule of  
17 industrial justice.

18 MR. GEOGHEGAN: But there is no such rule,  
19 Your Honor. I mean, if -- if there was, we would be in  
20 a different posture here.

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

1 industrial justice.

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

7 MR. GEOGHEGAN: Your Honor, all I can say,  
8 in answer to that, is that there are governmental rules  
9 that have very specific procedures that are in place.  
10 There -- I just --

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

18 MR. GEOGHEGAN: The adjustment board down  
19 the street. Thirty-four members.

20 JUSTICE GINSBURG: And I thought that  
21 your -- because there's nothing in this statute, nothing  
22 in any regulation, that gives an individual panel the  
23 right to prescribe rules of procedure that all parties  
24 to these disputes are obliged to follow.

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

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

3 MR. GEOGHEGAN: Arguably, in the board.

4 JUSTICE SCALIA: I don't know how that could  
5 possibly be true. I can't imagine being an arbitrator  
6 and not being able to say: All right, you know, we are  
7 going to have a conference next Tuesday. I want you to  
8 have all of the -- all of the papers relevant to this  
9 particular point that we are going to discuss in 2  
10 days before.

11 Can't do that?

12 MR. GEOGHEGAN: Well --

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

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

18 JUSTICE SCALIA: Well --

19 MR. GEOGHEGAN: -- no question that this  
20 was -- that these documents were --

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

24 MR. GEOGHEGAN: I -- well, Your Honor, an  
25 arbitrator can set rules of procedure within the

1 parameters of what is allowed by the Act.

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

4 MR. GEOGHEGAN: But the Act itself and the  
5 CFRs are very clear that there is no requirement that  
6 this evidence has to be submitted in the original  
7 submission. And none of the arbitration cases do that.

8 CHIEF JUSTICE ROBERTS: It says -- it says  
9 that, or it just doesn't address the question of whether  
10 they have to be included in the original submission? I  
11 mean, I assume there's no provision that says -- or I  
12 missed it -- there's no provision that says the  
13 conferencing materials do not have to be included in the  
14 original submission.

15 MR. GEOGHEGAN: There is no CFR that says  
16 that the conferencing materials have to be in the  
17 original submission or the case is dismissed. There's  
18 nothing like that.

19 CHIEF JUSTICE ROBERTS: Presumably, there is  
20 none that says they don't have to be. In other words, I  
21 take it that this is an issue that's simply not  
22 addressed by the CFR rules?

23 MR. GEOGHEGAN: Well, in any specific way.  
24 I understand Your Honor's point, but -- but the fact of  
25 it is that the record that you attach to the original

1 submission is only about the relevant argumentative  
2 facts that are in dispute. That doesn't mean that  
3 that -- that there isn't other evidence in the record  
4 down below.

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

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

22           MR. GEOGHEGAN: I think that an arbitrator  
23 could penalize a party for not showing up. But the --  
24 the fact of this is that there is no authority in the  
25 arbitrator to bar evidence of conferencing simply

1 because it wasn't in the original submission.

2 JUSTICE BREYER: I take it your point is  
3 that there is a rule? It's called 29 CFR 301.7(b). If  
4 that rule happened to say, you must show up by 11:00,  
5 that would be a fair inference you don't have to show up  
6 by 10:00. And that rule says you have to submit the  
7 argumentative facts, so there's a fair inference you  
8 don't have to submit the facts that are not  
9 argumentative. I take it that that -- yes.

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

15 In your research -- and the same question is  
16 really addressed to your fellow counsel. In your  
17 research on this, did you find any instance in which  
18 either a court or an agency does change a rule, and  
19 says: Now you have to say the date right underneath the  
20 caption, whereas previously it was stamped by the clerk.  
21 Okay? They changed the rule. And they have every good  
22 reason in the world for doing it. And then they apply  
23 it to the case in front of them, which didn't know about  
24 it, and then they won't let them change it.

25 Now, is there any case at all which said

1 that that was lawful? I can think of lots of cases that  
2 say you cannot apply rules retroactively where it is  
3 unfair to do it, even if you have all the power in  
4 the world to make the rules. I have lots of cases like  
5 that. What I wondered is if anybody found a case along  
6 the lines that I just said.

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

15 CHIEF JUSTICE ROBERTS: Do you recall the  
16 situation --

17 MR. GEOGHEGAN: Given a case like that --

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

23 MR. GEOGHEGAN: I would say that it is also  
24 in excess of the arbitrator's power under the Act  
25 because this arbitrator does not have rulemaking power.

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

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

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

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

16 MR. GEOGHEGAN: Yes.

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

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

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

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

9 JUSTICE SCALIA: Well --

10 MR. GEOGHEGAN: -- 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: How does the party filing --

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

24 JUSTICE ALITO: How does the party filing  
25 the grievance know exactly which facts are in dispute at

1 the time when they made the submission? Here, there's a  
2 dispute about whether there's a dispute about  
3 conferencing.

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

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

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

23 JUSTICE STEVENS: Let me ask you this  
24 question, if I may: Your opponent says that there's a  
25 sort of a common-law adjudication method of developing

1 new rules, and that there is precedent out there for  
2 dismissing these arbitrations because the conferencing  
3 was not established in the record at the time the  
4 proceeding started. Is this reference to the -- to  
5 precedent correct?

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

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

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

22 Your Honor, there are probably 60,000,  
23 70,000 of these cases. They are not codified online.  
24 What lawyer -- what lawyer would want to practice law in  
25 a system where the procedural rules are maybe in 4 cases

1 out of 80,000 that are not codified --

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

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

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

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

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

21 MR. GEOGHEGAN: Yes.

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

1           MR. GEOGHEGAN: Your Honor, I wish I had  
2 made that point earlier. I mean, they -- originally we  
3 passionately objected to this, and the -- and the  
4 neutral member said, oh, fine, you know, we will -- we  
5 will convene for -- we will reschedule this in 3 months,  
6 come back.

7           So everybody came back with the evidence.  
8 Union Pacific came back with what -- I mean, they found  
9 out that, in fact, they have letters and there are two  
10 of these cases that had been conferenced. We came back  
11 with our letters. We said here it is, and -- and the  
12 neutral member said, oh, no, you don't understand, I  
13 didn't really want you to do this. So, you know, why --  
14 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  
24 a 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 raise 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 this  
25 question 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 to  
9 match their six, or are there more than that?

10 MR. GEOGHEGAN: I don't think that there  
11 are -- there are the cases 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 3 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 board-wise 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's no authority for that, that many I am aware of.  
14 The lower courts have understood it the same way, and  
15 There's every reason to think that's correct. Congress  
16 was quite clear in the legislative history to the '66  
17 amendments 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 questions of  
22 law under the RLA.

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

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

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's no -- about the  
8 correct standard of review. But there is no reason to  
9 think that Congress wanted anything other than what the  
10 parties ordinarily want under this Court's case law,  
11 which is for procedural questions to be resolved by the  
12 arbitrator.

13 JUSTICE SOTOMAYOR: Is it -- is it your  
14 position that if you go through the first phase, and as  
15 everybody is walking out, the two adversaries in the  
16 first investigative space say: This is never going to  
17 be settled. This is the most important case in the  
18 history of this -- the railroad system. Let's go take  
19 it to the 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  
5 they chose not to appeal it to the Seventh Circuit.  
6 It's not before this Court.

7 Now, Respondent focuses a lot on section  
8 301.5 and 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 this opinion just on section 301.5. They never  
17 invoked 301.5. They said circular 1 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. And --

23 JUSTICE SOTOMAYOR: If we disagree with  
24 you -- you say if the board was just plain wrong. If we  
25 look at the Act and circular 1 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 then 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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