No. 02-557

In the Supreme Court of the United States

PAPER, ALLIED-INDUSTRIAL, CHEMICAL & ENERGY WORKERS INTERNATIONAL UNION, PETITIONER

v.

TNS, INC. ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514–2217

ARTHUR F. ROSENFELD
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

JOHN EMAD ARBAB
Assistant General Counsel

FRED B. JACOB
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

In this case, the National Labor Relations Board concluded that, when employees began a work stoppage on May 1, 1981, "objective evidence" supported the employees' good-faith belief that conditions at their work place had become abnormally dangerous. The question presented is whether the Board's "objective evidence" finding is supported by substantial evidence on the record considered as a whole.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Statutes—Continued: Page

In the Supreme Court of the United States

No. 02-557

PAPER, ALLIED-INDUSTRIAL, CHEMICAL & ENERGY WORKERS INTERNATIONAL UNION, PETITIONER

v.

TNS, INC. ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 296 F.3d 384. The second supplemental decision and order of the National Labor Relations Board (Pet. App. 35a-83a) is reported at 329 N.L.R.B. 602.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2002. The petition for a writ of certiorari was filed on October 8, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 502 of the Labor-Management Relations Act, 1947 (LMRA), 29 U.S.C. 143, provides, in relevant part: "[N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter." In this case, the National Labor Relations Board established the following four-part test for determining whether a work stoppage is protected by Section 502 in cases involving "cumulative, slow-acting dangers to employee health and safety":

> [T]he General Counsel must demonstrate by a preponderance of the evidence that the employees believed in good-faith that their working conditions were abnormally dangerous; that their belief was a contributing cause of the work stoppage; that the employees' belief is *supported by ascertainable, objective evidence*; and that the perceived danger posed an immediate threat of harm to employee health or safety.

Pet. App. 38a-39a (emphasis added).

2. TNS, Inc. manufactures ammunition at a plant in Jonesboro, Tennessee. Pet. App. 3a, 40a. In 1981, petitioner represented TNS's employees for purposes of collective bargaining. *Ibid.* At that time, the ammunition produced by TNS contained depleted uranium (DU), a low-level radioactive substance. During the manufacturing process, DU dust was released into the air inside the plant. *Ibid.* DU, a carcinogen and toxic heavy metal, poses a threat to the kidneys if inhaled or ingested over a long period of time. *Ibid.* Because DU is radioactive, TNS's plant fell within the jurisdiction of the Nuclear Regulatory Commission, which had dele-

gated its regulatory authority to the Tennessee Division of Radiological Health (TDRH). *Id.* at 21a-22a, 41a.

Petitioner's collective-bargaining agreement with TNS was set to expire on April 30, 1981. Pet. App. 44a. In March, petitioner advised TNS that employees in the bargaining unit would cease working upon expiration of the contract and would not return to work until TNS corrected certain safety violations identified by TDRH. *Id.* at 3a-4a, 44a. On May 1, 1981, the employees began a work stoppage. After initially shutting down the plant, TNS resumed partial operations by hiring permanent replacement workers. *Id.* at 44a, 45a. On February 15, 1982, petitioner made TNS an unconditional offer to return to work on behalf of the employees who were engaged in the work stoppage. *Id.* at 5a, 45a. Citing its hiring of permanent replacements, TNS declined petitioner's offer. *Ibid.*

3. Acting on charges filed by petitioner, the Board's General Counsel issued a complaint in August 1982 alleging that TNS committed an unfair labor practice under Section 8(a)(3) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(3), by hiring permanent replacements for and refusing to reinstate employees who were engaged in a work stoppage protected by LMRA Section 502. Pet. App. 5a, 35a.[1] Some 13 years of protracted litigation then ensued, involving a number of administrative and judicial decisions that are no longer in issue. Those proceedings culminated in an opinion of the D.C. Circuit remanding the Board's first

---

[1] Section 8(a)(3) of the NLRA makes it an unfair labor practice for an employer to "discriminat[e] in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization."

supplemental decision. See *Oil, Chem. & Atomic Workers Int'l Union* v. *NLRB*, 46 F.3d 82 (D.C. Cir.), remanding *TNS, Inc.*, 309 N.L.R.B. 1348 (1992), cert. denied, 516 U.S. 821 (1995).[2]

On September 30, 1999, the Board issued a second supplemental decision in response to the D.C. Circuit's 1995 remand. In that decision, the Board (with one member dissenting) sustained the 1982 complaint. Pet. App. 35a-83a. Applying a four-part test (see p. 2, *supra*), the Board concluded that the employees represented by petitioner were "engaged in a work stoppage protected by Section 502" when they ceased work on May 1, 1981. Pet. App. 57a. Of particular relevance here, the Board found that the General Counsel had carried his burden of proof with respect to the third requirement for a protected Section 502 work stoppage, *i.e.*, that "ascertainable, objective evidence" supported the employees' good-faith belief that their working conditions at the TNS plant were abnormally dangerous. *Id.* at 56a-57a.

In so concluding, the Board cited the following "factors" that an administrative law judge had identified in earlier proceedings: levels of DU dust in the air in excess of the "maximum permissible concentration" established by TDRH; the protracted use of respirators by a substantial number of employees; excessive "average whole body uranium exposures"; and excessive "uranium-in-urine" levels. Pet. App. 57a. "[T]his evidence," the Board found, "constitutes objective proof supporting [the employees'] belief that their workplace

---

[2] See *TNS, Inc.*, 288 N.L.R.B. 20 (1988) (on remand from *Oil, Chem. & Atomic Workers Int'l Union* v. *NLRB*, 806 F.2d 269 (D.C. Cir. 1986)); Pet. App. 5a-6a, 35a-38a.

had become too unsafe an environment to continue working." *Ibid.*

Next, the Board held that, under NLRA Section 8(a)(3), an employer may not permanently replace employees who engage in a work stoppage that is protected by Section 502. Pet. App. 58a-64a. The Board thus concluded that TNS committed an unfair labor practice by refusing to reinstate the employees in the bargaining unit after they unconditionally offered to return to work on February 15, 1982. *Id.* at 64a. As a remedy, the Board ordered TNS to reinstate and make whole the employees who participated in the work stoppage. *Id.* at 64a-65a.

4. TNS filed a petition for review of the Board's order in the United States Court of Appeals for the Sixth Circuit. Pet. App. 1a. The court afforded deference to the Board's four-part test for determining whether a work stoppage is protected by LMRA Section 502. The court also deferred to the Board's conclusion that, under NLRA Section 8(a)(3), an employer may not permanently replace employees who are engaged in such a work stoppage. *Id.* at 10a-17a.

However, the court held that "the Board's conclusion —that objective evidence supported the employees' belief that their workplace had become too dangerous to work in—is simply not supported by substantial evidence on the record considered as a whole." Pet. App. 32a. After reviewing the record, the court concluded that "the pieces of evidence relied upon by the Board as providing objective evidence to support the TNS employees' belief that their workplace was abnormally dangerous merely show that TNS had largely

complied with regulatory limits set with a considerable margin for safety." *Id.* at 31a; see *id.* at 26a-32a.[3]

Having rejected the Board's "objective evidence" finding on substantial evidence grounds, the court of appeals went on to consider whether a remand to the Board would be appropriate in this case. See Pet. App. 32a-34a. Noting its agreement with TNS's "inexcusable delay argument" (*id.* at 3a), the court concluded: "we VACATE the Board's decision finding TNS to have breached its obligations under [Section] 502, rather than remanding it for further consideration." *Id.* at 34a.

In declining to remand this case to the Board for further consideration, the court of appeals noted that some 17 years had elapsed between the filing of the administrative complaint against TNS in 1982 and the Board's issuance of its second supplemental decision in 1999. Pet. App. 34a. The court indicated that it could not "see a reasonable way to hold [TNS] responsible for damages accruing over all of this time, especially when its structure and business changed in the interim." *Ibid.*

ARGUMENT

The court of appeals' assessment of the evidentiary record in this case does not raise an issue warranting further review by this Court. The court of appeals' declining to remand this case to the Board for further consideration does not independently raise an issue of general importance or otherwise merit further review.

---

[3] Petitioner incorrectly states (Pet. 11) that the court of appeals acted *sua sponte* in addressing whether the record in this case adequately supports the Board's "objective evidence" determination. Rather, the parties extensively addressed that issue in the court of appeals. See TNS C.A. Br. 55-63; NLRB C.A. Br. 50-56; Pet'rs C.A. Br. 9-33.

The petition for a writ of certiorari should therefore be denied.

1. a. The validity of the Board's determination that TNS committed an unfair labor practice in this case turns on whether, as the Board concluded, "objective evidence" supported the employees' good-faith belief that conditions at TNS's plant had become abnormally dangerous when they began a work stoppage on May 1, 1981. See Pet. App. 26a-32a, 56a-57a, 64a. The court of appeals, however, held that substantial evidence on the record considered as a whole does not support the Board's "objective evidence" finding. *Id.* at 32a.

The Board believes that there is substantial evidence in the record to support its "objective evidence" finding, and thus that the court of appeals should have sustained that finding. See 29 U.S.C. 160(e). However, the Board recognizes that "[w]hether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). This Court will intervene "only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Ibid.* In the Board's judgment, the court of appeals' substantial evidence review of the conflicting evidence contained in the lengthy and complex record in this case does not present any issue meeting this Court's standards for certiorari.

b. The court of appeals' decision declining to remand this 1982 labor dispute to the Board for further consideration of the factual issues addressed in the Board's 1999 second supplemental decision, which is the focus of the petition for certiorari, also does not raise an issue of general importance warranting this Court's review. In

declining to remand, the court of appeals articulated a fact-bound rationale. See Pet. App. 34a (citing changes in TNS's "structure and business" during the interim). In addition, the court's holding on the substantial evidence issue is the functional equivalent of a conclusion that, on this record, "it would [not] have been possible for a reasonable jury to reach the Board's conclusion." *Allentown Mack Sales & Service, Inc.* v. *NLRB*, 522 U.S. 359, 366-367 (1998). Under that holding, no practical purpose would have been served by a remand to the Board for further consideration. See *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 767 n.6 (1969) (disapproving "meaningless" remands).[4]

2. Petitioner contends that this Court's review is necessary in this case in order to decide whether a court of appeals has authority to vacate a Board order "solely on the ground that the Board engaged in inexcusable delay in reaching its decision." Pet. i; see Pet. 14. However, the issue framed by petitioner is not presented by this case. The court of appeals did *not* vacate the Board's order solely on the ground of inexcusable agency delay. Rather, the court set aside the Board's order as unsupported by substantial evidence on the record considered as a whole. See Pet. App. 26a-32a. Although the court did address the issue of administrative delay, it did so in respect to the question of remand, not the question of enforcement. *Id.* at 32a-34a. If, as the court held, the Board's order is not supported by substantial evidence on the record considered as a whole, then that order is not entitled to enforcement. See, *e.g.*, *Allentown Mack Sales & Service*, 522 U.S. at 380.

---

[4] For these reasons, the Board did not file its own petition for a writ of certiorari in this case.

Contrary to petitioner's suggestion (Pet. 14), the court of appeals' decision does not conflict with this Court's decision in *NLRB* v. *J.H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258 (1969). In *Rutter-Rex*, the court of appeals reduced the amount of a Board back pay award solely on the ground of inordinate administrative delay during the back pay proceeding. See *id.* at 260-262. This Court held that the court of appeals "exceeded the narrow scope of review provided for the Board's remedial orders when it shifted the cost of the delay from the company to the employees." *Id.* at 266. *Rutter-Rex* is inapposite. Here, the court of appeals denied enforcement of the Board's order on substantial evidence grounds, not because of administrative delay.

Finally, petitioner contends (Pet. 14, 18) that, although the court of appeals' decision is consistent with decisions of the Second Circuit in *Emhart Indus.* v. *NLRB*, 907 F.2d 372 (1990), and *Olivetti Office U.S.A., Inc.* v. *NLRB*, 926 F.2d 181, cert. denied, 502 U.S. 856 (1991), the decision below deepens a pre-existing conflict between those decisions and that of the D.C. Circuit in *Southwest Merchandising Corp.* v. *NLRB*, 943 F.2d 1354 (1991). However, there is no pre-existing conflict of decisions. In the Second Circuit cases relied on by petitioner, the court concluded that particular changed circumstances which had occurred during the period of administrative delay—not merely the delay standing alone—warranted denying enforcement of the Board's order. See *Emhart Indus.*, 907 F.2d at 379-380 (parties had repeatedly agreed to reinstate strikers according to a procedure found unlawful in subsequent Board order); *Olivetti Office U.S.A.*, 926 F.2d at 189-190 (parties had agreed to compensate employees for the same losses covered by subsequent Board order). In other words, changed circumstances that occurred

during the Board's delay and which the Board failed to account for in its order rendered the Board's remedy in those cases incapable of "effectuat[ing] any reasonable policy of the [NLRA]." *Emhart Indus.*, 907 F.2d at 379; *Olivetti Office U.S.A.*, 926 F.2d at 190 (concluding that Board's remedy went "beyond any legitimate remedial purpose"). In *Southwest Merchandising*, by contrast, no such issue of changed circumstances was before the court; rather, the D.C. Circuit simply rejected, as inconsistent with *Rutter-Rex*, the employer's claim that laches alone is a sufficient ground for denying enforcement of a Board order, see 943 F.2d at 1357-1358—a proposition not challenged by the Second Circuit in the cases cited by petitioner, see, *e.g.*, *Emhart Indus.*, 907 F.2d at 379 (noting that "courts have been reluctant to deny enforcement on the basis of administrative delay alone").

Moreover, the decision of the court below does not conflict with *Southwest Merchandising*. The court of appeals here set aside the Board's order on substantial evidence grounds, not because of administrative delay. See Pet. App. 32a ("Since courts are to be deferential in reviewing agency determinations, denying enforcement of an order solely on the basis of delay is inappropriate."). Nothing in *Southwest Merchandising* precludes a reviewing court from setting aside a Board order on such grounds. Nor is there any inconsistency between *Southwest Merchandising* and the court of appeals' conclusion that further proceedings on remand would be unwarranted in light of the lengthy and elaborate administrative proceedings that had already occurred in this case and the significant changes to TNS's "structure and business" that occurred during the 17 years that had elapsed between the filing of the administrative complaint against TNS in 1982 and the Board's

issuance of its second supplemental decision in 1999. See *id.* at 34a. The court of appeals, having determined that the Board's enforcement order was not supported by substantial evidence on the record considered as a whole, was not precluded by anything in *Southwest Merchandising* from concluding that, in the context of this case, further proceedings were not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ARTHUR F. ROSENFELD
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
JOHN EMAD ARBAB
Assistant General Counsel
FRED B. JACOB
Attorney
National Labor Relations Board

DECEMBER 2002