No. 00-1499

In the Supreme Court of the United States

ANTONIO AUGUSTUS, ET AL., PETITIONERS

v.

SURFACE TRANSPORTATION BOARD, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether employees who failed to demonstrate their availability by reporting to work as required by a labor agreement were properly denied benefits under that agreement.

2. Whether the Surface Transportation Board may summarily affirm an arbitral decision.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is unpublished, but the decision is noted at 238 F.3d 419 (Table). The decision of the Surface Transportation Board (STB or Board) (Pet. App. 13a-28a), which is unreported, was issued in STB Finance Docket No. 21989 (Sub-No. 3). The arbitration panel's decision (Pet. App. 29a-61a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2000. The petition for a writ of certiorari was filed on March 22, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Railroads wishing to consolidate or merge their properties must first obtain regulatory approval, formerly from the Interstate Commerce Commission (ICC) and now from the STB.[1] See former 49 U.S.C. 5(2) (1970), revised at Pub. L. No. 104-88, Tit. 1, § 102, 109 Stat. 838-843 (to be codified at 49 U.S.C. 11323-11326 (2000)). As a condition to such an approval, the ICC was, and the Board is, required to protect the interests of affected railroad employees. See former 49 U.S.C. 5(2)(f) (1970); Pub. L. No. 104-88, Tit. 1, § 102, 109 Stat. 842-843 (to be codified at 49 U.S.C. 11326 (2000)). Among other things, an applicant carrier must negotiate an implementing agreement with its unions before it can make any operational changes that affect the carrier's employees. See *New York Dock Ry.—Control—Brooklyn Eastern Dist. Terminal* (*New York Dock*), 360 I.C.C. 60, 85 (1979), aff'd *sub nom. New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979). If the parties cannot reach an agreement voluntarily, the matter is submitted to arbitration, and the arbitrator will resolve the matter and set specific terms for implementation. *Ibid.*

An arbitral decision regarding labor protective conditions imposed by the ICC (and now the STB) can be appealed to the agency under the limited standard of review adopted in *Chicago & Northwestern Transportation Co.—Abandonment—Near Dubuque & Oelwein, IA* (*Lace Curtain*), 3 I.C.C.2d 729, 735-736 (1987), aff'd *sub nom. International Bhd. of Elec. Workers* v. *ICC*, 862 F.2d 330, 336 (D.C. Cir. 1988), now codified at

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[1] Section 204 of the ICC Termination Act of 1995, Pub. L. No. 104-88, Tit. 2, 109 Stat. 941 (ICCTA), transferred the ICC's rail-related functions to the STB, effective January 1, 1996.

49 C.F.R. 1115.8 (1999).[2] The agency generally "limit[s] our review of arbitrators' decisions to recurring or otherwise significant issues of general importance regarding the interpretation of [its] labor protective conditions." *Lace Curtain*, 3 I.C.C.2d at 736. Moreover, the agency will not set aside an arbitral determination involving "issues of causation, the calculation of benefits, or the resolution of other factual questions" in the absence of "egregious error." *Id.* at 735-736. Under *Lace Curtain*, the only other grounds for overturning an arbitral award are that the award is "irrational or fails to draw its essence from the imposed labor conditions or it exceeds the authority reposed in arbitrators by those conditions." *Delaware & Hudson Ry.—Lease & Trackage Rights Exemption—Springfield Terminal Ry.*, Finance Docket No. 30965 (Sub-No. 1), at 16-17 (ICC served Oct. 4, 1990), remanded on other grounds, *sub nom. Railway Labor Executives' Ass'n* v. *United States*, 987 F.2d 806 (D.C. Cir. 1993). In short, "review of an arbitration decision is limited to determining whether the award was procedurally fair and impartial. Awards are not vacated because of substantive mistake, * * * [unless] there is egregious error." *Atlantic Richfield Co. & Anaconda Co.—Control—Butte, Anaconda & Pac. R.R. & Tooele Valley R.R.*, Finance Docket No. 28490 (Sub-No. 1), at 6 (ICC served Mar. 2, 1988), aff'd *sub nom. Employees of*

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[2] The agency modeled its standard of review in arbitration review proceedings on the so-called *Steelworkers Trilogy* standard that courts employ to review arbitration decisions issued under collective bargaining agreements. See *Lace Curtain*, 3 I.C.C.2d at 733 n.7, 735 (citing *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)).

the Butte, Anaconda & Pac. Ry. v. *United States*, 938 F.2d 1009, 1013-1014 (9th Cir. 1991), cert. denied, 503 U.S. 936 (1992).

2. This dispute concerns individual claims for benefits under a voluntarily negotiated Merger Protection Agreement (MPA) that was imposed by the ICC as a condition to its approval of the 1968 merger of the New York Central Railroad Company (N.Y. Central) into the Penn Central Transportation Company (Penn Central or the carrier). The MPA provided extensive benefits to employees who were displaced or dismissed because of the merger, but it expressly excluded from benefits any employees who deliberately chose not to report for work, and thus were not available for service, when called up by the carrier.

Petitioners were employed as yard workers by the Cleveland Union Terminals Company (CUT), a passenger rail carrier subsidiary of the N.Y. Central. Because the MPA did not expressly refer to employees of subsidiaries, there was some debate between the employees and the carriers as to whether that agreement applied to CUT employees. In anticipation of the merger, petitioners' union and the N.Y. Central negotiated the so-called "Top and Bottom Agreement," which gave CUT employees seniority rights to bid for jobs in the N.Y. Central freight yard, but which did not purport to establish or affect any rights those employees might have under the MPA.

After N.Y. Central and Penn Central merged in 1968, petitioners, seven employees who were furloughed from their CUT jobs, received a series of four notices advising them that they were being recalled into active service, and directing them to "immediately contact" the yardmaster of the former N.Y. Central freight yard for work in that yard. Pet. App. 3a. When the first two

notices were issued, petitioners' union was still engaged in a dispute with the carriers over petitioners' coverage under the MPA. In July 1969, however, petitioners' union and Penn Central entered into an agreement expressly providing that, at least from that date forward, petitioners would be covered by the MPA. *Id.* at 4a. Nevertheless, the seven petitioners failed to report to work in response to any of the four notices, including the two notices received after the agreement expressly providing for MPA coverage. The notices warned petitioners that their failure to report could jeopardize any rights they might have, while a separate letter assured them that reporting for work in the freight yard would not jeopardize any of those rights. See *id.* at 44a-49a. As they had been warned, the employees were ultimately terminated for their failure to report to work.

In September 1969—when the carrier was still attempting to get petitioners to report to work—the seven petitioners, along with ten furloughed CUT employees who had reported to work, sued the carrier in the United States District Court for the Northern District of Ohio for benefits under the MPA. By oral and written decisions, issued in 1976 and 1979 respectively, the district court found that all 17 claimants were covered by the MPA, but the court specifically reserved for arbitration the question of which, if any, of the individual claimants had complied with the MPA's requirements so as to qualify for benefits. Pet. App. 4a; see *Knopik* v. *Penn Cent. Co.*, No. C 69-722 (N.D. Ohio Nov. 29, 1979).

In 1992, an arbitral panel denied benefits to all 17 claimants. Pet. App. 4a. The panel found that the seven petitioners did not qualify because they had not complied with the MPA's threshold requirement that

employees demonstrate their availability by reporting for work. *Id.* at 5a. As for the ten claimants who had reported to work, the arbitral panel found that they had not sufficiently demonstrated their entitlement to benefits for various reasons. *Ibid.*

3. In 1997, all 17 claimants appealed the arbitral ruling to the Board. In December 1998, the Board found that the arbitration panel had erred in denying the claims of the ten employees who had reported to work. Pet. App. 13a-28a.[3] But, as for the seven petitioners who had never reported, the Board summarily affirmed the arbitral decision finding that they had forfeited their rights to benefits by failing to report to work.

4. The court of appeals affirmed the Board's decision. Pet. App. 1a-12a. The court concluded that petitioners had failed to meet any of the criteria for overturning an arbitral ruling. *Id.* at 9a-11a. The court found that the arbitral ruling conformed to the express terms of the MPA, was consistent with the district court ruling that had sent to arbitration the question whether the employees had qualified for benefits, and was squarely within the arbitral panel's decision-making authority. *Id.* at 9a-10a. The court also agreed with the Board that there was no egregious error in the arbitral panel's decision. *Id.* at 10a-11a. The court found ample basis for the arbitration panel's rejection of each of the petitioners' various arguments—that

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[3] The Board remanded to the parties for further negotiation or arbitration the issue of compensation for the ten claimants who had reported. A challenge by the carrier to the Board's decision regarding those ten claimants was dismissed as unripe. *Penn Cent. Corp.* v. *STB*, No. 99-3115 (6th Cir. Dec. 6, 1999). Thus, the petition concerns only the portion of the Board's decision relating to the seven claimants who failed to report.

they would have risked waiving their MPA rights had they reported to work at the freight yard, that the carrier had anticipatorily breached its contractual obligation under the MPA, and that the work at the N.Y. Central freight yard was not comparable to their previous work. *Ibid.* The court also held that the Board could affirm an arbitral ruling summarily, without independently addressing petitioners' various arguments in detail. *Id.* at 8a-9a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. The court properly upheld the Board's conclusion that petitioners could not qualify for benefits under the MPA because they did not report to work when called to do so, as expressly required by the MPA. Petitioners concede that they did not report for work, and they do not challenge the finding that the MPA required them to do so in order to qualify for benefits. Rather, petitioners argue (Pet. i, 8) that, under the doctrines of anticipatory repudiation and futility articulated in *Vaca* v. *Sipes*, 386 U.S. 171 (1967), and *Glover* v. *St. Louis–San Francisco Railway*, 393 U.S. 324 (1969), they were excused from reporting to work in light of (1) the carrier's repeated assertion that the MPA did not apply to them and (2) the carrier's denial of benefits to other employees who reported but received neither work nor benefits. Those cases, however, are inapposite. *Vaca* and *Glover* concern when employees may seek a judicial remedy without first exhausting contractual or administrative remedies. In this case, the issue is whether petitioners may be excused from reporting for work—a

condition precedent for receiving labor protective benefits (because it establishes an employee's availability for work) according to the terms of the MPA under which benefits are sought. None of the cases cited by petitioners addresses whether employees may collect benefits under a labor agreement without first establishing their eligibility for benefits by reporting for work.[4]

Indeed, the Court's reasoning in *Vaca* supports the court of appeals' conclusion that petitioners were bound by the agreement they sought to enforce. See 386 U.S. at 184 ("Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced."). Although employees may be excused from a contractual requirement in certain circumstances where the actions of the employer or their union prevent them from performing that requirement, see *id.* at 185, petitioners in fact were urged to report. Thus, the doctrine of anticipatory repudiation invoked by petitioners (Pet. i, 8-10) is not available to them.[5]

Petitioners offer no support for their assertion that, once the carrier disputed the MPA's applicability to

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[4] The other cases cited by petitioners (Pet. 10) also involve employees' failure to exhaust administrative remedies. Petitioners mistakenly state (*ibid.*) that *United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Ass'n, Local 307* v. *G&M Roofing & Sheet Metal Co.*, 732 F.2d 495, 501 (6th Cir. 1984), involves a failure to report to work.

[5] Petitioners argue (Pet. 8, 10) that the court of appeals failed to address their futility/repudiation argument. To the contrary, the court specifically considered each of petitioners' arguments and found that the arbitration panel had properly rejected them. Pet. App. 8a-11a.

them, petitioners were forever excused from their duties under the MPA while the carrier's liabilities would still accrue. Indeed, petitioners' theory could not possibly apply to the two notices to report that were issued after all parties agreed that the MPA would apply. And, even as to the two prior notices, their argument is inconsistent with the nature of an employment relationship as a continuing one and with an ongoing right to receive benefits in lieu of wages. As the arbitrator noted, benefits under the MPA are based on the fact that "the Employee was available for work and that no work was offered to him." Pet. App. 52a. Thus, whether or not work actually existed for them, petitioners were obligated to make themselves available for work as a requirement for receiving MPA benefits.

Accordingly, the arbitrator reasonably found that petitioners acted at their peril in refusing to report for work, particularly given the numerous notices to report, accompanied by assurances that reporting would not jeopardize any rights they might have under the MPA (Pet. App. 46a), and by warnings from the carrier and even their own union that they would forfeit their benefits if they did not report.

2. The court of appeals correctly determined that the Board had "adopted by reference the reasoning of the arbitration panel" (Pet. App. 8a)[6] and acted within its authority by summarily affirming the arbitration

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[6] As petitioners recognize (Pet. 8), by summarily affirming the arbitrator, the Board clearly adopted the arbitrator's reasoning. See *City of Frankfort* v. *FERC*, 678 F.2d 699, 708 & n.18 (7th Cir. 1982) (agency order stating that "[t]he initial decision is affirmed and the proceeding is terminated" is sufficient to indicate adoption of the opinion of an administrative law judge).

panel's decision. As the court recognized, an agency's summary affirmance of a detailed and thorough decision issued under delegated authority is "proper and provide[s] an opportunity for intelligent review by the court." *Id.* at 8a-9a (citing *City of Bethany* v. *FERC*, 727 F.2d 1131, 1144 (D.C. Cir.), cert. denied, 469 U.S. 917 (1984)). Moreover, the Administrative Procedure Act "does not require an agency to furnish detailed reasons for its decisions so long as its conclusions and underlying reasons may be discerned with confidence." *Ibid.* (quoting *National Treasury Employees Union* v. *FLRA*, 802 F.2d 843, 845 (6th Cir. 1986)).[7] Petitioners seem to argue (Pet. 11) that, because the STB reversed a portion of the arbitral decision, it could not summarily affirm an entirely separate part of the decision. But the portion of the arbitral decision concerning petitioners (Pet. App. 42a-54a), which the Board summarized and incorporated by reference, was detailed and well reasoned. Thus, the Board was not required to do more.

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[7] Accord *Mid-South Bottling Co.* v. *NLRB*, 876 F.2d 458, 460 n.1 (5th Cir. 1989); *NLRB* v. *Gordon*, 792 F.2d 29, 33 (2d Cir.), cert. denied, 479 U.S. 931 (1986); *NLRB* v. *Horizon Air Servs., Inc.*, 761 F.2d 22, 24 n.1 (1st Cir. 1985); *Kenworth Trucks of Phila., Inc.* v. *NLRB*, 580 F.2d 55, 61-63 (3d Cir. 1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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