No. 01-939

In the Supreme Court of the United States

LYN SWONGER AND JAMES SPAULDING, ET AL.,
PETITIONERS

v.

SURFACE TRANSPORTATION BOARD, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 49 U.S.C. 11341(a) and 11347 (1994) allow the modification of seniority rights as part of a federally authorized merger of two railroad operations.

2. Whether the modification of seniority rights and relocation of a railroad terminal were necessary to the merger where they enhanced the public transportation benefit arising from the merger and facilitated more efficient operations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 265 F.3d 1135. The decision of the Surface Transportation Board (Pet. App. 18-26) is unreported. The decision of the arbitrator (Pet. App. 27-34) is also unreported.

JURISDICTION

The court of appeals entered its judgment on September 19, 2001. The petition for a writ of certiorari was filed on December 18, 2001. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Railroads wishing to consolidate or merge their properties must first obtain regulatory approval from the Surface Transportation Board (Board). See 49 U.S.C. 11323-11326 (Supp. V 1999). The Board may approve a proposed consolidation if it finds that the transaction is in the public interest, 49 U.S.C. 11324(c) (Supp. V 1999), taking into account such public benefits as cost reductions, service improvements, and efficiency gains. See, *e.g.*, *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233, 363-364 (1996), aff'd *sub nom. Western Coal Traffic League* v. *Surface Transp. Bd.*, 169 F.3d 775 (D.C. Cir. 1999). Once a consolidation is approved by the Board, the railroad may implement the merger and, in so doing, "is exempt from the antitrust laws and from all other law," 49 U.S.C. 11321(a) (Supp. V 1999),[1] which can include legal obligations under a collective bargaining agreement, see *Norfolk & Western Ry.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 127-130 (1991).

When large railroads merge, the Board is required to impose certain conditions for the protection of affected railroad employees. 49 U.S.C. 11326 (Supp. V 1999).[2] That Section requires a "fair arrangement" for employees affected by the merger, 49 U.S.C. 11326(a) (Supp. V 1999), and incorporates the protections of the Rail Passenger Service Act, 45 U.S.C. 565 (1988), for "the preservation of rights, privileges, and benefits" under existing collective bargaining agreements. The Board's

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[1] Prior to the 1995 Act terminating the Interstate Commerce Commission, Pub. L. No. 104-88, 109 Stat. 803, this provision was codified at 49 U.S.C. 11341(a).

[2] Prior to the 1995 Act terminating the Interstate Commerce Commission, this provision was codified at 49 U.S.C. 11347.

predecessor, the Interstate Commerce Commission, further identified a series of specific conditions for the protection of employees in *New York Dock Railway—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60, 84-90, aff'd, 609 F.2d 83 (2d Cir. 1979). See Pet. App. 44-56. As relevant here, the *New York Dock* conditions require that the

> rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

360 I.C.C. at 84.

Under 49 U.S.C. 11321(a) (Supp. V 1999), an agreement or arbitration order implementing a merger may displace provisions of collective bargaining agreements to the extent "necessary." See also *Norfolk*, 499 U.S. at 127-128. Abrogation of the collective bargaining agreement's terms is "necessary" if (1) some transportation benefit, such as enhanced efficiency or greater safety, will result from the underlying transaction, and (2) there is a nexus between the changes sought and effectuation of the Board-approved transaction. *United Transp. Union* v. *Surface Transp. Bd.*, 108 F.3d 1425, 1430-1431 (D.C. Cir. 1997).

Before any operational changes affecting employees can be made, carriers must negotiate with their unions. If those negotiations fail, the parties must submit to binding arbitration. *New York Dock*, 360 I.C.C. at 85. The arbitral decision can be appealed to the Board under the limited standard of review

established in *Chicago & North Western Transportation Co.—Abandonment—Near Dubuque & Oelwein, IA*, 3 I.C.C.2d 729, 735-736 (1987), aff'd *sub nom. IBEW* v. *ICC*, 862 F.2d 330 (D.C. Cir. 1988); see also 49 C.F.R. 1115.8. Under that standard, the Board's review of arbitrators' decisions is generally limited to "recurring or otherwise significant issues of general importance regarding the interpretation of [its] labor protective conditions." 3 I.C.C.2d at 736. The Board does not overturn an arbitrator's resolution of factual disputes in the absence of "egregious error." *Id.* at 735-736.

2. Petitioners are former employees of the now-defunct Rock Island and Pacific Railroad Company on its Tucumcari line out of Pratt, Kansas. In 1980, the St. Louis Southwestern Railway Company (St. Louis Railway) acquired the Tucumcari Line from the bankrupt Rock Island. Petitioners were hired by the St. Louis Railway and were given preference on Tucumcari line work over other St. Louis Railway employees, even though petitioners' system-wide "seniority date"—the date normally used to determine priority in bidding for work—was their date of hire by the St. Louis Railway. Pet. App. 4.

In 1996, the Board approved the merger of Union Pacific Railroad Company and the St. Louis Railway's parent company, the Southern Pacific Rail Corporation. Through the merger, Union Pacific acquired all of the rail carriers controlled by Southern Pacific, including the St. Louis Railway. Pet. App. 4. The Board approved the merger as in the public interest because, among other things, it would lead to greater efficiencies that would result in improved and less costly rail service. See *Union Pacific/Southern Pacific Merger*, 1 S.T.B. at 363-364. Among the promised efficiencies were the streamlining and consolidation of operations

through the use of a "hub and spoke" system, with one of the hubs located at Salina, Kansas, and encompassing the Tucumcari Line. Pet. App. 19.

After notice was formally given and negotiations were held, Union Pacific and the United Transportation Union (Union)—representing all conductors, foremen, brakemen, and yardmen affected by the implementation of the Salina Hub, including petitioners—reached a tentative implementing agreement for the Salina Hub. Pet. App. 27-28. Under the tentative agreement, employees from several districts, who had been governed by different collective bargaining agreements, would be put under a single agreement, with their seniority dovetailed based upon the employee's seniority date. Preference in bidding for work would be based on system-wide seniority, with one exception: no employee would lose existing "prior rights" seniority as to the rail lines on which he had originally worked vis-a-vis other employees who also worked on those lines before the merger. Thus, petitioners would retain their preference over former St. Louis Railway employees in bidding for work on the Tucumcari Line, but they would have to compete with other Union Pacific employees based on their relative system-wide seniority. *Id.* at 5, 29.

3. Dissatisfied with their limited preference and with the decision to site the "home terminal" at Herington, Kansas, rather than Pratt, Kansas, petitioners' local union official objected to the tentative agreement. The dispute was submitted to binding arbitration.

The arbitrator found the tentative agreement to be a fair and equitable method of blending the rights of all affected employees. Pet. App. 27-34. The arbitrator concluded that a public transportation benefit would result from the hub-and-spoke operation at Salina and

that both the seniority provisions and the establishment of Herington as the home terminal were related to the successful implementation of that hub-and-spoke operation. *Id.* at 31-32, 34. The arbitrator found no merit to petitioners' arguments that the agreement was unfair to them or that the changes it put into place were not necessary. *Id.* at 31-34.

The Board affirmed. Pet. App. 18-26. Characterizing petitioners' appeal as presenting a fact-bound challenge to the public transportation benefits arising from the seniority and hub-location changes (*id.* at 24), the Board sustained the arbitrator's decision because petitioners "failed to show that the arbitrator committed egregious error in making these findings," *ibid.*[3]

4. The court of appeals affirmed. Pet. App. 1-17. Tracking the decision of the D.C. Circuit in *United Transportation Union* v. *Surface Transportation Board*, 108 F.3d 1425 (1997), the court of appeals recognized that seniority rights must be modified in some manner in nearly all railroad mergers. The court accordingly ruled that the Board's determination that seniority rights can be modified when necessary to carry out an approved consolidation is reasonable and effectuates congressional intent. Pet. App. 9-10. The court further agreed with the Board and the D.C. Circuit that "the necessity standard does not require a finding by the arbitrator and the [Board] that the merger could not be effectuated without the specific changes that are proposed for the petitioners' seniority rights and for the designation of their home terminal."

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[3] Petitioners' request for a stay was denied. The Salina Hub was implemented on May 1, 1999, and thus has now been in operation for almost three years. See *Spaulding* v. *United Transp. Union*, 279 F.3d 901, 907 (10th Cir. 2002).

Id. at 10. Rather, it is sufficient if (1) "some transportation benefit flow[s] from the underlying transaction," and (2) there is "a nexus between the changes sought and the effectuation of an approved transaction." *Id.* at 11. The court then found that the arbitrator adequately demonstrated that the proposed agreement satisfied those requirements, with respect to both the modification of seniority rights and the relocation of the home terminal. *Id.* at 11-14.

ARGUMENT

The court of appeals' decision is consistent with decisions of this Court and other circuits. Accordingly, petitioners' record-bound challenge to the specific terms of their railway's merger agreement does not merit this Court's review.

1. Petitioners argue (Pet. 11-18) that the court of appeals erred in concluding that seniority rights may be modified as part of a merger agreement because they are not the types of "rights, privileges, and benefits" for which 49 U.S.C. 11326 (Supp. V 1999) and *New York Dock* require collective bargaining. Petitioners, however, fail to identify any conflict with this Court's prior decisions. To the contrary, the court of appeals' decision is fully consistent with this Court's decision in *Norfolk & Western Railway* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117 (1991), as evidenced by the petition's reliance on the *dissenting* opinion in that case. See Pet. 11-12. In *Norfolk*, this Court held that the merging carriers' exemption from "all other law" in 49 U.S.C. 11321(a) (Supp. V 1999), "extends to its legal obligations under a collective-bargaining agreement." 499 U.S. at 119. In so holding, the Court recognized that "consolidations in the public interest" can result in,

among other things, "the loss of seniority rights." *Id.* at 132-133.

Petitioners also fail to identify any conflict in the circuits. Quite the opposite, the court of appeals here deliberately tracked the decision of the only other court of appeals that has addressed the question—the D.C. Circuit in *United Transportation Union* v. *Surface Transportation Board*, 108 F.3d 1425 (1997). See Pet. App. 8-9. In *United Transportation Union*, the D.C. Circuit, like the court of appeals here (*id.* at 8), sustained the Board's conclusion that "rights, privileges, and benefits" are those collective "incidents of employment, ancillary emoluments or fringe benefits" like life insurance, medical care, and sick leave, but do not extend to such individualized concerns as seniority. See 108 F.3d at 1429-1430. Indeed, the D.C. Circuit concluded that the Board's interpretation "is exactly what was intended by Congress." *Id.* at 1430.

Petitioners' alternative focus (Pet. 12-16) on seniority rights as protected "rates of pay, rules, working conditions" fares no better. That argument was not addressed by the court of appeals. See Pet. App. 7 ("[Petitioners] argue, seniority rights are 'rights, privileges, and benefits.'"). Indeed, petitioners agree (Pet. 5-6) that their argument below focused on the "rights, privileges, and benefits" language, rather than the "rates of pay, rules, working conditions" terminology on which they now rely. Moreover, petitioners' new argument has not been addressed by any other court of appeals, so a grant of certiorari to address it here would be both inappropriate and premature.

Finally, petitioners' argument fails to come to grips with the substantial deference owed to the Board's construction of ambiguous statutory language and its interpretation of the scope of the *New York Dock* protec-

tions. See, *e.g.*, *Barnhart* v. *Walton*, No. 00-1937 (Mar. 27, 2002), slip op. 9.

2. Petitioners also contend (Pet. 18-29) that the court of appeals erred in holding that the modification of seniority rights and relocation of the home terminal were "necessary" to effectuate the merger in a sensible and efficient manner. Again, however, petitioners identify no inconsistency between the court of appeals' ruling and the decision of this Court in *Norfolk*, *supra*, or the decisions of other circuits. To the contrary, the court's analysis echoed the D.C. Circuit's resolution of the same question in *United Transportation Union*. There, the D.C. Circuit, like the court of appeals here (Pet. App. 10-12), ruled that the necessity standard requires only a nexus between the proposed changes and the public benefits arising from the merger. See 108 F.3d at 1430-1431; see also *Railway Labor Exec. Ass'n* v. *United States*, 987 F.2d 806, 815 (D.C. Cir. 1993).

The dearth of additional circuit court authority evidences the infrequency with which this issue arises—a point that petitioners acknowledge (Pet. 21). That factor further weighs against an exercise of this Court's certiorari jurisdiction.

Finally, petitioners' argument confessedly reduces to a record-bound challenge to the "application of facts to law." Pet. 25; see Pet. App. 24 (Board characterizes argument as a challenge to arbitrator's factual findings). This Court, however, does not sit to review the particularized application of law to facts in individual cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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