

No. 08-604

IN THE
Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
AND TRAINMEN GENERAL COMMITTEE OF
ADJUSTMENT, CENTRAL REGION,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

**BRIEF OF THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT**

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INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 national and international labor organizations with a total membership of 11 million working men and women.¹

The instant case presents an important question concerning the proper scope of judi-

¹ The parties have consented to the filing of this brief. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

cial review of arbitration awards issued by Divisions of the National Railroad Adjustment Board. The AFL-CIO has frequently filed briefs in cases before this Court that concern arbitration under collective bargaining agreements. *See, e.g., 14 Penn Plaza LLC v. Pyett*, 556 U.S. ___ (April 1, 2009). A number of AFL-CIO affiliates represent substantial numbers of railroad workers and frequently bring minor disputes over the application of their collective bargaining agreements before the National Railroad Adjustment Board for settlement.

STATEMENT

The Railway Labor Act mandates a system of compulsory arbitration for the settlement of disputes – known as “minor disputes” – between rail carriers and unions concerning the interpretation and application of their collective bargaining agreements. 45 U.S.C. § 153. One available avenue for the settlement of minor disputes is through a final and binding arbitration award by a Division of the National Railroad Adjustment Board. 45 U.S.C. § 153 First. Each of the NRAB’s four Divisions is composed of equal numbers of carrier-appointed and union-appointed members, and each Division has jurisdiction over disputes concerning particular classes or crafts of railroad employees. 45 U.S.C. § 153 First (h).²

² As an alternative to taking their disputes to a Division of the NRAB, rail carriers and unions may establish arbitration boards by mutual agreement to resolve minor disputes. 45 U.S.C. § 153 Second. Minor disputes between air carriers and unions, which are also covered by the RLA, are settled exclusively through awards by arbitration boards established by mutual agreement. 45 U.S.C. § 184.

The instant case was brought in federal court as a challenge to five related awards issued by the First Division of the NRAB, which has jurisdiction over minor disputes involving the so-called “operating crafts,” such as engineers and trainmen. Each of the challenged awards dismissed a claim that a particular engineer had been unjustly disciplined by the Union Pacific Railroad (“the Carrier”) in violation of its agreement with the Brotherhood of Locomotive Engineers and Trainmen, which is administered by the BLET General Committee of Adjustment (“the Union”). The awards did not reach the merits of the contract disputes but rather dismissed the claims on the ground that the Union’s written presentation of its case – its “original written submission” in RLA usage – did not satisfy a procedural prerequisite to the Division’s consideration of the Union’s claims, namely that the submission did not contain evidence that each of the disputes had been subject to the statutorily-required on-site settlement “conference” between the Carrier and the Union prior to the Union’s requests that the NRAB settle the disputes. *See* Pet. App. 72a (“In the instant case, therefore, since no evidence of conference was set forth in the on-property record, the Board is without authority to assume jurisdiction over the claim.”).

The Union filed a petition to review and set aside the awards under § 3 First (q) of the Railway Labor Act on the grounds that the First Division had “unlawfully held that [it] did not have authority to assume jurisdiction over [the] cases because there was no evidence of a ‘conference’ between the parties in the [Union’s submission to the NRAB].” Petition to Review ¶ 1. The Union contended that “the dismissals violate the Act by requiring that conferencing be alleged and proved in the original submission

of briefs when nothing in the Act or the Circular [containing the NRAB's procedural rules] imposes such a technical pleading or evidentiary requirement." *Id.* ¶ 3.³ Alternatively, the Union alleged that the First Division had denied the Union procedural due process by refusing to allow it to present evidence of conferencing when the issue was belatedly raised by a carrier member of the arbitration panel at the hearing on the claims. *Id.* ¶ 5.

The District Court dismissed the Union's petition. Based on its reading of various NRAB Division awards, that Court concluded that, in all instances, evidence of conferencing must be included in a party's original written submission to the NRAB as a prerequisite to a Division settling the dispute. Pet. App. 38a-42a.

The Seventh Circuit reversed the District Court. The Court of Appeals began by noting that "the essence of the conflict boils down to a single question: is written documentation of the conference in the on-property record a necessary prerequisite to arbitration before the NRAB?" Pet. App. 6a. The Seventh Circuit recognized that the Union's petition for review presented this question in "both a statutory and constitutional framework." *Id.* at 6a. But, bypassing the statutory ground for review asserted by the Union's petition, the Seventh Circuit ruled that the First Division dismissals of the Union's claims "ran

³ See also *id.* ¶ 4 ("the NRAB unlawfully evades . . . its authority as an administrative agency with primary jurisdiction over these claims") & ¶ 61 ("the NRAB has . . . acted in a manner that is in conflict with the strong public policy to hear and decide disputes on the merits and not to dismiss such disputes based on procedural pleading technicalities imposed by the NRAB on an ad hoc improvisatory manner and not set out in the Act or Circular No. 1").

afoul of the due process clause,” *ibid.*, by imposing “a new procedural rule without adequate notice to the parties” and thereby “den[ying] those parties first, and most importantly, the opportunity to comply with the rule, and ultimately, a fair opportunity to be heard,” *id.* at 11a. On this ground, the Court of Appeals found that the First Division’s “decision to dismiss violated the due process rights of the Organization,” and reversed the decision of the District Court. *Id.* at 23a.

SUMMARY OF ARGUMENT

I. The judgment of the Court of Appeals can and should be affirmed on the statutory ground that the NRAB First Division failed to comply with the requirements of the Railway Labor Act in dismissing the Union’s claims. 45 U.S.C. § 153 First (q). A Division of the NRAB has a statutory duty to settle all minor disputes properly brought before it. The Union’s claims were properly brought before the First Division, and the First Division, therefore, had a statutory duty to settle the minor disputes presented by the Union’s claims on the merits.

The First Division’s asserted ground for dismissing the Union’s claims – that the Union failed to meet the procedural prerequisite of including proof of on-site conferencing in its original written submission to the NRAB – is contrary to the NRAB procedural rules. The NRAB rules only require the parties to include in their submissions evidence relevant to matters in dispute between them. And, where there has been no dispute over the occurrence of on-site conferencing, as is the case here, the NRAB rules do not require that proof of conferencing be included in the parties’ original written submissions. Since the Union’s claims were presented in a manner consistent with the Act and the NRAB rules, the First Di-

vision had a statutory duty to settle those minor disputes on the merits, and its refusal to do so constituted a failure of the Division to comply with the requirements of the Act.

II. This Court need not, and therefore should not, reach the constitutional Due Process Clause ground on which the Court of Appeals based its judgment. The Railway Labor Act itself provides for procedural due process in the arbitration proceedings before the NRAB Divisions. Deprivation of these due process guarantees by a Division constitutes a violation of the RLA, and the resulting Division award would be subject to review and to being set aside on that statutory ground. Aside from being unnecessary, deciding this case on constitutional grounds would require the Court to address difficult “governmental action” issues that have not been addressed by any of the lower courts.

ARGUMENT

The Seventh Circuit decision setting aside the NRAB First Division awards at issue here should be affirmed on the ground that, in dismissing the Union’s claims, the Division failed to comply with the requirements of the Railway Labor Act. 45 U.S.C. § 153 First (q).⁴ Given that statutory ground for the

⁴ The Petition to Review challenged the First Division’s dismissals on the grounds that they “violate the Act . . . by requiring that conferencing be alleged and proved in the original submission of briefs when nothing in the Act or the Circular imposes such a technical pleading or evidentiary requirement,” ¶ 3, and that they “fail[] to conform [the NRAB’s] jurisdiction to that required by the law” in that they “unlawfully evade[] . . . [the NRAB’s] authority as an administrative agency with primary jurisdiction over the[] claims,” ¶ 4. The RLA provides that NRAB awards may be set aside both “for failure of the division to comply with the requirements of th[e] Act” and “for failure of the order to conform . . . to matters within the scope of

decision below, there is no need for this Court to reach the question of whether the First Division awards were reviewable on the nonstatutory ground that the Division violated the Due Process Clause of the Fifth Amendment.

I. THE SEVENTH CIRCUIT’S JUDGMENT SHOULD BE AFFIRMED ON THE GROUND THAT THE NRAB FIRST DIVISION FAILED TO COMPLY WITH THE REQUIREMENTS OF THE RAILWAY LABOR ACT IN DISMISSING THE UNION’S CLAIMS WITHOUT SETTling THE UNDERLYING MINOR DISPUTES.

Section 3 First (q) of the Railway Labor Act provides that “any employee or group of employees, or any carrier, [who] is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute [concerning the interpretation of a railroad collective bargaining agreement] referred to it, or [who] is aggrieved by any of the terms of an award . . . may file . . . a petition for review of the division’s order.” 45 U.S.C. § 153 First (q). Among the grounds on which “the order of the division may be set aside, in whole or in part, or remanded to the division” is “failure of the division to comply with the requirements of th[e] Act.” *Ibid.* Thus, in § 3 First (q), “Congress allowed for review of the Board’s failure to comply with the requirements of the Railway Labor Act, including procedural requirements ensuring claimants an opportunity to present evidence and argue their case.” *Kinross v. Utah Railway Co.*, 362 F.3d 658, 662 n. 3 (10th Cir. 2004).

the division’s jurisdiction.” 45 U.S.C. § 153 First (q). In the instant case, these two statutory grounds of review are largely to the same effect, and for ease of reference, we treat with only the first of the statutory grounds in this brief.

In this case, the First Division failed to comply with the RLA by dismissing – on spurious procedural grounds – claims that the Union had properly brought before the Division for settlement. *See* Petition to Review ¶s 1 & 3 (invoking this ground for review). The awards challenged by the Union’s petition for review should, therefore, be set aside and the disputes remanded to the First Division to be settled on the merits as required by the Act.

A. The Railway Labor Act provides that “disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions” – the so-called “minor disputes” – “may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board” for resolution through arbitration awards that are “conclusive on the parties.” 45 U.S.C. § 153 First (i) & (q).⁵

“The Board [i]s divided into four divisions, each with jurisdiction over particular crafts or classes and

⁵ The RLA provides that, prior to referring a dispute to the NRAB for settlement, the dispute must first be “handled in the usual manner up to and including the chief operating officer of the carriers designated to handle such disputes” and that there was a “fail[ure] to reach an adjustment in this manner.” 45 U.S.C. § 153 First (i). This is part of the Act’s general requirement that “[a]ll disputes” – including the minor disputes that may be referred to the NRAB – “shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.” 45 U.S.C. § 152 Second. *See Elgin, Joliet & Eastern Railway v. Burley*, 325 U.S. 711, 725 (1945) (“the duty to negotiate is imposed for both grievances[, i.e., minor disputes,] and major dispute[, i.e., contract negotiations]”).

their disputes,” and each Division is “composed of equal numbers of carrier representatives and representatives of unions.” *California v. Taylor*, 353 U.S. 553, 558 (1957). In this regard, § 3 First (k) states that “final awards as to any . . . dispute must be made by the entire division,” and § 3 First (k) through (n) specify how the Divisions are to proceed in making such awards. 45 U.S.C. § 153 First (k) - (n). As this Court has recognized, § 3 First (i) expressly provides the parties before a Division the procedural “[r]ights of notice, hearing, and participation or representation.” *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. at 727.⁶

The RLA’s detailed statutory provisions regarding the handling and resolution of minor disputes are intended “to provide a[n] *effective process of settlement*” of such disputes. *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. at 725 (emphasis added). “The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions.” *Union Pacific Railroad v. Sheehan*, 439 U.S. 89, 94 (1978). “[T]he provisions [of the RLA] dealing with the Adjustment Board” thus establish a system of “compulsory arbitration in this limited field.” *Railroad Trainmen v. Chicago River & Indiana Railroad*, 353 U.S. 30, 39 (1957). “The railroad[s], the employees, and the public, for all of whose benefits the Railway Labor Act was written, are entitled to have

⁶ For detailed descriptions of the minor dispute settlement process in the railroad industry see Vernon, “Arbitration in the Railroad Industry,” in Bornstein & Gosline, eds., *Labor and Employment Arbitration*, ch. 89 (1st ed. 1996), and Abram, *et al.*, eds., *The Railway Labor Act* 402-416 (2d ed. 2005).

a fair, expeditious hearing to settle [minor] disputes,” and, by the terms of the statute, the Divisions of the NRAB have a “duty to settle [such] dispute[s].” *Transportation-Communication Employees Union v. Union Pacific Railroad Co.*, 385 U.S. 157, 162 (1966).

B. In this case, the First Division of the NRAB violated that statutory duty by refusing to settle the minor disputes the Union referred to the Division on the spurious procedural ground that the Union had failed to meet its “duty and responsibility of including in the[] original written submission all known relevant, argumentative facts and documentary evidence.” 29 C.F.R. § 301.7 (b).

Section 3 First (i) provides in relevant part that “disputes may be referred by petition of the parties or by either party to the appropriate Division of the Adjustment Board with a full statement of the facts and all supporting data *bearing upon the disputes.*” 45 U.S.C. § 153 First (i) (emphasis added). “The Adjustment Board,” acting pursuant to its authority to “adopt such rules as it deems necessary to control proceedings before the respective Divisions,” 45 U.S.C. § 153 First (v), has implemented the requirements of § 3 First (i) by providing that “[t]he parties are . . . charged with the duty and responsibility of including in their original written submission all *known relevant, argumentative facts* and documentary evidence.” 29 CFR § 301.7(b) (emphasis added). *See also* 29 C.F.R. § 301.5 (d) & (e) (“all relevant, argumentative facts”). Interpreting the regulation’s requirement that the parties are to “includ[e] in their original written submission all *known relevant, argumentative facts* and documentary evidence,” 29 C.F.R. § 301.7 (b) (emphasis added), the NRAB has issued an Instructions Sheet advising that “[r]epresentatives may wish to *omit* documents that

are unimportant and/or irrelevant to the disposition of the dispute; for example, . . . *letters requesting a conference (assuming that is not in the dispute).*” NRAB Instructions Sheet, p. 5, Joint Exhibit Program (July 1, 2003), *available at* <http://www.nmb.gov/arbitration/nrab-instruc.pdf> (italicized emphasis added).⁷

Given the controlling NRAB rules, the First Division acted contrary to law in dismissing the Union’s claims because of “[t]he absence of such proof [of conferencing] within the Organization’s [original written submission].” Pet. App. 71a. That ruling by the First Division is contrary to the NRAB rules providing that submission statements are only required to contain “all known relevant, argumentative facts and documentary evidence,” 29 C.F.R. § 301.7 (b), and to the NRAB’s specific advice that proof of conferencing, such as “letters requesting a conference . . . may [be] omit[ted]” from the submission as “unimportant and/or irrelevant to the disposition of the dispute” where conferencing “is not an issue in the dispute,” NRAB Instructions Sheet, *supra*, p. 5.

⁷ The purpose of this suggestion is to further the NRAB’s Joint Exhibits Program by reducing the filing of “unnecessary” exhibits. *Ibid.* The express suggestion that parties *not* include in their submission “letters requesting a conference” where “that is not an issue in the dispute” shows that, by the NRAB’s interpretation of its own regulations, evidence of conferencing is “unnecessary” where conferencing “is not an issue in dispute.” The Instructions Sheet interpreting the NRAB rules was issued shortly after the Union made its original written submissions to the First Division and long before the March 15, 2005 hearing at which one of the First Division members raised a question as to the adequacy of the Union’s submissions. The governing NRAB regulations interpreted by the Instructions Sheet were issued by the Adjustment Board as Circular No. 1 on October 10, 1934.

The First Division’s ruling is contrary to the NRAB rules governing the contents of original written submissions, because there has never been any dispute in this case between the Carrier and the Union over whether conferences had been held regarding the claims at issue.

These NRAB proceedings began, as do all such proceedings, with the Union sending to the NRAB Arbitration Assistant a brief “notice of intent” to submit a particular, identified minor dispute to the NRAB, with a copy to the Carrier. *See* NRAB Instructions Sheet, *supra*, p. 4. The appropriate NRAB Division responds to such a notice of intent by assigning a case number and setting a particular date for the simultaneous filing of written submissions by the parties.⁸

Where there is a dispute over conferencing, the normal practice would be for the Carrier to raise a procedural objection based on the failure to hold a conference either just before or just after the Union filed its notice of intent bringing the claim to the NRAB. Petition to Review ¶ 16. The Carrier made no such objection to the NRAB taking the claims in response to the Union’s notice of intent. *Id.* ¶ 18. Nor did the Carrier make any such objection in its original written submission. *Ibid.* The question of the inclusion of proof of conferencing in the Union’s original written submission was only raised by a railroad-appointed member of the First Division panel at the hearing on the Union’s claims. Even then, the

⁸ Since 2003, the Divisions have responded to notices of intent by sending a form letter, which includes an invitation to submit procedural questions directly to the Division chairs. NRAB Instructions Sheet, *supra*, pp. 9-10.

Carrier did not take the position that conferences had not, in fact, taken place.⁹

The RLA provides that an NRAB Division “must exercise its exclusive jurisdiction to settle disputes like this” that are brought before the Division in accordance with the statute and the NRAB rules. *Transportation-Communication Employees Union*, 385 U.S. at 160. Thus, the First Division was not free to dismiss the Union’s claims here and refuse to settle the underlying minor disputes on the ground that the Union failed to include *irrelevant* evidence of conferencing in its original written submission when conferencing was *not* an issue in dispute between the parties. For the First Division is bound by the procedural rules adopted by the NRAB, including the rule that limits the parties’ duty with respect to their original written submission to including “all *known, relevant, argumentative* facts and documentary evidence,” 29 CFR § 301.7(b) (emphasis added), a category the NRAB has said does *not* encompass documents that are “unimportant and/or irrelevant to the disposition of the dispute[s]; for example, . . . letters requesting a conference [where] that is not an issue in the dispute,” NRAB Instructions Sheet, p. 5, *supra* (emphasis in original).

To be sure, in support of its dismissal, the First Division does cite several awards by various NRAB Divisions. Pet. App. 71a. However, as the Seventh Circuit demonstrated – and as even the Carrier ac-

⁹ The first time the Carrier even suggested that it might contest the fact that conferences had been held was in its petition for rehearing to the Seventh Circuit, where the Carrier asserted that “[i]f forced to do so, the railroad certainly will dispute the allegation that conferences took place with respect to at least some, if not all, of the five grievances at issue.” Pet. Rehearing 7. *See* Pet. Br. 9 n. 2.

knowledges, Pet. Br. 46 – the cited awards “do not indicate whether the Board dismissed the cases because conferencing did not in fact occur . . . or because the parties did not put written evidence of conferencing in the on-property record.” Pet. App. 15a. Thus, the cited awards do *not* stand for the proposition that, even where there is no dispute between the carrier and the union concerning conferencing, the union’s original written submission must as a procedural precondition include proof of conferencing.

In sum, by refusing to settle the disputes brought before the First Division by the Union in accordance with the NRAB rules, the First Division has “abdicate[d] its duty to settle [such] dispute[s].” *Transportation-Communication Employees Union*, 385 U.S. at 162. The First Division awards dismissing those claims, therefore, “should be set aside . . . for failure of the Division to comply with the requirements of this Act.” 45 U.S.C. § 153 First (q).

**II. THE COURT OF APPEALS’ JUDGMENT
SHOULD BE AFFIRMED ON THE AVAIL-
ABLE STATUTORY GROUND RATHER
THAN ON THE CONSTITUTIONAL
GROUND RELIED UPON BY THE COURT
BELOW.**

There is no warrant for deciding in this case the conceptually difficult constitutional question of whether the courts, as a supplement to the specific review authority over NRAB Division awards provided in § 3 First (q), have a free standing review authority over such awards to redress violations of the Due Process Clause of the Fifth Amendment.

A. First of all, as we have shown, in this case the courts below had express statutory authority to review and vacate the First Division awards “for failure of the division to comply with the requirements

of th[e] Act.” 45 U.S.C. § 153 First (q). And, as this Court recently noted, “[i]t is a well-established principle governing the prudent exercise of this Court’s jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.” *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. ___, 129 S.Ct. 2504, 2513 (June 22, 2009), quoting *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984).

B. Second, what is true here – that the statutory review authority provided by § 3 First (q) is fully sufficient to ensure that the parties to an NRAB Division arbitration proceeding are accorded procedural due process – is true for the run of cases challenging Division awards on procedural due process grounds.

The essential requirements of procedural due process are “notice and opportunity for hearing appropriate to the nature of the case.” *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). As this Court has recognized, the Railway Labor Act expressly provides “[r]ights of notice, hearing, and participation or representation” in proceedings before a Division of the NRAB. *Elgin, Joliet & Eastern Railway v. Burley*, 325 U.S. at 727 (citing RLA § 3 First (j)).¹⁰ And, the failure of an NRAB Division to accord any of these rights constitutes grounds for setting aside its award under § 3 First (q). See *Transportation-Communication Employees Union*, 385 U.S. at 165 n. 4 . Thus, as the Tenth Circuit aptly observed, “the Railway Labor Act itself provides for sufficient procedural due process within its own boundaries” to

¹⁰ Due process also requires an unbiased decision maker. See *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973). And, the RLA provides that an award may be vacated “for fraud or corruption by a member of the Division making the order.” 45 U.S.C. § 153 First (q).

“meet constitutional requirements.” *Kinross*, 362 F.3d at 662 n. 3.

Indeed, as the parties to this case acknowledge, there is effectively no difference between a statutory challenge to an award on the grounds that the Division failed to comply with the RLA’s notice and fair hearing requirements and the constitutional Due Process Clause challenges to Division awards that have been entertained in some of the circuits. *See* Pet. Br. 37 (“The statutory review provisions are plainly generous enough to permit litigants to raise all of the simple, common, easily adjudicated, and likely to be meritorious claims that sail under the flag of due process of law – including claims seeking to vindicate a right to fair notice, an opportunity to be heard, and an unbiased decisionmaker.”); Br. Opp. 1 (“The grounds for review under the Fifth Amendment of the constitution are effectively the same as those provided by the Railway Labor Act itself.”).

Reflecting that effective identity, even the circuits that entertain constitutional due process challenges treat “the RLA provisions governing Board hearings” as defining what “due process requires.” *Goff v. Dakota, Minnesota & Eastern Railroad Corp.*, 276 F.3d 992, 997 (8th Cir. 2002). *See also English v. Burlington Northern Railroad Co.*, 18 F.3d 741, 744 (9th Cir. 1994) (“the RLA provisions governing Board hearings” define what “due process requires”); *Chicago, Rock Island and Pacific Railroad Co. v. Wells*, 498 F.2d 913, 917 (7th Cir. 1974) (finding that “the Division denied the plaintiff Railroad due process under the Fifth Amendment,” the court “remanded to the Division with directions that plaintiff be permitted to file a written submission . . . and to appear before the Division at a hearing as contemplated by § 3 First (j) of the Act”). That being so, all of the constitutional

Due Process Clause claims that have been deemed cognizable could easily have been brought and decided as statutory challenges.¹¹

Against that background – and since “Section 153 First (q) unequivocally states that ‘the findings and order of [an NRAB Division] shall be conclusive on the parties’ and may be set aside only for the three reasons specified therein,” *Sheehan*, 439 U.S. at 93 – this Court should be slow in reaching the question of whether or not there is an additional, constitutional ground for judicial review of NRAB Division awards.

C. There is, moreover, a third consideration that reinforces the prudential case against reaching and deciding the question of whether the courts have Due Process Clause authority to review NRAB Division awards.

“Procedural due process imposes constraints on *governmental* decisions” *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (emphasis added). Thus, a necessary predicate to challenging an RLA-mandated arbitration award on due process grounds is that the award constitutes a “governmental decision[].” Yet, the circuits that entertain Due Process Clause challenges to RLA arbitration awards have done little more than presume that those awards are “governmental decisions,” even though there are indications that this presumption might be wrong and that the

¹¹ See, e.g., *Morin v. Consolidated Rail Corp.*, 810 F.2d 720, 722 (7th Cir. 1987) (employee discharged for theft alleged that “the NRAB did not afford him the opportunity to show that perjury occurred at his . . . disciplinary hearing” or “the opportunity to submit his criminal acquittal”); *Edelman v. Western Airlines*, 892 F.2d 839, 847 (9th Cir. 1989) (“effectively denied a hearing”); *Shafii v. PLC British Airways*, 22 F.3d 59, 60 (2d Cir. 1994) (“arbitrator . . . denied his attorney’s request to present one witness and several documents during the proceeding”).

awards are not governmental decisions. Thus, in order to decide this case under the Due Process Clause, the Court would have to confront a serious “governmental action” question that has never been squarely addressed by the lower courts.

The entirety of the circuit courts’ governmental action analysis regarding arbitration awards by NRAB Divisions is the following passage from a Seventh Circuit opinion:

“The National Railroad Adjustment Board, however, while private in fact, is public in name and function; it is the tribunal that Congress has established to resolve certain disputes in the railroad industry. Its decisions therefore are acts of government, and must not deprive anyone of life, liberty, or property without due process of law.” *Elmore v. Chicago & Illinois Midland Railway Co.*, 782 F.2d 94, 96 (7th Cir. 1986).

This passage, however, is nothing but *dicta*. The holding of *Elmore* is that, even though “the Railway Labor Act forces railroads and workers to arbitrate their disputes and to establish as part of the arbitration process an initial grievance procedure on the property,” this does not “turn[] the railroad’s grievance procedure into a governmental procedure required to conform to the requirements of due process.” *Ibid.* What is more, the *Elmore dicta* conflicts with the earlier holding of *Edwards v. St. Louis-San Francisco Railroad Co.*, 361 F.2d 946, 955 (7th Cir. 1966), that, “[l]ooking to the nature of the Board itself,” a “procedural” ruling by the NRAB that is “contemplated by the statute, cannot be said to be of that category of ‘governmental action’ prohibited by the

Constitution[]” that is subject to constitutional constraints.¹²

It is, moreover, not well-considered *dicta*. As for the NRAB being “public in name and function,” the Seventh Circuit merely observed that “[t]he tribunal [is] grandly styled the National Railroad Adjustment Board” and that “it is the tribunal that Congress has established to resolve certain disputes in the railroad industry.” *Elmore*, 782 F.2d at 95-96. It might be added, in this regard, that the federal government does provide certain administrative and financial support to the operations of the NRAB. 45 U.S.C. § 153 First (l), (t), (u) & (w).

On the other side of the public/private equation, it is, as the Seventh Circuit also observed, very much to the point that “the National Railroad Adjustment Board[] in fact consists of private individuals chosen by the railroad industry and the railroad unions.” *Elmore*, 782 F.2d at 95. Further indicating its private nature is the fact that “[t]he NRAB does not formulate policy or enforce laws,” *Radin v. United States*, 699 F.2d 681, 686 (4th Cir. 1983), but rather settles private disputes concerning private agreements. And, like the statutorily-mandated initial grievance procedures for settling such disputes that have uniformly been found to be beyond Due Process Clause review, the NRAB Divisions are not “required

¹² That being so, the *Edwards* opinion went on to observe, any “attempt to equate the review functions of the Adjustment Board with prohibited governmental action ultimately resolves itself into a direct attack upon the constitutionality of those provisions of the Railway Labor Act creating the Adjustment Board with authority to finally settle disputes which evolve otherwise unadjusted out of the grievance procedure agreed upon between the parties.” 361 F.2d. at 955. And, the court concluded that the provisions of the RLA in this regard do not “infringe due process.” *Ibid*.

or even encouraged” by the RLA “to act irregularly in [deciding such] grievances.” *Elmore*, 782 F.2d at 96.

It is particularly to the point that NRAB arbitration awards are issued, not by the NRAB itself, but by the Divisions of the NRAB. 45 U.S.C. § 153 First (k) & (m). The members of the Divisions are appointed by the carriers and the national labor organizations and have their compensation and expenses paid by the appointing carriers and labor organizations.. 45 U.S.C. § 153 First (b), (c) & (g). And, the resolution of disputes brought before the Divisions is by majority vote of the members of the Division. 45 U.S.C. § 153 First (n).

Where the members of a Division cannot agree on an award, they are required to select a neutral referee to sit as a temporary member of the Division for purposes of making an award. 45 U.S.C. § 153 First (l). If the members cannot agree upon a referee, they may ask the National Mediation Board to appoint one. *Ibid.* The neutral referees are paid by the NMB. *Ibid.* The referees are not, however, employees of the federal government. See “Compensating Neutral Arbitrators Appointed to Grievance Adjustment Boards Under the Railway Labor Act,” Comptroller General Opinion B-305484, at 3 (June 2, 2006) (“arbitrators serve as independent contractors and not as employees of the federal government”). Indeed, employment by the federal government disqualifies an individual from serving as an NMB-appointed referee. See “Uniform Guidelines for Placement on the National Mediation Board’s Roster of Arbitrators,” 17 NMB No. 54 (May 25, 1990).

In sum, the awards of NRAB Divisions are entirely the decisions of private arbitrators who are charged with resolving private disputes growing out of pri-

vate collective bargaining agreements and who do so without any control or even influence by the federal government. All that being so, the proposition that the awards of NRAB Divisions are “governmental decisions” subject to direct Due Process Clause constraints is dubious to say the least. *See Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 397-400 (1995).

An additional difficulty is the fact that the RLA provides for arbitration options other than arbitration by the NRAB Divisions. Indeed, far more awards are issued by the alternative boards of adjustment than are issued by the NRAB Divisions. *See National Mediation Board, Annual Performance & Accountability Report, FY 2008 (Nov. 14, 2008), Appendix A, available at http://www.nmb.gov/documents/nmb_ar08.pdf*. And, the proposition that the arbitration awards resulting from resort to these alternative options are “governmental decisions” subject to direct Due Process Clause constraints has no discernable legal basis.

Carriers and railroad labor organizations may provide for the settlement of their minor disputes by tripartite arbitration panels created by mutual agreement. 45 U.S.C. § 153 Second. Some of these arbitration panels are formed and administered solely by the parties with no involvement of the National Mediation Board. Others may be created solely by private agreement or with the assistance of the NMB and may have NMB-paid neutral referees. *Ibid.* With regard to the airline industry, the RLA imposes on air carriers and labor organizations – in lieu of the NRAB or to the airline industry equivalent – “the duty . . . to establish a board of adjustment” having the same jurisdiction to settle minor disputes as the non-NRAB boards of adjustment permitted to rail

carriers and rail labor organization. 45 U.S.C. § 184.¹³

The only decision even attempting to explain the basis for subjecting awards by these privately created boards of adjustment to Due Process Clause review is *Shafii v. PLC British Airways, supra*, which has the following to say about the neutral member of the airline industry system boards of adjustment: “Because the arbitrator occupies the position of the statutorily-created NRAB, he or she is subject to the same statutory and constitutional constraints as the NRAB.” 22 F.3d at 61 (citations omitted). Proceeding on the assumption that the privately created airline boards of adjustment and the NRAB are “associated entities,” the *Shafii* court then quotes the Seventh Circuit’s description of the NRAB as “private in fact, . . . public in name and function” as justifying the conclusion that the arbitration awards of the NRAB Divisions and the arbitration awards of the airline system boards of adjustment are equally subject to Due Process Clause review. *Id.* at 64.

¹³ The statutory grounds for reviewing arbitration awards of the NRAB Divisions stated in RLA § 3 First (q) apply to the awards of adjustment boards created by agreement between the rail carriers and labor organizations pursuant to RLA § 3 Second, *English v. Burlington Northern Railroad, supra*, 18 F.3d at 743 n. 1, and to boards of adjustment created by agreement between air carriers and labor organizations pursuant to RLA § 204, *Hunt v. Northwest Airlines, Inc.*, 600 F.2d 176, 178 (8th Cir. 1979). Those courts that entertain procedural due process challenges to arbitration awards covered by the RLA make no distinction between awards issued by NRAB Divisions and awards issued by boards of adjustment created by private agreement. *See, e.g., Edelman v. Western Airlines, supra*, 892 F.2d at 847; *Hall v. Eastern Air Lines, Inc.*, 511 F.2d 663, 664 (5th Cir. 1975).

The obvious flaw in the *Shafii* court's analysis is that minor disputes in the airline industry are *not* subject to the jurisdiction of the NRAB at all. *Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 685-86 (1963).¹⁴ The boards of adjustment created by agreement between air carriers and labor organizations are not related in any way to the NRAB and are most certainly not "associated entities." Thus, not even the dubious points that have been made in support of the proposition that the NRAB Divisions are governmental decisionmakers have any application to the airline boards of adjustment, which are private decision making bodies "established by agreement" between the parties. 45 U.S.C. § 184.

The salient point of all this is that Due Process Clause review of arbitration awards by NRAB Divisions implicates difficult – and hitherto unexplored – governmental action issues that can and should be avoided by deciding this case on statutory rather than constitutional grounds.

¹⁴ Section 205 gives the National Mediation Board the authority to create a National Air Transport Adjustment Board to resolve minor disputes in a manner similar to that of the NRAB. 45 U.S.C. § 185. But the NMB has never exercised that authority.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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