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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 *AMICUS CURIAE* BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN, NATIONAL DIVISION, IN SUPPORT OF RESPONDENT

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BRIEF OF *AMICUS CURIAE*[1] BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN, NATIONAL DIVISION, IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The Brotherhood of Locomotive Engineers and Trainmen, National Division ("BLET"), is an employee association and labor union organized under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* BLET is the collective bargaining representative for its 56,000 members in the craft of locomotive engineers on all of the nation's major railroads, Amtrak and many of the regional and short line railroads. The BLET has full jurisdiction over wages and working conditions set forth in all BLET national agreements and of all questions arising thereunder. The BLET's General Committees of Adjustment, like the respondent herein, are subordinate, semi-autonomous entities within the BLET that administer the agreements in effect on their respective railroad properties and handle all disciplinary investigations and grievances of BLET members within their jurisdictions on a day-to-day basis.

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[1] Counsel of record for all parties consented to the filing of this *amicus curiae* brief. No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae,* its members or counsel made a monetary contribution to its preparation or submission.

BLET and its predecessor, the Brotherhood of Locomotive Engineers, have existed since 1863 and participated separately, as here, or joined together with other rail unions, such as the Railway Labor Executives' Association, in the legislative process leading to the RLA in 1926, its amendments in 1934 and the 1966 amendments to Section 3 of the RLA, 45 U.S.C. § 153. BLET similarly has appeared before this Court, separately or jointly, on numerous matters important to rail labor, including arbitration issues arising out of the application of Section 3 before and after the 1966 amendments, such as *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.,* 353 U.S. 30 (1957); *Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad Co.,* 373 U.S. 33 (1963); and *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n,* 491 U.S. 299 (1989).

As stated often by this Court, the major purpose for the 1934 statutory scheme was the promotion of a method to effectively adjust the multitude of "minor" disputes in the railroad industry and to eliminate any cause that would give employees justifiable reason to interrupt interstate and foreign commerce, as they had the right to do at that time under the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.* This purpose is stressed in Section 2, First of the RLA, 45 U.S.C. § 152, First, which imposes a duty upon carriers and their officers and upon the employees "to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any

carrier growing out of any dispute between the carrier and the employees thereof." This Court on numerous occasions has recognized that duty placed upon the employees, and also the concomitant duty upon carriers. This duty represents the *quid pro quo* for rail labor's relinquishing the right to strike during the expansive open-ended term of railroad collective bargaining agreements, *i.e.,* to *adjust* their disputes over the interpretation and application of the existing agreements or, upon failure to reach an adjustment, to submit those disputes to binding arbitration on the merits. *See, e.g., Elgin, Joliet & Eastern Railway Co. v. Burley,* 325 U.S. 711, at 727-28 & n. 23, 24 (1945) ("*Burley I*").

Contrary to the inference that petitioner and its supporting *amici curiae* attempt to convey, the arbitration scheme under Section 3 only applies to railroad employers and their employees. It does not apply to airline employees. *See* Section 201 of the RLA, 45 U.S.C. § 181. Also, it does not apply to workers covered by the Labor Management Relations Act of 1947, 29 U.S.C. § 141. But in contrast to the 1934 situation when strikes over contract interpretation disputes were the norm, since 1934 virtually every dispute arising between railroads and their employees during the term of their collective bargaining agreements has become grist for the arbitration mill. *See Consolidated Rail Corp.*, 491 U.S. at 307 (an asserted contractual right renders the dispute subject to mandatory arbitration unless the claim is "frivolous or obviously insubstantial").

Contrary to the contention of the National Railway Labor Conference ("NRLC") and its fellow *amici*, sustaining the ruling below will not add undue delay to the Section 3 dispute resolution process. The number of pending arbitration cases just prior to the 1966 amendments at the end of fiscal year ("FY") 1965, (6,245), was virtually identical to the number of cases the National Mediation Board ("NMB") reports to be awaiting arbitration today (6,212). *Compare* Thirty-First Annual Report of the National Mediation Board (G.P.O. 1968) at Table 9 and National Mediation Board Annual Performance and Accountability Report FY 2008 *available at* http://www.nmb.gov/documents/nmb_ar08.pdf at 37. More cases regularly are docketed than are decided annually. *Id*. The current situation is comparable to what existed pre-1966 when the nearly identical "backlog of pending disputes [was] immense" and the National Railroad Adjustment Board ("NRAB" or "Board") did not "even come close to maintaining an equilibrium in its backlog by being able to dispose of as many cases as were docketed during the period." *See Brotherhood of Locomotive Engineers v. Louisville & Nashville R.R.*, *supra* at 47, n. 5 (Goldberg, J., dissenting opinion).

The facts in this case confirm that disputes presented to the NRAB are not being decided quickly so as to remove cause for job actions or labor unrest. The railroad discharged or disciplined the five locomotive engineers in 2001 and 2002, their cases were docketed in 2002 and 2003, but the NRAB did

not issue its awards refusing to decide their cases until 2005. Not only does the system take inordinate periods of time to provide oral argument (for the first and only time the employee receives consideration by a non-partisan) and a merits decision, but many railroads, particularly petitioner Union Pacific, have engaged in various tactics in an effort to abolish or weaken the Section 3 process and to eliminate the use of Section 3 arbitration to "adjust" disputes and to "decide them on the merits." *See* 45 U.S.C. § 153, First (i).

Among other things, Union Pacific has attempted to delay the arbitral process by assigning too few labor relations personnel to handle claims and grievances; has refused to timely meet with the employee's representative; has in some instances insisted on party-pay boards if the organization desired expedited handling; has insisted that UP officers, rather than the regularly assigned carrier NRAB representatives, handle UP's cases before the NRAB; and then has interjected previously unraised factors, such as offsets to monetary awards, at the conclusion of the referee hearing without contractual support or evidence. For well over fifty years, railroad efforts to eliminate the benefits of the NRAB Section 3 statutory arbitration process by legislative and agency action have failed and properly so, given that the RLA is the cornerstone of the social compact in the railroad industry.

The lengthy periods that cases languish before the NRAB belies the argument of petitioner that the

federal policy of settling labor disputes expeditiously by arbitration would be undermined if the simple issue in this case had been decided upon the actual evidence presented by respondent. Indeed, the federal policy would best have been served if the NRAB referee had dismissed Union Pacific's objection as untimely, coming as it did some two years after on-property handling had been completed. While Union Pacific and other rail carriers actively have sought to discourage rail employees and their representatives from relying on the NRAB, the catastrophic outcome predicted by the NRLC *amici* will not occur as long as the statutory process is maintained and the employees receive a fair determination on the merits of their claims and grievances.

Furthermore, the position of the petitioner and the railroad industry in this case would, as a practical matter, mean that railroads can effectively circumvent the duties imposed upon them by Section 2, First of the RLA. Rather than allowing grievances to be determined on their merits, as bargained for in the 1934 amendments, rail carriers could use various devices, such as deliberately withholding affirmative or alleged jurisdictional defenses as in this case until the written on-property record had been closed, in order to deny the employees oral argument or a fair hearing on the merits before the arbitration board. Such conduct severely undermines the very system created by the parties and enshrined in law by Congress to prevent interruptions to commerce. Due to the number of disputes submitted to the NRAB

each year and the lack of any effective deterrent to chicanery similar to that employed by petitioner in this case, employees will be denied a determination on the merits and the risk of job actions would then multiply throughout the rail industry. In this case, BLET has a clear interest in assisting its members and other rail employees in protecting their rights under the RLA, which are distinctly different from those employees working for entities other than railroads. BLET hopes to assist the Court in upholding an important and cherished protection for rail workers, as promised in 1934, and the public's interest in the uninterrupted flow of commerce, which is jeopardized by the rail carriers' position before the Court.

SUMMARY OF ARGUMENT

The question before the Court is a very narrow one, which pertains to only a small percentage of workers in the nation – railroad workers with claims being handled pursuant to Section 3 of the RLA. Unlike workers covered by the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.*, and airline employees, who by reason of 45 U.S.C. § 181 are specifically exempt from Section 3, persons working for rail carriers are subject to compulsory arbitration. The labor organizations representing railroad employees agreed to forego their otherwise available right to strike over contract interpretation disputes and to this form of arbitration, because the 1934

amendments to the RLA created and funded the NRAB and provided for a nonpartisan determination on the merits by a neutral appointed by the government and paid with federal funds. *See Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30, 36-39 (1957).

In 1966, Section 3 of the Act was amended to include a subparagraph (q), which permitted any party aggrieved by a NRAB award to have it reviewed on three grounds. Those grounds are failure of the board to comply with the requirements of the Act, failure of the order to conform or confine itself to matters within the scope of the board's jurisdiction, and fraud or corruption by a member of the board making the order.

Consistently, this arbitration scheme was found to require, at a minimum, notice of oral argument before the board, an opportunity to be heard, and a determination on the merits. These requirements may be considered the core requirements of Section 3. They are referred to in the legislative history and decisions of this Court and have been applied in various cases as the requirements that must not be violated by Section 3 arbitration boards.

In this case, involving the dismissal or disciplining of five locomotive engineers, the railroad's partisan board member, immediately prior to the scheduled oral hearing before the board and more than two years after submissions had been filed, requested the board dismiss the claims because

employees' submissions did not state that the claims had been conferenced. The employees' representative affirmed that the cases had been discussed in conferences between the railroad and the union and offered to present evidence of the conferences. The neutral referee gave him the opportunity to present that evidence at a later date. When that day came, however, the referee reversed himself, refused to accept the proffered evidence and authored awards dismissing the claims without addressing their merits, which dismissal was joined by the petitioner's officer who had belatedly raised the issue and sat as a member of the board.

Respondent filed a petition to review under Section 3, First (q), 45 U.S.C. § 153, First (q), seeking to vacate the awards on several grounds, including failure of the board to comply with the requirements of the RLA and due process. The district court dismissed for failure to state a claim for which relief could be granted. On appeal, the Seventh Circuit reinstated the petition and held, among other things, that the board had violated due process in dismissing the complaints without taking evidence, particularly since the railroad did not deny that conferencing had taken place. Petitioner requests the Court hold that constitutional due process does not apply to any decision of any labor arbitration and, therefore, the decision below should be reversed. However, the decision of the Seventh Circuit can be affirmed based upon the board's failure to enter a decision on the merits, a requirement of the Act, or upon statutory, in

addition to Fifth Amendment, due process. As we also show, the writ of certiorari could be dismissed as improvidently granted. Accordingly the Court need not reach and decide the Constitutional issue that the carriers claim needs to be decided.

Although the Court decides constitutional issues only when a case cannot be decided on other grounds, BLET supports the proposition that the decision below also is sustainable on constitutional due process if necessary. Contrary to the implication of petitioner, this Court did not hold in *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89 (1978), that a decision of the NRAB could not be vacated for failure to grant the aggrieved party due process. But even those federal circuit courts of appeal that do not recognize due process as a permissible challenge consider the three grounds for review set forth in Section 3, First (p), 45 U.S.C. § 153, and (q) as establishing core due process rights, such as the right of notice and participation in the board's proceedings. Thus, due process issues are regularly decided under the rubric of the three statutory grounds.

The *amici* rail and aviation associations exaggerate considerably the effect of recognizing constitutional review of NRAB decisions. From the thousands of RLA adjustment board decisions rendered since 1966, there have been fewer than two dozen reported due process challenges, and less than a handful have succeeded. Furthermore, virtually all have come in the context of a board's treatment of an individual's claim. These are hardly "*destabilizing*

minor disputes." NRLC Brief at 5 (emphasis supplied). The industry points to none that has threatened an interruption to commerce, which is precisely the destabilization RLA Section 3 is intended to prevent. On the other hand, the Court's purpose in *Sheehan* was to ensure that the resolution of minor disputes not be taken away from the NRAB and placed in the courts. Due process review is not inconsistent with that purpose. Upon a finding that due process is violated, a federal court's appropriate response is to remand the dispute to the NRAB to correct the defect and resolve the matter on its merits. The rulings of those courts that recognize due process review and which have found violations have done just that. *See, e.g., Hall v. Eastern Airlines,* 511 F.2d 663 (5th Cir. 1975); *Hornsby v. Dobard*, 291 F.2d 483 (5th Cir. 1961). Those few district courts that injected themselves into the merits of the particular contract dispute that brought the parties to the Board in the first place were reversed on appeal, as happened in *Sheehan*.

Even considering all of this, only a very small group of workers is subject to the NRAB's jurisdiction, process and procedures. The situation before the Court is a unique one involving a few employees; there is little likelihood that it will happen again. Pet. App. 22a ("This case presented a unique situation which we doubt will come before a court again. . . ."). Since the case can be disposed of on non-constitutional grounds, the decision below should be affirmed or

alternatively the writ of certiorari should be dismissed as improvidently granted.

ARGUMENT

I. THE DECISION BELOW SHOULD BE AFFIRMED ON THE GROUND THAT THE BOARD VIOLATED THE REQUIREMENT OF THE RAILWAY LABOR ACT THAT THE RAILROAD EMPLOYEE BE RENDERED AN AWARD ON THE MERITS.

Amicus BLET agrees with the position taken by the *amicus curiae* American Federation of Labor – Congress of Industrial Organizations that the decision of the Court of Appeals for the Seventh Circuit should be affirmed on the ground that the dismissals of the five claims by the NRAB's First Division, the exclusive NRAB forum for adjusting minor disputes involving train and engine service employees, failed to comply with the requirements of the RLA. To the extent that requirement is a substantive one for rail employees subject to and invoking Section 3 arbitration, however, BLET submits that it does not reach any needed discussion of statutory or constitutional due process. In fact, the factual situation presented here is a unique case that should never have arisen and in all likelihood will never arise again and, therefore, is not an appropriate vehicle for deciding the issue that petitioner Union Pacific and the NRLC *amici curiae* attempt to conjure from the court of appeals ruling.

A great deal of time and paper have been consumed in this case on stressing that there are only three grounds for review and that those grounds are "the narrowest known in the law." *See* Pet. Brief at 14, 25, 53; NRLC Brief at 12. Those specific reasons are: (1) "failure of the division to comply with the requirements of this chapter," (2) "failure of the order to conform or confine itself, to matters within the scope of the division's jurisdiction," and (3) "fraud or corruption by a member of the division making the order." *See* 45 U.S.C. § 153, First (q); *also see Sheehan*, *supra*, at 94. However, overlooked is the breadth of the ground that the arbitration proceedings must conform to the requirements of the RLA.

According to Petitioner (Brief at 34), the RLA has but three requirements the NRAB must follow:

> "[p]arties may be heard either in person, by counsel, or by representatives, as they respectively elect"; ensure[ ] an equal number of labor and management representatives, with ties to be broken by a neutral referee; and direct[ ] that . . . "[a] copy of the awards shall be furnished to the respective parties." *See* 45 U.S.C. §153, First (a), (j), (l), (m). The RLA thus provides the core due process requirements of notice, an opportunity to be heard, and a neutral decisionmaker.

But neither this Court nor any appellate court has read the requirements of the RLA as narrowly as petitioner contends.

"Rights of notice, hearing and participation or representation are given." *See Burley I* at 727. These rights always existed under the voluntary arbitration scheme before 1934 and continue to be recognized by the Act. 45 U.S.C. § 153, Second. By 1934, however, there were thousands of undecided grievances, and the employees could strike over them in various contexts. Thus, the National Railroad "Adjustment Board was created to remove the settlement of grievances from this stagnating process and bring them within a general and inclusive plan of decision." *Id.*, 727-28 (footnote omitted). The employees and their organizations gave up the right to strike in consideration of a government sponsored and paid National Railroad Adjustment Board, which would resolve grievances on the merits with the involvement of a federally-paid neutral referee when the parties could not resolve them on their own. The testimony in this regard of Mr. George Harrison, head of the Railway Labor Executives' Association, before the Senate Interstate Commerce Committee has often been relied on by this Court:

> *These railway labor organizations have always opposed compulsory determination of their controversies.* We have lived a long time and got a lot of experience, and we know that these minor cases that develop out of contracts that we make freely, and * * * *we are now ready to concede that we can risk having our grievances go to a board and get them determined, and that is a contribution that these organizations are willing to make,*

> * * * if we are going to get a hodgepodge arrangement by law, then we don't want to give up that right because we feel that we will get a measure of justice by this machinery that we suggest here.

Burley I at n. 24 (emphasis in original); *see also Union Pacific R. Co. v. Price*, 360 U.S. 601, 613 (1959); *Brotherhood of R.R. Trainmen v. Chi. River and Indiana R. Co.*, 353 U.S. 30, 38-39 (1957). That this determination must be on the merits of a grievance to give finality to a NRAB award was further underscored in *Gunther v. San Diego & Arizona Eastern Railway Co.*, 382 U.S. 257, 264 (1965).

Similarly, the Sixth Circuit, one of the lower courts that rejects due process as a ground for review of a RLA arbitration award, in *Jones v. St. Louis – San Francisco Railway Co.*, 728 F.2d 257 (6th Cir. 1984), set aside an award on the basis that the award violated a requirement of the RLA when two of the members of the board making the decision had replaced the members who had heard the case. The decision was based upon the finding that Section 3, First (j) and (n), 45 U.S.C. § 153, First (j), (n), entitle the parties to be heard by a board and that board's members "must hear the parties and participate in the decision-making process before rendering an award." *Id.*, at 262. That situation is no different than the instant matter where the neutral member refused to hear the merits of the case. Stating the standard somewhat differently in *Kinross v. Utah Railway Co.,* 362 F.3d 658, 662 n. 3 (10th Cir. 2004), the Tenth

Circuit, which also has rejected the due process ground of review, said relative to Section 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." Citing this Court's decision in *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), the court emphasized that "a tribunal must ensure 'an opportunity to be heard at a meaningful time and in a meaningful manner,'" which is encompassed within the three grounds set forth in the Act. *Id*. Here, the Board violated the RLA's requirement by dismissing the claims solely on the oral statement of Union Pacific's board member in an executive session. That extra-record statement was contrary to the documentary evidence the referee permitted the employees' representative to produce and then refused to consider or place in the record. One inference that may be drawn from this sequence is that the railroad's representative on the board had somehow persuaded the referee that the employees' representative would be unable to produce evidence of conferencing and was forced to concoct a different, "technical" ground when the evidence was produced and it proved that conferencing had in fact occurred.

In any event, simply dismissing the employees' cases without consideration of any facts and evidence violates one of the four fundamental requisites of the RLA: a resolution of the minor dispute upon the merits. That requisite was not fulfilled in this case.

The judgment of the court of appeals should be affirmed.

II. WHETHER STATED IN TERMS OF DUE PROCESS, PUBLIC POLICY OR OTHER NON-STATUTORY GROUNDS, RAILROAD LABOR ARBITRATION AWARDS ARE OFTEN CHALLENGED AND REVIEWED ON BASES OTHER THAN THOSE SPECIFICALLY LISTED IN SECTION 3 OF THE ACT.

Although BLET submits that the decision below fully conforms to review under Section 3 of the RLA and, therefore, is not dependent on the viability of Constitutional due process for affirmance, it is significant to note that railroad arbitration awards have been and continue to be challenged on various non-statutory grounds. *See*, *e.g., The Railway Labor Act* (Michael E. Abram, *et al.*, eds., ABA Section of Labor and Employment Law (2d ed. 2005), at 432-37. One non-statutory challenge that is a particular favorite of the petitioner is public policy. In *Union Pacific Railroad Co. v. United Transportation Union,* 3 F.3d 255 (8th Cir. 1993), *cert. denied*, 510 U.S. 1072 (1994), the Railroad successfully petitioned the district court to review a Section 3 arbitration award reinstating an employee, who had been found to have used drugs, on the basis that the award violated public policy against drug use by persons working in safety sensitive jobs. The Court of Appeals for the Eighth Circuit agreed. A similar situation arose

before the same court in *Union Pacific Railroad Company v. United Transportation Union*, 23 F.3d 1397 (1994). In that case, however, the district court concluded that it lacked jurisdiction to review the award on public policy grounds. Nevertheless, and notwithstanding this Court's decision in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), the appellate court reversed and remanded the case for further proceedings so the district court could engage in non-statutory public policy review.

The professed fidelity of some of the railroad *amici* to the narrowest possible reading of Section 3 First (q)'s statutory bases for judicial review also is of recent vintage, as they, too, have launched non-statutory public policy challenges to RLA arbitration awards. *See, e.g., Atchison, Topeka and Santa Fe Railway Co. v. United Transportation Union,* 3 F.3d 355 (5th Cir. 1999) (district court denial of public policy challenge affirmed); *BNSF Railway Co. v. Brotherhood of Locomotive Engineers and Trainmen*, 524 F.Supp.2d 818 (N.D.Tex. 2007) (vacating NRAB award on public policy grounds).

Unlike due process review, public policy challenges by employers have become commonplace, even though that doctrine was narrowed by the Court's decision in *Eastern Associated Coal Corp. v. United Mine Workers,* 531 U.S. 57 (2000). Due to the broad sweep and nebulous nature of the term "public policy," this exception to the three listed grounds for review in the Act would just as easily encompass the

term "due process" as argued by the respondent and found to have been violated by the Seventh Circuit when it considered the matter below. Accordingly, we submit that the rationale for allowing public policy review applies equally to considering whether an employee's fundamental right to receive a fair hearing before the NRAB is implicated, and on that basis, too, the decision below should be affirmed.

III. BECAUSE THIS IS A SIMPLE CASE THAT HAS NOT FREQUENTLY OCCURRED, PRESENTS A SIMPLE QUESTION NOT REQUIRING A CONSTITUTIONAL ANSWER, AND IS UNLIKELY TO REOCCUR, THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

As shown by the NRLC (Brief 6, n. 3), arbitration is sought in over 6,000 new railroad minor disputes annually. Contrary to the shrill outcry from the NRLC *amici*[2] about due process challenges dominating railroad labor arbitrations, there are very few reported cases asserting due process violations over the past decade. *See The Railway Labor Act* at 433-34, as supplemented in 2009 at 115-17. In fact, the present challenge arose because Union Pacific sat on its hands for over two years and then sandbagged the

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[2] In fact, the NRLC *amici* urge the Court to engage in judicial activism by arguing that the "questions presented in this case should not be considered solely in the narrow context of the particular facts of the current dispute." NRLC Brief at 4.

employees' representative on the day of the oral argument. If the respondent had merely stated in its submission, "All on-property appeals have taken place and the claim has been conferenced," the referee would have been forced to reject the railroad's untimely argument.

The record indicates that the referee looked at NRAB Rules from 1934 and a few decisions from divisions other than the First Division, and then decided that he was required to dismiss the claims because the written submissions before him were silent on whether they had been conferenced. In handling the matter this way, however, the referee overlooked the NRAB's own Instructions Sheet in which parties are encouraged to refrain from proving conferencing if the issue is not in dispute. NRAB Instructions Sheet (July 1, 2003), *available at* www.nmb.gov/arbitration/nrab-instruc.pdf, p. 5 ("Representatives may wish to omit documents that are unimportant and/or irrelevant to the disposition of their dispute; for example, letters granting time limit extension (assuming time limits are not an issue in the dispute), letters requesting a conference (assuming that is not an issue in the dispute)."). If inclusion of proof of conferencing in a written submission were jurisdictional, as the referee found here, the NRAB hardly would be advising the parties that they may freely dispense with it.

In sum, this case presents a highly unusual situation that never before occurred before the First Division of the NRAB; it has not happened since

these cases were before the Division in 2005 and should not happen in the future.[3] Moreover, if the employees' due process claim is treated, as we suggest it should be, as a "denial of a right guaranteed in Section 3 of the RLA" and "a failure of a Board to comply with the Act," as such challenges are or should be classified judicially, there would be no expansion of "judicial review of RLA awards," contrary to the claims by some. *The Railway Labor Act* at 433-34. In this way, most due process violations can be addressed without requiring Constitutional analysis.

Once the petitioner's improper and unjustified characterization of this case, as only one of a veritable multitude that raise Constitutional due process issues, is removed and the case is correctly viewed as concerning simply whether the employees were denied a right already contained in the RLA, it is clear that this case is not the appropriate vehicle for the broad ruling sought by petitioner and its supporting *amici*, many of whom are not even eligible to participate in NRAB proceedings.

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[3] As a result of this case, BLET has instructed its subordinate bodies, out of an abundance of caution, to affirm in all their submissions that all appeals and conferencing have been held. We are unaware of any railroad raising a conference-based challenge since that time.

IV. SHOULD THE COURT REACH THE CONSTITUTIONAL QUESTION, IT SHOULD AFFIRM THE SEVENTH CIRCUIT'S RULING THAT THE EMPLOYEES WERE DENIED DUE PROCESS.

BLET was one of the national labor organizations involved in the legislative process when the NRAB was created in 1934. As explained by this Court on numerous occasions, before the creation of the Board, the railroad industry faced a plethora of unresolved contract interpretation disputes that frequently boiled over into strikes that interrupted the flow of interstate commerce, a consequence that Congress deemed inimical to the public interest. The Board was created as part of a legislative response to this national problem. Congress's solution was to eliminate the right to strike over such disputes in exchange for the creation of a mandatory minor dispute resolution process. Section 3, First of the Act is "the source of the power and authority by which any private rights are lost or sacrificed." *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 232 (1956). The enactment of Section 3, First authorizing the NRAB to resolve contract disputes, and requiring that such disputes be presented to that Board in the absence of voluntary agreement to do otherwise, "is the governmental action on which the Constitution operates." *Id*.

The NRAB is embodied in a federal entity, housed in government offices, staffed by government employees, assisted by government selected and paid

referees, empowered to promulgate binding rules that have been embodied in the Code of Federal Regulations, and imbued with the authority to render final and binding decisions with compulsive orders to resolve those minor disputes in order to keep interstate rail traffic flowing freely. *See* 45 U.S.C. § 153, First, (g) and (l) (referee selection and payments); (m) (binding nature of awards); (o) (orders of compliance); (t) (federal offices); (u) (federally-paid employees); (v) (rulemaking); and (w) (accounting and reporting); *see also* www.nmb.gov/arbitration. The actions of the Board plainly are governmental actions for constitutional purposes.[4] To paraphrase Justice Clark in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), "The State has so far insinuated itself into [the resolution of "minor disputes"] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the [Fifth] Amendment."

Here the employees represented by the respondent General Committee were deprived of the opportunity to obtain a ruling on the merits of their claims that they had been wrongly dismissed or disciplined by the railroad due to the interjection *sua sponte* by a Carrier partisan member of the Board of a possible procedural misstep on the Committee's part,

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[4] Indeed, Petitioner concedes that "state action technically exists in this setting." *See* Pet. Brief at 31.

something the Union Pacific itself had never raised. When confronted with the Carrier Board member's suggestion that a pre-arbitration conference requirement may not have been satisfied, the Committee orally stated that it had. Then, with the blessing of the referee, the Committee presented documentary evidence to support its position that every procedural requirement had been satisfied. Startlingly, when confronted with the proof, the referee refused to consider it and, joined by the Carrier partisan on the Board, dismissed the cases as procedurally defective – not because conferences had not been proven, but because the proof had not been included in the written submissions, even though there was no reason to include it in the submissions because the fact of conferencing had never been in dispute. A starker denial of the fundamental right to a hearing on the merits can hardly be imagined.

CONCLUSION

For the reasons stated above, the *amicus curiae* respectfully requests that the court dismiss the writ of certiorari as improvidently granted, or in the alternative hold that the ruling below should be affirmed.

Respectfully submitted,

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