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 *AMICI CURIAE* NATIONAL RAILWAY LABOR CONFERENCE, ASSOCIATION OF AMERICAN RAILROADS, AND AIRLINE INDUSTRIAL RELATIONS CONFERENCE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST [1]

The *amici* filed a brief in support of certiorari in this case, and now file the attached brief to address the merits of the important questions presented. The

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

resolution of these questions will affect not only the parties, but the entire railroad and airline industries in the United States – the two industries whose labor relations are regulated by the Railway Labor Act ("RLA" or "Act"). The *amici* represent the collective views of the Nation's major rail and air carriers, and their members have a strong interest in protecting the efficacy of the Act's compulsory framework for the resolution of labor disputes, and hence the stability of labor relations in industries that Congress has deemed critical to the national economy. Pursuant to Supreme Court Rule 37.3(a), the *amici* file this brief with consent from the Respondent, Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Region, and the Petitioner, Union Pacific Railroad Company. Letters of consent have been lodged with the Clerk of the Court.

The National Railway Labor Conference ("NLRC") is an unincorporated association whose membership includes all of the Class I freight railroads in the United States and many smaller lines. The NRLC, through its National Carriers' Conference Committee, represents most of its members in multi-employer collective bargaining under the RLA. It also represents the industry on labor-related issues (including matters related to grievance handling and arbitration) before congressional committees, executive branch agencies, and the courts. The NRLC has filed briefs as *amicus curiae* in numerous cases before this Court, including *Brown v. Pro-Football, Inc.*, 518 U.S. 231 (1996), and *Conrail v. RLEA*, 491 U.S. 299 (1989).

The Association of American Railroads ("AAR") is a trade association whose membership includes freight

railroads that operate 77 percent of the line-haul mileage, employ 92 percent of the workers, and account for 94 percent of the freight revenue of all railroads in the United States. Members also include passenger railroads that operate intercity passenger trains and provide commuter rail service. AAR represents its members in connection with a wide variety of administrative, legislative, and judicial matters. AAR has submitted *amicus* briefs in this Court in numerous cases, including *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004), *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003), and *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344 (2000).

The Airline Industrial Relations Conference ("AIRCON") was formed in 1971 as a voluntary association of various passenger and air cargo carriers. AIRCON's purpose is to facilitate the exchange of ideas and information concerning personnel and labor relations issues and to represent member carriers, who collectively operate in 49 states, concerning legislative, judicial, and administrative matters. AIRCON has submitted *amicus* briefs in this Court in numerous cases, including *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), *Eastern Associated Coal Corp. v. United Mine Workers, Dist. 17*, 531 U.S. 57 (2000), *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426 (1989), and *Northwest Airlines, Inc. v. Air Line Pilots Ass'n*, 486 U.S. 1014 (1988).

Because the *amici* represent virtually all of the major rail and air carriers covered by the Railway Labor Act, the views expressed in this brief will assist the Court in understanding the scope and impact of the issues presented by this case. The

court below has inappropriately expanded the bases for judicial review of arbitration awards under the Railway Labor Act, thereby threatening to undermine the finality of the arbitral process for resolving employee grievances. This presents a great concern to the *amici*. The *amici* therefore urge the Court to reverse the Seventh Circuit's decision.

SUMMARY OF THE ARGUMENT

The questions presented in this case should not be considered solely in the narrow context of the particular facts of the current dispute. Rather, the Court should analyze these questions against the background of the overriding goal, clearly expressed by Congress in the Railway Labor Act ("RLA" or "Act"), of achieving the prompt and orderly resolution of labor disputes in the airline and railroad industries, and thereby avoiding strikes and other interruptions to commerce. 45 U.S.C. § 151a (2006).

This statutory goal depends in large part on the finality that attends the Act's procedures for resolving the many thousands of grievances that arise in the airline and railroad industries each year. The various boards of adjustment provided for in the RLA are established and administered by labor and management as an adjunct to the collective bargaining process in order to resolve "minor disputes" concerning the interpretation or application of the parties' agreements.[2] Awards are made by the partisan

[2] The distinction between "major disputes" and "minor disputes" under the RLA is that major disputes involve the formation of collective bargaining agreements, whereas minor disputes involve grievances or other disputes concerning the interpretation of an existing collective bargaining agreement. *See Consol. Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299,

members of the board who are selected by the parties, together with a neutral arbitrator who breaks deadlocks. The award is thus crafted by the advocates and their board members who are familiar with the parties' agreement and experienced in resolving labor disputes in the airline and railroad industries.

The decision below is inconsistent with the language, structure, and purpose of the RLA because it undermines the practical finality of adjustment board awards by expanding the bases for judicial review and prolonging the resolution of destabilizing minor disputes. Furthermore, the decision below is inconsistent with the broader federal policy favoring final and binding arbitration of all disputes subject to statutory or contractual arbitration provisions. Procedural issues necessarily arise in these disputes, but there is no cause for courts to apply stricter scrutiny to an arbitrator's resolution of procedural issues than to the merits of the award itself. Indeed, it is often difficult, if not impossible, to separate an arbitrator's decision on procedural issues from the arbitrator's award on the merits of the case.

"Due process" challenges to arbitration awards under the RLA invite legal complexity and protracted litigation into a process that is, by congressional design, intended to be efficient, practical, and sensitive to the peculiar customs and practices of the airline and railroad industries. Congress included procedural safeguards in the arbitral process set forth in Section 3 First of the RLA, 45 U.S.C. § 153 First, and specified the narrow grounds upon which an arbitration award may be challenged. Superim-

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302 (1989) ("[M]ajor disputes seek to create contractual rights, minor disputes to enforce them.").

posing an additional, non-statutory basis for due process review, as in the court below, interferes with this congressional design. Accordingly, the *amici* urge the Court to reverse the Seventh Circuit's decision and hold that the finality of an adjustment board award may not be challenged on independent due process grounds, or, in any event, on the procedural grounds relied upon by the court below.

ARGUMENT

I. THE RLA REFLECTS A STRONG LABOR POLICY FAVORING ARBITRATION, AND FINALITY OF ARBITRATION AWARDS IS AN INTEGRAL ASPECT OF THAT POLICY.

Stability of labor-management relations in the airline and railroad industries is achieved, on a day-to-day basis, through final and binding arbitration pursuant to the Railway Labor Act. Thousands of cases are submitted for arbitration each year in the railroad industry, and many more are arbitrated in the airline industry.[3] The particular forum for arbi-

[3] The National Mediation Board reported that it received 6,056 new arbitration cases in the railroad industry during fiscal year 2008. *See* National Mediation Board, *Annual Performance and Accountability Report* 71 (2008). In the airline industry, the number of arbitration cases is not publicly reported, but in the last reported study it was estimated that more than 15,000 grievances were filed during 1988 and about 50% were expected to progress to arbitration. It was also estimated that 8,000 cases were decided by airline system boards of adjustment in 1988. *See* Dana Eischen & Mark Kahn, *Grievance Handling and Arbitration in the Airlines: Can they be Improved*, in *Labor and Employment Dispute Resolution Under the Railway Labor Act: Airlines and Railroads, Society of Professionals in Dispute Resolution* 49-50 (1990). *See generally*

tration may vary depending on the industry and type of case, but the common feature in every case is that the decision of the board is to be treated as final and binding. 45 U.S.C. § 153 First (m) (awards of the National Railroad Adjustment Board "shall be final and binding"); § 153 Second (awards of system, group, or regional boards "shall be final and binding").

A. The Public Policy Favoring Final and Binding Arbitration Is Reflected Not Only in the Language of the Statute, But Also Through the Legislative History of the Act.

The statutory requirement of final and binding arbitration under the RLA evolved out of necessity and is the product of the parties' experience under prior legislation. Under the original version of the RLA as enacted in 1926, Congress intended that so-called "minor disputes" (*i.e.*, disputes concerning the interpretation or application of existing collective bargaining agreements) would be resolved through arbitration. It was left to the parties to voluntarily establish the arbitration boards. *See Slocum v. Delaware, L. & W.R. Co.*, 339 U.S. 239, 242 (1950). As this Court has recounted, that original system of voluntary arbitration proved to be unworkable and failed to achieve the stability of labor relations that Congress had intended:

> The result was a complete breakdown in the practical working of the machinery. Grievances accumulated and stagnated until the mass assumed the proportions of a major dispute. Sev-

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Cleared for Takeoff (McKelvey ed. 1988) (citing Part 6, Handling of Minor Disputes).

> eral organizations took strike ballots and thus threatened to interrupt traffic . . . .

Elgin, Joliet & E. Ry. Co. v. Burley, 325 U.S. 711, 726 (1945).

In 1934, Congress determined that it was necessary to amend the Act in order to provide for compulsory arbitration through a National Railroad Adjustment Board ("NRAB"). *See Slocum*, 339 U.S. at 243; *Burley*, 325 U.S. at 726. Although the unions were reluctant to abandon their asserted right to strike over unresolved minor disputes, they supported the system of compulsory and final arbitration in the 1934 amendments. *See Bhd. of R.R. Trainmen v. Chicago River & Ind. R.R. Co.*, 353 U.S. 30, 37-39 (1957). The chief spokesman for the railway labor organizations testified that "we are willing to take our chances with this national board because we believe, out of our experience, that the national board is the best and most efficient method of getting a determination of these many controversies . . . ." *Id.* at 38 (quoting *Hearings Before S. Comm. on Interstate Commerce on S.3266*, 73d Cong. 33, 35 (1934)).

The 1934 amendments did not, however, dispense with the process of direct negotiations (*i.e.*, "conferencing") between the parties as a means of resolving minor disputes. *See Burley*, 325 U.S. at 728 ("The aim was not to dispense with agreement. It was to add decision where agreement fails and thus to safeguard the public as well as private interests against the harmful effects of the preexisting scheme."). Accordingly, the Act provides that a dispute may be submitted to the NRAB only after the parties have failed to resolve it through conferencing. Section 2 Second provides that "[a]ll disputes . . . 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 (emphasis added). Further, Section 3 First (i) provides that grievances "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred . . . to the appropriate division of the Adjustment Board . . . ." 45 U.S.C. § 153 First (i); *see also Burley*, 325 U.S. at 727 n.23 (noting that Section 3 First (i) "expressly conditions the right to move from negotiation into proceedings before the Adjustment Board upon 'failing to reach an adjustment in this manner,' i.e., by negotiation").

The possibility of a negotiated compromise continues even after the dispute has been submitted to the NRAB. The NRAB consists of partisan representatives of both labor and management, who attempt to resolve the dispute and may issue an award by agreement or majority vote. 45 U.S.C. § 153 First (n). In the event of a deadlock among the partisan members of the Board, a neutral "referee" is appointed to render an award. 45 U.S.C. § 153 First (*l*).

This power to appoint a neutral referee to break deadlocks was a critical improvement over the pre-1934 Act. *See Chicago River*, 353 U.S. at 35-36 ("Many thousands of these (minor) disputes have been considered by boards established under the [1926] Railway Labor Act; but the boards have been unable to reach a majority decision, and so the proceedings have been deadlocked." (quoting H.R. Rep. No. 73-1944, at 3 (1934))). As this Court has

found, the legislative history of the 1934 amendments shows that all parties understood that the award of the neutral referee would be treated as final and binding:

> The employees' representatives made it clear that, if such a statutory scheme were provided, the employees would accept the awards as to disputes processed through the scheme as *final settlements of those disputes which were not to be raised again*.

Union Pac. R.R. Co. v. Price, 360 U.S. 601, 614 (1959) (emphasis added).

When the RLA was extended to the airline industry in 1936, Congress replicated this arbitral framework for the resolution of minor disputes, but it did not create a single, national board like the NRAB. Instead, Congress obligated the parties to create boards of adjustment on an individual carrier (*i.e.*, "system") basis or on a group or regional basis and decide disputes in the "usual manner," as provided in Section 3 First (i). 45 U.S.C. § 184. *See also Int'l Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 686 (1963). In the event it became necessary to create a national adjustment board in the airline industry, Congress authorized the National Mediation Board ("NMB") to establish a National Air Transport Adjustment Board that would have the same structure and power as the NRAB. 45 U.S.C. § 185. To date, the NMB has not exercised its authority to create such a board, so minor disputes in the airline industry continue to be resolved through system boards that are typically established on an individual carrier and union basis. *See The Railway Labor Act* 416-17 (Michael E. Abram et al. eds., ABA Section of Labor and Employment Law, 2d ed. 2005).

Although the forum for arbitration of minor disputes may be somewhat different in the airline industry, this Court has held that the principle of finality is a constant and essential element of the congressional design:

> There is no reason to believe that in 1936 Congress discarded for an entire industry an element essential to a reliable system of settling disputes under existing contracts or that it contemplated awards by adjustment boards the enforceability of which depended entirely upon the desires of the parties or upon state statutes or court decisions.

Central Airlines, 372 U.S. at 695. Were it otherwise, unresolved minor disputes would threaten the stability of labor relations in the airline industry, just as they did in the railroad industry prior to 1934. *See id.* at 694-95 (holding that the finality to be accorded to airline system board awards should be "judged against the Act and its purposes and enforced or invalidated in a fashion consistent with the statutory scheme"). Accordingly, the law regarding the finality of adjustment board awards should be developed with due regard for the impact of that law on both industries that are regulated by the RLA.

B. *Sheehan* Recognizes that Finality Is Essential to the Proper Functioning of the Adjustment Board Process.

In *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89 (1978), this Court recognized that, under the Act, awards of an adjustment board are to be treated as final and judicial review is to be extraordinarily limited. Until 1966, the Act did not contain any explicit provision for judicial review of an adjustment board award except for collateral review in the con-

text of a petition to enforce a monetary award under Section 3 First (p). *See* Pub. L. No. 73-442, 48 Stat. 1185, 1191-92 (1934); *Union Pac. R.R. Co. v. Price*, 360 U.S. 601, 614-16 (1959). The 1966 amendments removed the provision that allowed carriers to collaterally attack monetary awards and permitted both sides to seek judicial review of an award. However, such review was extremely narrow. Congress specified only three limited bases for review in Section 3 First (q): (1) failure of the Adjustment Board to comply with the requirements of the Railway Labor Act; (2) failure of the Adjustment Board to conform, or confine itself, to matters within the scope of its jurisdiction; and (3) fraud or corruption by a Board member. 45 U.S.C. § 153 First (q).

In *Sheehan*, this Court held that these three bases for judicial review must be narrowly construed because "[t]he effectiveness of the Adjustment Board in fulfilling its task depends on the finality of its determinations." *Sheehan*, 439 U.S. at 94. If the parties were permitted more leeway to challenge adjustment board awards in federal court, minor disputes would continue to fester, as they did prior to the 1934 amendments. Congress clearly sought to avoid such an outcome in the RLA. Therefore, *Sheehan* wisely recognizes that in order to serve the fundamental purpose of the Act – promoting stable labor relations in the airline and railroad industries – it is "essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts." *Id.*

C. RLA Adjustment Boards Have Special Industry Expertise and Are Intimately Familiar with the Practices and Procedures That Have Developed Through Decades of Experience.

The various adjustment boards that exist in the airline and railroad industries are uniquely qualified to resolve the multitude of labor disputes that arise on a daily basis in these industries. They are not detached outsiders who decide grievances with an eye only on the facts and circumstances of the particular case. Rather, they are typically longstanding, bipartisan boards composed of experienced representatives of management and labor who are intimately familiar with the parties' written and unwritten customs, practices, and precedents. As the RLA provides, these bipartisan boards seek the opinion of a neutral when they are not able to reach a decision themselves. *See* 45 U.S.C. § 153 First (*l*). The neutral member is drawn from a limited roster of arbitrators who generally have years of experience with the parties and are likewise familiar with their customs, practices, and precedents. *See* National Mediation Board, *Annual Performance and Accountability Report* 65-66 (2008) (listing the current partisan members of the NRAB and the roster of available referees for each division).

The NRAB is the paradigmatic adjustment board under the RLA. Its bipartisan structure has its roots in the Director General's operation of the railroads during World War I, when disputes were resolved through boards of adjustment composed of equal numbers of management and labor representatives. H. D. Wolf, *The Railroad Labor Board* 47-57 (1927). *See also* P. Harvey Middleton, *Railways and Orga-*

nized Labor 63 (1941). As noted by arbitrator and scholar Dean Lloyd Garrison, the NRAB is "a unique administrative agency" that reflected the customs and traditions of the railroad industry. Lloyd K. Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567 (1937). Indeed, because the NRAB is composed of representatives of the parties, it is not subject to the rulemaking provisions of the Administrative Procedure Act. *See Jones v. Seaboard Sys. R.R.*, 783 F.2d 639, 642 (6th Cir. 1986) ("The Administrative Procedure Act exempts from its coverage 'agencies composed of representatives of the parties' . . . [and] [t]he NRAB is such an agency . . . .").

The importance of specialized industry and craft experience is reflected in the structure of the NRAB, which is subdivided into four independent divisions with jurisdiction over disputes involving certain crafts and classes of employees. 45 U.S.C. § 153 First (h); John W. Gohmann, *Arbitration and Representation: Applications in Air and Rail Labor Relations* 91-92 (1981). The First Division has jurisdiction over disputes involving "train- and yard-service employees," such as the grievants below. 45 U.S.C. § 153 First (h) (2006); 29 C.F.R. § 301.4(a) (2008). The Second Division exercises jurisdiction over disputes involving the "shop crafts" (*e.g.*, machinists, boilermakers, sheet metal workers, and electrical workers). 45 U.S.C. § 153 First (h); 29 C.F.R. § 301.4(b). The Third Division maintains jurisdiction over disputes involving other non-operating crafts, such as dispatchers, maintenance-of-way employees, and signal workers. 45 U.S.C. § 153 First (h); 29 C.F.R. § 301.4(c). Finally, the Fourth Division has jurisdiction over disputes involving categories of employees not covered

by the other three divisions. 45 U.S.C. § 153 First (h); 29 C.F.R. § 301.4(d).

This Court has recognized that the Board members' specialized experience and familiarity with the parties makes the NRAB uniquely qualified to resolve labor disputes in the railroad industry. *See Gunther v. San Diego & Ariz. E. Ry. Co.*, 382 U.S. 257, 261 (1965) ("The Railway Adjustment Board, composed equally of representatives of management and labor is peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world. Its membership is in daily contact with workers and employers, and knows the industry's language, customs, and practices."); *Slocum v. Delaware, L. & W.R. Co.*, 339 U.S. 239, 243 (1950) ("The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications.").

Although the decisions of the NRAB are not considered to be binding precedent, they are often cited by the Board in subsequent cases on the same or related issues. *See Slocum*, 339 U.S. at 243. These organic lines of authority exist on issues of Board procedure as well. Indeed, in the complex world of labor relations, issues of substance and procedure are often inextricably intertwined. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 559 (1964) (regarding "procedural disagreements not as separate disputes but as aspects of the dispute which called the grievance procedures into play"). Therefore, individual Board decisions, like the decisions at issue in this case, should not be viewed in isolation, but rather as part of a broader pattern of decision-making. The

Board's decisions in this case have been incorrectly characterized as creating a "new" rule. In fact, the Board applied and built upon longstanding rules and arbitral authority. Pet.App.65a-107a.

The NRAB has served as a model for the various other kinds of adjustment boards that have been authorized by the RLA and utilized by the parties to resolve minor disputes under the RLA. These include the system boards that are prevalent in the airline industry, as well as the "system, group, or regional boards" (so-called SBAs) and "special boards" (so-called public law boards) that are established on an ad hoc basis in the railroad industry. 45 U.S.C. § 153 Second. Like the NRAB, these boards are bipartisan, typically consisting of at least two partisan members (one appointed by each side) and a neutral member to resolve deadlocks. *See The Railway Labor Act* 410-12, 417-18 (Michael E. Abram et al. eds., ABA Section of Labor and Employment Law, 2d ed. 2005). Unlike the NRAB, however, these system boards, public law boards, and SBAs are creatures of the parties' agreements. *See* John W. Gohmann, *Arbitration and Representation: Applications in Air and Rail Labor Relations* 91, 96 (1981). System boards and SBAs, while authorized by the RLA, are established only by mutual agreement, whereas a public law board may be established upon written request by either party. *Id.* at 91.[4] The jurisdictional and procedural rules

[4] Congress authorized the creation of public law boards in the 1966 amendments to the RLA in an effort to eliminate the backlog of pending grievances at the NRAB. Pub. L. No. 89-456, 80 Stat. 208 (1966); Benjamin Aaron et al., *The Railway Labor Act at Fifty* 229 (1977). They are called "public law boards" because they were authorized by the Public Law that is now codified in §3 Second (second paragraph). *See The Railway*

applied by these boards are defined by the parties' agreement. *See The Railway Labor Act* at 411-12, 414-15, 418.[5]

Given the different source of the jurisdiction and procedures of these various other boards, the concept of constitutional due process cannot be readily applied to them. Furthermore, the exacting standard of due process review applied by the Seventh Circuit in this case – a standard that abhors "new" rules – would be all the more inappropriate if applied to these ad hoc boards, whose procedural and evidentiary rules are the product of the parties' agreements.

II. THE RLA IS IN HARMONY WITH THE GENERAL FEDERAL POLICY FAVORING FINAL AND BINDING ARBITRATION.

The statutory mandate for final and binding arbitration in the airline and railroad industries is in harmony with federal policy under the National Labor Relations Act ("NLRA"), the law that governs labor relations outside the airline and railroad industries. Arbitration's central role in federal labor policy is also in accord with a broader public policy trend that favors final and binding arbitration as a method of resolving many other categories of disputes.

Labor Act 72 (Michael E. Abram et al. eds., ABA Section of Labor and Employment Law, 2d ed. 2005).

[5] Indeed, in the case of public law boards, the Act provides for the appointment of a "procedural neutral" to help the parties resolve disputes over the board's jurisdiction and procedures. *See* 45 U.S.C. § 153 Second; *see generally The Railway Labor Act* at 412-13.

In cases arising under the NLRA, this Court has recognized that arbitration plays a central role in federal labor policy not merely as a substitute for litigation, but as "the substitute for industrial strife." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). This appreciation for arbitration was borne out of the reality that a collective bargaining agreement is "more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *Id.* Consequently, arbitration is needed in order to develop the "common law of the shop which implements and furnishes the context of the agreement." *Id.* at 580. In this sense, arbitration of labor disputes "is part and parcel of the collective bargaining process itself." *Id.* at 578.

Arbitration cannot serve as an effective substitute for industrial strife unless courts afford an extraordinary level of deference to the arbitrators whom the parties designate to develop the "common law of the shop." Resolution of labor disputes requires "knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements." *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). Rules and decisions that evolve as part of the common law of the shop can be easily misunderstood by outside observers. A new arbitrator, like a new employee, must be "gradually initiated into what amounts to a miniature society" that has "a formal government of its own – the rules which management and the union have laid down" and its own "social classes, folklore, ritual, and traditions." *Id.* at n.2 (quoting Walker, *Life in the Automatic Factory*, 36 Harv. Bus. Rev. 111, 117 (1958)).

Given the peculiar realities of the industrial social order, this Court has acknowledged that there is an almost insurmountable preference for the judgment of labor arbitrators over that of the federal judiciary: "Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987). This holds true even when the arbitrator commits "serious error" or engages in "improvident, even silly, fact-finding." *Id.* at 38-39. "The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *Enter. Wheel & Car*, 363 U.S. at 596.

Although the public policy favoring final and binding arbitration of labor disputes has existed for decades, this Court in recent years has embraced the value of arbitration as an effective and efficient method of resolving disputes arising under a wide range of other federal laws as well, including anti-discrimination laws, securities laws, and antitrust laws. Most recently, in *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009), this Court traced the gradual erosion of "the old judicial hostility to arbitration." *Id.* at 1470 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480 (1989)). In particular, this Court acknowledged that the parties may legitimately trade "the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.* at 1471 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

Expanding the bases to challenge an arbitration award in federal court undermines the strong policy preference for resolution of such disputes by an arbitrator who is familiar with the parties, their agreement, and their unwritten practices and customs. It also undermines the tradeoff between the cumbersome procedures of federal court litigation and the relative informality of arbitration. For both reasons, it is essential for the Court to enforce statutory limits on judicial review of arbitration awards.

III. PROCEDURAL AND EVIDENTIARY ISSUES DECIDED BY ADJUSTMENT BOARDS ARE NOT APPROPRIATE SUBJECTS FOR COLLATERAL DUE PROCESS REVIEW.

Due process review of adjustment board awards is inconsistent with the 1966 amendments to the RLA, the legislative history of that statute, this Court's decision in *Sheehan*, and the practical reality that procedural issues are resolved by arbitrators in the context of their consideration of the merits of the case.

A. Congress Rejected Judicial Review on Extra-Statutory Due Process Grounds.

When Congress amended the RLA in 1966, it did not authorize judicial review of adjustment board awards beyond the grounds specifically provided in those amendments. Before the 1966 amendments, the RLA did not provide any explicit bases for judicial review of adjustment board awards, except in the context of an action to *enforce* an award against a noncomplying carrier under Section 3 First (p). *See Union Pac. R.R. Co. v. Price*, 360 U.S. 601, 615-16 (1959). There was no judicial review of awards that

denied an employee's claim. The Court in *Price* held that "[t]he disparity in judicial review of Adjustment Board orders, if it can be said to be unfair at all, was explicitly created by Congress, and it is for Congress to say whether it ought be removed." *Id.*[6] This Court acknowledged, however, that some courts of appeals had, under the pre-1966 version of the Act, permitted judicial review on due process grounds. *Id.* at 616.

In 1966, Congress specified three explicit, and narrow, bases for judicial review of adjustment board awards, which now appear in Section 3 First (q) of the Act. During the debate over the 1966 amendments, Congress rejected proposals to add provisions that would have permitted judicial review on independent due process grounds. The report of the House Committee on Interstate and Foreign Commerce considered the constitutionality of limited judicial review of adjustment board awards and concluded that "it is clearly within the power of the Congress to limit the scope of judicial review of orders of such a tribunal without regard to whether such tribunal is constituted by agreement or by governmental action." H.R. Rep. No. 89-1114, at 16 (1965). Further, the House Committee specifically rejected arguments that "judicial review must be available in the case of awards of the Board because the Board's procedures are so sketchy that they, standing alone, do not constitute due process of law." *Id.* at 17. Similarly, the Senate rejected a proposal, made by the railroads, that would have allowed chal-

[6] As the Court noted, the Act did not contain a similar provision for enforcement of an award against employees because "if the grievance is not sustained by the Board, the award simply denies the claim and requires no affirmative action by the employee." *Price*, 360 U.S. at 613 n.10.

lenges to NRAB awards that were "contrary to constitutional right, power, privilege, or immunity" or that were issued "without observance of procedure required by law." Alvin L. Goldman, *Selecting the Correct Standard for Judicial Review of Airline Grievance Arbitration Decisions*, 9 U. Pa. J. Lab. & Emp. L. 743, 773-74 (2007) (citing *Amend the Railway Labor Act: Hearing on H.R. 706 Before the Subcomm. on Labor of the S. Comm. on Labor and Pub. Welfare*, 89th Cong. 16-66, 123-44, 303-16 (1966)).

The Court's subsequent decision in *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89 (1978), is consistent with the 1966 amendments and their legislative history. In *Sheehan*, the Court reviewed a Tenth Circuit decision that remanded an award on due process grounds because the board failed to consider the employee's argument for tolling the time limits set forth in the collective bargaining agreement. The Tenth Circuit held that the board's failure to consider this equitable tolling argument "deprived Sheehan of an opportunity to be heard in violation of his right to due process." *Id.* at 91-92 (quoting 576 F.2d at 857). This Court ruled that either the Tenth Circuit was mistaken as to the board's consideration of Sheehan's equitable tolling argument, or the Tenth Circuit "exceeded the scope of its jurisdiction to review decisions of the Adjustment Board." *Id.* at 92-93. In either case, this Court held that Sheehan's objections to the board's award did not fall within "any of the three limited categories of review" provided in Section 3 First (q). *Id.* at 93.

Thus, Section 3 First (q) must be read as foreclosing judicial review on due process grounds that are not otherwise subsumed within those three

limited grounds and the specific procedural safeguards provided elsewhere in Section 3. *See, e.g.*, 45 U.S.C. § 153 First (i), (j); *Kinross v. Utah Ry. Co.*, 362 F.3d 658, 663 n.3 (10th Cir. 2004) ("We believe the Railway Labor Act itself provides for process sufficient to meet constitutional requirements."). This meaning is evident from the plain terms of the statute as well as its legislative history.

B. Procedural Issues, Even Those Affecting Arbitrability, Are Within the Particular Expertise of the Arbitrators.

Due process review as applied by the lower court is also inconsistent with the fundamental rule, expressed by this Court, that procedural issues must be left to the arbitration board. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002). As this Court held in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), procedural issues must be treated as part and parcel of the substantive dispute:

> Questions concerning the procedural prerequisites to arbitration do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it.

Id. at 556-57. In some cases, the award is so brief that it is difficult to discern whether the board decided the case on procedural or substantive grounds. *See, e.g.*, *Bhd. of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.*, 373 U.S. 33, 34 (1963); *Price*, 360 U.S. at 606-07. Indeed, there may be good labor relations reasons for issuing a terse award, without explicitly dealing with every argument raised by the parties – whether procedural or substantive. But if the board, in its wisdom, decides to rest its decision

on procedural grounds, that award is entitled to no less deference than if it were based solely on the substantive merits of the dispute.

The due process review undertaken by the lower court conflicts with this important policy because it subjects the procedural aspects of the award to stricter scrutiny than the arbitrator's decision on the merits. In effect, therefore, the award may be treated as less final and less binding when the board, in its discretion, determines to base its decision on procedural grounds rather than on the substantive merits. This result is inconsistent with the judgment, articulated in *Wiley*, that labor disputes involving both procedural and substantive issues should be decided exclusively by the arbitrator. *See id.* at 557 ("It would be a curious rule which required that intertwined issues of 'substance' and 'procedure' growing out of a single dispute and raising the same questions on the same facts had to be carved up between two different forums, one deciding after the other. Neither logic nor considerations of policy compel such a result."). It is also inconsistent with well-established precedent under the RLA, which holds that an adjustment board's rulings on procedural and evidentiary issues are not subject to judicial review. *See, e.g.*, *Pokuta v. Trans World Airlines*, *Inc.*, 191 F.3d 834, 841 (7th Cir. 1999) (claims that a board weighed the evidence improperly exceeded the scope of judicial review); *Anderson v. Nat'l R.R. Passenger Corp.*, 754 F.2d 202, 204 (7th Cir. 1984) (the "sufficiency of the evidence comprising the foundation of the Board's decision is not reviewable"); *Kotakis v. Elgin, Joliet & E. Ry.*, 520 F.2d 570, 576 (7th Cir.) ("Congress did not intend for the courts to maintain a check on each procedural and substantive ruling of the Board."), *cert. denied*, 423 U.S. 1016 (1975).

In the end, permitting an arbitration award to be challenged on independent due process grounds would, in almost all cases, serve only to delay final resolution of the underlying dispute.[7] Sanctioning yet another basis for review of arbitration awards under the RLA – particularly the sort of intensive scrutiny of procedural and evidentiary issues that the Seventh Circuit engaged in here – would invite many more longshot attempts to change the outcome of the award.

IV. THE NRAB'S DECISION IN THIS PROCEEDING WAS A RUN-OF-THE-MILL PROCEDURAL RULING THAT DOES NOT OFFEND PRINCIPLES OF DUE PROCESS.

The corollary to *Wiley* is that due process review cannot be undertaken apart from the context in which the underlying decision was made. "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). *See also Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."). The NRAB presents

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[7] A recent study of 158 petitions to vacate commercial arbitration awards on the ground that the arbitrator exceeded his/her authority found that the award was vacated in only 12 of those cases, and 2 of those 12 cases were reversed on appeal. *See* Thomas J. Brewer & Lawrence R. Mills, *When Arbitrators "Exceed Their Powers,"* Disp. Resol. J., Feb./Apr. 2009, at 48. Thus, the party seeking to vacate the award was ultimately successful in only 6.3% of these cases (10 out of 158 cases). In the other 93.7% of cases, the petition succeeded only in prolonging final resolution of the dispute.

a compelling illustration of this principle. Its bipartisan design and its place in the complex mechanics of railroad labor-management relations must be considered when evaluating any claim that a particular award violated due process.

A claim that the NRAB violated due process by refusing to consider certain evidence, as in this case, must be judged in light of the appellate nature of proceedings before the Board. It is well-understood that the Board, as an appellate body, decides cases solely on the basis of document submissions, although either party may request an oral hearing. 29 C.F.R. § 301.7(a). In discipline cases, such as the claims now before the Court, the Board receives a copy of the "Investigation Transcript," including any exhibits entered into that record, as well as the parties' correspondence during the on-property appeals process. 29 C.F.R. § 301.5; National Railroad Adjustment Board, *Uniform Rules of Procedure* 1.(d) (Revised June 23, 2003). The parties have long understood that new evidence may not be added to the original submissions. Therefore, in evaluating a claim that the Board should have considered additional evidence, it must be recognized that consideration of such additional evidence would be inconsistent with the parties' normal practice.

As the supplemental appendix submitted by the Petitioner in the court of appeals reflects, the NRAB considers a wide variety of procedural issues, including evidentiary questions that may determine whether a matter is properly before the Board. The multiple factual situations in which these issues are presented to the NRAB become grist for the Board's decision-making processes. The facts are debated by partisan members who typically have had years of

experience in such matters.[8] The Division members hearing the case call upon their own experience as well as on the decisions and practices in other Divisions of the NRAB. In some cases, the union members persuade the referee and in others the carrier members prevail. Some of these procedural disputes relate to the conduct of a conference between the parties to resolve the dispute and to the introduction of new evidence at the board-stage of the proceeding. As early as 1937, Dean Garrison reported on his experience as an NRAB referee on the First Division addressing disputes over the introduction of new facts not contained in the original submissions. Lloyd K. Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 578-79 (1937) ("The rules of the Board provide that the parties are 'charged with the duty and responsibility of including in their original written submission all known relevant, argumentative facts and documentary evidence.'").

The NRAB continually deals with the potentially dispositive issue of what evidence the Board may properly consider. In Awards 26089-94, now before the Court, the referee relied upon past awards for the decision to reject new evidence, including his own prior First Division decision in Award 24020. Pet.App.65a-107a; Supp.App.82 (7th Cir.). These very same parties took opposite positions on the issue of new evidence just a year before the awards at issue. In that proceeding, the Respondent successfully argued that the grievance should be sustained because the carrier could not give the Board the date

[8] For instance, the Respondent's representative on the NRAB Division that heard this case had served as a member of the Board since 1982.

of an Investigation Transcript; the date had not been part of the record submitted to the NRAB. Supp.App.63-66 (7th Cir.). Accordingly, the Board overturned the discipline based on that seemingly technical omission. Similarly, with respect to the jurisdictional requirement that a conference between the carrier and the union take place before the grievance is progressed to the NRAB, the arbitrator in this case relied on several awards in the First Division and other Divisions to support his conclusion. Pet.App.65a-107a. There is no dearth of authority on the procedural issues before the NRAB; at least nineteen previous NRAB cases have addressed similar issues. Supp.App. 63-134 (7th Cir.).

Thus, "due process" before the NRAB involves a unique common law that has developed and evolved over nearly seventy-five years. This case is an apt example of how the NRAB process deals incrementally with its appellate character, its evidentiary rules, and the predicate stages of the grievance process. It would accomplish little to superimpose new and uncertain standards for proceedings by permitting due process to be a basis for reviewing the decisions of the NRAB and possibly also the many other adjustment boards that interpret and apply the thousands of negotiated agreements in the railroad and airline industries.

CONCLUSION

For all the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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