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

REPLY BRIEF OF PETITIONER

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ARGUMENT

The RLA limits judicial review of NRAB decisions to three exclusive statutory grounds that this Court has characterized as "among the narrowest known to the law," in order to protect the crucial national interest in the speedy and final resolution of labor disputes in the rail and airline industries. Respondent's brief offers no persuasive reason for disregarding the plain language of the statute. Its constitutional analysis confuses the ordinary retroactivity inherent in all adjudication with a due process problem. And its alternative statutory argument is inconsistent with the text of Circular One and the standards that this Court has articulated in every other context for judicial review of procedural issues arising in arbitration. The Seventh Circuit's decision should be reversed.

I. THE THREE STATUTORY GROUNDS ARE EXCLUSIVE

A. The Statute Is Clear

The RLA expressly limits judicial review of NRAB orders to three specific grounds, and "due process" is not one of them. In *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89, 93 (1978), this Court found the Act's plain language "unequivocal[]" and "emphasized that this statutory language means just what it says." Respondent pretends that the statutory argument against "due process" review depends on the *expressio unius* canon or similar inferences from congressional silence. Resp.Br.28. Union Pacific specifically *did not* rely on "debatable *inferences*" but on "the plain and express meaning of the text." Pet.Br.26.

Respondent asserts (at 27-28) that "[t]here is not a word in subparagraph (q) that review under it is

'exclusive,'" and suggests that the following sentence contains "words without limitation": "The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct." 45 U.S.C. §153 First (q). But the very next sentence states that "the findings and order of the division *shall be conclusive* on the parties, *except that*" review may be had on three identified grounds. *Id.* (emphasis added).

"Conclusive" means "decisive"; "final"; and "that settles a question." *Webster's New World Dictionary: Second College Edition* 295 (1989); *see also Black's Law Dictionary* 329 (9th ed. 2009) ("[a]uthoritative" and "decisive," as in "her conclusive argument ended the debate"). And "except" plainly denotes an exclusive category of exceptions to the generally "conclusive" nature of these awards. *See*, *e.g.*, *Merriam-Webster Dictionary* 403 (10th ed. 2001) ("except" means "only"). When the Constitution says that the President's opportunity to veto a bill runs for ten days—"Sundays excepted"—it means that *only* Sundays are excluded. U.S. Const. art. I, §7, cl. 4; *Pocket Veto Case*, 279 U.S. 655, 675, 691-92 (1929). "'Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (citation omitted).

This case is nothing like *Utah v. Evans*, 536 U.S. 452 (2002) (Resp.Br.26), where this Court rejected the argument that merely "by directly authorizing" certain lawsuits a statute "implicitly forbids" others. 536 U.S. at 462-63. This Court explained in *Sheehan* that "[the

RLA] unequivocally states that … [Board decisions] may be set aside *only* for the three reasons specified therein." 439 U.S. at 92-93 (emphasis added). Respondent (at 17) invokes cases like *Webster v. Doe*, 486 U.S. 592, 603 (1988), and *Califano v. Sanders*, 430 U.S. 99, 109 (1977), but does not seriously engage UP's explanation of why those cases are inapposite. *E.g.*, Pet.Br. 25-32. Respondent seems to think that limitation of judicial review requires magic words, but this Court has consistently rejected that position. *E.g.*, *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984).

Respondent even concedes that some due process challenges are precluded under the RLA. Resp.Br.33. It reads *Sheehan* as holding that "once an arbitrator applies the CBA, there is no due process review of that application" because "the interpretation of the CBA itself could be reviewed only on one of the three statutory grounds." Resp.Br.34. Nothing in *Sheehan* suggests that some non-statutory review grounds are permitted while others are not.

B. Respondent Misunderstands The Objectives And Legislative History Of The 1966 Amendments

Respondent states (without citation) that in 1966 "Congress sought to expand—not limit—the existing direct judicial review of NRAB awards." Resp.Br.25. UP's opening brief detailed the extensive legislative history demonstrating that Congress's purpose in 1966 was to strengthen the finality of Board awards while providing for symmetrical, but highly limited, judicial review. Pet.Br.20-23.

Respondent's only answer is that prior to 1966 some lower courts permitted "due process" challenges, this Court had acknowledged the existence of those

decisions in *Union Pacific Railroad Co. v. Price*, 360 U.S. 601 (1959), and no one in Congress said anything about them either way in 1966. Respondent's inference from congressional silence is not persuasive.

First, the language it points to in *Price* is clearly dicta. This Court certainly had never "'exercised'" or "claimed" the authority to set aside Board awards on due process grounds, as Respondent incorrectly suggests. Resp.Br.26 (quoting *Evans*, 536 U.S. at 463), 21; *see also id.* at 17.

Second, as Respondent acknowledges (at 23), those pre-1966 decisions were rendered "at a time when federal law did not provide for statutory review" for disappointed employees *at all*. That inequity clearly motivated some lower courts to bend the "final and binding" language in the 1934 statute to permit collateral attacks under various equitable causes of action. The 1966 amendments transformed the landscape by explicitly authorizing judicial review of certain procedural deficiencies in Board proceedings, eliminating any plausible argument that extra-statutory "due process" review was necessary or consistent with the statutory scheme. As the Fourth Circuit explained in *Radin v. United States*, 699 F.2d 681, 687 n.14 (4th Cir. 1983), the early cases permitting due process challenges under various equitable causes of action "arose before the 1966 amendments in §153 First (q) that provide for full and direct judicial review of NRAB, and are no longer persuasive."

This Court has recognized that comprehensive statutory review schemes generally displace generic equitable causes of action of the sort relied upon by the lower courts to engage in "due process" review prior to 1966. In *United States v. Fausto*, this Court held that

the judicial review provisions of the Civil Service Reform Act foreclosed "the various forms of action traditionally used for so-called nonstatutory review of agency action, including suits for mandamus, injunction, and declaratory judgment." 484 U.S. 439, 444 (1988) (citations omitted). Congress had enacted an "integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various … employees with the needs of sound and efficient administration." *Id.* at 445. This Court has applied similar principles when refusing to imply extra-statutory remedies for constitutional claims. *See Bush v. Lucas*, 462 U.S. 367, 368 (1983) (refusing to imply a *Bivens* remedy for federal employees, in light of statute's "comprehensive procedural and substantive provisions giving meaningful remedies against the United States").[1] The RLA similarly establishes a "'mandatory, exclusive, and comprehensive system for resolving grievance disputes,'" *Gunther v. San Diego & Ariz. E. Ry. Co.*, 382 U.S. 257, 263-64 (1965) (citation omitted), including particular grounds for judicial review.

Congress struck a careful balance in 1966 between additional procedural safeguards and the overarching importance of speedy resolutions of grievances. This Court has repeatedly recognized the importance of finality in arbitration and emphasized the judiciary's limited role in reviewing such disputes. *See, e.g., Hall*

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[1] *Bush* (and similar prior cases such as *Schweiker v. Chilicky*, 487 U.S. 412 (1988)), do not conclusively resolve this case because the statutes provided for judicial review of constitutional claims at the end of the administrative process. Nonetheless, much of this Court's reasoning remains pertinent.

St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1405 (2008) (more expansive judicial review would "bring arbitration theory to grief in post-arbitration process"); *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1470 (2009) (noting the Court's "'strong endorsement of the federal statutes favoring this method of resolving disputes'") (citation omitted). Creative lawyers can reframe almost any procedural complaint about the arbitration in due process terms, particularly when armed with the remarkable due process theory embraced by the Seventh Circuit here. A ground for review so expansive and manipulable would fundamentally undermine the policies of finality and limited judicial review which underlie the RLA (and arbitration generally). *See, e.g.*, *Price*, 360 U.S. at 616 (RLA "was designed for effective and final decision of grievances which arise daily").

C. The Statute Authorizes Review Of Procedural Violations Of The RLA

Respondent argues that the three statutory grounds permit a court to review "a panel's interpretation of a CBA" but do not permit any review of *procedural* deficiencies in Board proceedings. Resp.Br.29-31. Respondent suggests that extra-statutory due process review is therefore essential to ensure that the Board complies with the RLA's most basic procedural safeguards. *See* Resp.Br.36 ("[D]ue process review ensures that NRAB panels conduct hearings under the RLA.").

Respondent essentially gives the statutory review criteria an implausibly narrow construction in order to manufacture a problem that must then be "solved" by inventing extra-statutory review grounds. The RLA specifically permits review of violations of the Act

itself, even if they are procedural in nature. In *Radin*, for example, the Fourth Circuit explained that "the Act specifically provides that NRAB awards can be set aside for the procedural irregularities [that the employee] complains of in this case." 699 F.2d at 687; *see also id.* at 684 ("[The NRAB] allegedly denied him statutorily mandated due process rights in sustaining his dismissal, and such procedural deprivation by the arbitrators is ground for relief in the district court."); *Kinross v. Utah Ry. Co.*, 362 F.3d 658, 662 n.3 (10th Cir. 2004) ("[T]he Railway Labor Act itself provides for sufficient procedural due process within its own boundaries."); *Jones v. St. Louis-San Francisco Ry. Co.*, 728 F.2d 257, 261-62 (6th Cir. 1984) (recasting due process claim as one for "fail[ure] to comply with the requirements of the [RLA]"). Respondent argues that the statutory review criteria embrace its procedural complaints in this case, Resp.Br.52-53, and has previously argued that those criteria are coextensive with the Due Process Clause, *see* Pet.Br.36 & n.9 (collecting such assertions).

Respondent's suggestion that the statutory criteria were primarily designed to permit review of a panel's substantive "interpretation of a CBA" is implausible. The statutory grounds principally relate to *procedural* flaws with the arbitration, not to the substantive interpretation of the parties' agreement. Respondent emphasizes the possibility of judicial review on the ground that the award completely failed to "draw[] its essence from the collective bargaining agreement" and instead reflected the Board's "own brand of industrial justice." *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); Resp.Br.31. An award of that nature might be reviewable on the

statutory ground that the Board failed to respect the limits of its jurisdiction. But the availability of limited merits review in rare and extreme cases certainly does not establish that the Board's interpretation of the CBA is the exclusive basis for review under §153 First (q).

D. Respecting Congress's Clear Directive Does Not Violate The Constitution

This Court has explained that whether Congress could foreclose all judicial review of a colorable constitutional claim presents a serious constitutional question.[2] That may be a serious question, but it does not have to be a yes-or-no question. The importance of judicial review can be approached as a due process issue, or as a question arising under the particular constitutional provision creating the rights at stake. Of course here those approaches converge. However framed, the analysis should be sensitive to the particular context, the type of claim for which review is not afforded, the strength of Congress's reasons, and the availability of alternative safeguards.

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[2] *Amicus* AFL-CIO suggests that the Board is so similar to private arbitrators that its awards may not even be state action. The NRAB is "public in name and function." *Elmore v. Chicago & Ill. Midland Ry. Co.*, 782 F.2d 94, 96 (7th Cir. 1986). NRAB neutrals are paid by the federal government. The lower courts have concluded for decades that the Board's awards are state action, and there is no reason for this Court to revisit that issue in a case where neither party has ever contested it. But the AFL-CIO's argument underlines the basic point that any constitutional interests at stake here, and not adequately protected by the statutory review grounds, are exceedingly weak and attenuated. Pet.Br.32-39.

The only question presented here is whether Congress can limit review of *procedural due process* claims to a statutory framework that internally guarantees all the process that this Court has ever suggested might be due, for the purpose of producing swift and binding arbitral resolutions of employment grievances in an industry crucial to broad national interests.[3] The procedures guaranteed by the RLA are without question constitutionally sufficient on their face, Pet.Br.34-35, and Respondent simply complains that the Board misapplied a procedural rule to the facts of these cases. Due process does not demand judicial review at that level of specificity, particularly in an arbitral context. To the contrary, procedural due process has always focused on "the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions." *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). If Congress *cannot* channel due process scrutiny through the clear and objective statutory requirements, then (as this case demonstrates) these grievances may be prolonged for many years. This Court has recognized that not every litigation context needs to be a vehicle for adjudicating novel claims at the outer boundaries of

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[3] There is no reason for this Court to opine on whether the RLA precludes *other* constitutional claims. The issue may never arise. The statutory review grounds embrace almost any plausible equal protection claim, Pet.Br.35, and the NRAB's substantive decisions just enforce the parties' consensual collective bargaining agreement, which is unlikely to raise any issues of constitutional stature. *See, e.g., Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 295-300 (2007) (recruiting rules agreed to by voluntary participants in athletic league do not violate First Amendment).

constitutional law. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982); 28 U.S.C. §2254(d)(1).

The balancing test established by *Mathews* affords a sound framework for evaluating whether judicial review of a procedural due process claim is essential in this context. This Court has invoked the *Mathews* framework when considering the importance of independent review of executive action when far weightier constitutional interests were at stake. *E.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-29 (2004) (plurality op.). And the balance Congress struck here is plainly reasonable. The statutory scheme provides everything reasonably necessary to ensure that the arbitral process is fundamentally fair. The statutory criteria also permit review of all of the due process claims that are common and likely to be meritorious. Pet.Br.37. Non-statutory judicial review therefore would not seriously "reduce the risk of erroneous deprivation." *Schweiker v. McClure*, 456 U.S. 188, 199-200 (1982) (citation omitted). And the potential harm to other interests such as the speedy, efficient, and final resolution of disputes is quite severe.

II. THE BOARD'S DECISION DID NOT VIOLATE DUE PROCESS

UP's opening brief explained that the Seventh Circuit's due process reasoning committed two distinct but related errors. First, there was no unfair surprise because the language of the statute, regulations, and prior Board decisions made the decision here at least foreseeable, and in fact likely. Second, even if this were the first time the Board had ever confronted this issue (and clearly it was not), there is no due process problem with the application of general rules to

particular facts—even in novel and debatable circumstances. That is the nature of adjudication.

Respondent essentially argues that the Board should have interpreted the general rules in Circular One differently on these facts, that the extensive body of precedent built up by the Board over decades must be wholly ignored, and that arbitral panels lack any authority to interpret and apply the RLA, Circular One, and the NRAB's other procedural rules in circumstances where the application of those rules is in any way debatable. Respondent paints a misleading picture of NRAB proceedings, and its peculiar vision of due process would leave the Board unable to function.

A. Respondent's Claims Of Surprise Or Unfairness Are Unfounded

BLET's factual premises are incorrect. The Board's ruling was foreseeable and the procedures followed here were fundamentally fair. *See* Pet.Br.40-47.

First, Circular One mandates that "[n]o petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act." 29 C.F.R. §301.2(b). That provision plainly indicates that the Board must be satisfied that the RLA's preconditions, including conferencing, have occurred before it "consider[s]" any petition—*i.e.*, that conferencing is a *jurisdictional* requirement. Circular One also requires that disputes must be submitted "with a full statement of the facts and all supporting data bearing upon the disputes," 29 C.F.R. §301.2(a), and that parties "should prepare submissions in such manner that the pertinent and related facts and all supporting data bearing upon

the dispute will be fully set forth," 29 C.F.R. §301.6.[4] Given the unambiguous requirement of §301.2(b), whether a conference occurred is clearly a fact "bearing on the dispute." And Respondent has no answer to the venerable judicial precedent holding that an appellate court's jurisdiction must be evident from the record submitted to it. Pet.Br.41-42.

Respondent argues that evidence of conferencing is not an "argumentative fact[]" and that it would make no sense to require proof that such evidence was "presented to the carrier," as required by 29 C.F.R. §301.5. That argument proves too much and is unpersuasive even as an interpretation of §301.5. Regardless, it ignores the *Board*'s strong interest, reflected in §§301.2 and 301.6, in obtaining evidence of conferencing to confirm its own jurisdiction.

Second, the Board precedent on this point is both pertinent and clear. Respondent (like the Seventh Circuit) wrongly suggests that the prior arbitral decisions can be distinguished on the ground that in those cases "there [was] no question that the parties did in fact fail to conference." Resp.Br.46. Several of the awards cited by the Board dismissed grievances because evidence of conferencing did not appear *in the record*, which indicates that the arbitrators saw no need to inquire into whether conferencing actually

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[4] Respondent quibbles with UP's citation to the statute rather than Circular One, arguing that the Board relied on Circular One. Resp.Br.40. UP's brief cited to the statute and the identical text in Circular One in parallel. Pet.Br.40. Regardless, the Board's decision was not based solely on Circular One, but on "Circular 1" and "the weight of arbitral precedent on this very issue." Pet.App.70a-71a.

occurred. For example, First Division Award, No. 18679 (Apr. 8, 1958), noted only that "[i]n a review of this record we fail to find any evidence that [a] conference was ever held on the property," JA40, while Third Division Award, No. 30821 (Apr. 27, 1995) indicated only that "[n]owhere does the record indicate that a conference was ever held or requested on the property," JA58. Respondent concedes that "these awards dismiss cases for lack of conferencing 'in the record.'" Resp.Br.46. That is precisely the basis for the Board's dismissal here. *See*, *e.g.*, Pet.App.68a.[5]

One of the awards cited by the First Division in these cases—No. 23883—is directly on point. As here, the union failed to include evidence of conferencing in the record, but later proffered such evidence "in the form of the handwritten notes" of a phone call. Just as here, the Board refused to consider this proof, noting that "[s]ince this statement was not shown to have been furnished to the Carrier on the property, it is not properly before this Board …." First Division Award, No. 23883 (July 28, 1988).[6]

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[5] This has been the Board's practice for decades. In addition to the cases cited in UP's brief, Pet.Br.42, see First Division Award, No. 23883 (July 28, 1988); Third Division Award, No. 17166 (May 20, 1969); Third Division Award, No. 15400 (Mar. 10, 1967); Third Division Award, No. 19709 (Apr. 13, 1973); Third Division Award, No. 29231 (May 18, 1992); Fourth Division Award, No. 4799 (Oct. 17, 1991). National Mediation Board, *NMB Knowledge Store*, *available at* http://kas.cuadra.com/starweb1/nmbks/servlet.starweb1?path=nmbks/nmb.web.

[6] The other awards cited by Respondent do not establish any consistent contrary practice. In First Division Award, No. 23867 (Apr. 7, 1988), the panel did suggest in dictum the possibility of

BLET also misrepresents the nature and availability of Board precedent. Prior awards do not have *stare decisis* effect in the judicial sense, but they are viewed by other arbitrators (and even this Court) as persuasive authority and "provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems." *Slocum v. Del., Lackawanna & W. R.R. Co.*, 339 U.S. 239, 243 (1950); Pet.Br.43-46. Congress created the Board as an expert tribunal "acquainted with established procedures, customs and usages in the railway labor world." *Elgin, Joliet & E. Ry. Co. v. Burley*, 327 U.S. 661, 664 (1946). Labor arbitrators take prior arbitral precedent seriously because doing so is the only way to create stability in the interpretation and administration of collective bargaining agreements. *See, e.g.*, Alan Miles Ruben, ed., *Elkouri & Elkouri: How Arbitration Works* 578 (6th ed. 2003) (observing that where arbitral awards are not consistent "the collective bargain made for employees in the unit [will] break down and be replaced, in effect, by a series of individual bargains") (citation omitted); William H. Spencer, *The National Railroad Adjustment Board* 65 (1938) (NRAB "is beginning to lay down precedents which will eventually result in greater uniformity in the interpretation and application of the standard rules of railway collective agreements."); Lloyd K. Garrison, *The National*

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dismissing without prejudice due to the conferencing issue, but ultimately dismissed anyway on laches grounds. In Fourth Division Award, No. 5074 (June 21, 2001), the panel made an equitable exception to the general rule on the ground that the union actually sought to conference but the carrier failed to accommodate its requests.

Railroad Adjustment Board: A Unique Administrative Agency, 46 Yale L.J. 567, 593 (1937) (describing the NRAB as a "quasi-judicial tribunal developing its own common law" to bring about "uniform interpretation[s]"). Even this Court looks to Board awards as an important and persuasive interpretive aid. *See, e.g., Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 254-55 (1994); *Pa. R.R. Co. v. Day*, 360 U.S. 548, 552 & n.2 (1959); *Order of Ry. Conductors of Am. v. Swan*, 329 U.S. 520, 527 (1947).

Respondent's suggestion that prior awards are unavailable to regular participants before the Board is incorrect. The parties to NRAB arbitrations are repeat players; in the absence of formal reporting, carriers and unions maintain their own databases of awards. Respondent's own bylaws establish an "Arbitration Department" in its "National Division," which is charged (*inter alia*) with "manag[ing] the ND electronic arbitration data base." BLET Bylaws §7(i), *available at* http://www.ble659.com/bylaws.pdf. The United Transportation Union maintains a "searchable database of thousands of arbitration awards" on its web site. *See* United Transportation Union, *Awards/Agreement/Other Documents*, *available at* http://www.utu.org/worksite/awards.cfm. The Brotherhood of Maintenance of Way Employes has its "own database, automated submission preparation, and research tools." Society of Professionals in Dispute Resolution, *Labor and Employment Dispute Resolution Under the Railway Labor Act: Airlines and Railroads* 85 (1990).

The partisan members of the divisions, the neutral referees, and the representatives who regularly advocate before the Board are a small community of

experts familiar with Board practices, rules, and the large body of NRAB precedent. Parties regularly cite to prior awards, and the Board in this case noted that it had "closely studied the arbitral and judicial precedent cited by *both parties* in support of their respective positions." Pet.App 68a (emphasis added). Indeed, throughout this litigation BLET has claimed in one breath that prior awards are unavailable or have no precedential value, while then appealing to Board precedent it deems useful. *See, e.g.*, Resp.Br.51; Pl.-Appellant Br. (Seventh Circuit) at 26 n.1. It also bears mention that one of the principal First Division awards on which UP has relied in this litigation, First Division Award, No. 18679 (Apr. 8, 1958) (JA40-41), was rendered at a time when Respondent concedes the awards were collected and published in bound volumes. *See* Resp.Br.46.

Third, Respondent erroneously suggests that UP was obliged to raise the conferencing issue at an earlier point in the proceedings, and that UP's failure to do so somehow prejudiced Respondent. *See, e.g.*, Resp.Br. 44-45. Circular One provides that each party is responsible for the contents of its own submissions, and there is nothing unusual or surprising about a ruling that the party invoking an appellate body's jurisdiction must establish it, *see, e.g.*, Fed. R. App. P. 28(a)(4); S. Ct. R. 24.1(e), or that jurisdictional defects may be raised at any time. The Board reasonably put the burden on Respondent to establish that conferences happened. And in these cases the defect was ultimately identified by one of the members of the Board itself. Pet.App.4a. So Respondent's position is, essentially, that the Board cannot raise jurisdictional problems *sua sponte*.

Respondent's suggestion is also difficult to understand as a matter of Board procedure. Typically the union "attach[es] as part of its Submission to th[e] Board a copy of a letter sent to Carrier confirming the fact that a conference was held on the property or a letter from the Carrier referring to the fact that a conference was held on the property." First Division Award, No. 23883 (July 28, 1988). As *amicus* AFL-CIO concedes (Amicus.Br. 12), the parties' submissions are exchanged *simultaneously*. *See* National Railroad Adjustment Board Uniform Rule of Procedure 1(a)-(b) (revised June 23, 2003).[7] Because of this briefing schedule, "the carrier has had to frame and file its submission without having seen the union's submission." *Garrison*, *supra*, at 578. Revisions to the Board's Uniform Rules of Procedure have steadily eliminated opportunities for post-submission filings, so it is far from clear that UP even had a procedural opportunity to point out the defect in Respondents' submission until the hearing itself. *See* National Railroad Adjustment Board Uniform Rule of Procedure 8 (adopted Oct. 27, 1987) (eliminating rebuttals); National Railroad Adjustment Board Uniform Rule of Procedure 5 (revised May 4, 1994) (eliminating letters of objection). And even if UP *had* somehow anticipated this issue in its initial submission, the Board would have looked to Respondent's (simultaneous) initial submission for the necessary proof and it would still have been missing. Pet.Br.47.[8]

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[7] *Available at* http://www.nmb.gov/arbitration/nrab-rules.pdf.

[8] *Amicus* AFL-CIO points to an instruction sheet promulgated by the NRAB permitting parties participating in the NRAB's

Respondent continues to insist that conferences actually occurred. That issue is legally irrelevant because the Board properly dismissed on the ground that no evidence of conferencing appears in the on-property record. If the actual facts were relevant in some way, in the present posture Respondent's allegation that it "did in fact conference the claims," Petition to Review ¶13, must be taken as true because the district court dismissed under Rule 12(b)(6). UP believes that two of these cases were conferenced but has consistently maintained that the evidence Respondent offers concerning the other three is unpersuasive.

Fourth, BLET's argument that it was deprived of due process because it never had an opportunity to be heard on the merits of its contractual claims assumes, wrongly, that it was improper for the Board to dismiss on procedural grounds. Due process requires notice and an opportunity to be heard on the *dispositive* issue, not an opportunity to be heard on issues that the tribunal properly does not need to reach. BLET was heard on the dispositive question of whether its failure to include evidence of conferencing required dismissal. As BLET admits, after the conferencing issue arose, the Board adjourned the proceedings and allowed both parties to submit additional briefing on the question. Resp.Br.13.

"Joint Exhibit Program" to omit the customary letters indicating that a conference was requested, if that is not in dispute. Amicus.Br.10-11. These instructions apply only to cases in which the parties agree to file joint exhibits (which did not occur here), and were not even promulgated until *after* the parties here filed their submissions. *Id.* at 11 n.7.

In that respect, this case is just like *Sheehan*. Indeed, BLET even characterizes the due process concern in *Sheehan* as whether the employee received an opportunity to be heard on the dispositive issue: "this Court found that Sheehan himself had received procedural due process, i.e., consideration of his tolling argument and a decision on the merits." Resp.Br.34. The employee in *Sheehan* did not receive an adjudication of the merits of his grievance.

Henry Bierce Co. v. NLRB, 23 F.3d 1101 (6th Cir. 1994), and *NLRB v. Complas Industries, Inc.*, 714 F.2d 729 (7th Cir. 1983), do not support Respondent's position for the same reason. Both involve situations in which the NLRB amended an unfair labor practice complaint in the middle of the administrative hearing to add an additional charge. The reviewing courts held that while the NLRB had the authority to amend the complaint, it was improper to do so without giving the company additional time to meaningfully respond to the amended charge. Respondent admits that it received a full opportunity to respond to the Board's jurisdictional concerns here. *See* Resp.Br.13.

Finally, to the extent that Respondent's argument rests on the proposition that the result in arbitration was simply unfair—a violation of what the Seventh Circuit called the rules of the "kindergarten playground," Pet.App.11a—it is worth emphasizing that the Board routinely applies a strict interpretation of its jurisdictional rules against carriers as well as unions. Indeed, UP has lost cases for no reason other than the failure to include the date of the hearing transcript in the on-property record. *See* First Div. Award, No. 25994 (Mar. 10, 2004) (available as explained *supra* n.5, and involving the same parties as

this case). After decades of such rulings, both sides understand—or should understand—the risks of omitting any potentially relevant material from the record.

B. The First Division's Decision Did Not Violate Due Process

Even if there were something unexpected or surprising about the Board's application of its evidentiary and jurisdictional rules (although in this case clearly there was not), it could not possibly amount to a violation of due process. Respondent's due process theory would require courts to second-guess an arbitrator's resolution of every routine procedural dispute, nullifying Congress's intent that judicial review in this context be "'among the narrowest known to the law,'" *Sheehan*, 439 U.S. at 91 (citation omitted).

First, Respondent cannot deny the basic principle that any adjudicative process *always* involves the resolution of controversies about how broadly stated general rules should be applied to particular facts. *See* Pet.Br.47-54.

Respondent argues that the Board's decision "was not even a genuine 'interpretation' when the regulation being 'interpreted' could not logically apply to this class of evidence at all." Resp.Br.42. As noted above, Respondent's substantive arguments pertain only to 29 C.F.R. §301.5, and even if persuasive (which they are not) have no purchase whatsoever on §§301.2 or 301.6. Those sections provide ample independent support for the Board's holding.

More remarkably, Respondent is saying that the Board could not genuinely have been interpreting Circular One *because Respondent disagrees with the Board's interpretation.* The Seventh Circuit

committed the same error. Hypothesizing that the rationale for the rule that the Board will only consider evidence in the record is that the carrier should have a chance to consider the evidence, the Seventh Circuit reasoned that there was no need to apply the rule to evidence of conferencing because it did not fit the rationale the Seventh Circuit made up. Pet.App.19a. But the Seventh Circuit ignored that the Board has an obligation to satisfy itself of its own jurisdiction, and might want evidence of conferencing to be included in the record simply to avoid engaging in unnecessary fact-finding, particularly because the Board regards itself as an appellate body which does not conduct evidentiary hearings. *See The Railway Labor Act* 407-08 (Michael E. Abram et al. eds., 2d ed. 2005). Or the Board might want "[t]o conserve time and expedite proceedings" by requiring parties to "prepare submissions in such manner that the pertinent and related facts and all supporting data bearing upon the dispute will be fully set forth, thus obviating the need of lengthy briefs and unnecessary oral discussions," 29 C.F.R. §301.6. Respondent and the Seventh Circuit should not be allowed to dictate a special exception to the Board's general prohibition against consideration of extra-record evidence in these circumstances.

The best interpretation of the statute and Circular One, considered as a whole, is the one applied by the First Division here. Indeed, the Board might have failed "to comply with the requirements of th[e] Act" and "to conform, or confine itself, to matters within the scope of [its] jurisdiction" if it had done anything else. 45 U.S.C. §153 First (q). Regardless, it simply is not a *due process* issue of any kind for the Board to interpret the procedural rules in the RLA and Circular One in a

manner that Respondent and the Seventh Circuit now find unpersuasive. It does not violate due process, for example, for a lower court to dismiss a case on contestable evidentiary or statute of limitations grounds, even if an appellate court later reverses.

Second, Respondent persists in relying on retroactivity precedents that have nothing to do with due process or with adjudication. For example, *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), addresses the retroactive application of new *statutes*, which do not participate in the traditional fiction applicable to adjudicative processes that judges simply declare what the law always was. A statute changes the law; a judge's interpretation of an existing rule on particular facts, or even his declaration of a new interstitial rule in entirely novel circumstances, does not. *Landgraf* explicitly distinguishes "the retroactive application of intervening *judicial* decisions," for which this Court has "established a firm rule of retroactivity," from the retroactive application of statutes, which bear a "presumption against" retroactivity. *Id.* at 278 & n.32; *compare, e.g., id.* at 265 ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic."), *with Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 94 (1993) ("Nothing in the Constitution alters the fundamental rule of 'retrospective application' that has governed 'judicial decisions … for near a thousand years.'") (quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)).

Respondent similarly cites *Bowen v Georgetown University Hospital*, 488 U.S. 204 (1988), for the proposition that this Court has expressed its "distaste"

for agency rulemaking by adjudication, Resp.Br.51, but *Bowen* has nothing to do with adjudication—agency or otherwise. Rather, it concerned an agency's power to promulgate "legislative regulations" that would be overtly retroactive in effect. *Bowen*, 488 U.S. at 208. It applied the rule that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.* And it specifically concluded that a provision of the statute that *did* appear to permit limited retroactivity "applies only to case-by-case adjudication, not to rulemaking." *Id.* at 209.

Respondent's contention that the Divisions lack authority under the RLA to engage in "rulemaking by adjudication" has nothing to do with due process (although it too will be considered *infra*, in connection with Respondent's statutory arguments). Resp.Br.47-50. Even if a Division did somehow exceed its statutory authority, that would not be a constitutional issue.

BLET argues that "[i]n a system like the NRAB with very weak *stare decisis*, there is no particular logic for applying an unfair or surprising 'interpretation' retroactively—certainly not for the sake of any consistency." Resp.Br.50. Even if persuasive, that too would not rise to the level of a due process argument. Regardless, Respondent's suggestion makes no sense, and would render arbitral systems entirely unable to function. If novel interpretations are *not* applied to the parties at hand in a system with weaker *stare decisis*, then they will never be applied at all. Respondent's position is essentially that debatable interpretations can't be applied either retroactively or prospectively—which is

another way of saying that the Board can never resolve any difficult interpretive question. This Court certainly has never suggested that the presumption of retroactivity attendant to judicial, agency, and arbitral adjudication would somehow disappear if a particular agency (or state judicial system) decided to substantially curtail the importance of *stare decisis*.

In any event, a concern for "consistency" is not the only reason why some retroactivity is tolerated in all adjudicative systems. Resp.Br.51. Application of "new" rules to the parties at hand provides greater incentive to litigants to argue in favor of legal change, *see James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 537 (1991) (Souter, J., concurring); may be necessary to comply with constitutional concerns, *id.* at 548-49 (Scalia, J., concurring); ensures the accuracy of newly-announced rules, Bradley S. Shannon, *The Retroactive & Prospective Application of Judicial Decisions*, 26 Harv. J.L. & Pub. Pol'y 811, 850-51 (2003); promotes efficiency, *id.* at 871; and slows the rate of legal change, which results in greater adherence to precedent, *id.* at 872.

III. THE ONLY TRIBUNAL THAT EXCEEDED ITS JURISDICTION HERE WAS THE SEVENTH CIRCUIT

Respondent also seeks affirmance on the alternative ground that the Board failed to "to conform, or confine itself, to matters within the scope of the division's jurisdiction." 45 U.S.C. §153 First (q).[9] Its

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[9] This argument presents a pure question of law that this Court can and should resolve without need for remand. *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) ("purely legal question … is 'appropriate for our immediate resolution'

claim rests on the theory that the Board exceeds its jurisdiction whenever it interprets the statute or regulations in a manner that a court, reviewing *de novo*, disagrees with—because in Respondent's view the Divisions have no statutory authority to interpret the RLA or Circular One, or at least are not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Respondent entirely misconceives the issue. Arbitral panels do not exercise or need the power to engage in *rulemaking*, by adjudication or otherwise, in the sense of announcing prospective rules that would have the force of law, bind subsequent panels, and be entitled to *Chevron* deference from a court. NRAB panels simply exercise the power, inherent in any adjudicative process, to resolve the particular controversy before them.

The real question here is how (if at all) Congress intended for courts to review a Division's application of the broad rules outlined in the RLA and Circular One in particular circumstances that call for an exercise of judgment or the resolution of some interstitial ambiguity. Respondent's position seems to be that a reviewing court must set aside an award based on the RLA or Circular One whenever the court would have resolved a procedural ambiguity differently.

That is not the law. To the contrary, this Court has repeatedly enforced a strong presumption that "'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *John Wiley & Sons, Inc. v. Livingston*, 376

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notwithstanding that it was not addressed by the Court of Appeals") (citation omitted).

U.S. 543, 557 (1964). Like this case, *Wiley* concerned a procedural rule requiring the parties to conference prior to arbitration. *Id.* at 555-56. The dispute concerned whether that requirement should be excused in light of one party's claim that it would have been futile or inappropriate in the particular circumstances of that grievance. This Court concluded that "labor disputes of the kind involved here cannot be broken down so easily into their 'substantive' and 'procedural' aspects," and that a rule giving courts greater power to review "procedural" than merits issues would be unworkable and "may entirely eliminate the prospect of a speedy arbitrated settlement of the dispute, to the disadvantage of the parties (who, in addition, will have to bear increased costs) and contrary to the aims of national labor policy." *Id.* at 556-58. This Court held that any doubts about whether required pre-arbitration procedures "have been followed or excused" must therefore be decided by the arbitrator, subject only to the same highly deferential judicial review appropriate to substantive aspects of the dispute. *Id.* at 557.

This Court reaffirmed those principles in *Howsam v. Dean Witter Reynolds, Inc.*, holding that "gateway procedural disputes" or issues of "procedural arbitrability," including "'whether … conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." 537 U.S. 79, 85 (2002) (citation omitted.) It explained that arbitrators are "comparatively more expert about the meaning of their own [procedural] rule" and hence "comparatively better able to interpret and apply it," and that "align[ing] (1) decisionmaker with (2) comparative expertise will help better to secure a fair and

expeditious resolution of the underlying controversy—a goal of arbitration systems and judicial systems alike." *Id.*; *see also United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 (1987) (applying Federal Arbitration Act principles by analogy in labor arbitration case, and holding that an arbitrator's refusal to consider particular evidence could be reviewed only if "in bad faith or so gross [an error] as to amount to affirmative misconduct").

There is no reason to believe that Congress envisioned a radically more intrusive role for courts in reviewing issues of "procedural arbitrability" arising out of Circular One than obtains everywhere else in the field of labor arbitration, or arbitration generally. This Court recognized in *Wiley* that *de novo* judicial review of procedural questions would be "contrary to the aims of national labor policy." 376 U.S. at 558. Those same considerations apply equally to arbitration under the RLA, which was enacted to provide for "the prompt and orderly settlement" of railroad labor disputes in order to "'prevent strikes'" and "safeguard the vital interests of the country" in uninterrupted rail service. 45 U.S.C. §§151a(4), (5); *Tex. & New Orleans R.R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 565 (1930) (citation omitted). And this Court made clear in *Sheehan* that "[c]haracterizing the issue presented as one of law" rather than of interpretation of the parties' agreement "does not alter the availability or scope of judicial review" under the RLA. 439 U.S. at 93.

The lower courts have generally held that the Board fails to "conform, or confine itself, to matters within the scope of [its] jurisdiction," 45 U.S.C. §153 First (q), when "its decision was 'wholly baseless and completely without reason'" or it "ignored 'clear and

unambiguous provisions' in the parties' agreement." *See* Abram et al., *supra*, at 426-27. (citations omitted). That is the same highly deferential standard, drawn from this Court's *Steelworker Trilogy* cases, that governs judicial review of labor arbitration more broadly. There is no reason to suspect that Congress would have wanted a much more intrusive review standard for questions of procedural arbitrability arising under Circular One.

There is no statutory basis for setting aside this award. The Seventh Circuit recognized, the parties agree, and the rules make clear that (1) conferencing is required, and (2) all evidence must be submitted in the on-property record. Pet.App.12a-13a, 17a-18a. The Board's interpretation of these rules to mean that evidence of conferencing must be included in the on-property record was sound, and certainly not baseless or completely without reason. Nor is there any claim here that the Board ignored express terms of Circular One, the RLA, or the parties' agreement. To the contrary, the Seventh Circuit specifically recognized that the rules were silent as to how conferencing was to be proved. Pet.App.23a. Courts have consistently held that arbitrators are entitled to resolve interstitial gaps or ambiguities in procedural rules. *See, e.g.*, *Norfolk & W. Ry. Co. v. Transp. Commc'ns Int'l Union*, 17 F.3d 696, 701-02 (4th Cir. 1994) (where agreement is silent, the parties have "effectively ceded to the arbitrators the task of defining the scope of their power")*; see also Finley Lines Joint Protective Bd. Unit 200 v. Norfolk S. Ry. Co.*, 312 F.3d 943, 947 (8th Cir. 2002) (Board acted within its jurisdiction when it decided evidentiary issue absent "'specific controlling language in the collective bargaining agreement'")

(citation omitted); *Kotakis v. Elgin, Joliet & E. Ry. Co.*, 520 F.2d 570, 576 (7th Cir.) ("Congress clearly intended that the awards of the Adjustment Board be as unassailable as those of an arbitrator. … 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).

CONCLUSION

The decision of the Seventh Circuit should be reversed.

Respectfully submitted,

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SEPTEMBER 9, 2009