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 PETITIONER

J. MICHAEL HEMMER
PATRICIA O. KISCOAN
UNION PACIFIC RAILROAD
1400 DOUGLAS STREET, STOP 1580
OMAHA, NEBRASKA 68179
(402) 544-6302

DONALD J. MUNRO
GOODWIN PROCTER
901 NEW YORK AVENUE, NW
WASHINGTON, DC 20001
(202) 346-4137

MAUREEN E. MAHONEY
Counsel of Record
J. SCOTT BALLENGER
MELISSA B. ARBUS
JAMES C. KNAPP, JR.
LATHAM & WATKINS LLP
555 11TH STREET, NW
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200

Counsel for Petitioner

QUESTIONS PRESENTED

The Railway Labor Act ("RLA"), 45 U.S.C. §§151 *et seq.*, sets forth a comprehensive framework to resolve labor disputes in the railroad industry through binding arbitration before the National Railroad Adjustment Board ("the Board"). The statute provides that the Board's judgment "shall be conclusive … except … for": (1) "failure … to comply" with the Act, (2) "failure … to conform or confine" its order "to matters within … the [Board's] jurisdiction," and (3) "fraud or corruption" by a Board member. 45 U.S.C. §153 First (q). This case involves the Board's denial of employee grievance claims for failure to comply with its rules governing proof that the dispute had been submitted to a "conference" between the parties. 45 U.S.C. §152 Second. The Seventh Circuit held that the award must be set aside because the Board violated due process through retroactive recognition of a supposedly "new rule." The questions presented are:

1. Whether the Seventh Circuit erroneously held, in square conflict with decisions of the Third, Sixth, Tenth, and Eleventh Circuits, that the RLA includes a fourth, implied exception that authorizes courts to set aside final arbitration awards for alleged violations of due process.

2. Whether the Seventh Circuit erroneously held that the Board adopted a "new," retroactive interpretation of the standards governing its proceedings in violation of due process.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Union Pacific Railroad Company, Petitioner, was formerly known as the Southern Pacific Transportation Company. Union Pacific Corporation owns 62.6 percent of Union Pacific Railroad Company's stock and also wholly owns the Southern Pacific Rail Corporation. Union Pacific Corporation has issued publicly traded securities, and Union Pacific Railroad Company has issued publicly traded debt securities.

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OPINION BELOW

The denial of the petition for rehearing or rehearing en banc and the concurring opinion are reported at 537 F.3d 789 (Pet.App.43a-46a). The opinion of the Seventh Circuit is reported at 522 F.3d 746 (Pet.App.1a-23a). The opinion of the United States District Court for the Northern District of Illinois is reported at 432 F. Supp. 2d 768 (Pet.App.24a-42a). Copies of the relevant Awards of the National Railroad Adjustment Board are attached at Pet.App.65a-107a.

JURISDICTION

The Seventh Circuit denied rehearing on August 11, 2008. Pet.App.43a. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petition Appendix (Pet.App.47a-64a) reproduces the text of the Fifth Amendment to the United States Constitution, relevant provisions from the Railway Labor Act, codified at 45 U.S.C. §§151 *et seq.*, as amended, and corresponding regulations. Other relevant statutory and regulatory provisions are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

Statutory Background

The Railway Labor Act ("RLA" or "the Act"), codified at 45 U.S.C. §§151 *et seq.*, is a detailed statutory scheme designed to handle labor disputes arising in the railroad and airline industries. The Act's primary purpose was to provide for "the prompt and orderly settlement" of 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); *see also Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 94 (1978) ("Congress endeavored to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective-bargaining agreements.").

When first enacted in 1926, the RLA directed unresolved grievances to private adjustment boards established by the parties and composed of equal numbers of management and employee representatives. *The Railway Labor Act* 62 (Michael E. Abram et al. eds., 2d ed. 2005) (1995). This did not work. Parties failed to establish boards, deadlocks were common, and grievances remained unresolved. *Id.* at 64-65; William H. Spencer, *The National Railroad Adjustment Board* 11-12 (1938).

To remedy these issues, Congress amended the Act in 1934 to create the National Railroad Adjustment Board ("NRAB" or "the Board") and to declare arbitration mandatory and binding. Pub. L. No. 73-442, 48 Stat. 1185 (1934); Abram, *supra*, at 66-67; *Bhd. of R.R. Trainmen v. Chicago River & Ind. R.R. Co.*, 353 U.S. 30, 34-39 (1957). Under the 1934 Act, NRAB awards were "'final and binding upon both parties to the dispute, except insofar as they contain a monetary award.'" Abram, *supra*, at 73 (citation omitted). In the event a carrier failed to comply with a monetary award, the employee was permitted to bring an enforcement action, where the findings of the Board were to be "prima facie evidence of the facts stated therein." *Id.* Thus, employees who did not prevail

before the Board were afforded no review, while an aggrieved carrier received a trial *de novo*. *Id.*; *see also* Jacob A. Seidenberg, *Grievance Adjustment in the Railroad Industry*, *in The Railway Labor Act at Fifty* 209, 233-34 (1974).

In 1966, Congress amended the RLA again—this time to ensure finality of Board awards and to cure the perceived inequity between the review afforded to employees and that afforded to carriers. Pub. L. No. 89-456, 80 Stat. 208 (1966). Congress declared that Board awards would be "final," "binding," and "conclusive on the parties." 45 U.S.C. §153 First (m), (q). And it granted both carriers and employees equal but limited judicial review. *Id.* §153 First (p), (q).

The Grievance Process

The grievance procedure arising out of disciplinary charges begins with a series of investigations, hearings, and appeals that take place on the railroad property as set forth in the parties' collective bargaining agreement ("CBA"). *See* 45 U.S.C. §153 First (i) (providing for disputes to be handled "in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes"); *see also* 29 C.F.R. §301.2(a).

If one of the parties is dissatisfied with the outcome, the dispute must be submitted to a "conference." *See* 45 U.S.C. §152 Second ("All disputes between a carrier or carriers and its or their employees 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."); *see also* 29 C.F.R. §301.1(b). The investigations, hearings, and

conferences are collectively referred to as "on-property" proceedings.

If the dispute cannot be resolved in conference, the parties may initiate arbitration proceedings before the appropriate division of the NRAB.[1] 45 U.S.C. §153 First (i); 29 C.F.R. §301.2(a). The Board handles so-called "minor" disputes—those that "'grow out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions'" and "involve 'controversies over the meaning of an existing collective bargaining agreement in a particular fact situation.'" *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252-53 (1994) (citation omitted). In contrast, "major" disputes "relate to 'the formation of collective [bargaining] agreements or efforts to secure them.'" *Id.* at 252 (citation omitted) (alteration in original). The NRAB serves as an "expert body" "peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world." *Gunther v. San Diego & Ariz. E. Ry. Co.*, 382 U.S. 257, 261 (1965). The Board is split among four divisions, with each having jurisdiction over

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[1] The RLA also permits parties to refer disputes to one of two other types of arbitral bodies as an alternative to the NRAB: "public law boards" and "special boards of adjustment." 45 U.S.C. §153 Second; *Bhd. of Locomotive Eng'rs Int'l Union v. Union Pac. R.R. Co.*, 134 F.3d 1325, 1332 n.4 (8th Cir. 1998). The rules governing "private" board proceedings are creatures of contract among the parties, but the scope of judicial review is the same as that for the NRAB under 45 U.S.C. §153 First (q). *See, e.g., Cole v. Erie Lackawanna Ry. Co.*, 541 F.2d 528, 531-32 (6th Cir. 1976); *Employees Protective Ass'n v. Norfolk & W. Ry. Co.*, 511 F.2d 1040, 1045 (4th Cir. 1975).

different classes of employees. 45 U.S.C. §153 First (h); 29 C.F.R. §§301.3-.4.

Although the NRAB is an arbitral body, Congress set forth detailed procedural requirements to ensure fairness to all parties. The RLA requires the Board to provide "due notice of all hearings," an opportunity for the parties to "be heard … in person," and the option to be represented "by counsel, or by other representatives, as they may respectively elect." 45 U.S.C. §153 First (j). Participants are required to set forth, in written form, "all relevant argumentative facts, including all documentary evidence submitted in exhibit form" and to submit "a full statement of all facts and the supporting data bearing upon the disputes." 29 C.F.R. §301.5(d)-(e); 45 U.S.C. §153 First (i); *see also* 29 C.F.R. §301.7(b). This evidence is commonly referred to as the "on-property record." After reviewing the record before it and hearing argument, the Board makes an award "in writing" and "furnishe[s it] to the respective parties to the controversy." 45 U.S.C. §153 First (m). In the event the Board is deadlocked, a neutral "referee" is appointed to break the tie. *Id.* §153 First (*l*). The Board's award "shall be final and binding upon both parties to the dispute." *Id.* §153 First (m).

If either party is dissatisfied with the award judicial review is available, but only under limited circumstances. The Act unequivocally states that "the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division" for only three specific reasons: (1) "failure of the division to comply with the requirements of this Act," (2) "failure of the order to conform, or confine

itself, to matters within the scope of the division's jurisdiction," or (3) "fraud or corruption by a member of the division making the order." *Id.* §153 First (q).

Proceedings Below

1. Union Pacific Railroad Company ("Union Pacific" or "the Carrier") and the Brotherhood of Locomotive Engineers and Trainmen ("BLET" or "the Organization") are parties to several agreements covering Union Pacific employees. Pet.App.28a. Union Pacific charged five employees with disciplinary violations after a formal investigation, and a formal hearing that was recorded and transcribed with attached exhibits. Pet.App.3a, 28a-29a. BLET filed claims with Union Pacific challenging each decision as violating one of the CBAs. Pet.App.3a, 28a-29a.

Dissatisfied with the result, BLET filed a Notice of Intent to arbitrate before the Board. Pet.App.29a. In compiling the on-property record, the Organization failed to include evidence that any of the cases had been conferenced as required by the Act, 45 U.S.C. §152 Second. Pet.App.68a-69a, 76a-77a, 84a-85a, 92a-93a, 100a-101a. After the record was closed, Union Pacific raised this omission as an issue precluding the Board's exercise of jurisdiction over the cases. Pet.App.66a, 74a, 82a, 90a, 98a. BLET offered to submit new evidence to demonstrate that the conferencing requirement had been satisfied, but the Board refused to consider this evidence because it was untimely. Pet.App.69a, 77a, 85a, 93a, 101a. Citing extensive Board precedent, the panel held that BLET's failure to include evidence of conferencing in the on-property record required dismissal and, on March 15, 2005, the Division issued five arbitration awards denying the claims for lack of jurisdiction: Award Nos.

26089, 26090, 26092, 26093, and 26094 (hereinafter "Awards"). Pet.App.65a-107a.

In all relevant parts, the awards are identical and conclude that based on "the weight of Board precedent upholding the Carrier's position," "the record developed on the property does not substantiate that the on-property conference prerequisite was, in fact, satisfied" and, accordingly, "[t]he Board is … without jurisdiction to consider this dispute." Pet.App.68a, 76a, 84a, 92a, 100a. The Board panel went on to explain that it could not consider the Organization's belated submissions because "all evidence of the statutorily required conference is entirely absent from the on-property record, where, in order to be considered by the Board, it must reside." Pet.App.69a, 77a, 85a, 93a, 101a. The panel thus "stress[ed]" that "the Organization's belated production of supporting evidence, post-hearing in this case, no matter how convincing, cannot be entertained by the Board, given its function as an appellate tribunal." *Id.*

2. BLET filed a Petition for Review to the United States District Court for the Northern District of Illinois, arguing that: (1) conferencing is not required by the RLA; (2) the Board had improperly limited its jurisdiction by refusing to consider the merits of its claims; and (3) the Board's decision not to consider BLET's untimely evidence of conferencing amounted to a violation of due process. Pet.App.25a.

The district court dismissed under Rule 12(b)(6). Pet.App.42a. The court held that Board precedent "made clear that it considered conferencing a jurisdictional requirement and … that the record should contain evidence of such conferencing." Pet.App.40a-41a. "Under its limited scope of review,"

therefore, it could not "find that the NRAB proceedings were fundamentally unfair when the Organization had the ability to submit evidence of conferencing." Pet.App.40a. The district court also rejected BLET's suggestion that Union Pacific's jurisdictional objection was untimely, pointing out that the Board had "considered" "late challenges to their jurisdiction in the past." Pet.App.41a.

3. On appeal, BLET abandoned its claim that conferencing was not required by the Act and argued only that the Board denied it due process and failed to act within the scope of its jurisdiction by requiring proof of conferencing in the on-property record. Pet.App.6a-7a. At the outset, the Seventh Circuit rejected Union Pacific's attempt "to cast doubt on the law of this circuit that allows judicial review of Board orders where a party asserts a due process violation." Pet.App.8a. Finding that judicial review of constitutional questions cannot be foreclosed without "clear and convincing evidence" from Congress, and deeming the RLA to fall short of that standard, the Seventh Circuit "decline[d] to depart from [its] prior holdings on this issue." Pet.App.8a-9a.

The Seventh Circuit reasoned that "if the Board created a new rule previously unknown and unapplied, this would constitute a violation of due process." Pet.App.11a. It then reviewed the arbitral decisions of the Board, the RLA, and the regulations (known as "Circular One"), and found nothing clearly requiring evidence of conferencing to be included in the record. Pet.App.13a-22a. Finally, the Seventh Circuit held that the Board denied BLET due process by considering the Carrier's late jurisdictional objection but refusing to review the Organization's untimely

submission and reversed the district court.[2] Pet.App.21a-23a.

4. The Seventh Circuit denied Union Pacific's petition for rehearing and rehearing en banc on August 11, 2008. Pet.App.43a. Chief Judge Easterbrook and Judge Posner joined in the denial, but wrote a separate concurrence. Recognizing the 4-5 split among the Circuits on the question of whether there is a separate, extra-statutory exception permitting due process review, they ultimately found "little to be gained from making the conflict 5-4 one way rather than 5-4 the other way," because "[o]nly Congress or the Supreme Court can bring harmony." Pet.App.44a.

The concurrence also questioned the assumption underlying the panel's due process holding: "that, if the Board adopted this requirement in the course of decision—that is, by adjudication rather than prospective rulemaking—then it violated the Constitution." Pet.App.45a. To the contrary, "[l]awmaking in the course of adjudication is a staple of any common-law system, and rules adopted in that fashion apply not only to the parties but also to all similar cases." *Id.* This is true of administrative agencies as well, and applies regardless of whether the

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[2] The Seventh Circuit also erroneously suggested that there was "no question that the parties had met in conference and therefore the presentation of new evidence in no way prejudiced the Carrier." Pet.App.21a. In fact, the case was before the district court on a Rule 12(b)(6) motion to dismiss and whether or not there had been a conference is very much in dispute. Rehearing Pet. at 6-7 (7th Cir. Apr. 23, 2008).

"new" rule is substantive or procedural in nature. Pet.App.45a-46a.[3]

SUMMARY OF ARGUMENT

1. The RLA's provision governing judicial review of NRAB decisions could not be more clear. "[T]he findings and order of the division shall be conclusive on the parties, *except* that the order of the division may be set aside, in whole or in part, or remanded to the division" for any of three specified reasons. 45 U.S.C. §153 First (q) (emphasis added). There is no basis for review of "due process" or any other issues *not* encompassed within the three statutory grounds for judicial review. This Court has already construed the statutory language, in a case where the plaintiff was attempting to raise extra-statutory "due process" objections, and squarely held that NRAB decisions "may be set aside *only for the three reasons specified therein*. We have time and again emphasized that this statutory language means *just what it says*." *Sheehan*, 439 U.S. at 93 (emphasis added).

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[3] As discussed in the Petition for Certiorari, Chief Judge Easterbrook mistakenly believed that "all parties to this case assumed that a change of law during the course of administrative adjudication offends the Constitution." Pet.App.46a. Union Pacific in fact argued in its brief below that: "BLET is unable to point to a single case holding that an arbitrator violates due process if he or she applies a new or previously obscure evidentiary rule, so long as both sides are in fact allowed to make their case on the disputed evidentiary point." Def.Appellee Br. at 26 (7th Cir. Oct. 30, 2006). Regardless, the Seventh Circuit actually ruled on the issue: "When a Board creates a new requirement on its own, it is not interpreting a CBA or following the dictates of the RLA or its regulations…. [S]uch changes in the rules violate the due process rights of the parties." Pet.App.22a.

The statutory and legislative history confirm that conclusion. Prior to 1966 an employee disappointed by a Board decision received no judicial review whatsoever. But carriers could obtain a trial *de novo* in court simply by refusing to comply with a resulting award. Congress responded to the perceived inequity by providing that Board decisions would be "final and binding" on both sides, subject to a limited (but even-handed) judicial review provision. Congress's manifest desire was for a swift, efficient, and *final* determination of minor disputes by the Board—not endless litigation in court.

The evidence that the RLA "means just what it says," *Sheehan*, 439 U.S. at 93, is clear enough to overcome any clear statement rule or presumption favoring judicial review that this Court chooses to apply. And respecting Congress's obvious wishes here does not raise any serious constitutional issues. The requirements of due process are flexible and context-specific, and Congress's judgment that the RLA provides sufficient process on its own terms is reasonable and entitled to respect. The RLA guarantees parties the fundamental requirements of due process—including notice and an opportunity to be heard before a neutral decisionmaker—and judicial review of whether those requirements have been satisfied. If parties are unable to pursue novel theories of due process beyond what the RLA provides (such as Respondent's unprecedented due process theory in this case), that is appropriate in these limited and unusual circumstances. Congress reasonably patterned the grounds for review of Board awards after the RLA's judicial review provision for voluntary arbitration—where, of course, there is no state action and even the

most creative parties cannot dress up their procedural complaints in constitutional garb. It does not violate due process for parties to NRAB proceedings to receive basically the same procedural protections, and the same grounds for judicial review, that are enjoyed by parties to employment arbitration in most other settings.

2. If this Court reaches the merits of Respondent's "due process" objections it should reverse the Seventh Circuit. The NRAB simply, and reasonably, interpreted the statute and its own rules to require that the petitioner's initial submission establish a fact (on-property conferencing) that is essential to the Board's jurisdiction. Respondent claims to have been surprised by that ruling, and that its surprise means that due process was violated. That contention is wrong on the facts and the law.

On the facts, there was nothing unprecedented or unpredictable about the Board's holding. The statute requires parties to supply the Board "with a full statement of the facts and all supporting data bearing upon the disputes." 45 U.S.C. §153 First (i). And several prior decisions of the Board had interpreted the rules this way. The Seventh Circuit noted that those decisions were not precedential—but that reasoning would mean that the Board engages in unfair surprise whenever it applies a general rule in a manner that is ambiguous or debatable by lawyers, even for the hundredth time.

On the law, even if this *were* the first time the Board had addressed the issue, it simply does not implicate due process for the Board to resolve a debatable issue and apply its resolution to the parties at hand. What Respondent is complaining about is just

the ordinary retroactivity inherent in all adjudication. The law has been built, for centuries, around the premise (a fiction, perhaps, but a necessary one) that courts simply declare what the rules always were—and as a result litigants cannot claim unfair surprise when a legal dispute is resolved against them. The same is true in agency adjudication and in arbitration. Respondent's (and the Seventh Circuit's) due process theory in this case would transform all debatable questions into fodder for constitutional litigation, rendering the legal system utterly paralyzed and unable to function.

The decision of the Seventh Circuit must be reversed.

ARGUMENT

I. THE THREE STATUTORY GROUNDS FOR JUDICIAL REVIEW SET FORTH IN THE RAILWAY LABOR ACT ("RLA") ARE EXCLUSIVE

A. Congress Intended The Three Statutory Grounds For Judicial Review Set Forth In The RLA To Be Exclusive

As in any case of statutory construction, this Court's analysis "begins with 'the language of the statute.'" *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (citation omitted). And "where the statutory language provides a clear answer, it ends there as well." *Id.*; *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (citation omitted). This Court "'presume[s] that [the] legislature says in a statute what it means and means in a statute what it says there.'" *Barnhart*, 534 U.S. at 461-62 (citation

omitted). "When the statute's language is plain, the sole function of the courts … is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quotation marks and citations omitted).

1. The express language is clear

The express language of the RLA is clear and unequivocal. Board awards shall be "final and binding upon both parties." 45 U.S.C. §153 First (m). "[T]he findings and order of the division shall be conclusive on the parties, *except* that the order of the division may be set aside, in whole or in part, or remanded to the division" for only three specific reasons: (1) "failure of the division to comply with the requirements of this chapter," (2) "failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction," or (3) "fraud or corruption by a member of the division making the order." 45 U.S.C. §153 First (q) (emphasis added); *see also id.* §153 First (p) (limiting reasons for refusing enforcement of a Board award to the same three grounds).

In the words of this Court, judicial review afforded under the RLA is "'among the narrowest known to the law.'" *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 563 (1987) (citation omitted); *see also Consolidated Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299, 304 (1989) ("Judicial review of the arbitral decision is limited.") (citing 45 U.S.C. §153 First (q)). And, as this Court has repeatedly recognized, the statutory language means exactly what it says.

In *Union Pacific Railroad Co. v. Sheehan*, this Court held that "[j]udicial review of [NRAB] orders is *limited to three specific grounds* …. *Only* upon one or

more of these bases may a court set aside an order of the [NRAB]." 439 U.S. at 93 (emphasis added). In *Sheehan*, the NRAB dismissed a wrongful discharge claim because the employee had failed to file his appeal within the time limits provided for in the collective bargaining agreement. *Id.* at 89. The employee argued that the NRAB should have tolled the filing period during the pendency of a state court lawsuit he filed, and the Tenth Circuit agreed that the NRAB's "'failure to address the merits of [the employee's] claim denied him due process.'" *Id.* at 91 (citation omitted).

This Court squarely rejected the Tenth Circuit's "due process" rationale and reversed, reasoning that the employee "simply failed to demonstrate the existence of any of the grounds for review set forth in §153 First (q)." *Id.* at 93. It explained that "[t]he *dispositive* question is whether the party's objections to the Adjustment Board's decision fall within any of the three limited categories of review provided for in the [RLA]." *Id.* (emphasis added). The *Sheehan* Court found the Act's plain language "unequivocal[]" on this point: NRAB decisions "may be set aside *only for the three reasons specified therein*. We have time and again emphasized that this statutory language means *just what it says*." *Id.* (emphasis added); *see also Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 325 (1972) ("[A party] is limited to the judicial review of the Board's proceedings that the Act itself provides."); *cf. Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297, 302 (1943) ("Congress intended to go no further in its use of the processes of

adjudication and litigation than the express provisions of the Act indicate.").[4]

Following *Sheehan*, several courts of appeals have focused on the plain language, asked this "dispositive question," and held that where "due process" challenges to particular NRAB determinations do not "fall within any of the three limited categories of review," they cannot serve as a basis to set aside a Board award. Most recently, in *Kinross v. Utah Railway Co.*, the Tenth Circuit held that *Sheehan* "preclude[s] judicial review of due process claims beyond those specifically articulated in the Railway Labor Act." 362 F.3d 658, 662 (10th Cir. 2004). The Sixth Circuit likewise held that under *Sheehan* and the plain language of the RLA review "is limited to only those grounds specified" and thus an extra-statutory due process claim "cannot serve as a basis for judicial review." *Jones v. St. Louis-San Francisco Ry. Co.*, 728 F.2d 257, 261 & n.3 (6th Cir. 1984); *see also Henry v. Delta Air Lines*, 759 F.2d 870, 873 (11th Cir. 1985) (holding that, per *Sheehan*, "'judicially created due process challenges to System Board awards'" "'must

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[4] Although *Switchmen's Union* predates the current judicial review provision and did not involve a constitutional claim, its approach to statutory interpretation of the RLA is informative. This Court held that Congress foreclosed all judicial review of National Mediation Board decisions certifying a union as the employees' representative. 320 U.S. at 300. Where "Congress for reasons of its own decided upon the method for the protection of the 'right' which it created" and "selected the precise machinery and fashioned the tool which it deemed suited to that end," there was no reason to believe that "judicial review on top of the Mediation Board's administrative determination would strengthen that protection." *Id.* at 301.

fail'") (quoting district court); *United Steelworkers of Am. Local 1913 v. Union R.R. Co.*, 648 F.2d 905, 914 (3d Cir. 1981) (rejecting argument that court can review alleged due process violations that do not otherwise fit into three statutory grounds based on *Sheehan* and "statutory command").

Where, as here, the text is unambiguous, the statutory analysis is at an end.

2. The statutory and legislative history confirm what the language makes clear

The overall statutory scheme and the history of the RLA confirm that conclusion.

The specific judicial review provision at issue here was enacted as part of the 1966 Amendments to the RLA. Prior to 1966, employees who did not prevail before the Board were afforded *no review* whatsoever. *See* Pub. L. No. 73-442, 48 Stat. 1185, 1191 (1934) ("[A]wards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award."). Carriers, on the other hand, could procure judicial review (usually in the form of a trial *de novo*) if they refused to pay a monetary award and the prevailing employee brought an enforcement action. *See id.* at 1192 (providing for an enforcement action in the event the carrier fails to comply with a Board award wherein "findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated"); Seidenberg, *supra*, at 233-34. Thus, whereas a "'railroad affected [could] obtain judicial review of [an] award by declining to comply with it,'" an aggrieved employee had "'no means by which judicial review [could] be obtained.'" *Walker v. S. Ry. Co.*, 385 U.S. 196, 198 (1966) (citation omitted).

As this Court explained in *Union Pacific Railroad Co. v. Price*, that "disparity in judicial review of Adjustment Board orders … was explicitly created by Congress." 360 U.S. 601, 615-16 (1959). Under the pre-1966 statutory scheme, if an "employee loses his case before the National Railroad Adjustment Board, he has *no judicial remedy at all*—he cannot sue the railroad on his claim, and he cannot obtain judicial review of the decision of the Board." Debate in the House of Representatives, 89th Cong., 2d Sess. (Feb. 9, 1966) ("House Debate"), *reprinted in* 1 *The Railway Labor Act of 1926: A Legislative History* ("*Legis. Hist.*") 1354 (Michael H. Campbell & Edward C. Brower III eds. 1988) (Rep. Staggers) (emphasis added); *see also* H.R. Rep. No. 89-1114 (1965) ("House Report"), *reprinted in* 1 *Legis. Hist.* 1307, 1321 (Before "[i]f … an employee fail[ed] to receive an award in his favor, there [was] no means by which judicial review may be obtained."); S. Rep. No. 89-1201 (1966) ("Senate Report"), *reprinted in* 1 *Legis. Hist.* 1337, 1339 (same); House Debate, 1 *Legis. Hist.* at 1373 ("[A]ll awards which deny a worker's claim for settlement of a grievance are final and binding, while those awards which sustain his claim when money is involved are not final and binding on the employer.") (Rep. O'Konski); *id.* at 1356 ("As the law now stands, the right to a court review … is an entirely one-sided affair.… There is *no way that [an employee] can obtain a review* of that decision." (emphasis added)) (Rep. Younger).

Congress understood this Court's case law to hold that the absence of *any* review under the 1934 Act was constitutionally permissible, and that understanding suffused the debate on the 1966 Amendments. *See* House Report, 1 *Legis. Hist.* at 1321 (explaining that

the "constitutionality of permitting judicial review to be obtained by carriers while such review is prohibited to employees was upheld" by this Court); House Debate, 1 *Legis. Hist.* at 1357 ("[T]he Supreme Court has upheld the principle of not permitting employees any review of denied claims, over dissents pointing out how unfair this is.") (Rep. Williams). Citing *Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad Co.*, 373 U.S. 33 (1963), *Pennsylvania Railroad Co. v. Day*, 360 U.S. 548 (1959), and *Price*, 360 U.S. 601, "[t]he committee point[ed] out" that because "the constitutionality of permitting no review of decisions of the Board has been upheld," "[i]t would therefore follow that the constitutionality of permitting only limited review should be upheld" as well. House Report, 1 *Legis. Hist.* at 1323. In all three of those cases, this Court held that employees were precluded from seeking redress outside of the statutorily prescribed procedures. *See Bhd. of Locomotive Eng'rs*, 373 U.S. at 38 (union cannot legally strike to enforce Board award but rather must utilize statutory enforcement procedure); *Price*, 360 U.S. at 608-09 (discharged employee aggrieved by Board decision could not pursue common law action); *Day*, 360 U.S. at 552 (resigned employee could not file common law action in first instance but rather must seek redress before the NRAB). While none of the cases directly addressed constitutional claims, Congress read them as holding that judicial review could be entirely precluded.

Several *lower* courts dissatisfied with the perceived unfairness of the review scheme under the 1934 Act had taken it upon themselves to permit (with little discussion) non-statutory "due process" challenges by

employees. *See Price*, 360 U.S. at 616. But Congress chose to address that perceived unfairness in another way. In 1966, the Act was amended to provide that "awards shall be final and binding upon both parties to the dispute" *period*, with no exception for money awards; that the Board findings and order "shall be conclusive on the parties"; and that judicial review for non-prevailing parties (employees or carriers) would be available for three specified reasons. 45 U.S.C. §153 First (m), (p), (q). Congress's preferred resolution was to *strengthen* the finality of Board awards by equalizing the playing field. Senate Report, 1 *Legis. Hist.* at 1337 (purpose is to make NRAB awards final and "to provide equal opportunity for limited judicial review … to employees and employers"); House Report, 1 *Legis. Hist.* at 1309 (similar); House Debate, 1 *Legis. Hist.* at 1357 ("the bill provides for finality of decisions" and "for [e]quality of treatment of both parties" by eliminating the "one-sided right of railroads to take money awards cases to court for de novo review") (Rep. Williams).

Congress patterned the 1966 review provisions after the limited grounds for judicial review traditionally available to parties aggrieved by the decisions of private arbitrators. House Debate, 1 *Legis. Hist.* at 1354 ("[T]he feeling of our committee [was] that the review prescribed for awards should be that generally prescribed for arbitration tribunals ….") (Rep. Staggers); *id.* at 1370 ("Judicial review would thus be available to employers and employees alike, but on the limited basis traditionally applicable to awards of arbitration tribunals ….") (Rep. Harsha). This new regime limited judicial review for both carriers and employees "to the determination of questions

traditionally involved in arbitration legislation." House Report, 1 *Legis. Hist.* at 1309.

More specifically, "[t]he limited grounds for judicial review" Congress chose "are the same grounds that are provided in section 9 of the Railway Labor Act." *See* Senate Report, 1 *Legis. Hist.* at 1339; *see also* House Report, 1 *Legis. Hist.* at 1322 ("The foregoing three tests are the tests traditionally applicable to awards of arbitration tribunals, as set out in section 9 of the Railway Labor Act.").[5] Section 9 was enacted in 1926 to govern review of *voluntary* arbitration proceedings. *See* 45 U.S.C. §§157-59.[6]

During the congressional hearings, the railroads argued that compulsory arbitration required more protection than that afforded to "awards of boards of arbitration created by agreement of the parties" and subject to Section 9 of the Act. *See, e.g., Amend the Railway Labor Act: Hearing on H.R. 706 Before the Subcomm. on Labor of the S. Comm. on Labor and Public Welfare*, 89th Cong. (1966), *reprinted in* 4 *Legis. Hist.* 124. They also insisted that "awards [should] be

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[5] Section 9 provides for judicial review where: (a) "the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act"; (b) "the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate"; or (c) "a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption." 45 U.S.C. §159 Third.

[6] In practice, Sections 9 governs the arbitration of "major" disputes and other interest disputes. *See* Benjamin Aaron, *Voluntary Arbitration of Railroad and Airline Interest Disputes*, *in The Railway Labor Act at Fifty* 129, 130-31 (1974).

subject to different, more demanding standards of judicial review than those of arbitrating bodies that act under private agreements." *Id.* at 125. Congress disagreed. Congress specifically rejected a railroad proposal that would have expanded judicial review beyond the grounds traditionally provided for arbitration awards to permit a court to set aside Board awards that were "contrary to constitutional right, power, privilege, or immunity." *Id.* at 123-32.

Not a single member of Congress suggested an intent to preserve the amorphous "due process" review previously recognized by some lower courts. While Congress shared the fairness concerns that had prompted some judges to create an avenue for aggrieved employees to seek redress, it adopted a quite different and very specific solution to that problem. In purpose and effect, the three well-recognized bases for review of arbitration awards essentially subsumed the "due process" challenges read into the statute by the lower courts. As even Respondent concedes, "[t]he grounds for review under the Fifth Amendment of the constitution are effectively the same as those provided by the Railway Labor Act itself." Br. in Opp. at 1; *see also infra* at 36 & n.9.

That Congress intended the statutory grounds to be exclusive is as plain from the legislative history as it is from the text itself. The committee reports explain that "[t]he only matters which may be considered by the court are" the three grounds now-specified in the Act. House Report, 1 *Legis. Hist.* at 1322; Senate Report, 1 *Legis. Hist.* at 1342 ("[J]udicial review … would be available to either party but limited to" the three statutory grounds). The floor debate repeatedly and uniformly confirmed this sentiment. As one

representative explained, the 1966 Amendment "limits the judicial review currently available to carriers, and expands the review available to employees, so that each side is entitled to obtain review of Board decisions *on these grounds and these three grounds only*." House Debate, 1 *Legis. Hist.* at 1354 (Rep. Staggers) (emphasis added); *see also e.g.*, *id.* ("Under the bill as reported, all decisions of the [NRAB] are final and may not be reviewed by the court *except on the grounds specified in the law* …." (emphasis added)); *id.* at 1364-65 (judicial review "limited" to the three categories) (Rep. Pickle).

3. A contrary interpretation would directly contravene the RLA's overriding purpose

The recognition of an additional, extra-statutory ground for review of "due process" claims would fundamentally undermine the policies underlying the RLA. *See* 45 U.S.C. §151a(5) (overarching purposes include "provid[ing] for the prompt and orderly settlement of all disputes growing out of grievances"). "The disruptive practical consequences of such a determination" should "confirm [the] view that Congress intended no such result." *S. Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 457 (1979) (presumption of judicial review overcome when applied to Interstate Commerce Commission's refusal to investigate lawfulness of proposed rate increase).

"Congress' purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." *Hawaiian Airlines, Inc*, 512 U.S. at 252; *Gunther*, 382 U.S. at 263-64 (RLA provides for a "'mandatory, exclusive, and comprehensive system for

resolving grievance disputes'") (citation omitted). The goal was to keep minor disputes "out of the courts" and to ensure "finality of [Board] determinations." *Sheehan*, 439 U.S. at 94; *see also Price*, 360 U.S. at 616 ("Plainly the statutory scheme … was designed for effective and final decision of grievances which arise daily …."); *Gunther*, 382 U.S. at 263 ("This Court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided *finally* by the Railroad Adjustment Board." (emphasis added)).

Permitting a nebulous additional "due process" basis for review of Board decisions undermines this "comprehensive" scheme by throwing open the courthouse door to any litigant competent enough to dress up his merits objection in constitutional garb. Virtually any litigant can claim, for example, that the Board's application of the rules in his particular circumstances was so surprising as to violate procedural due process. This case provides a telling example. Here, the Board panel held that evidence of conferencing must be in the on-property record. The substance of that ruling is plainly unreviewable under the RLA. So instead of arguing the merits, BLET claimed lack of notice and called it "due process." By affixing a constitutional label to a simple evidentiary dispute, awards that would otherwise be "final" and "binding" are subjected to a four-year court battle closely scrutinizing the propriety of the Board's interpretation of its own rules. In the end, "[s]tripping away the disguise is scarcely different from resolving the suit on the merits." *Czerkies v. U.S. DOL*, 73 F.3d 1435, 1446 (7th Cir. 1996) (en banc) (Easterbrook, J., concurring). The RLA review provision is supposed to

provide "'among the narrowest'" grounds for judicial review "'known to the law.'" *Buell*, 480 U.S. at 563 (citation omitted). The finality it envisions cannot withstand this onslaught.

B. The Possibility That A Small Number Of Constitutional Claims May Go Unreviewed Does Not Require This Court To Disregard The Plain Language Of The Statute

1. There is clear and convincing evidence that Congress intended to confine judicial review to the enumerated statutory criteria

This Court has held that "'clear and convincing evidence'" is required to overcome "'the general presumption favoring judicial review of administrative action.'" *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984) (citation omitted). Similarly, "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear," *Webster v. Doe*, 486 U.S. 592, 603 (1988), or "manifested by 'clear and convincing' evidence," *Califano v. Sanders*, 430 U.S. 99, 109 (1977) (citation omitted). *See also Weinberger v. Salfi*, 422 U.S. 749, 762 (1975) ("'clear and convincing' evidence would be required" before interpreting statute to bar constitutional review). But "[t]his Court has … never applied the 'clear and convincing evidence' standard in the strict evidentiary sense." *Block*, 467 U.S. at 350-51. The presumption "is just that—a presumption [and] like all presumptions used in interpreting statutes, it may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent." *Id.* at 349.

For all the reasons explained above, the RLA is abundantly clear that judicial review is limited to the three statutory grounds. *See, e.g.*, *Sheehan*, 439 U.S. at 93 ("[The RLA] *unequivocally* states that [Board decisions] may be set aside *only for the three reasons specified therein*. We have time and again emphasized that this statutory language means *just what it says*." (emphasis added)); *see* Section I.A, *supra*. Congress consciously opted for three precise grounds for review and, in doing so, struck a deliberate balance between additional review and finality.

When Congress expressly specifies that an agency or arbitral decision shall be final and binding on the parties except for certain specifically enumerated grounds for judicial review, it is not required to add "and we really mean it" or "notice that we intentionally did not add 'due process' to that list." A hospital sign that says "No entry except for hospital staff" unequivocally excludes patients and their families. A "final" clearance sale that precludes all returns "except electronics, furniture, and books" means the purchaser is stuck with shoes. These are not debatable *inferences* that might be overcome by presumptions or implications from common practices, but the plain and express meaning of the text.

In *United States v. Erika, Inc.*, this Court was asked whether judicial review existed for the amount of benefit determinations under Part B of the Medicare statute. 456 U.S. 201 (1982). The statute declared the administrative decision "final and binding upon all parties to the hearing," distinguished all eligibility determinations and *Part A* benefit awards from smaller Part B awards, and provided judicial review for the former but not the latter. *Id.* at 203, 208-09. This

Court held that Congress's "final and binding" language coupled with a failure to expressly authorize judicial review "provides persuasive evidence that Congress deliberately intended to foreclose further review of such claims." *Id.* at 208. Here, the RLA declares Board awards "conclusive," "final and binding" and, in far more explicit fashion, "'greatly restrict[s]' the appealability" of NRAB decisions "'in order to avoid overloading the courts with quite minor matters.'" *Id.* at 209 (citation omitted).

This Court cannot "'pervert[] the purpose of a statute … or judicially rewrit[e] it'" "in order to avoid constitutional adjudication." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986) (internal quotation marks and citation omitted). The cases in which this Court has held that statutes are insufficiently clear to bar constitutional review are readily distinguishable. In *Webster v. Doe*, for example, this Court held that the statutory scheme did not preclude a constitutional challenge to the CIA Director's decision to terminate an employee, where the statute provided that he "'may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States.'" 486 U.S. at 594 (quoting 50 U.S.C. §403(c)). The statute in *Webster* nowhere directly addressed judicial review of the director's decisions or provided that his decisions would be final, binding, or conclusive. Here, by contrast, the statute clearly provides that Board awards will be final and binding on the parties, and explicitly limits judicial review to three specific grounds.

Most of the other cases involve constitutional challenges to the statutory or regulatory regime itself, and statutory language that appears to preclude judicial review only of issues arising *within* the challenged regime. In *Johnson v. Robison*, for example, this Court permitted a constitutional challenge to a statutory provision precluding conscientious objectors from obtaining veterans' education benefits. 415 U.S. 361, 366-67 (1974). The statute provided that "'[t]he decisions of the [agency] on any question of law or fact *under* any law administered by the [agency] providing benefits for veterans … shall be final and conclusive and no other official or any court … shall have power or jurisdiction to review any *such* decision.'" *Id.* at 365 n.5 (quoting statute) (emphasis added). This Court explained that the statute only constrained review of individual benefits "decisions" of the agency "under" the statute, not "decisions" of Congress in creating the statute in the first place "under" the Constitution. *Id.* at 367; *see also e.g.*, *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 491-92 & n.12 (1991) (holding that the Immigration Reform Control Act did not preclude constitutional and statutory challenges to INS procedures where statute provided "no administrative or judicial review of a *determination respecting an application for adjustment of status*" "except" for review of deportation or exclusion orders (emphasis added) (citation omitted)); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 675-76, 681 n.12 (1986) (distinguishing individual "amount determination" challenge in *Erika* and holding that neither statutory nor constitutional challenges to the Medicare regulations was barred where statute limited review of

"any determination … of … the amount of benefits under Part A" and the "amount of … payment of benefits under Part B," but "simply [did] not speak to challenges mounted against the *method* by which such amounts are to be determined rather than the determinations themselves").

The consistent thread is that even when Congress specifies that the internal outcomes of agency adjudicative processes will be final and unreviewable, it ordinarily does not intend, in the absence of a clear statement, to preclude *external* constitutional challenges to the statutory scheme itself. *See Czerkies*, 73 F.3d at 1444-45 (Easterbrook, J., concurring) (noting this Court's recognition of an important distinction between "systematic" and "case-specific" challenges and that precluding review of the latter, even when a constitutional claim is at issue, "is no occasion for creative readings of the law"). The RLA does not prevent Respondent from arguing (as it surely will to this Court) that the RLA itself is unconstitutional because it denies judicial review of its underlying grievance. But Respondent may not challenge "the award" and "[t]he findings and order of the division"—the very matters expressly deemed "final," "binding," and "conclusive" by the RLA. This Court's reasoning in the cases discussed above presumes that judicial review of such matters is precluded by language deeming the agency's decision "final" and "binding" on the parties. *See id.* at 1447-48 (noting that circuit courts read *Johnson* as precluding judicial review of "individual veterans' benefits decisions, even when the veteran advanced a constitutional argument").

The "presumption" in favor of judicial review that this Court applies in many settings is also misplaced

here. NRAB decisions are specifically *excluded* from the judicial review provisions of the Administrative Procedure Act because the Board is "composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them." 5 U.S.C. §551(1)(E); *see Jones v. Seaboard Sys. R.R.*, 783 F.2d 639, 642 (6th Cir. 1986).[7] And while Congress does favor judicial review of agency action as a general matter, it *does not* favor searching judicial scrutiny of the processes employed by arbitrators in any other setting. *See* 9 U.S.C. §10 (authorizing judicial review of arbitral awards only on limited grounds very similar to those in the RLA); *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36-37 (1987) (explaining that "courts play only a limited role when asked to review the decision of an arbitrator" in part because "grievance and arbitration procedures are part and parcel of the ongoing process of collective bargaining"). Indeed, in *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, this Court held that parties could not, by private contract, expand the limited scope of judicial review provided by the FAA. 128 S. Ct. 1396, 1406 (2008). "Any other reading [would] open[] the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review

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[7] The NRAB is composed of an equal number of members chosen and compensated by the carriers and the unions. 45 U.S.C. §153 First (a)-(c), (g). These "railroad men, both workers and management, serv[e] on the Adjustment Board with their long experience and accepted expertise in this field." *Gunther*, 382 U.S. at 261-62. A neutral referee is appointed only when the partisan members cannot reach a majority decision. 45 U.S.C. §153 First (*l*), (n).

process,' and bring arbitration theory to grief in post-arbitration process." *Id.* at 1405 (citation omitted).

As Congress recognized when designing the RLA review provisions at issue here, in substance adjustment boards like the NRAB are much more akin to private arbitrators than to traditional agencies. *See supra* at 20-22; *see also Hawaiian Airlines, Inc.*, 512 U.S. at 248, 252 (describing adjustment board as a "mandatory arbitral mechanism"); *Consolidated Rail Corp.*, 491 U.S. at 303 (describing RLA's "compulsory arbitration procedures"); *Buell*, 480 U.S. at 558 (describing RLA's "binding arbitration procedures"). There certainly is no *presumption* that parties to arbitration proceedings will be able to come to court to complain about alleged constitutional violations in the arbitration. To the contrary, judicial review is narrowly limited and there typically is no state action—and hence no constitutional issue—in employment arbitration at all.[8] And while state action technically exists in this setting, substantively Congress patterned its review provisions after those governing private arbitral decisions where a "due process" issue could not possibly arise.

There is no good reason to torture the language and obvious intent of the RLA in order to conform its procedures to some preconceived model of agency adjudication, when the better analogy by far is ordinary private employment arbitration. Congress explicitly patterned the judicial review provision at

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[8] *See* Sarah Rudolph Cole & E. Gary Spitko, *Arbitration and the Batson Principle*, 38 Ga. L. Rev. 1145, 1161 & n.68 (2004) ("Every federal court considering the question has concluded that there is no state action present in contractual arbitration.").

issue here on the arbitral review provisions in Section 9 of the RLA, which are typical of judicial review of arbitration awards in other areas of the law. *See supra* at 20-22. A substantially more expansive role for judicial review in this setting would be surprising, anomalous, and highly disruptive.

2. The RLA's limited judicial review provision presents no serious constitutional problem

To the extent the presumption favoring judicial review gains any additional force in the constitutional context, it derives from the canon of constitutional doubt. In certain circumstances, a "heightened showing" is required "to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster*, 486 U.S. at 603 (citation omitted). "A colorable claim, of course, presupposes that there is some possible validity to a claim." *See Richardson v. United States*, 468 U.S. 317, 326 n.6 (1984). In the narrow and unusual circumstances presented here, there simply is no "serious constitutional question" that could justify interpretive contortions, and no substantive constitutional problem with enforcing the RLA as written.

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *see also Mathews v. Eldridge*, 424 U.S. 319 (1976). The appropriate procedures are "shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions," *Mathews*, 424 U.S. at 344, and marginal

gains from added process may be outweighed by the costs and harm to institutional interests, *id.* at 348. When "assessing what process is due," "substantial weight must be given to the good-faith judgments of … Congress … that the procedures they have provided assure fair consideration of the entitlement claims of individuals." *Id.* at 349.

Congress here has made a judgment, informed by long experience and after deep consultation with representatives of both carriers and employees, that a workable system for resolving railroad employment disputes must be informal, speedy, conducted before decisionmakers deeply familiar with the railroad industry rather than generalist judges, and (with narrow exceptions) must produce decisions that bring a conclusive end to the controversy. The process the disputants receive is largely up to them at the on-property level, and then at the Board level is comparable to that received in typical agency or even judicial appeals.

Before the parties even get to the Board, they have been through an on-property hearing and adversarial dispute resolution procedure. The process afforded on-property in discipline cases typically consists of an informal investigation and written notice of the charges, followed by a formal investigation and hearing where both parties may present and cross-examine witnesses, introduce evidence, and argue before the hearing officer. *See generally* Pl.'s Exhibit B to Petition (N.D. Ill. Apr. 22, 2005); Abram, *supra*, at 407-08. If the decision is adverse to the employee, there is an opportunity for at least one (and often two) appeals on written submissions. Abram, *supra*, at 406-07. And after all of that there is a conference between the

parties, mandated by the RLA but detailed by the particular collective bargaining agreement. *See* 45 U.S.C. §152 Second. Whatever variation in proceedings may exist between or among different carriers, the on-property process is exactly what the parties themselves have negotiated and agreed to in the collective bargaining agreement, so they cannot complain that it is somehow insufficient. Abram, *supra*, at 404 ("Other than the requirement to meet and confer, the RLA allows the parties to define for themselves the structure of the pre-arbitration grievance procedures.").

Once before the NRAB, the RLA requires "due notice of all hearings"; provides that "[p]arties may be heard either in person, by counsel, or by other representatives, as they may respectively elect"; ensures an equal number of labor and management representatives, with ties to be broken by a neutral referee; and directs that Board awards "shall be stated in writing" and that "[a] copy of the awards shall be furnished to the respective parties." *See* 45 U.S.C. §153 First (a), (j), (*l*), (m). The RLA thus provides the core due process requirements of notice, an opportunity to be heard, and a neutral decisionmaker. *See* Christopher L. Sagers, *Due Process Review Under the Railway Labor Act*, 94 Mich. L. Rev. 466, 479-83 (1995). That these structural provisions afford employees (and carriers) sufficient process is not disputed by the parties here. Indeed, NRAB proceedings have been governed by these very procedures for over seventy years without successful challenge. The only question then is whether the RLA nevertheless violates due process by precluding

judicial review of a narrow class of purported "due process" challenges to individual Board awards.

The Act *itself* provides for statutory judicial review affording parties an opportunity to raise in court a broad range of objections generally sounding in due process. The RLA authorizes judicial review for any violation of the processes provided by the Act itself, *i.e.*, for "failure of the division to comply with the requirements of this chapter," 45 U.S.C. §153 First (q). Thus, if a party did not receive notice of the Board's proceedings, representation of his choosing, a fair opportunity to be heard before a panel including a neutral representative in the event of a deadlock, or a formal decision in writing, then the terms of the RLA itself were violated and the court can set the award aside. If the Board exceeded its authority or jurisdiction, a reviewing court can also set aside the award. *Id.* And if there was any "fraud or corruption" by a Board member, which has been interpreted broadly to encompass any claim that a decisionmaker was biased or unwilling to listen, the court can intervene. *Id.*; *see, e.g.*, *Pac. & Arctic Ry. & Navigation Co. v. United Transp. Union*, 952 F.2d 1144, 1148 (9th Cir. 1991) (interpreting "fraud" as "properly embrac[ing] a situation in which the supposedly neutral arbitrator exhibits a complete unwillingness to respond, and indifference, to any evidence or argument in support of one of the parties' positions").

In other words, "the Railway Labor Act itself provides for sufficient procedural due process within its own boundaries." *Kinross*, 362 F.3d at 662 n.3; *see also* Sagers, *supra*, at 479-83. Indeed, Respondent argued vehemently in its Brief in Opposition that the

statutory review criteria are expansive enough to permit a court to reach any viable due process claim: "It is unlikely that there is any case involving a constitutional violation—a denial of due process—that does not also involve some act by the NRAB in excess of its lawful authority, or put in the convoluted statutory parlance, an act that is a failure of the panel to 'confine or conform itself' to its proper jurisdiction." Br. in Opp. at 8.[9] And certainly many of the cases reviewing ostensibly extra-statutory due process objections could have been accommodated within the statutory framework.[10] Petitioner does not believe

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[9] *See also* Br. in Opp. at 1 ("The grounds for review under the Fifth Amendment of the constitution are effectively the same as those provided by the Railway Labor Act itself."); *id.* at 12 (referring to "the lack of a practical distinction between reviewing a case under constitutional due process and under the three categories of statutory review provided in the RLA"); *id.* at 13 (discussing *Kinross* and observing that "any case which would violate the limited notions of fundamental fairness required by due process would be reviewable under the statutory categories in the RLA"); *id.* at 15-16 ("[A]ny act that constituted a denial of procedural due process—which is a very high standard—would almost certainly entail some act or conduct that exceeded the panel's jurisdiction or authority within the meaning of 45 U.S.C. 153 First (q) as well."); *id.* at 22 ("The reasons that employees bring a claim under 45 U.S.C. 153 First (q) are the same reasons that employees bring a claim under the Fifth Amendment. Courts apply the same analysis to both claims—a review for fundamental unfairness that prevented a claim from being heard.").

[10] For example, in *Burlington Northern Inc. v. American Railway Supervisors Ass'n*, the Seventh Circuit cited to a pre-1966 due process case—which held that an NRAB order violated due process by depriving an employee of his seniority without notice—and explained that now the "statutory requirement of notice incorporates th[e] notion of due process: one will not be

that the statute, fairly understood, is expansive enough to authorize review of every conceivable "colorable" constitutional challenge. Respondent's strained and creative "due process" claim in this case does not, for example, fall within any of the statutory categories. But we agree with Respondent to the following limited extent. The statutory review provisions are plainly generous enough to permit litigants to raise all of the simple, common, easily adjudicated, and likely to be meritorious claims that sail under the flag of due process of law—including claims seeking to vindicate a right to fair notice, an opportunity to be heard, and an unbiased decisionmaker.

The potential due process claims that *do not* fall within the broad boundaries of the statutory criteria are (like Respondent's theory here) at best marginal, novel, rare, and unlikely to succeed. "Congress is entitled to believe that the probability of unconstitutional conduct in a class of cases is sufficiently low that a judicial search for it would come at too high a cost to other interests." *Czerkies*, 73 F.3d at 1447 (Easterbrook, J., concurring). In *Schweiker v.*

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bound by a judgment when not afforded an opportunity to challenge it." 527 F.2d 216, 220 (7th Cir. 1975) (citing *Nord v. Griffin*, 86 F.2d 481, 484 (7th Cir. 1936), *cert. denied*, 300 U.S. 673 (1937)); *compare also*, *e.g.*, *Hornsby v. Dobard*, 291 F.2d 483, 487 (5th Cir. 1961) ("due process" claim of bias), *with Pac. & Arctic Ry.*, 952 F.2d at 1148 (claim of bias, recast as statutory claim of "fraud"); *see also Jones*, 728 F.2d at 261-62 (recasting due process claim—that substitute Board members improperly decided case without a hearing, a transcript, or conferring with predecessor members—as one alleging that the Board "failed to comply with the requirements of the Railway Labor Act, namely 45 U.S.C. [§153] First (j) [requiring a hearing] and (n) [requiring awards be made on majority vote of members]").

McClure, 456 U.S. 188 (1982), for example, this Court held that an administrative scheme for Medicare Part B benefits satisfied due process, notwithstanding that private carriers made the final award determination without any administrative or judicial review, because the hearing officers have a "'thorough knowledge of the Medicare program'" and "additional procedures" would not "reduce the risk of erroneous deprivation of Part B benefits." *Id.* at 199-200 (citation omitted). The RLA review provisions likewise reflect Congress's (and the industry's) judgment that railroad arbitration disputes should not be a battleground for novel and creative constitutional adjudication—and that in this narrow and unique context swift, workable, and final resolution of disputes is more important than judicial review of every possible theory that a smart lawyer can dress up in constitutional garb. Due process does not require a different balance.

This Court has "never held … that Congress may not, by explicit language, preclude judicial review of constitutional claims," *McNary*, 498 U.S. at 504 (Rehnquist, C.J., dissenting), and several Justices have concluded that, in various circumstances, Congress did just that.[11] Congress's intent in the RLA is crystal clear, and enforcing the plain statutory text will not

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[11] *See Webster*, 486 U.S. at 612-13 (Scalia, J., dissenting) (rejecting the view that "judicial review of all 'colorable constitutional claims'" is "constitutionally required"); *id.* at 605 (O'Connor, J., concurring in part and dissenting in part) (concluding that Congress had authority "to close the lower federal courts to constitutional claims" on facts of case); *McNary*, 498 U.S. at 504 (Rehnquist, C.J., dissenting) (concluding that Congress had authority to "preclude review of constitutional claims" on facts of case).

deprive anyone of serious constitutional rights, or aggrandize the political branches at the expense of the judiciary's prerogative to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Respondent is essentially complaining that it was surprised by a routine holding that it failed to carry an evidentiary burden in an employment arbitration proceeding. If its attempt to repackage that grievance as a due process case is frustrated by the RLA's limited review provisions, the constitutional order will not be seriously threatened.

II. THE BOARD PANEL DID NOT VIOLATE DUE PROCESS

Even if an amorphous, extra-statutory due process exception could be read into the RLA, the Seventh Circuit was wrong to set aside the Board award on due process grounds here.

The Seventh Circuit held that the NRAB panel's dismissal amounted to a due process violation because the requirement that evidence of conferencing be included in the on-property record was a "new rule, unknown to the Organization." Pet.App.10a. The court held that "if the Board created a new rule previously unknown and unapplied, this would constitute a violation of due process." Pet.App.11a. And it also concluded that "fundamental fairness" required the Board to either consider Respondent's new outside-the-record submissions or reject Petitioner's jurisdictional argument raised after the record closed.

The Seventh Circuit's analysis fails on the facts and on the law. On the facts, the Board's requirement that evidence of conferencing must be contained in the record was not actually "new." On the law, a tribunal does not announce a "new rule" requiring prior notice

to the parties whenever it interprets an ambiguous provision or applies existing rules to novel factual circumstances. What the Seventh Circuit described as the Board's unconstitutional "creat[ion of] a new requirement" (Pet.App.22a) was, at most, the ordinary retroactivity inherent in all adjudication. That raises no difficulties of constitutional stature.

A. The Requirement That Proof Of Conferencing Be Included In The On-Property Record Was Nothing "New"

The central premise for the Seventh Circuit's due process holding was its belief that the rule applied by the Board panel was "new." That premise was factually incorrect.

The panel's award fully comports with the text of the RLA and corresponding regulations (known as "Circular One") which make clear that:

- "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." 45 U.S.C. §152 Second; *see also* 29 C.F.R. §301.1(b);
- "[T]he disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board *with a full statement of the facts and all supporting data* bearing upon the disputes." 45 U.S.C. §153 First (i) (emphasis added); *see also* 29 C.F.R. §301.2(a); and

- "*No 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, approved June 21, 1934.*" 29 C.F.R. §301.2(b) (emphasis added).

The NRAB operates as an appellate body and not as a court of first review. Proceedings before the Board are "on the basis of the record and closely resemble an appellate proceeding based on the record established during the on-property stage." Abram, *supra*, at 407-08; *id.* at 407 ("The Board does not conduct an evidentiary hearing but reviews an administrative record that is created during the grievance handling procedure ….").[12] That the Board would read these rules together to require that the basis for its jurisdiction, *i.e.*, conferencing, be evident from the on-property record is entirely consistent with the plain language of the RLA and Circular One and certainly does not upset any settled expectations. To the contrary, appellate tribunals have long required that the basis of their jurisdiction be apparent from the record. *See, e.g.*, *King Bridge Co. v. Oteo County*, 120 U.S. 225, 226 (1887) (cited in *Renne v. Geary*, 501 U.S. 312, 316 (1991)); *Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884) (This Court is required to "deny its own jurisdiction … in the exercise

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[12] *See also* BLET's Opp. to Mot. to Dismiss at 5, 12 (N.D. Ill. Aug. 23, 2005) (referring to the NRAB as an "appellate body" where the "notice of intent is like a notice of appeal"); Appellant Br. at 9 (7th Cir. Sept. 20, 2006) (referring to the proceeding before the NRAB as comparable to "an appellate proceeding"); Br. in Opp. at 1-2 ("Congress established the [NRAB] as an 'appellate body'" constituted to perform an "appellate function.").

of its appellate power … in all cases where such jurisdiction does not affirmatively appear in the record").[13]

Indeed, as the district court found (Pet.App.40a-41a), a number of Board awards prior to the ones at issue here dismissed claims where there was no evidence of conferencing in the existing record. *See, e.g.*, First Division Award, No. 18679 (Apr. 8, 1958) (dismissing case without reviewing merits where "a review of th[e] … record fail[s] to [reveal] any evidence that conference was ever held on the property") (JA40); Second Division Award, No. 12475 (Nov. 4, 1992) (dismissing case without deciding merits where "there is nothing in the record to establish that a conference was held on the property") (JA42); Third Division Award, No. 30821 (Apr. 27, 1995) (dismissing case without reviewing merits where "[n]owhere does the record indicate that a conference was ever held or requested on the property") (JA57); *cf.* First Division Award, No. 26738 (Feb. 5, 2009), *available at* http://kas.cuadra.com/star/images/nmb/nm00014746.pdf ("There is no evidence in the record to confirm that a conference was ever held to discuss the matter"; "prior Awards have held that the failure to conference is a jurisdictional defect that precludes the Board's consideration of the claim" (citing prior awards including one of the awards on appeal here)).

The Seventh Circuit recognized this long line of consistent Board awards but nevertheless concluded

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[13] Appellate courts can, in their discretion, permit a party to supplement its jurisdictional allegations on appeal. 28 U.S.C. §1653. But a denial of such discretionary leave to supplement does not violate due process.

that the panel below somehow announced a "new" rule because: (1) Board awards are not precedent, and (2) the above-cited awards failed to clearly state whether conferencing had *in fact* occurred despite the absence of evidence of such in the record. Neither ground withstands scrutiny.

First, while short of binding *stare decisis* effect, Board awards do have some precedential value and are viewed by other panels as persuasive authority. *See, e.g.*, Lloyd K. Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 581-84 (1937). Garrison, an early commentator who had himself served as a neutral on a number of Board panels, explained the relative weight given to Board awards—starting with "[a] previous award by the same Division before which the case is pending," followed shortly thereafter by "[a] previous award by another Division of the Board." *Id.* at 581-82.[14] Although "this order of importance is not a fixed one and has not consciously been adopted by the Board, … it expresses fairly accurately the prevailing instincts of the members." *Id.* at 582.

This somewhat informal but nevertheless common and accepted practice continues to the present day. Board awards regularly cite prior decisions as authority for the propositions stated or rulings made therein. *See, e.g.*, First Division Award, No. 26738,

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[14] This Court has cited the Garrison article as persuasive authority on several occasions. *See, e.g., Consolidated Rail Corp.*, 491 U.S. at 305; *Slocum v. Del., Lackawanna & W. R.R. Co.*, 339 U.S. 239, 243 n.6 (1950); *Elgin, Joliet & E. Ry. Co. v. Burley*, 325 U.S. 711, 714 n.4 (1945); *id.* at 751 (Frankfurter, J., dissenting) (describing Garrison as "one of the most discerning students of railroad labor relations").

supra; Second Division Award, No. 12517 (Mar. 3, 1993) (JA47); Third Division Award, No. 33916 (Jan. 24, 2000) (JA59); Fourth Division Award, No. 4931 (Sept. 22, 1994) (JA52). And parties rely on prior awards in arguing to the Board. *See* National Railroad Adjustment Board Uniform Rules of Procedure (Revised June 23, 2003) at 1, *available at* http://www.nmb.gov/arbitration/nrab-rules.pdf (instructing parties on how to include prior awards as exhibits "[w]hen excerpts … are quoted within a Submission"); *cf.* Garrison, *supra*, at 578 (noting that carriers' and employees' written submissions to the Board often include "appeals to precedents").

This Court too relies on Board awards as an important and persuasive interpretive aid. In *Hawaiian Airlines, Inc. v. Norris*, for example, the question presented was whether the use of the word "or" in the statutory phrase "'disputes … growing out of grievances, *or* out of the interpretation or application of [collective bargaining agreements]'" meant that the two clauses were to be read in the disjunctive as applying to two different types of disputes, or as synonyms describing the same type of dispute. 512 U.S. at 254-55 (quoting 45 U.S.C. §153 First (i)). Concluding that the answer was the latter, this Court relied in part on the interpretation given to the statute in various Board awards: "Significantly, the adjustment boards charged with administration of the minor-dispute provisions have understood these provisions as pertaining only to disputes invoking contract-based rights." *Id.* at 254-55 (citing awards); *see also Day*, 360 U.S. at 552 & n.2 (citing several awards adjudicating claims of retired employees before endorsing the "uniform" and "settled administrative

interpretation that the Board has jurisdiction over [a retired employee's] claim for compensation").

In short, "[p]recedents established by [Board panels], while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems." *Slocum v. Del., Lackawanna & W. Ry. Co.*, 339 U.S. 239, 243 (1950); Garrison, *supra*, at 593 (describing the NRAB as a "quasi-judicial tribunal developing its own common law" to bring about "uniform interpretation[s]"). Thus, even if prior Board decisions do not function exactly like precedent in common law adjudication, they clearly suffice to put litigants on notice that a particular ruling or interpretation is reasonably foreseeable—which would solve any conceivable due process notice problem.[15] The Seventh Circuit's reasoning would find the announcement of a "new rule," and a violation of due process, any time the Board interprets the RLA or Circular One in circumstances where their meaning is debatable among lawyers—even if the Board has already confronted the same issue, and resolved it the same way, a hundred times. That is an absurd result. In such a world, the Board would only be able to

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[15] In some extremely narrow circumstances, this Court does require "fair warning" of unexpected interpretations of the law, principally in the context of interpreting the substantive scope of criminal statutes. There the issue is always whether the court's ruling was *foreseeable* in light of the interpretive materials available to the defendant. *See, e.g.*, *Rogers v. Tennessee*, 532 U.S. 451, 461, 463 (2001) (where several jurisdictions had already abolished the common law "year and a day" rule, state court's retroactive application of decision abolishing rule could not be said to be "unexpected and indefensible").

function if the written rules themselves were so detailed, complex, and festooned with illustrations and examples as to answer any possible ambiguity up front. Such an elaborate body of rules would read like the Justinian Codex or the Napoleonic Code, rather than the simple and straightforward terms contained in the RLA and Circular One. And if, by chance, a situation somehow happened to arise which was not addressed by that complex code, the Board would be left unable to function. That cannot be the law.

Second, the Seventh Circuit finely parses prior Board awards to ferret out whether those dismissals were based on the failure to include *evidence* of conferencing in the record—or an affirmative finding that no conferencing occurred. The Seventh Circuit adopted an unreasonably cramped reading of the prior awards. In each award, the dispositive question as articulated by the panels themselves was whether *the record* contained evidence of conferencing. *See supra* at 42. That the panels (in their rather brief opinions) did not explicate whether or not conferencing actually occurred suggests that the underlying facts were not available and/or were not relevant to the disposition. At the very least, the existence of these awards put the parties on notice that a case in which the record does not contain evidence of conferencing is subject to dismissal—and that a later panel may well apply these prior awards to a case where conferencing supposedly occurred. As such, the rule certainly was not "new" or surprising in any legally relevant respect.

Finally, the Seventh Circuit's opinion also suggests that due process was violated because the Board allowed the Carrier to raise its jurisdictional objection after the initial submissions, while not allowing

Respondent to supplement the appellate record in response. The Seventh Circuit's apparent concern about delay or "sandbagging" makes little sense in light of the substance of the Board's ruling—which was that jurisdiction was lacking because Respondent's *initial* submission omitted crucial jurisdictional facts. The Board would have ruled exactly the same way if identifying that defect had been the very first thing that the Carrier said to the Board. Any delay in identifying the issue did not, in other words, prejudice Respondent in any way. In any event, it was hardly unforeseeable that the Board might permit a party to raise a concern about the Board's jurisdiction at any time. Prior Board awards consistently permitted that, and panels uniformly dismissed when jurisdiction was lacking. *See, e.g.*, Fourth Division Award, No. 4931 (Sept. 22, 1994) (observing that "jurisdictional issues can be raised at any time" and dismissing where lack of conferencing was raised for first time before neutral referee) (JA54-55); Second Division Award, No. 12517 (Mar. 3, 1993) ("[E]ven though the Organization argues that it comes late, this Board has uniformly held, on all Divisions, that issues of jurisdiction may be raised at any time.") (JA50-51). Courts (including this one) likewise permit and indeed encourage the belated identification of jurisdictional defects.

B. The Board Properly Applied Its Rule Of Decision To The Cases Under Review

Even if this had been the first case in which a Board panel confronted the issue of whether the record must contain evidence of on-property conferencing, the Board's resolution of that question (either way) would not constitute the announcement of a "new rule" in any sense that could create a due process violation. What

happened here is nothing but the ordinary retroactivity inherent in any adjudicative process—and not even a particularly striking or troubling example. New decisions are normally applied to the parties at hand (*i.e.*, "retroactively") rather than only to parties filing claims in the future (*i.e.*, "prospectively"). This is consistent with the common law fiction that because courts simply declare what the law has always been, parties have no right to claim surprise. *See, e.g.*, William Blackstone, 1 *Commentaries* 69 (1765) (the duty of the court is not to "pronounce a new law, but to maintain and expound the old one"). This approach "reflects the declaratory theory of law, according to which the courts are understood only to find the law, not to make it." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535-36 (1991) (Souter, J.) (citing *Linkletter v. Walker*, 381 U.S. 618, 622-23 (1965)); *Beam*, 501 U.S. at 549 (Scalia, J., concurring). Nothing unusual or troubling happened here.

First, the Seventh Circuit's characterization of the Board's holding as a "new rule" is a serious overstatement. The Board did not invent the requirement of evidence of on-property conferencing from whole cloth. The statutes and regulations expressly state that "[a]ll disputes … shall be considered … in conference," 45 U.S.C. §152 Second, that a party seeking Board review must include "a full statement of the facts and all supporting data bearing upon the disputes," *id.* §153 First (i), and 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, approved June 21, 1934," 29 C.F.R. §301.2(b). A requirement that the petition must include a "full

statement of the facts" showing that "the subject matter has been handled in accordance with the [RLA]" which requires "[a]ll disputes" to be "considered ... in conference" is a straightforward reading of the governing text. Indeed, as the Seventh Circuit explained, BLET ultimately conceded that (1) parties cannot proceed to arbitration without first meeting in conference, and (2) "parties to arbitration must present all of their evidence to the Board in the on-property record." Pet.App.12a. At most, the Board's decision here resolves the sort of interstitial ambiguity that is *always* present whenever general rules must be applied to particular facts.

"A basic distinction must be recognized between (1) new applications of law or policy, clarifications, and additions, and (2) substitution of new law or policy for old law or policy that was reasonably clear. Only the second raises problems of fairness to those who have relied on the old law." 2 Richard J. Pierce, *Administrative Law Treatise*, §13.2 (4th ed. 2002). For example, in *United Food & Commercial Workers Int'l Union, Local No. 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), the NLRB developed and applied a new test to determine whether the employer's decision to relocate certain operations was subject to a statutory duty of collective bargaining. In upholding the retroactive application of this new standard to the employer, the court acknowledged its "consistent willingness to approve the retroactive application of rulings that do not represent an 'abrupt break with well-settled policy' but merely 'attempt to fill a void in an unsettled area of the law.'" *Id.* at 34 (citation omitted). The D.C. Circuit also observed that "where an agency ruling seeks only to clarify the contours of established doctrine, we will

almost *per force* allow its retroactive application." *Id.* at 35.

Second, even for decisions that genuinely *do* announce a "new rule," in the sense of a dramatic innovation or a clear break from prior law, this Court has in recent years moved very close to adopting a rule of absolute retroactivity in the context of judicial adjudication. *See Beam*, 501 U.S. 529; *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995). This trilogy of cases ultimately garnered a majority to overrule *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), in so far as that case permitted "selective retroactivity"—*i.e.*, a holding that applies to the parties before it but not to other cases pending at the time of decision. *See Reynoldsville Casket Co.*, 514 U.S. at 752 ("[Respondent] concedes that *Harper* overruled *Chevron Oil* insofar as the case (selectively) permitted the prospective-only application of a new rule of law."). This Court described *Harper* as establishing a "firm rule of retroactivity" for judicial decisions. *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 278 n.32 (1994).[16]

As Chief Judge Easterbrook and Judge Posner recognized below in their opinion concurring in the denial of rehearing *en banc*, "[l]awmaking in the course of adjudication is a staple of any common-law system, and rules adopted in that fashion apply not only to the

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[16] Although these cases do not decide the issue of "pure prospectivity" (*i.e.*, a decision that does not even apply to the case under review), it seems unlikely that approach remains viable. *See Beam*, 501 U.S. at 547 (Blackmun, J., concurring); *id.* at 548 (Scalia, J., concurring); Kermit Roosevelt III, *A Little Theory Is A Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 Conn. L. Rev. 1075, 1102 & n.164, 1112 & n.197, 1130 (1999).

parties but also to all similar cases." Pet.App.45a (citing *Beam*, 501 U.S. 529). This is true whether the changes are substantive or procedural. And it remains the rule even when the decision cuts off a party's access to the tribunal, and even when the party's claim would have been viable before the decision. For example, in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, this Court announced a new, uniform federal statute of limitations for securities actions and dismissed hundreds of proceedings in which plaintiffs, relying on older law, delayed in filing suit. 501 U.S. 350 (1991); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (modifying federal pleading requirements and throwing out a complaint that was deemed sufficient under the earlier standard); *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888 (1988) (upholding decision invalidating state law tolling provision under which the complaint would have been timely and dismissing the complaint on statute of limitations grounds).

The rule is similar for "new" rules announced in the course of agency adjudication. This Court recognized long ago that "[e]very case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). And, in the NLRB context, this Court has repeatedly recognized agency authority to announce new rules in adjudicative proceedings—and even to do so exclusively through adjudication.[17] The presumption is

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[17] *See, e.g., Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (observing that the NLRB "has chosen to promulgate virtually all the legal rules in its field through

that such rules or interpretations apply to the parties before the agency, as well as to cases pending at the time of decision. *Thorpe v. Hous. Auth. of Durham*, 393 U.S. 268, 281-82 (1969) (noting the "general rule" of retroactivity).

And the rule is no different for decisions by arbitrators—including decisions about arbitrability or the scope of the arbitrator's authority. This Court has repeatedly held that arbitrators must decide debatable procedural issues which bear on the arbitrability of a dispute, and apply their resolution of such issues to the case at hand.[18] Whether the NRAB is analogized to a judicial tribunal, an administrative agency, or an arbitral panel, the analysis remains the same.

This Court's decision in *Sheehan* vividly illustrates the operation of these rules. In *Sheehan*, a railroad employee filed a wrongful discharge suit in state court. While that action was pending, this Court decided

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adjudication rather than rulemaking"); *NLRB v. Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974) ("The views expressed in [*Chenery*] … make plain that the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion.").

[18] *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 555, 557 (1964) (arbitrator to decide whether union's failure to conference the dispute precluded review of claim); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (reaffirming that arbitrators are to decide issues of procedural arbitrability including whether a National Association of Securities Dealers' six-year time limit barred plaintiff's claim); *United Paperworkers Int'l Union*, 484 U.S. at 39-40 (affirming arbitrator's application of an evidentiary rule announced in prior decisions to exclude evidence in the case under review).

Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320 (1972), which overruled prior precedent and held that such disputes could only be submitted to a adjustment board. Since that decision was applied retroactively, Sheehan dismissed his now-invalid state law claim and attempted to institute a proceeding before the NRAB. The Board held that Sheehan's claim was untimely. None of that was Sheehan's fault, and the Tenth Circuit found a due process violation in the fact that the Board did not consider equitably tolling the limitations period in light of the retroactive impact of *Andrews*. This Court *summarily reversed.*

Third, and finally, even if there were a plausible argument that the Board should not have applied its evidentiary ruling retroactively to Respondent here, any resulting error simply would not sound in due process. Even when this Court's case law was more concerned about the potential unfairness of adjudicatory retroactivity, it did not suggest that retroactive application of new interpretations (including genuinely "new rules") would violate *due process*. "Those Justices who defended adjudicative nonretroactivity based on considerations of fairness, notice, and reliance never argued that these factors were of constitutional magnitude," which "is not surprising, given that adjudicative retroactivity was the exclusive practice for most of the period during which due process limitations would likely have been developed." Jill E. Fisch, *Retroactivity and Legal*

Change: An Equilibrium Approach, 110 Harv. L. Rev. 1055, 1075 (Mar. 1997).[19]

However characterized, the Board panel's application of its evidentiary ruling to the parties in this case presents no issue of constitutional magnitude. The Seventh Circuit wrongly mistook an unremarkable—in fact, notably mild—example of the ordinary retroactivity inherent in any adjudicative process for a violation of due process of law. Its ruling gives Respondent rights that no other litigant in any judicial or administrative forum has ever had, and does so in a context where judicial review is supposed to be "'among the narrowest known to the law.'" *Sheehan*, 439 U.S. at 91 (citation omitted). Respondent received notice (including fair warning of the possibility of the precise holding that ultimately doomed its petition), and a full and fair opportunity to be heard before unbiased decisionmakers. Due process requires nothing more.

CONCLUSION

The decision of the Seventh Circuit should be reversed and the NRAB panel awards should be reinstated.

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[19] Indeed, the only genuine *constitutional* issue in this area is the risk that purely *prospective* application of judicial rulings would violate the Article III "case or controversy" requirement or separation of powers considerations. Fisch, *supra*, at 1075.

Respectfully submitted,

J. MICHAEL HEMMER
PATRICIA O. KISCOAN
UNION PACIFIC RAILROAD
1400 DOUGLAS STREET, STOP 1580
OMAHA, NEBRASKA 68179
(402) 544-6302

DONALD J. MUNRO
GOODWIN PROCTER
901 NEW YORK AVENUE, NW
WASHINGTON, DC 20001
(202) 346-4137

MAUREEN E. MAHONEY
Counsel of Record
J. SCOTT BALLENGER
MELISSA B. ARBUS
JAMES C. KNAPP, JR.
LATHAM & WATKINS LLP
555 11TH STREET, NW
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200

Counsel for Petitioner

MAY 26, 2009

ADDENDUM

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45 U.S.C. § 153

§ 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

* * *

(b) The carriers, acting each through its boards of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than

one voting representative on any division of the Board.

* * *

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

* * *

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

* * *

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties,

and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however*, That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

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45 U.S.C. § 159

§ 159. Award and judgment thereon; effect of chapter on individual employee

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Third. Impeachment of award; grounds

Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this chapter for such awards, or that the proceedings were not substantially in conformity with this chapter;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: *Provided, however,* That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this chapter: *Provided further,* That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

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Code of Federal Regulations
Title 29. Labor
Subtitle B. Regulations Relating to Labor
Chapter III. National Railroad Adjustment Board
Part 301. Rules of Procedure

§ 301.2 Classes of disputes.

* * *

(b) No 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, approved June 21, 1934.