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 Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the use of procedural due process as a ground of review in this case differ in any fundamental way from statutory review when the NRAB panel "failed to confine or conform itself to" its proper jurisdiction by adopting a door-closing procedural rule that is not in the Railway Labor Act or Circular One or the relevant collective bargaining agreement?

2. Whether, in the absence of any statement that it was doing so, Congress expressly barred the federal courts from their original equity jurisdiction to hear cases alleging that a governmental agency, the National Railway Adjustment Board, has invaded constitutional rights and for the court to restrain such an invasion?

3. Can the NRAB panels adopt new rules at all when the NRAB decisions have no binding effect as precedents?

CORPORATE DISCLOSURE STATEMENT

Respondent is the General Committee of Adjustment, Central Region, for the Brotherhood of Locomotive Engineers and Trainmen, a division of the Rail Conference of the International Brotherhood of Teamsters. It is a labor organization and has issued no stock.

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INTRODUCTION

At first glance, this case seems ripe for review. There is a 5-4 split across the circuits, and as noted by *amici*, thousands of arbitration cases are affected by the split. *Amici* Br. at 7. The Court should not add this case to its docket, however, because whichever side of the split it came down on, there would be no practical effect. The grounds for review under the Fifth Amendment of the constitution are effectively the same as those provided by the Railway Labor Act itself. While *amici* list the thousands of grievances and arbitrations affected by this split, they do not point out how few cases have actually sought constitutional review of an arbitration under the Railway Labor Act. The Court should decline to take this case because it could only result in an empty ruling.

COUNTERSTATEMENT OF THE CASE

Statutory Background

The Railway Labor Act ["RLA"] predates the National Labor Relations Act and controls labor-management relations in the rail and air industries. At the time the RLA was enacted, Congress authorized a one time only rulemaking, resulting in "Circular One." The rules of "Circular One" are codified in 29 C.F.R. Part 301. There are no other applicable regulations or rules in existence.

Congress established the National Railway Adjustment Board ["NRAB"] as an "appellate body"

consisting of a Carrier Representative, a labor representative, and a Neutral Member who is employed and paid by the United States.[1] In this appellate function, the NRAB hears and decides grievances arising under the collective bargaining agreements of carriers and labor organizations.[2] With respect to each grievance, the parties present their evidence in hearings "on the record," in a manner set out in the parties' collective bargaining agreements. In the grievances resulting in the instant case, the procedures for these hearings were set out in detail in the so-called "Disciplinary Rule," which is a collective bargaining agreement between Petitioner and the Respondent.

The purpose of the NRAB is solely to apply the collective bargaining agreement ["CBA"]. It does not administer or enforce any provision of federal law – although is itself a creature thereof and subject to the Fifth Amendment. *See, e.g., Elmore v. Chicago & Ill. Midland Ry.*, 782 F.2d 94, 96 (7th Cir. 1986). In this respect, it is different from the NLRB or the SEC in that it does not have an agency "head," or "general counsel" and it does not create a body of precedent

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[1] While current funding levels inhibit the timeliness of resolutions in the rail industry, the obligation of the government to pay for arbitrators is related to the limitations on the right of workers to strike.

[2] *See generally,* Frank Elkouri, Edna Asper Elkouri, and Alan Miles Ruben, *How Arbitration Works*, 164-67, BNA Books (6th ed., 2003).

under federal law. *Cf. SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

The NRAB is essentially a system for the appointment and payment of Neutral Members who are otherwise like *ad hoc* private labor arbitrators for the enforcement of private labor agreements. Like other arbitrations, the decisions of NRAB panels have no binding effect as precedent. They only recently have begun to be digitally preserved, and there is limited access to these records. Their value as precedent is further limited by the fact that they interpret and apply many different CBA's. In any case, there is no decision of any RLA panel other than the one at hand which applies the rule that written "evidence" of the conferencing between the union and the railroad must be presented with other "evidence" as to the merits of the grievance itself.

In the cases at hand, the CBA is silent as to how or in what manner conferencing shall occur. The CBA has no requirement that evidence of conferencing must be presented to the NRAB panel at all, much less in any particular manner. While the Brotherhood of Locomotives Engineers and Trainment ("BLET") accepts that conferencing must occur in some form, the RLA and Circular One leave it to the parties to decide how the conferencing must occur. While the RLA and Circular One discuss how the evidence as to the merits of the case should be presented, they, along with the CBA, are silent as to how the fact that conferencing occurred can be shown.

Conferencing can be thought of as a step in the grievance process. Like many non-RLA covered industries, certain steps take place as informal and oral communications between the railroad and the union. If this communication does not resolve the issue, then a subsequent step is triggered – in this case, the next step is an appeal to the NRAB. If conferencing has not occurred, then the case is not ripe for hearing and must be "conferenced" before it can be submitted to the NRAB.

Proceedings Below

The CBA does not require conferencing, or even refer to it. However, as to all five of the discharge cases in this matter, the BLET and Union Pacific did in fact conference the grievances. 7th Cir. Dec. at 20. The BLET prepared the submissions to the NRAB, and Union Pacific substantively responded. It was only after the case had begun, "on the eve of arbitration," that Union Pacific raised the procedural objection that the BLET had not submitted any "evidence" of the conferencing. 7th Cir. Dec. at 20. Surprised by this procedural objection by a panel member as the case was to commence, rather than in formal filings, the BLET representative asked for an adjournment and returned with documentation that the parties had met and conferenced. 7th Cir. Dec. at 21-22.

The panel – the Neutral Member and the Carrier Representative – refused to accept this evidence, though the Neutral Member implied that the

evidence was in fact persuasive that conferencing had occurred. Furthermore, Union Pacific did not deny that conferencing had occurred. The panel said that "no matter how persuasive the evidence" (and it was), the fact of conferencing was irrelevant and that it was dismissing all five discharge cases without any hearing on the merits simply because this "evidence" had not been presented with the "evidence" as to the merits of the cases. As a result, there was no hearing on the merits. The five discharges were never considered.

In the district court, the BLET contended that the creation of a new procedural rule not in the RLA, Circular One, or the CBA was a denial of procedural due process and of fundamental fairness. The BLET framed the argument as a denial of procedural due process because: (1) the new procedural rule had no legitimate source in the federal statute, in Circular One, or in the procedural rules adopted by the parties themselves in their collective bargaining agreement, and (2) the BLET had no prior notice of such a rule – a rule with which it could have easily complied had it known of such a rule in advance. It was fundamentally unfair for the NRAB to create a new jurisdictional requirement of which the BLET had no notice.

At no time did Union Pacific challenge the availability of due process as a ground of review, either in the district court or in the U.S. court of appeals. Instead, Union Pacific simply denied that in fact the panel had violated procedural due process and merely

argued that the Seventh Circuit rarely upheld a decision on this ground. Union Pacific did not argue that due process was or should be unavailable as a ground of review, that is until it submitted its petition for rehearing *en banc*.

REASONS FOR DENYING THE PETITION

I) The alleged circuit split is illusory and has no practical effect.

At the outset it should be said that Union Pacific did not raise or object to the use of procedural due process as an available ground for reviewing the NRAB decision either in the district court or initially in the court of appeals. It raised this particular issue for the first time in its petition for re-hearing *en banc* with the U.S. court of appeals. The BLET filed a complaint which cited violation of its procedural due process rights as a ground of review in part because the Seventh Circuit had a decision directly on point based on denial of procedural due process. The BLET argued this due process position throughout the appeal in part because Union Pacific did not deny in the district court or in its response brief in the Seventh Circuit that procedural due process was available as a ground of review. Union Pacific did not make the argument it makes before the Court until filing its *en banc* petition.

A. The use of "procedural due process" as a ground for reviewing an NRAB decision under the Fifth Amendment is not significantly different from the review provided by the RLA.

The use of "procedural due process" under the Fifth Amendment is not significantly different from, and is arguably encompassed by, at least one of the express statutory bases of review: the failure of the NRAB panel to "confine or conform itself" to its statutory jurisdiction. The proper statutory role and jurisdiction of an NRAB panel is to decide a particular contract grievance. The Seventh Circuit's sensible decision in this matter makes this equivalence clear:

> Because no statute, regulation, or CBA required the evidence to be presented in the on-property record, because the Carrier could not have been prejudiced by the tardy submission of evidence, and because the Organization was prejudiced by the late objection, we find that the Board's decision to dismiss violated the due process rights of the Organization.
>
> – 7th Cir. Dec. at 22.

The court of appeals found a due process violation because the NRAB panel created a rule beyond those in its statutory jurisdiction, i.e. the RLA, Circular One, or the CBA. This is the same as saying it failed to "confine or conform itself" to its statutory jurisdiction – one of the grounds of review affirmatively provided by the RLA. This is in addition to the

inherent equity jurisdiction which a federal district court has over constitutional claims. The NRAB panel was clearly exceeding its statutory authority as well as denying due process.

Had Union Pacific challenged the availability of procedural due process, the BLET might have *also* argued this alternative statutory ground. Instead, the BLET naturally relied on the leading case of *Chicago Rock Island and Pac. R.R. v. Wells*, 498 F.2d 913 (7th Cir. 1974), in which the Seventh Circuit struck down a novel procedural ruling as a denial of procedural due process. In both this case and *Wells,* one could have said the NRAB panel's use of a new rule not authorized by the Railway Labor Act, Circular One, or the collective bargaining agreement was a "failure" of the panel to "confine or conform itself" to its proper statutory authority. 45 U.S.C. 153 First (q). No doubt one can think of technical differences in the two rationales, and there may one day be a case where such differences actually exist. But there is no practical difference here.

In fact, this is really a dispute about nomenclature. 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. *See, e.g., Kinross v. Utah Ry. Co.*, 362 F.3d 658 (10th Cir. 2004). That is why even circuits that do not use "procedural due process" as a ground

of review still inquire as to whether the NRAB panel exceeded its authority by an act that in one way or another denies fundamental fairness.

In contradiction to Petitioner's concern about the broadening of judicial review of NRAB panels, the Seventh Circuit expressly noted the narrowness of its review. It reasserted the principle of *Hill v. Norfolk & W. Ry.*, 814 F.2d 1192 (7th Cir. 1987) and *Bhd. of Locomotive Eng'ring v. Atchison, Topeka and Santa Fe R.R.*, 768 F.2d 914, 922 (7th Cir. 1985) that judicial review of arbitrations is limited to whether the arbitrator (in this field the NRAB panel) interpreted the contract – not how or how well – simply whether it was interpreted. 7th Cir. Dec. at 21. These cases clearly comport with the Court's own recent jurisprudence cited by Petitioner, *Hall St. Asscs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008). In the instant case, the court of appeals correctly found that the NRAB panel did not interpret the contract, and while it made its ruling based on the Fifth Amendment, it clearly would have reached the same outcome under the statutory review provided by the RLA.

This is clear as the NRAB panel created a new procedural rule not present in the RLA, Circular One, or the relevant CBA, that "evidence" as to conferencing had to be in the original submission of the record of the "on the property hearing" relating to the merits of the case. Relying on this entirely new "rule," announced for the first time in the very case it was ruling upon, the NRAB panel dismissed five discharge cases without any consideration of the merits.

This is, to say the least, a dereliction of duty of the NRAB panel.

Again contrary to Petitioner's assertion, the outcome in this matter would have been the same in any other circuit, whether it recognizes jurisdiction over constitutional claims or not. The facts recognized by the Seventh Circuit clearly show that the NRAB panel did not "interpret the contract" but rather created a new rule "according to [its] private notions of justice." *Atchison*, 768 F.2d 914, 922 (7th Cir. 1985). As argued *supra*, this is the same as saying that it failed to "confine or conform itself" to its statutory jurisdiction.

Indeed, the four Circuits that do not recognize constitutional jurisdiction over claims arising out of NRAB proceedings have all struck down arbitrary actions by NRAB panels under similar circumstances albeit with a different label.

Third Circuit

Petitioner cites *United Steel Workers of America Loc. 913 v. Union R.R. Com.*, 648 F.2d 905 (3rd Cir. 1981) as a case in the minority of the split. Yet even under that precedent, the instant case would have been decided the same. In overturning the district court's setting aside of the NRAB panel, the Third Circuit looked to the reasons the lower court gave, and examined whether the reasons fit into one of the three statutory grounds. *Loc. 913*, 648 F.2d 905 at 912. In the instant case, as argued *supra*, the "due

process" violation consisted in creating a rule beyond those the Organization was already on notice of – namely those in the RLA, Circular One, and its own CBA. As argued *supra*, this ground falls under one of the three statutory grounds, and as such, would have had the same result had it been brought in the Third rather than the Seventh Circuit.

Sixth Circuit

Petitioner cites *Jones v. St. Louis-San Francisco Ry. Co.*, 728 F.2d 257 (6th Cir. 1984) as a case in the minority of the split. As in *Loc. 913*, the instant case would have had the same outcome on appeal had it been decided by the Sixth Circuit. In *Jones*, the Sixth Circuit noted that in arbitrations under the RLA:

> [c]ertain minimal procedural considerations must be afforded the parties, as Congress so required by enacting 45 U.S.C. § 153 First (j). Among these considerations, in order for there to be complete fairness to the litigants, we reason that Congress intended for all the arbitrators to hear the proof in evidence submitted by the parties and to consult with each other for the purpose of determining the proper resolution.
>
> – *Jones,* 728 F.2d 257 at 263-64.

In rendering its decision, the Sixth Circuit performed its constitutional role by interpreting the RLA

and in determining what the arbitral body's powers and duties were under the RLA.[3] The Seventh Circuit performed the same analysis in the instant case when it held that the NRAB acted improperly because the RLA does not empower an NRAB panel to create new procedural rules beyond those found in the RLA, Circular One, and the relevant CBA. As such, the instant case would have had an identical outcome had it been decided in the Sixth Circuit.

Tenth Circuit

The case that best shows 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 comes from the Tenth Circuit, which the Court overturned in *Union Pacific R.R. Co. v. Sheehan*, 439 U.S. 89 (1978). In *Kinross v. Utah Ry. Co.*, 362 F.3d 658 (10th Cir. 2004), the Tenth Circuit explains its reason for determining that *Sheehan* precludes constitutional review in footnote 3:

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[3] It is well-established law that federal courts are the appropriate body to interpret what an act of Congress means. This is part of the layman's simplified understanding of the separation of powers doctrine – Congress makes law, the courts tell us what the law means, and the Executive enforces it. This is what held true in *Jones* – Congress passed the RLA, the Sixth Circuit interpreted it, and the Public Law Board was supposed to enforce it.

> We believe the Railway Labor Act itself provides for process sufficient to meet constitutional requirements. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972). To satisfy due process requirements, a tribunal must not act outside its jurisdiction, and it must be impartial, see *Goldberg v. Kelly*, 397 U.S. 254, 271, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970). Most importantly, a tribunal must ensure an "opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976) (quotation marks and citation omitted).
>
> Congress provided sufficient process to meet these due process requirements when it set forth the three grounds for judicial review in 45 U.S.C. § 153(q).
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> * * *
>
> In the instant case, the district court improperly operated outside the bounds of these three grounds for judicial review by evaluating the scope of the evidence presented, and thus exceeded its subject matter jurisdiction.

By citing this venerable line of due process cases, the Tenth Circuit made it clear 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. This

interpretation wisely avoids creating a conflict between the constitution – which requires that the United States shall not deprive a person of a right (such as employment under a union contract) without due process of law – and the RLA itself. The BLET maintains that the Tenth Circuit would have found that by creating a new jurisdictional requirement not found in the RLA, Circular One, or the relevant CBA, the NRAB panel would have denied the employees an "opportunity to be heard at a meaningful time and in a meaningful manner," and rule similarly.

Eleventh Circuit

Petitioner cites a final minority decision from the Eleventh Circuit, *Henry v. Delta Airlines*, 759 F.2d 870 (11th Cir. 1985). *Henry* is a poor case for two reasons. First, although the plaintiff in that case did allege "fraud or corruption" as per the statutory standards of review, the only fraud or corruption he could point to was the presence of an impartial panel member. This complaint of impartiality was not made of the Neutral Member, but against the airlines' representative and ignored the presence of the union representative to offset the airlines'. Second, the ruling is based on a particular judicial philosophy that all due process under the Fifth Amendment is judicially created rather than extant in the constitution itself. "Therefore, *Sheehan* precludes judicially created due process challenges to System Board awards and Henry's argument based on due process concerns is without merit." *Henry* at 873.

Even with these flaws, the instant case would have had the same outcome in the Eleventh Circuit as in the Seventh. In *Henry*, the Eleventh Circuit cited to Fifth Circuit precedent for the rule that "an award must be enforced, without judicial review of the evidence, if it draws its essence from the collective bargaining agreement." *Citing Johns-Manville Sales v. Intern. Ass'n of Machinists*, 621 F.2d 756, 758 (5th Cir. 1980). In the instant case, the NRAB panel's award did not "draw its essence" from the CBA. Neither was it grounded in the RLA or in Circular One. As such, its decision to create a wholly new jurisdictional rule would have been held to be in clear excess of its jurisdiction.

B. The availability of constitutional review of NRAB proceedings has had a negligible effect on labor-management relations in affected industries.

There is no issue of "national significance" here since no federal court is ever willing to upset an arbitration award except under extraordinary circumstances when a panel has acted in some very peculiar and bizarre way outside of its statutory mission. The false premise here is that there really is any difference between the use of procedural due process and the use of the express statutory bases of review. As argued *supra*, any 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. In other words, this is all an issue of nomenclature rather than one of any significant standard of judicial review.

Furthermore, Union Pacific makes a contradictory argument. It says on the one hand that it is urgent for this Court to resolve a conflict among the Circuits with respect to the use of procedural due process. Then it says on the other hand that it is extremely rare for the courts to use procedural due process as a ground for review. Indeed, as Union Pacific acknowledges, no court has used procedural due process to invalidate an award for thirty years or more prior to this case. The Seventh Circuit itself noted that, "[t]his case presented a unique situation which we doubt will come before a court again." 7th Cir. Dec. at 21. The Court should not take up a case which will have no practical effect.

II) The NRAB cannot engage in adjudicatory rulemaking.

Petitioner presents this issue for the first time, apparently in response to a separate concurrence with the denial of its petition to the court of appeals for a rehearing *en banc*. Unfortunately for it, musings in *dicta* in a concurrence – no matter the jurists making them – do not create an immediate path to review by this Court. It is also disingenuous to argue that the NRAB is a rulemaking or adjudicative

agency like the NLRB or the SEC. *Cf. SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

It is a false premise that the NRAB is an agency like the NLRB or SEC and that it can and should begin adopting agency "rules" in the way these other agencies do, whether by formal rulemaking or adjudication. This is a misconception of the way the NRAB operates. The NRAB has its own unique legal framework. Technically, it is a federal agency, but there is no other agency like it. Even if this Court were to take this case only to say the NRAB should *not* be in this legal framework, the very raising of this question in the nation's highest court might unsettle the way the NRAB now works – this has never been and should not be a "rulemaking" federal agency as Union Pacific contends.

The NRAB is less an administrative agency than a service provider like the American Arbitration Association or the Federal Mediation and Conciliation Service. It does not apply federal law, as the NLRB and SEC do. Rather it resolves grievances under private labor agreements by providing an ostensibly neutral third member to a panel containing a representative of the union and one of the company. It provides this service under the authority and sanction of the government. Since it does not apply federal law it does not build up a body of precedents as the NLRB, SEC, or similar agencies do. The NRAB does not have a Commissioner or Chair or Members who are appointed and confirmed by the Senate. There is no General Counsel. There is no body of case law, no

codification of agency precedent. Indeed, there is no precedent, as the Seventh Circuit noted on pp. 15-16 of its decision, *citing*, *inter alia*, Carlton Snow, *An Arbitrator's Use of Precedent*, 94 Dick. L. Rev. 665, 672-74 (1990). The decision written by a private arbitrator who is the Neutral Member in one *ad hoc* panel on one discharge case can be cited, but is not precedent that is binding or which must be followed by any other panel. In short, an NRAB panel by its nature and Congressionally mandated function cannot engage in any "rulemaking," let alone retroactive rulemaking by adjudication.

Accordingly, in this system of contract arbitration, the arbitrators or Neutral Members cannot adopt "rules" like the rules of the NLRB or the SEC if those rules are not in the RLA, Circular One, or in the parties' own CBA's. Congress has provided NRAB panels with a limited role which does not include rulemaking.

In this case, a single NRAB panel came up with a new "jurisdictional" rule that had no basis in the RLA, in Circular One, or the collective bargaining agreement. In doing so the particular NRAB panel in this case abused or acted outside its authority. To use the parlance of the Railway Labor Act, it refused to "conform or confine itself" to its proper jurisdiction, which was to apply the collective bargaining agreement itself. Union Pacific refers disingenuously to "Board rules" and "Board standards." But there is no such body of rules or standards, other than the rules that are set out in Circular One or in the parties own

particular collective bargaining agreements. Nor does Union Pacific point to or cite to any other verifiable source where these "rules" are kept or codified.

At any rate it is misleading to even talk about the application of a "rule." Because no decision has any precedent, the "rule" of this panel may never be applied by any other panel again. Obviously even in private labor arbitration decisions, a private labor arbitrator can cite a prior arbitration case that strikes him or her as relevant, and NRAB Neutral Members cite prior arbitration cases in this same manner. They are not, however, bound to follow these decisions.

III) Congress has never clearly eliminated the jurisdiction of Art. III courts to hear constitutional claims arising out of NRAB proceedings.

Of course, procedural due process review is and should be available in the rare case it is needed. After all, Congress did not preclude the original equity jurisdiction of the courts to enjoin governmental invasions of constitutional rights. It has long been clear that the NRAB is a governmental agency, and since it is so, it should be presumptively subject to constitutional restraint. *Elmore,* 782 F.2d 94, 96. Unless there is "clear and convincing evidence" that Congress expressly barred the Art. III jurisdiction of the federal courts, federal district courts retain original equity jurisdiction to stop such denial of

procedural due process even when Congress has provided a mechanism for statutory review. *Califano v. Sanders*, 430 U.S. 99, 109 (1977); *see also McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991).

It is a "well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed, and [the Court will] not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by '"clear and convincing"' evidence." *Califano*, 430 U.S. 99 at 109, *citing Johnson v. Robinson*, 415 U.S. 361 (1974). Providing a list of grounds for *statutory* review as Congress did in 45 U.S.C. 153 First (q), is not "clear and convincing" evidence that it sought to foreclose constitutional review. Furthermore, not even in *Sheehan* did the Court make a finding of such "clear and convincing" evidence of Congressional intent to bar constitutional review.

IV) None of the issues presented are properly before the Court.

A. Petitioner has waived the issue of Art. III jurisdiction to hear constitutional due process claims arising out of NRAB proceedings.

Petitioner first raised the issue of the propriety of Article III jurisdiction to hear constitutional claims arising out of NRAB proceedings in its petition to the Seventh Circuit Court of Appeals for a rehearing or a

hearing *en banc*. It did not raise the issue before the district court. It did not raise the issue in its response brief in the Court of Appeals. As such, it has clearly waived this issue, and it is not properly before the Court. *California v. Taylor*, 353 U.S. 553, 557 (1957). As argued *supra*, there is little practical difference in the outcomes of cases across Circuits due to the split. As such there is no exceptional circumstance such that the Court should make an exception to the rule against hearing issues not addressed by the lower courts. *Youkim v. Miller*, 425 U.S. 231, 234 (1976).

B. The issue of whether the NRAB engaged in permissible adjudicatory rulemaking is not properly before the Court.

Similarly, the issue of whether the NRAB engaged in permissible adjudicatory rulemaking is not properly before the Court because it was not raised before the district and appellate courts. As noted *supra*, it was raised for the first time in a two-judge concurrence which denied the petition for rehearing or hearing *en banc*. Accordingly, it is not properly before the Court as the lower courts did not weigh in on this issue. *Taylor*, 353 U.S. 553, 557; *Youkim*, 425 U.S. 231, 234.

CONCLUSION

The Court should decline to grant *certiorari* because any such decision will make no practical change in labor-management relations under the RLA. 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 a fundamental unfairness that prevented a claim from being heard. The Court should not take up a case which would have such an empty result. Furthermore, the lower courts were not given the opportunity to properly address the issues presented by Petitioner, and there are no extraordinarily compelling reasons for the Court to do so itself.

Respectfully submitted,

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